



Does the shoe fit? The expedited proceedings-ground in practice

Evaluation into the Act on the extension of the grounds for pre-trial detention

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Summary

This report holds the evaluation into the ‘Act on the extension of the grounds for pre-trial detention’ (*Wet Uitbreiding gronden voorlopige hechtenis, Wugvh*) in the Netherlands. The Act was introduced in 2015 following commitments made by the State Secretary for Security and Justice (now: Justice and Security) in the context of combatting violence against public officials. The purpose of the Act is ‘to extend the possibilities for the application of pre-trial detention in the event of violence in the public domain and violence against public officials, with a view to a speedy trial of the suspect’ (Explanatory Memorandum, p. 1). The evaluation was promised to Parliament during the parliamentary proceedings of the Act (art. IA of the Act).

This new ground is laid down in Article 67a, section 2, under 4^o CCP¹ and is applicable if someone is suspected of:

- one or more of the crimes defined in articles 141, 157, 285, 300-303 or 350 CCP (vandalism, fire setting, physical abuse, threats of violence)
- and this crime has been committed
 - o in a public area and/or
 - o against one or more public officials (policemen, ambulance staff, firemen etc.)
- and the crime has caused social unrest
- and the trial will commence within 17 days and 18 hours after the arrest of the suspect.

In short: this ground allows for pre-trial detention with a view to expedited proceedings against suspects of crimes in public areas or against public officials, such as policemen, firemen, and ambulance staff.

The purpose of our study was to examine to what extent the ‘expedited proceedings-ground’ (*snelrechtgrond*) introduced by this Act contributes to a swift response to crimes committed in places accessible to the public and/or committed against public officials. The research consisted of (i) literature research, (ii) desk research,

¹ See the full definition at the end of this summary.

(iii) semi-structured interviews among examining judges, judges, public prosecutors and criminal defence lawyers, (iv) an online survey among examining judges and (v) an expert meeting with a judge and three public prosecutors.

The ‘expedited proceedings-ground’ is hardly used for pre-trial detention: main reasons

Our study has shown that little use is made of this new ground for pre-trial detention. Although we did not have concrete numbers at our disposal, a rough estimate can be made on the basis of extrapolation of the data obtained in our research. Our assessment is that from January 2018 to May 2020 (i.e. in 29 months), public prosecutors filed requests for the suspect’s pre-trial detention based on the new ground in between 187 and 274 cases. Not all of these requests have been granted by the examination judges and, besides that, our research shows that other grounds for pre-trial detention (the traditional grounds, such as fear of absconding or fear of reoffending) are usually applied in addition to the new ground. In recent years, more than 13,000 suspects were taken in pre-trial detention on a yearly basis. Compared to those numbers, our estimate shows that the new ground leads a marginal existence, that does not live up to the expectations put forward in the Explanatory Memorandum at the time.

Most criminal offences mentioned in the new ground do not fit within the parameters of expedited proceedings

In expedited proceedings, the suspect is remanded in custody and the criminal case is heard within seventeen days and eighteen hours after his arrest.² Although expedited proceedings are a widely used and widely accepted and appreciated phenomenon in the Netherlands, the offences referred to in the new ‘expedited proceedings-ground’ for pre-trial detention are often not suitable for these proceedings. This is, firstly, because they are offences that are in part considered to be of a too complicated or a too serious nature for a court hearing within such a short time. Secondly, in cases of lesser gravity, the Public Prosecution Service’s sentence guidelines (*strafvorderingsrichtlijnen*) and the judiciary’s sentencing principles (*oriëntatiepunten voor straftoemeting*) do not indicate custodial sentences, as a result of which, due to the so-called anticipation requirement,³ the application of pre-trial detention is not possible. Moreover, many other situations involve suspects who can be remanded in custody using the traditional grounds for pre-trial detention (e.g. because they already have a criminal record and/or the case needs further investigation). Dutch examining judges have wide discretion in accepting the fear of

² After seventeen days and eighteen hours, the court in chambers is to review the continuation of pre-trial detention. The aim of expedited proceedings is for the trial to be completed before that review is necessary.

³ Article 67a paragraph 3 of the Code of Criminal Procedure: an examining judge or court may not order pretrial detention if it is anticipated that upon sentencing, the accused will not be subject to a non-suspended prison sentence.

reoffending as a ground for pre-trial detention – even in some cases in which the suspect is a first offender.

In short: in practice, the situation envisaged by the legislator hardly occurs. It's rare to encounter a case with a first offender who has committed a crime that is relatively easy to prove and that falls within the parameters of the expedited proceedings, but to which no other grounds for pre-trial detention apply and for which an unconditional custodial sentence can be expected. Our research thus confirms many of the practical reservations that were raised when the Act was being discussed.

