

A Supreme Court researcher pleads for help from scholars with dealing with the new political reality and bureaucratic jungle of crimmigration (i.e. the convergence of criminal law and immigration law).

Crimmigration: the convergence of criminal law and immigration policy reflected in the case law of the Dutch Supreme Court

Heleen de Jonge van Ellemeet

(The article I will present is work in progress. It is to be published later this year in Dutch in a collection by the research department of the Dutch Supreme Court.)

For almost a decade American criminologists are observing the merger of criminal law and immigration law. They call this trend 'crimmigration'. The phenomenon, both an outcome of rule-making and a discursive practice, ties in with the larger trend of 'governing through crime'. Some warn of a 'crimmigration crisis': the risk of progressively excluding groups of people from the civic community. At the same time, in individual cases, criminal law may provide more procedural guarantees than immigration law.

The use of penal policies to curb irregular migration also seems to be on the rise in the Netherlands, culminating in the now advanced – though still hotly debated – legislative proposal to criminalise the presence of irregular migrants in the country. If irregular migration is drawn further into the ambit of criminal law, judges in criminal proceedings will more frequently be exposed to migration-related issues. In this article I explore to what extent this is true for the criminal law chamber of the Dutch Supreme Court. In the case law of the past three years several issues emerge, including:

- article 31 UN Refugee Convention as a limitation to the right to prosecute for the use of false travel documents (article 231 Criminal Code);
- determining and accounting for the punishment (article 359 Code of Criminal Procedure) and its consequences for legal residency of the suspect;
- presenting an unlawful border control (mobiel toezicht vreemdelingen) as a procedural failure in subsequent criminal proceedings (article 359a Code of Criminal Procedure);
- the deported alien and the right of the suspect to be present (and defend himself) at his own trial (article 6 European Convention of Human Rights), and
- the consistency of imposing a prison sentence on an undesirable alien (article 197 Criminal Code) with the European Directive on returning illegally staying third country nationals (2008/115/EC).

The case law on these issues is varied. For example, the Supreme Court goes to great lengths to interpret article 31 of the Refugee Convention and set out the protection this provision intends to give. But it sets high standards for a plea regarding the consequences of a particular punishment for the suspect's migration status to be taken into account (explicitly) by the judge passing the sentence. In practice it may be difficult for both defence lawyers and criminal judges to assess the consequences of a punishment in terms of the suspect's (future) right to legal residency. In the case law on unlawful border checks and on deported suspects, the Court holds on to its strict reading that no sanctions apply to procedural failures which are not committed by the public prosecutor in the course of the criminal investigation. Finally, the Court has ruled that a prison sentence may be imposed on a third country national who is in the Netherlands despite having been declared an undesirable

alien, if the judges have ascertained that the procedure to remove that person has been completed. One can ask the question if an average criminal judge – or even those in the Supreme Court – know when exactly that is the case.

The jurisprudence shows consistency from a criminal law perspective but on certain issues the judgments seem out of touch with, or indifferent to, the social reality and bureaucratic jumble facing many irregular migrants in the Netherlands today. Perhaps migration lawyers and criminologists could teach criminal judges a few things about that?