HOUTHOFF

Court of Appeal of The Hague

Date of hearing: 17 May 2022
Case number: 200.304.295/01

STATEMENT OF APPEAL, ALSO CONTAINING CHANGE OF CLAIM

in the matter of:

[Appellant 1],
residing in [city] ("**[appellant 1]**"),

[Appellant 2],
residing in [city] ("**[appellant 2]**"),

the foundation **Stichting RADAR Inc.,**
with its registered office in Rotterdam ("**RADAR**")
attorney: A.M. van Aerde

and

Nederlands Juristen Comité voor de Mensenrechten (NJCM) [Dutch Section of the International Commission of Jurists],
an association with full legal capacity with its registered office and principal place of business in Leiden ("**NJCM**"),

Amnesty International Dutch Section,
an association with full legal capacity with its registered office and principal place of business in Amsterdam ("**Amnesty Netherlands**"),
attorneys: J. Klaas and M.B. Hendrickx
appellants, claimants in the first instance (jointly "**Amnesty International et al.**")

v.:

the State of the Netherlands (the Ministry of Defence and the Ministry of Justice and Security),
a legal entity under public law with seat in The Hague and office and place of business ("**the State**"), respondent, defendant in the first instance,
attorney: C.M. Bitter

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1. Introduction

1.1. This case concerns discrimination by the Royal Netherlands Marechaussee (hereinafter: "**RNM**"). This discrimination is a violation of the prohibition on discrimination, it is a human rights violation, and it is harmful and unlawful.

1.2. The human rights violations that the appellants are taking action against with this case concern persons arriving in the Netherlands from another Schengen country and 'being pulled from the line' or 'being taken aside'. This happens during the performance of checks within the process of the Mobile Security Monitoring ("**MSM**") procedure. The RNM performs these checks as part of its monitoring for illegal immigration following a border crossing (this pursuant to section 50(1) of the Aliens Act 2000 ("**AA 2000**") in conjunction with Article 4.17a of the Aliens Decree 2000 ("**AD 2000**") and for cross-border criminality. In essence, what this refers to is stopping persons who have just crossed the Dutch border for the purposes of determining whether such persons have a legal entitlement to stay in the Netherlands and/or for the purposes of fighting various forms of border-related criminality. For this purpose, people are pulled from the line after leaving an aircraft, or in the case of travel by road, from a vehicle (such as a bus) after passing the border, in order to check who they are and whether they are allowed to be in the Netherlands.[1] As part of this process, it does happen that the RNM makes a distinction by race, which leads or can lead to a difference in treatment between people that is, at least in part, based on ethnic physical characteristics.[2] Such a difference in treatment is racial discrimination.

1.3. Racial discrimination is a particularly invidious kind of discrimination that requires a vigorous reaction from the State. The government must do everything possible to fight racism with the goal of reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment.[3] Making distinctions on the basis of race is an assault on the human dignity of the people towards whom the distinction is directed. It also contributes to the spread of xenophobia, and is an obstacle to an effective fight against discrimination.[4]

1.4. What the appellants want to achieve by bringing this case is, simply put, that ethnic profiling and discrimination are no longer part of the performance of this enforcement capacity by and on behalf of the State. For the appellants, it is about the selection decision that is made in a fraction of a second by an officer of the RNM in selecting someone for a MSM check, as well as the risk profiles used by the officers of the RNM for the purposes of these selection decisions. The appellants wish to ensure that the RNM no longer uses race, skin colour, origin

[1] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraph 2.1.
[2] District Court, paragraph 8.6.
[3] European Court of Human Rights, 13 December 2005, no. 55762/00 and 55974/00, ECLI:CE:ECHR:2005:1213JUD005576200 (Timishev v. Russia), paragraph 56.
[4] Derived from the decision of the UN Human Rights Commission in Lecraft; see paragraph 10.4.5 below.

or national or ethnic background – including presupposed nationality – as an indicator in risk profiles and in selection decisions for MSM checks.

2. Essence of the matter

2.1. What is at issue in this matter is, put very succinctly, whether during MSM checks the RNM is entitled to treat people differently on the basis of external physical characteristics such as race, skin colour, origin or national or ethnic background, including presupposed nationality. Amnesty International et al. are of the firm conviction that this is prohibited.

2.2. The District Court established that in the methods used by the RNM, ethnicity can play a role in these selection decisions, and that in the performance of MSM checks this will lead or could lead to a difference in the treatment of individuals, one that is based in part on ethnic physical characteristics (paragraph 8.6).