At the time of our research one exception appeared to prove the rule, though: the corona crisis broke out and, in its wake, the so-called 'coronaspitters'⁴ came about. According to our respondents, the new ground for pre-trial detention was very suitable for these crimes: they are relatively simple cases for which first offenders can also be sentenced to custodial sentences. In the end, though, it turned out that the expedited proceedings-ground was not often applied in these cases, for example because the suspect had a criminal record or the case was heard in so-called super-expedited proceedings (*supersnelrecht*): a trial within three days after the suspect's arrest.

'Social unrest' is an unclear criterion

Our research also confirms the fear that the concept of 'social unrest' would be difficult to apply in practice. This difficulty may lead to a certain arbitrariness in the application of the ground. In the Explanatory Memorandum to the Act, the prospect of an Instruction from the Public Prosecution Service (PPS) in this respect was put forward. Such an Instruction might have been able to deal with the observed lack of clarity but was never issued.

In a grammatical interpretation of the legislation, 'social unrest' must be determined based on the nature of the crimes. Statute-historical interpretation learns that the unrest may to a certain extent be assumed *in abstracto* when the crimes meet the criteria described in the new ground (e.g. the assumption that violence towards a police-officer leads to social unrest). However, the Explanatory Memorandum also shows that the social unrest is presumed to be present when the suspect is released prematurely and that expedited proceedings are necessary to address this social unrest. This kaleidoscopic approach to the concept of 'social unrest' bears the risk of a self-fulfilling prophecy and proves extremely difficult to apply in practice. Matters such as media attention, unrest as evidenced by activities on social media (Facebook, Twitter, Instagram), the number of bystanders, the *locus delicti* and/or the (public) position of the person of the victim all seem to be relevant

⁴ People that would spit, cough or sneeze in the direction of the police (or ordinary civilians), while saying to have been infected with the corona-virus. This act is considered to be punishable as a threat of violence and/or attempted aggravated assault, leading to custodial sentences.

circumstances regarding the decision on the existence of ‘social unrest’. At the same time, according to our respondents, these circumstances are difficult to quantify and are susceptible to subjective decision-making. Nevertheless, the respondents felt there was little discussion as to the existence of social unrest relating to the ‘corona-spitters’.

Respondents often related the interpretation of ‘social unrest’ to that of the ‘serious upset to the legal order’ (another ground for pre-trial detention, which is applicable only in connection to very serious crimes⁵). Some respondents spoke of the ‘serious upset to the legal order *light*’. In doing so, they seem to lose sight of the fact that ‘serious upset to the legal order’ must, according to Dutch legislation, be seen in relation to crimes of severe gravity, carrying a sentence of imprisonment of twelve years or more. Suspects of such crimes are often held in pre-trial detention because the judge will argue along the lines that ‘one cannot explain to the victims of a serious offence or to society in general that somebody who just committed a serious crime gets released pending his trial.’ In our opinion, the Explanatory Memorandum has suggested too light-heartedly that a similar reasoning can be used to argue ‘social unrest’ necessary for the application of the expedited proceedings-ground. Moreover, such reasoning is not tenable in the light of recent ECtHR case law. In the *Buzadji*-judgment,⁶ the ECtHR emphasised that preventive detention can be grounded solely on a reasonable suspicion only for a very short time (a couple of days at most). After that period, one of the grounds for pre-trial detention recognised by the ECtHR case law must be applied. Moreover, justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. In the *Geisterfer v. Netherlands* judgment, the ECtHR emphasised above all that the ‘serious upset to the legal order’-ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused’s release would actually disturb public order. Consequently, the substantiation of ‘social unrest’ must therefore encompass more than just a suspicion and the general, abstract assumption of ‘public disorder’.

Phenomena related to the new ground for pre-trial detention: expedited proceedings and ‘Safe Public Duties’.

The findings in this report must be seen against the background of two important phenomena that underlie the new ground for pre-trial detention: expedited proceedings (fast-track justice system) and the National program for ‘Safe Public Duties’ (*Veilige Publieke Taak, VPT*) that led to so-called Unambiguous National Agreements (*Eenduidige Landelijke Afspraken, ELA*) between the police and the PPS regarding the prosecution of violence against public officials. Both phenomena are partly based on assumptions that are not always solidly substantiated.

⁵ See the definition in Art. 67a, section 2, under 1° at the end of this summary.

