Summary

Operational surveillance of foreign nationals. Evaluation of the powers of the police for the surveillance of foreign nationals in the Aliens Act 2000

Background


Amongst other things, the amendment of the above Act pertained to the rules governing the operational supervision of foreign nationals. The amendment’s chief concern was the powers available to police officers responsible for the supervision of foreign nationals, which powers permit them to stop and question individuals in order to establish their identity, nationality and position in terms of the right of residence. Since, in police practice, the criterion stipulated under the Aliens Act 1994 in this respect, i.e. the possession of ‘specific indications of unauthorised residence’, was said to raise too many obstacles for the performance of active foreign nationals surveillance, the criterion applicable was amended in the Aliens Act 2000. After extensive discussion in the Lower House [Tweede Kamer], the new Aliens Act stipulated that the stopping and questioning of individuals would only be justified when made on the basis of verifiable facts and circumstances that constitute a reasonable suspicion of illegal residence, when measured against objective criteria. The Lower House attributed particular importance to the need to ‘objectify’ the circumstances and facts applicable when a person is stopped and questioned, given the fact that the Cabinet’s original legislative proposal provided inadequate safeguards for the non-discriminatory application of foreign nationals surveillance.

Therefore, the primary object of the amendments made in the new Aliens Act regarding the criterion applicable for stopping and questioning individuals lies in the promotion of active and effective foreign nationals surveillance by the Aliens Police. The conditions stipulated for the objectification of these measures are intended to prevent discriminatory police action.

Object of the evaluation

Shortly after the Aliens Act entered into force in April 2001, the State Secretary then in office indicated the importance she attached to the evaluation of the Aliens Act 2000. An analysis of operational foreign nationals surveillance was proposed as one of the sub-studies to be conducted as part
of the evaluation. The State Secretary felt that it would be important, in the study proposed into foreign nationals surveillance, to ascertain:

– how police forces have used the amended powers to stop and question individuals in situations where illegal residence is suspected and whether the checks made are performed in a way that is non-discriminatory;

– whether the extension of powers to stop and question individuals is resulting in an increased number of checks, an increase in the cases of illegal residence detected and, subsequently, to a greater number of detentions and deportations.

After the Aliens Act 2000 entered into force, various new impulses were given to foreign nationals policy, one of which was the intensification of foreign nationals surveillance. This was preceded by the reorganisation of the duties and activities undertaken by the various departments of the Aliens Police. Given the possible consequences of intensification, in the form of the expansion of staff capacity levels at the various Aliens Police departments, for ‘active and effective foreign nationals surveillance’, the question of ‘intensification’ was also included in the evaluation. Therefore, when formulating the study brief from the Ministry of Justice, the two central questions raised for the evaluation of the operational surveillance of foreign nationals were further assessed and specified in the light of various new developments. The central questions for the evaluation are as follows:

– is the execution of operational surveillance by the various Aliens Police departments effective? Has the effectiveness of supervision been altered by the introduction of the Aliens Act 2000 and/or the intensification of surveillance?

– is surveillance carried out by the various Aliens Police departments in a way that is non-discriminatory? Has the non-discriminatory nature of the surveillance exercised been affected by the introduction of the Aliens Act 2000 and/or the intensification of surveillance?

Evaluation approach

In the period from September 2003 to June 2004, BBSO conducted an evaluation study into the consequences of the amended definition of the powers to stop and question individuals in the context of active operational foreign nationals surveillance by the police. During the study, a large number of data collection methods were used to gain an insight into the effectiveness and (non-)discriminatory nature of foreign nationals surveillance.

In order to gain a better understanding of the two themes in quantitative and qualitative terms, it was decided to opt for national (registration) data collection, in combination with the more specific collection of information
from selected Aliens Police departments. This approach involved the collection of national totals on the deployment of Aliens Police departments, combined with a further qualitative analysis of six selected Aliens Police departments in order to gain a better insight into the way in which these departments operate, amongst other things. The various Aliens Police departments were selected such that, in principle, any regional, substantive and organisational differences were taken into consideration in the study.

During the orientation stage, interviews were held with 17 key individuals employed in politics and science, with policy officials at the Ministry of Justice, with people involved from a legal perspective (from the Foreign Nationals sections [Vreemdelingenkamers], from the Immigration and Naturalisation Service [Immigratie- en Naturalisatiedienst (IND)], from Forum [the Institute for Multicultural Development] and from the legal profession) and with managers from various departments of the Aliens Police.

To assess the effectiveness of the powers amended in the Aliens Act 2000, the decision was made, on the basis of substantive and methodological considerations, to use one indicator, i.e. the number of occasions on which foreign nationals have been stopped and questioned, as registered by the police. This indicator corresponds to the primary object of the amendment of supervision powers and, in particular, provides an insight into the operational foreign nationals surveillance exercised by the police. As such, the evaluation of the amended powers did not extend to the foreign nationals chain as a whole, in the sense that it did not include the number of detentions and deportations effected.