2.3. However, the District Court nonetheless concludes that this is not by definition a violation of Article 1 of Protocol 12 to the ECHR. In the view of the District Court, here the State is making use of the *discretionary power* that it has in the identification of situations in which it considers making such a distinction justified. The District Court establishes that making such a distinction in the methods of the RNM must be based on an objective and reasonable justification (paragraph 8.6).

2.4. The District Court then goes on to determine that there is indeed a general reasonable and objective justification for using or potentially using ethnicity as a selection indicator in the MSM selection decisions. The District Court bases this determination on its considerations at paragraphs 8.9-8.12, which can be summarized as follows:

a. The primary consideration in the MSM checks is obtaining specific clarity on identity, nationality and immigration status of an individual. The ability to establish the nationality or geographic origin of a person is of compelling importance for the effectiveness of MSM, because these can be the determining factors in a person's immigration status in this country. Ethnic physical characteristics are not necessarily always, but could in some cases be an objective indication of someone's origin or nationality. This is not changed by the fact that this is being done on the basis of an assumption about a person's *presupposed* nationality (paragraph 8.9).

b. The use of ethnicity as a selection indicator does not go further than reasonably necessary. When ethnicity as an indicator does play a role in the selection decisions in MSM checks, this happens exclusively in combination with other selection indicators in the specific determination of whether persons meet the relevant profile for the check action in question; taken together, these indicators could indicate a situation of illegal migration. Here "the principle of non-discrimination is paramount", and the selection decisions must be explainable. If someone's ethnicity plays a role, this is one element of a formula made up of interrelated indicators for a specific selection decision. While it is true that a person's ethnicity cannot be the decisive factor

in this formula, it is not considered disproportionate, neither by definition nor generally, in view of the aim of MSM. The use of ethnicity in MSM in general does not inevitably lead to a difference in treatment that is exclusively or to a decisive extent based on ethnicity. The fact that a particular selection indicator is decisive at a given moment for the decision of whether or not to conduct a check does not, by virtue of being decisive, make it the only relevant or the most significant indicator (paragraph 8.10).

c. There is no reasonable alternative for directed selection decisions. General checks are prohibited because they cannot constitute a de facto regular border control: on any flight only a portion of the passengers can be checked, on any train only some of the train can be subjected to checks, and on roads or waterways only a portion of the passing vehicles or craft can be stopped. Random checks would strongly reduce the effectiveness of MSM because this would not be sufficiently information-driven and so would prevent sufficiently directed action (paragraphs 8.11-8.12).

d. Amnesty International et al. base their arguments on effectiveness principally on academic research on the subject of fighting criminality. According to the District Court, the aim of MSM is not to fight crime, so this comparison and the argumentation built on it does not hold up.

2.5. Amnesty International et al. are of the firm conviction that this judgment is incorrect. In essence, their objections are the following:

a. The District Court took insufficient regard of how *extremely strict* the prohibition on discrimination is, how strictly the discrimination review must be applied and how *extremely narrow* the discretionary freedom is for allowing an objective justification of a difference in treatment based (even in part) on race. There are essentially no conceivable circumstances that would allow a reasonable and objective justification for racial discrimination.

b. Following on from the foregoing, the District Court also erred in determining that the State has “discretionary power” in identifying the situations in which it deems making such a distinction justified.

c. The consideration that external ethnic characteristics do not always necessarily, but in some circumstances could, constitute an objective indication of someone’s origin or nationality, is incorrect and incomprehensible. One cannot see the nationality of a person simply by looking at them.

d. The District Court failed to appreciate that MSM does in fact also pertain to fighting criminality, so the academic argumentation in the context of fighting criminality does hold up.

e. The District Court failed to appreciate that it was not Amnesty International’s responsibility to demonstrate that the use of race was proven to be ineffective, but in these proceedings it was rather up to the State to prove that there is a reasonable and objective justification for a difference in treatment of people during MSM checks. in other words, it is the State that

bears the burden of proof for the assertion that it is necessary for MSM to treat people differently according to their race.

f. In its assessment of the objective and reasonable justification, the District Court erred by completely ignoring the severe impact of the difference in treatment on all non-white Dutch citizens, Union citizens and other non-white people with a valid residence status in the Netherlands who have higher chances of being selected than white people. In its assessment the District Court completely failed to consider both the damages that are suffered by non-white people as a result of racial discrimination and the harmful impact on society that racial discrimination in the form of ethnic profiling has (summons, paragraph 4.7).

g. Finally, it became clear from the proceedings that the RNM evidently considers itself capable of implementing MSM without using race as an indicator in profiles or selection decisions. This step shows that it is apparently not necessary for proper performance of MSM to apply a difference in treatment on the basis of characteristics such as race, skin colour, origin, or national or ethnic background, including presupposed nationality.