⁶ ECtHR (GC) 5 July 2016, nr. 23755/07 (*Buzadji v. Moldavia*).

In Dutch criminal justice, the application of expedited proceedings has become commonplace. A very important, but never concretely researched and substantiated, assumption in this respect is that ‘on the spot’ penalties, including immediate detention, satisfy certain societal interests. As such, crimes committed in public places (nightlife violence, hooliganism, violence during New Year’s Eve) have consistently been considered prime examples of crimes suitable for expedited proceedings. The same is true for violence against the police and other public officials. Moreover, expedited proceedings are efficient: the throughput can drastically be increased, and the execution of the sentence takes place immediately. The downside is that the fast-track justice system is at odds with the presumption of innocence: after all, an important implicit assumption is that the suspect is, indeed, the offender. A PPS policy document on the ‘fast-track justice system’ puts it like this: ‘expedited proceedings must make clear to the suspect and to society that the behaviour is unacceptable, while it is in the interest of society that offenders are not released before having served their sentences’.⁷

In the meantime, there is no concrete evidence to show that speedy trials (with suspects awaiting the trial while on remand) are more effective and/or actually really meet the needs of society. Respondents to our research therefore indicate that a fast-track procedure for non-custodians can also have added value. This message seems to be getting across: pilots have shown that expedited proceedings for non-custodians can be a valuable and meaningful addition and the Minister of Justice and Security aims for these proceedings to become commonplace nationwide.

The question is whether this development will change the assumption that violent crimes against public officials pre-eminently require an on-the-spot reaction and should therefore end up in expedited proceeding with pre-trial detention. In the *ELA* between the police and the PPS, it has been agreed, among other things, that – where possible – expedited proceedings and pre-trial detention will be applied. In addition, it has been agreed that prosecutors demand much higher penalties in court. In practice, cases are hardly as clear-cut as these agreements suggest: cases are difficult to solve on short notice and suspects often have behavioural problems and/or suffer from addiction, which means that the straightforward mould of expedited proceedings does not fit at all.

In this context, our respondents do not see unconditional custodial sentences as a ‘holy grail’. In particular the prosecutors indicate that they much rather provide a tailor-made intervention. This is also in line with the official policy rules of the PPS, that do not take unconditional custodial sentences and/or pre-trial detention as a starting point in cases of violence against public officials. In fact, those policy rules specifically refer to ‘meaningful interventions’ with regard to such crimes. The findings of the most recent evaluation of the *ELA* therefore show that respondents from the PPS have proposed to abandon specific agreements that suggest that all

⁷ Menukaart (super)snelrecht.

cases will be dealt with swiftly and that pre-trial detention will be demanded where possible. In practice, these agreements raise expectations that cannot be met.

A paradoxical situation thus arises. It is precisely the situations of nightlife violence, hooliganism, disturbances around New Year's Eve and/or violence against public officials that are strongly associated with the fast-track justice system. At the same time, these crimes do not seem to fit within the outline of expedited proceedings: lengthy police investigations are needed, or policy prevents first offenders from being taken in pre-trial detention.

Does the new expedited proceedings-ground for pre-trial detention contribute to a swift response to crimes committed in places accessible to the public and/or towards public officials?

The answer to the main question of this study is that the expedited proceedings-ground contributes to a very limited extent to a swift response to the criminal conduct in question. The ground turns out to be a 'mould' that fits only a very limited number of the intended cases.

In addition, the pre-trial detention culture in the Netherlands plays an important role. In the past decades, pre-trial detention has been applied fairly easily and extensively and over the years a system of interpreting and applying grounds for pre-trial detention has been developed in which virtually all cases can be included and in which all parties have been and are socialised. In practice, there is little need for a new ground, and neither prosecutors nor judges appear to be inclined to alter this practice. Still: in those rare cases in which the new ground for pre-trial detention is put forward as the only option, the examining judge will usually go along and order pre-trial detention. Only very few respondents rejected the ground as a matter of principle. All in all, the added value of the ground is (very) small, though.

Furthermore, the emergence of the so-called ZSM procedure should not go unnoticed. A system has been put in place in which 'bare' penalties (whether monetary fines or custodial sentences) are not necessarily pursued. The 'meaningful intervention' plays an important role – often in the context of out-of-court proceedings. In these interventions, behavioural orders (as a condition for out-of-court proceedings or on the basis of Art. 509hh CPP) may also be considered. Such behavioural orders could in some cases be a very effective means of mitigating the alleged unrest caused by the release of the suspect.