Both quantitative and qualitative measurements were taken on the effectiveness of the power that the police have to stop and question individuals, as provided for under the Aliens Act 2000: national and regional police figures pertaining to the number of individuals stopped and questioned were analysed for trends, and interviews with a total of 36 managers and operational executives from various foreign nationals departments provided an insight into the application of the new powers within operational surveillance.

In order to gain an idea of the (non-)discriminatory nature of surveillance, interviews were held with legal experts, amongst other individuals, and case law was collected on cases brought before foreign nationals sections and the Administrative Law Division of the Council of State [Afdeling Bestuursrechtspraak van de Raad van State]. In addition, via the National Ombudsman, the regional police complaints co-ordinators, the National Bureau against Racism [Landelijk Bureau Racismebestrijding] and anti-discrimination centres, the study sought to ascertain the extent to which complaints have come to the fore in relation to discriminatory foreign
nations surveillance. During the study, participant observations obtained from six regional forces also made it possible to gain an insight into the way in which police officers from the Aliens Police departments are actually responding to the so-called 'stop and question' criterion.

**Changes to the legal framework for foreign nationals surveillance**

The most drastic changes to operational foreign nationals surveillance set out in the new Aliens Act relate to the power that police officers have to stop individuals, take them away for questioning and detain them in order to establish their identity, nationality and position in terms of the right of residence (Section 50) and the power to enter a house without the occupant's consent (Section 53).

The legislator intended the Sections above to provide for an extension of the powers available to the Aliens Police and, as such, in principle, for an extension of the possibilities available for the police surveillance of foreign nationals. By extending powers to include the stopping and questioning of individuals, the legislator was seeking to respond to the wish expressed by the police in particular, i.e. that they be able to perform their supervision activities more effectively.

The extension of the above powers also formed a response to an evaluation of the old Aliens Act, in which the conclusion was drawn that very little active foreign nationals surveillance was being exercised on the streets, due to the feeling that the criterion stipulating 'specific indications of illegal residence' was (too) strict.

**The operational surveillance of foreign nationals and the role played by the police**

For some considerable time now, the domestic supervision, in general, of foreign nationals has been the responsibility of the police. In practice, activities relating to the supervision of foreign nationals are performed by officers from the Aliens Police Department within the police force in question. Each police region has its own police-operated foreign nationals department (Aliens Police) that supervises foreign nationals residing in the Netherlands.

Until recently, two central tasks could be distinguished in the supervision to be executed: administrative supervision and operational supervision (surveillance). Administrative supervision is also defined as the 'paper' surveillance exercised when admitting foreign nationals to the country,
monitoring the obligation imposed upon foreign nationals to report to the Aliens Police Department, the assessment of visa applications, etc. For a long time, this type of supervision dominated the activities undertaken by the Aliens Police departments. Despite increased staff capacity levels for administrative supervision in recent years, it has been found that the police have been unable to respond adequately to various problems that have arisen in the performance of their admission task.

Analogous to this development and on the basis of the ‘core-tasks debate’, the police have requested that they be given more practical possibilities for the performance of primary police duties. The police authorities indicated their wish to focus more on the surveillance function and to transfer administrative supervision to the Immigration and Naturalisation Service and the municipalities. This resulted in the transfer of (administrative) supervision away from the various Aliens Police departments in the period from spring 2003 to spring 2004, which was accompanied by the reduction of staff capacity levels for the admission task on the one hand and initial steps towards the achievement of intensified surveillance through the expansion of capacity levels for the surveillance task on the other.

The operational surveillance of foreign nationals comprises domestic police surveillance geared towards the combating of illegal residence by foreign nationals, as well as surveillance geared towards the provision of support for repatriation and removal policy. In practice, the operational surveillance of foreign nationals carried out by the Aliens Police is broken down into active and passive surveillance:

– **active surveillance** entails the detection of illegal foreign nationals on the basis of facts and circumstances that give rise to a reasonable suspicion of illegal residence, which may result in the performance of location checks, involvement in checks intended to uncover illegal labour and the supervision of repatriation and removal. In addition, various policy documents identify the following as examples of active supervision: proposals for ministerial orders declaring specific individuals undesirable foreign nationals, the withdrawal of a right of residence and, where appropriate, ministerial orders declaring specific individuals undesirable foreign nationals in the event of nuisance or criminal activities;

– **passive surveillance** pertains to investigations into the legitimacy of a foreign national’s residency ‘at any time at which the police are authorised to conduct an investigation of this nature as part of the lawful execution of their duties’. This surveillance ensues from Section 2 of the Police Act ([Politiewet](https://www.legifit.nl/Politiewet)), which describes the general duties to be performed by the police. This means that the police are able to check a foreign national’s identity, nationality and position in terms of the right of residence where the said foreign national is suspected of an offence, for example, or in the
event of traffic spot-checks. Based on the circumstances encountered and the information provided, a reasonable suspicion of illegal residence may arise in these situations.