3. Terminology

3.1. This statement will make repeated use of terms such as ‘nationality’, ‘race’, ‘ethnic profiling’, ‘origin’, ‘national background’, ‘ethnic background’, ‘presupposed nationality’ and ‘risk profile’. In the following, Amnesty International et al. will clarify what they mean by these terms.

3.2. By ‘nationality’, Amnesty International et al. mean: the legal connection between a person and a state (citizenship). This term does not refer to the ethnic background of the person.[5]

3.3. Where Amnesty International et al. use the word ‘race’, it is exclusively in the legal sense, for the purposes of conforming to existing legislation and regulations and in order to act in defence of those who are treated differently due (in whole or in part) to their presupposed race, and thus unlawfully. Amnesty International et al. reject the idea that among humans, there are different ‘races’ in the biological sense. All humans belong to the same race, being: the human race. The term ‘race’ as a basis for discrimination also includes: skin colour, origin and national or ethnic background.[6]

3.4. Amnesty International understands the term ‘origin’ as relating to national or ethnic roots, such as: having a place of birth outside the Netherlands or having grown up in a country other than the Netherlands.

[5] On this, see Article 2(a) of the European Convention on Nationality (Strasbourg, 6 November 1997), Treaty Series 1998/10, approved by Act of 21 December 2000, Bulletin of Acts and Decrees 2000/619, effective date 1 July 2001 (Treaty Series 2001/40).

[6] Article 1.1, ICEAFRD.

3.5. By ‘national background’, Amnesty International et al. refer to a person’s connection with a nation-state, for example because that person or that person’s parents or ancestors were born and raised in that nation-state. National background as a ground for discrimination can be placed under the concept of race.

3.6. Amnesty International et al. define ‘ethnic background’ or ‘ethnicity’ as a reference to membership in a social or societal group that is characterized by a common nationality, tribe, religion, language or culture and traditional origin or background.[7] Ethnic background as a ground for discrimination can be placed within the concept of race.

3.7. The term ‘ethnic profiling’ will be used as a synonym for ‘racial profiling’. By this Amnesty International et al. mean: the use by the police or other enforcement agencies, to any degree, of race, skin colour, origin or national or ethnic background in order to subject a person to examination and/or to determine whether a person might be participating in criminal activities: see paragraph 10.3.6 below for more detail. Ethnic profiling/racial profiling in this sense happens, for example, when the RNM bases the selection decision for a check (either fully or partially) on race.

3.8. Because of the synonymous nature of the terms ‘racial profiling’ and ‘ethnic profiling’, and for the purposes of readability of this statement, the appellants have opted to use the term ‘race’ in all instances (including in the relief sought) rather than identifying ‘skin colour, origin or national and ethnic background’ each time.[8] Consequently, wherever this statement and the claims refer to ‘race’, this should be read as including skin colour, origin and national/ethnic background.

3.9. The RNM asserts that it selects based on nationality. In this statement Amnesty International et al. refer to ‘presupposed nationality’ to highlight the point that the ‘nationality’ of a person to be selected is unknown. The RNM cannot see what nationality a person has by looking at them, but can only establish that nationality after inspecting a passport or other form of identification. The selection of people for a MSM check, which the RNM claims is made on the basis of nationality, is in reality a selection based on presupposed nationality. In this selection, the RNM derives the presupposed nationality from (in part)[9] external characteristics.

[7] Derived from Timishev v. Russia, point 55; see paragraph 10.6.10 below.

[8] It is difficult to use correct terminology when referring to issues of racial discrimination and ethnic profiling, since there are different perspectives and considerations on what terminology is correct. At the international level, the terminology used is generally of racial profiling and profiling on the basis of race. In the Netherlands, the terms used are ethnic profiling and profiling on the basis of ethnicity. For this reason, in the first instance Amnesty International et al. opted to refer to ‘ethnicity’ rather than ‘race’. On this appeal, Amnesty International et al. have chosen to put the focus in their claims for relief and injunctions on the legal term ‘race’ in order to conform more explicitly to the prohibitions on discrimination; this is the reason for the change of claim.