Undesirable side-effects and ambiguities

The study does not reveal any undesirable side-effects (such as, for example, an increased risk of wrongful use of pre-trial detention). It is, however, advisable to clarify whether the new ground for pre-trial detention also continues to apply when the (super) expedited hearing is adjourned or if the suspect does not immediately waive the right to appeal after conviction in the (super)expedited proceedings. At

the moment, the consensus among respondents from the judiciary seems to be that, after a conviction that is not yet irrevocable, it is not possible to continue pre-trial detention on the new ground. This leads to the somewhat paradoxical situation that a suspect whose pre-trial detention is solely based on the new ground and who (within the seventeen days and eighteen hours) is sentenced to, say, one month's imprisonment, will have to serve the remainder of that sentence at a later point in time, because the judge cannot give an order for immediate detention as the new ground no longer applies.

Some concluding remarks

The new expedited proceedings-ground for pre-trial detention has not been met with great acclaim within the judiciary and the prosecution, but there is no broad resistance to the ground either. Only a few respondents see the ground as a political vehicle. The considerable discretion that the prosecution and the judiciary have in deciding whether or not to request or grant pre-trial detention, seems to lead to restricted, well-considered application of the ground.

This large discretion is not to be taken for granted, though. A bill limiting the court's possibility of imposing community sentences has recently been submitted to Parliament. The bill specifically relates to cases of violence against public officials. Passing this bill would mean that custodial sentences could become the norm in more of these cases which would, as such, temper the scope of the *anticipation requirement*. This is not to say, however, that a more extensive use of pre-trial detention based on the new ground would be imminent. The expedited proceedings will still not be appropriate in many of the cases, because the investigations are too complex. Also, the introduction of expedited proceedings for non-custodians may put the assumption that on-the-spot sanctioning is inextricably linked to pre-trial detention in perspective. On top of that, we would like to emphasize that in the draft proposals for the modernisation of the Dutch CCP, the Minister of Justice & Security has explicitly opted for a system that expresses more compellingly than the current pre-trial detention system that the judge must seriously consider alternatives before deciding that pre-trial detention is necessary and unavoidable.

Violence against people with a public duty and/or in the public domain must be tackled seriously. However, the one does not have to exclude the other. In our opinion it is just a matter of how to put it. It can very well be argued that a 'bare' (relatively short) custodial sentence is really not beneficial, certainly not in the case of first offenders. An offender-oriented approach can also be chosen. Such an approach could focus on a careful process in which sufficient attention is paid to the interests of the victim. Initiatives such as the expedited proceedings for non-custodians, mediation and/or behavioural orders may be able to accomplish a much more meaningful response than the 'on-the-spot' justice, that has never really had the desired outcome.

Appendix:

Article 67a (Dutch CCP)

1. An order based on Article 67 can only be issued:
 - a) if it is apparent from particular behaviour displayed by the suspect, or from particular circumstances concerning him personally, that there is a serious danger of absconding;
 - b) if it is apparent from particular circumstances that there is a serious reason of public safety requiring the immediate deprivation of liberty.
2. For the application of the preceding paragraph, only the following can be considered as a serious reason of public safety:
 - 1°. if it concerns suspicion of commission of an act which, according to its legal definition, carries a sentence of imprisonment of twelve years or more and that act has caused serious upset to the legal order;
 - 2°. if there is a serious risk the suspect will commit an offence which, according to the law, carries a prison sentence of six years or more or whereby the security of the State or the health or safety of persons may be endangered, or give rise to a general danger to goods;
 - 3°. if it concerns suspicion of one of the offences defined in Articles 285, 300, 310, 311, 321, 322, 323a, 326, 326a, 350, 416, 417bis, 420bis or 420quater of the Criminal Code, whereas less than five years have passed since the day on which, on account of one of these offences, the suspect has been irrevocably sentenced to a punishment or measure entailing deprivation of liberty, a measure entailing restriction of liberty or community service, and there is in addition a serious likelihood that the suspect will again commit one of those offences;
 - 4°. **if it concerns suspicion of one of the offences defined in articles 141, 157, 285, 300-303 or 350 CCP, committed in a public area or against persons with a public task that has caused social unrest and the adjudication of the criminal offence will commence within 17 days and 18 hours after the arrest of the suspect.**
 - 5°. if pre-trial detention is necessary in reason for discovering the truth otherwise than through statements of the suspect.
3. An order for pre-trial detention shall not be issued if there are serious prospects that, in case of a conviction, no irrevocable custodial sentence or a measure entailing deprivation of liberty will be imposed on the suspect, or that he, by the enforcement of the order, would be deprived of his liberty for a longer period than the duration of the custodial sentence or measure.

(...)