**Areas for attention in active foreign nationals surveillance**

The number of projects for which the various Aliens Police departments are being deployed, partly at the instigation of other departments, has been increasing in recent years. In these projects, the police concentrate on themes derived directly or indirectly from the core responsibilities arising for them in respect of (foreign nationals) surveillance. The police refer here to aspects such as safety and the quality of life in the local community, the systematic exploitation of foreign nationals and migration crime. In the three major cities in particular, the Aliens Police are being involved in operations resulting from policy initiated at a local and national level. These operations focus primarily on the combating of illegal employment, rack-renters and nuisance arising in local communities partly as a result of overpopulation.

Over the last two years, the use of the police for surveillance of foreign nationals has become an emotionally charged theme, partly due to the diversity of opinions on the priorities to be established. For example, an urgent political request was expressed that the Aliens Police be required to make a bigger contribution to the implementation of repatriation policy in respect of asylum seekers who have exhausted all legal procedures, while the police themselves wish to concentrate their efforts with regard to foreign nationals surveillance on tackling crime committed by (legal and illegal) foreign nationals.

**The effectiveness of the Aliens Act 2000 for operational surveillance**

The analysis of police figures on the number of foreign nationals stopped and questioned in the Netherlands in the period from April 1998 to April 2004 shows that several reasonably stable years have been followed by a dramatic increase. Two police-registration developments underlie this increase: the number of incidences of stopping and questioning has increased under the Aliens Act 2000 and an increase can be observed in the number of arrests made under criminal law. An important part of the increase observed under the Aliens Act can be explained by an increase in the number of targeted operations undertaken and an increase in the number of checks made under the Foreign Nationals (Employment) Act [Wet arbeid vreemdelingen (Wav)] as of 2002-2003. The practical possibilities presented by police powers to stop and question individuals and the powers
of entry provided for in the Aliens Act 2000 would appear to play a role in this context.

An explanation for the increase in the number of foreign nationals referred to the Alien Police for further questioning, subsequent to their being arrested or held for questioning under criminal law, would appear to lie in an increased alertness in regional police forces to the identity of the individual arrested and his position in terms of the right of residence. The agreements made within regional police forces on internal communication and the checks made on the identity and residency data of any foreign national that has been arrested (under criminal law) have resulted in an increase in the number of foreign nationals registered by the police. The broader implementation of the so-called ‘VRIS approach’ (an approach governing foreign nationals implicated under criminal law) within regional police forces would appear to be another important factor in the increase observed in the number of foreign nationals arrested under criminal law in recent years.

The police assessment of the new Aliens Act shows that the amended powers provided for in the Aliens Acts 2000 as regards the stopping and questioning of individuals are only perceived to a limited extent as an extension of the possibilities for foreign nationals surveillance. The police have not explicitly assessed the new Aliens Act as a new instrument that could result in an increase in the number of individuals stopped and questioned. However, use is made of the practical possibilities offered by Foreign Nationals legislation in the implementation of specific large-scale operations in particular. The Act offers more operational, practical possibilities for large-scale operations of this nature, while the need to objectify reasonable suspicion is resulting in an increase in preliminary investigations, of a more intensive nature, by the Aliens Police departments.

The influence exercised by the new legislation cannot be viewed in isolation; the possibilities and limitations applicable to the Aliens Police in other areas must also be taken into account. These are primarily the staff capacity levels available, the organisational approach applicable, whether centralised or decentralised, and the priorities established by local government and police force management teams. The various Aliens Police departments have put forward these aspects in particular to explain the development in the number of foreign nationals stopped and questioned in their police regions. As such, various factors are impacting simultaneously on the number of foreign nationals stopped and questioned by the police. The amendment of the ‘stop and question’ criterion set out in the new Aliens Act would appear to play a limited role in this respect.
Influence exerted by the transition and intensification of surveillance

Following the relatively strong increase observed in preceding years, the total number of foreign nationals stopped and questioned by the police stabilised during the period from April 2003 to April 2004. The transition of administrative supervision away from the Aliens Police departments during this period had consequences for staff capacity levels in the Aliens Police departments (resulting, for the time being, in a reduction in capacity for supervision staff in various regions), but also for the organisation of responsibilities and work processes within active foreign nationals surveillance.

The fact that the number of foreign nationals stopped and questioned decreased in almost 60% of regional police forces during the transition phase, and the fact that the number of individuals stopped and questioned under the Aliens Act also fell, leads us to conclude that various circumstances have prevented the more active surveillance of foreign nationals.