[9] The RNM also derives presupposed nationality from the registration of an aircraft. This has been shown in the literature, including research by Van der Woude et al., to play a role in the RNM’s method of selection: both the registration of the aircraft and the appearance of passengers are used to derive the presupposed nationality: *“The employees of the RNM questioned during the fieldwork placed a great deal of weight on the*

Selection based on presupposed nationality, for example because the person looks Nigerian, 'non-Dutch', or Romanian in effect means selection based on national or ethnic background.[10] This is therefore not a distinction on the basis of nationality but on the basis of race.

3.10. A risk profile is a collection of one or more criteria, also referred to as 'indicators', on the basis of which an assessment is made of a risk of a violation of rules and standards and on the basis of which a selection decision is then made.[11] These are, then, in fact assumptions by which the data of individuals is generalized to a group level and then applied as statistical data at the individual level and from which a certain risk is derived. A risk profile oriented towards persons must be distinguished from a description of a suspect or perpetrator; this latter category is a description of the physical appearance of a person who is suspected of committing a crime, while a risk profile oriented towards persons does not pertain to a suspect of a crime but rather to a person who matches certain group characteristics. The use of race in describing a suspect or perpetrator may be objective and reasonably justified, while the use of race in a risk profile is, in Amnesty International et al.'s view, a form of racial discrimination.

4. Procedural Documents

4.1. At the appropriate time, the following documents from the first instance will be submitted to these proceedings:

- the summons of 24 February 2020, with exhibits 1-83
- the statement of defence of 19 August 2020 ("**SOD**") with exhibits 1-10
- the interlocutory judgment of 28 April 2021
- the interlocutory judgment of 19 May 2021
- the statement submitting exhibits on the part of Amnesty International et al. of 15 June 2021, with Exhibits 84-86
- the statement submitting exhibits on the part of Amnesty International et al. of 15 June 2021, with Exhibit 87
- the pleadings on the part of Amnesty International et al. of 15 June 2021 (the "**Amnesty Pleadings**")
- the pleadings on the part of the State of 15 June 2021 (the "**State Pleadings**")

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vehicle's number plate and the appearance of the passengers as indicators. These indicators were used to deduce the alleged nationality of the passengers, which would then commonly be linked to certain associations about transgressive behaviour. In these associations, it was noteworthy that the majority of RNM employees referred to such associations as criminal conduct, and not particularly to conduct linked to violation of the Aliens Act... The associations that are ingrained in the minds of the RNM officers and also incorporated into the Amigo-boras camera system could likewise lead to a systemic negative stereotyping of certain nationalities and groups, which would be in conflict with the prohibition on racial discrimination... This last applies in general for the large degree of selection based on the indicators number plate and physical characteristics of passengers…" See Exhibit 4 to the Summons. Van der Woude et al., (2016), pp. 137-138. The fact that the RNM also derives presupposed nationality from the registration of an aircraft is likewise evidenced from statements of the officers interviewed: see paragraph 8.8, below, and Exhibit 93.

[10] Cf. Netherlands Institute for Human Rights, 25 April 2013, ruling 2013-52, paragraph 3.3; District Court of Haarlem, 8 May 2007, ECLI:NL:RBHAA:2007:BA5410, paragraph 2.5.

[11] CRM Review Framework, Netherlands Institute for Human Rights (see paragraph 9.2 below), p. 7.

- the official report of the hearing of 15 June 2021
- the 26 July 2021 letter from Amnesty International et al. containing the response to the official report
- the final judgment of 22 September 2021

5. The facts

5.1. Amnesty International et al. can accept the account of the facts as set out in paragraphs 3.1-3.18 of the judgment being appealed.

6. Scope of this appeal

6.1. The District Court of The Hague rendered an interlocutory judgment in this matter on 19 May 2021 and a final judgment on 22 September 2021. Amnesty International et al.'s grounds for appeal are directed solely against the final judgment.[12]

6.2. Amnesty International et al. maintain all their arguments in the first instance insofar as not explicitly departed from in this appeal.

6.3. With the grounds for appeal to be formulated in the following, Amnesty International et al. intend to submit the dispute in its full extent to the Court of Appeal.

7. Responses in the media to the disputed judgment

7.1. The judgment rendered by the District Court hit home with many people, and produced a large number of public responses. The tenor of these responses was extremely consistent: disappointment and indignation. Below, Amnesty International et al. set out a number of these responses to the judgment (in translation) in order to give the Court of Appeal an idea of the criticism with which the judgment was met in society and to illustrate the magnitude of the damage to society from unequal treatment on the basis of race.