In this respect, measurement of the effectiveness of surveillance intensification has also proved premature. The expectation is that the further activation of foreign nationals surveillance will only be achieved when the organisational (re-)establishment of surveillance has taken root and increased staff capacity levels are recognisably deployed for the purpose of surveillance.

(Non-)discriminatory foreign nationals surveillance

When developing the new Aliens Act, the Cabinet undertook to provide staff from the Aliens Police departments with information and instructions on how to avoid discrimination when stopping individuals, amongst other things. Given the participation of these police officers, the instruction of the various Aliens Police departments by the National Police Selection and Training Institute (Landelijk Selectie- en Opleidingsinstituut voor de Politie (LSOP)) was successful, as a result of which the various Aliens Police departments were aware, at that time, of the consequences of the new Aliens Act for their surveillance activities.

However, at this time, no (structural) national programme of instruction ensuring the transfer of knowledge on the new Aliens Act to police officers in regular police service has been put into place. The regular police service’s involvement in foreign nationals surveillance is no more active than it was before the Act was adopted, nor has it started to make intensive use of the new Foreign Nationals legislation.
In general, the actions undertaken by the various Aliens Police departments are characterised by the adoption of a targeted and specific approach to groups of foreign nationals in respect of whom a reasonable suspicion of illegal residence has already arisen from extensive preliminary investigations. The need to achieve the objectification of reasonable suspicion plays a regulatory role in this approach. Although the above does not guarantee that a non-discriminatory approach will be adopted towards (groups of) foreign nationals, the regulatory framework within which operations unfold does, in principle, provide more protection against an individual, discriminatory type of surveillance of foreign nationals. In the operations undertaken by the Aliens Police departments, the type of supervision and the possibilities that apply are governed not so much by Section 50(1) of the Aliens Act 2000, but more by the Aliens Circular (Vreemdelingencirculaire (Vc2000)), which, together with its supplements, clearly sets out for the police the situations in which foreign nationals surveillance can be exercised. In this respect, it would appear that the use of ‘experiential or circumstantial information’ is playing an increasing role in the large-scale operations undertaken by Aliens Police departments.

The efforts being made to achieve the further professionalisation of active foreign nationals surveillance through the national standardisation of internal procedures and work processes are also contributing towards the safeguarding of non-discriminatory surveillance. However, the internal safeguards of this nature implemented in various Aliens Police departments are not yet optimal, as witnessed by the (on some occasions) limited availability of an Assistant Public Prosecutor familiar with Foreign Nationals legislation and as witnessed by the varying quality of the reports produced by police officers.

An important shortcoming, which is evident in the safeguarding of professional non-discriminatory surveillance by the various Aliens Police departments during the last two years, has to do with training. In a large number of Aliens Police departments, the development of specialist expertise has been given lower priority. It is anticipated that the new specialist training being developed for the Aliens Police, and the inclusion of the ‘foreign nationals surveillance’ theme in the new police training to be provided, could change this situation for the better.

The amendment in the Aliens Act 2000 regarding the powers that the police have to stop and question individuals has not resulted in an increase in formal signs of discriminatory foreign nationals surveillance. Given the overall context and the ‘built-in threshold’ for the foreign nationals involved as regards official organisations, it must not be forgotten that an illegal foreign national is unlikely to want to commence an official complaints procedure in relation to an incident in which the said foreign national was
stopped and questioned by the police. However, neither the information obtained from intermediary organisations and individuals, nor the observations made further to active supervision point to different indications.

Since the new Aliens Act entered into force, case law from the Foreign Nationals Section and the Administrative Law Division of the Council of State on the discriminatory surveillance of foreign nationals has been limited to a total of just three cases. The case law available in this respect does not provide any indication of a (serious) violation of the non-discriminatory nature of foreign nationals surveillance. Therefore, the evaluation points to an extremely low level of official signs or indications of discriminatory foreign nationals surveillance by the police. However, since discrimination is largely hidden from view, the evaluation has revealed just part of the problem.

Under the influence of recent national policies and local initiatives on safety, nuisance and illegality, demands are being made for increased deployment as regards the operational surveillance of foreign nationals. Although intensified surveillance has not yet been achieved in full and, as such, does not (yet) have any effect on the non-discriminatory nature of surveillance, the activation and intensification of supervision may jeopardise the required objectification of the process of stopping and questioning, designed to prevent discriminatory surveillance. As regards the period studied, the conclusion is drawn that the pursuit of more active surveillance under the Aliens Act 2000 has remained ‘in balance’ with the aim to achieve surveillance of a non-discriminatory nature. However, the shifts observed as regards the priorities applicable and the approach taken to surveillance, in which more emphasis will be placed on themes such as overpopulation and nuisance, do indicate that the ‘boundaries of the law’ are being explored.