7.2. Dr Sinan Çankaya, cultural anthropologist and University lecturer at the Vrije Universiteit in Amsterdam, who wrote his dissertation on the inclusion and exclusion of ethnic minorities within the police organization,[13] wrote a much-shared article entitled "Court wrongly links Dutchness with whiteness" (**Exhibit 88**):[14]

> *With this decision, the court is casting Dutchness and whiteness in concrete. That's something that many Dutch-on-the-fringes have already known for a long time, but now it is precedent. The Dutch person is white, and the alien is not; no one can gloss that over any longer. The decision is the legally*

[12] Judgment of the District Court of The Hague, 22 September 2021, ECLI:NL:RBDHA:2021:10283.

[13] S. Çankaya, *Buiten veiliger dan binnen: in- en uitsluiting van etnische minderheden binnen de politieorganisatie* (Safer outside than inside: inclusion and exclusion of ethnic minorities within the police organization), Delft: Eburon 2011.

[14] S. Çankaya, 'Rechter koppelt ten onrechte Nederlanderschap aan witheid', *NRC* 24 September 2021.

substantiated, grandiloquent stand-in for its baser counterpart: "Yes, but the bottom line is they're black, and we're white, and that's all there is to it."

7.3. Professor Ashley Terlouw, professor of Sociology of Law at Radboud University, and Dr Carolus Grütters, a researcher in the sociology of law and migration law at the same university, wrote an article in the legal journal *Asiel & Migratierecht* ("Asylum and Migration Law") (Exhibit 89):[15]

The decision of the District Court creates the impression that anyone who is not milk-white does not belong in the Netherlands. But this idea is in fact exactly what the prohibition on discrimination is intended to stop. The District Court leaves people with a non-white skin colour completely out in the cold and denies them basic dignity. As such, the decision gives rise to feelings of fear: fear on the part of white Dutch people of their less white fellow citizens, because the government evidently considers it necessary to apply additional checks and inspections towards these fellow citizens, and fear on the part of all non-white people residing in the Netherlands, of discrimination and exclusion.

7.4. Eva Gonzalez Pérez, an attorney with the law collective Trias and Dr Hans Siebers, senior University lecturer at Tilburg University, wrote an article criticizing the decision that was published in national newspaper *Trouw* (**Exhibit 90**):[16]

...the District Court finds that the criteria of the RNM must be effective. This could only be the case if ethnicity was a clear and incontrovertible fact that unambiguously indicated illegal immigration. However, ethnicity is far from clear and so cannot point to illegality…

As if skin colour in the Netherlands has been linked to nationality…

...because neither ethnicity nor the meaning of the characteristics that are supposed to indicate it are objective and determinable at first sight, using them as selection criteria will unavoidably lead to arbitrariness. It encourages the RNM to base itself on stereotypes and prejudices. For what else can they? The District Court is opening the door to discrimination.

7.5. The judgment also generated international attention. The Council of Europe's General Rapporteur on Combating Racism and Intolerance wrote to the State in a letter of 5 October 2021, expressing serious concerns about the District Court's judgment and ethnic profiling in the Netherlands (**Exhibit 91**):

Not only does the judgment highlight that ethnic profiling, which is inherently discriminatory and therefore illegal, is still practiced in the Netherlands. It also shows that the judiciary supports and justifies it, thus normalising a clear manifestation of discrimination on grounds of ethnic origin.

[15] Prof. A .B. Terlouw and Dr C.A.F.M. Grütters, 'Hoe wit is een Nederlander?' (How white is a Dutch person?), *Asiel & Migrantenrecht* 2021, no. 9 ("**Terlouw & Grütters 2021**").

[16] M. E. Gonzalez Pérez and H. Siebers, 'Etnisch profileren aan de grens leidt tot willekeur en discriminatie' (Ethnic profiling at the border leads to arbitrariness and discrimination), *Trouw*, 7 October 2021.

7.6. In any case, it is clear to Amnesty International et al. from these responses that their position is broadly supported, and in the meantime the RNM has indicated, possibly in consideration of these responses, that it has seen reason to reformulate its own position.

8. The RNM announces intention to change its practices

8.1. On 19 November 2021 the RNM announced that it had been working for some time on restructuring the activities that would or could be based on ethnic characteristics. This 'restructuring' was, according to the RNM, taking into account the principles of legality and legitimacy. Here the basic assumption of the RNM was that it no longer wished to make use of ethnicity as an indicator within profiles or selection decisions in its monitoring activities, and the RNM indicated that it had decided to do this for reasons of legitimacy of the RNM and trust in society (**Exhibit 92, "RNM Discussion Notes"**).[17] The RNM confirmed this position in the roundtable discussion on ethnic profiling with the Lower House of Parliament's standing commission for Internal Affairs on 24 November 2021.

8.2. The RNM's new position seems to fall within the parameters of what Minister Grapperhaus (in his role in the demissionary Cabinet of the Netherlands) had already written concerning ethnic profiling among the police prior to the judgment of 7 September 2021:[18]

> *Preventing ethnic profiling, regardless of whether unintentional and unknowing, is of critical importance to the legitimacy of the actions of the police, society's trust in the police, and effective police action. The subject therefore is and remains high on the agenda. Proper dialogue, awareness-raising and a collective approach are needed to address this subject…*

8.3. The foregoing does not alter the fact that the RNM remains of the opinion that the use of ethnicity (race) as an indicator in profiles and selection decisions for MSM is permitted from a legal standpoint (legality). According to the RNM, such actions are based on a "solid legal foundation", and the RNM feels itself further legitimized by the District Court's decision.[19]

8.4. During the aforesaid roundtable discussion, the Commander of the RNM stated that he still wishes to use 'nationality' (which Amnesty International et al. understands still refers to the *presupposed* nationality derived from physical characteristics; see paragraph 3.9) as an indicator in risk profiles and for selecting persons for an MSM check:[20]

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[17] RNM Discussion Notes for purposes of roundtable discussion on ethnic profiling with the standing committee for Internal Affairs (TK) on 24 November 2021 ("**RNM Discussion Notes**").

[18] Parliamentary Papers II, 2020/21, 29 628, no. 1035, Letter from Ministry of Security & Justice, 7 September 2021, p. 6.

[19] Ibid.

[20] Commander of the RNM during roundtable discussion on ethnic profiling, 24 November 2021. The remarks in question begin at 11'33" of the recording of this roundtable discussion: https://debatdirect.tweedekamer.nl/2021-11-24/binnenlandse-zaken/groen-van-prinstererzaal/etnisch-profileren-13-00/onderwerp

> *So if it's intra-Schengen, this means we have to select what people we subject to a check, the selection is intended to look at who should be given a check. We do this because we have to establish the nationality, establish the identity and have to establish the country of residence status; that is the object of this check. So we need to be able to figure out what a person's nationality is, and we have to be able to profile based on nationalities. I deliberately add this because in some definitions of ethnic profiling nationality also makes up part of a given ethnicity, and that's not the case with us and it can't be done any other way, because this is exactly what our task is, to check that nationality and establish it and then to look at whether on the basis of that nationality and his or her status in the Netherlands that person is allowed to stay in or travel through the Netherlands.* [emphasis added by attorney]

8.5. Consequently, the RNM's 'new' position is based on maintaining the old position that the use of race that is being disputed in these proceedings, including this presupposed nationality, as an indicator in risk profiles and for selection decisions for MSM checks is based on a solid legal foundation. Once again, in this appeal Amnesty International et al. are requesting the court to establish the incorrectness of this position and the unlawfulness of the actions in question.

8.6. The existence of an unlawful rule can be considered a violation of a right, even if that rule is not followed.[21]

> *... a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation...*

This is, for example, how the European Court of Human Rights ruled with regard to legislation that prohibited sexual relations between men:[22]

> *In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life...*

8.7. Because the RNM now says that it wishes to stop the use of ethnicity (race) in profiling and selection decisions, but states first and foremost that it is, in fact, justified and that there is a solid legal foundation for using it, the violation of the prohibition on discrimination remains. Moreover, the RNM has not stated anything about the way in which or the term within which policy and practice will be changed.

8.8. It is clear, however, from an article in national newspaper NRC of 24 November 2021 that the RNM's methods have not changed in any significant way and that ethnic profiling is still standing practice (**Exhibit 93**):

[21] European Court of Human Rights 6 September 1978, no. 5029/71, ECLI:CE:ECHR:1978:0906JUD000502971 (Klass et. al/Germany), paragraph 33.

[22] European Court of Human Rights 22 October 1981, no. 7525/76, ECLI:CE:ECHR:1981:1022JUD000752576 (Dudgeon/United Kingdom), paragraphs 40-41.

The question remains: when exactly do skin colour and other ethnic characteristics play a role in the selection? "It's always a combination of factors," Erwin says. "It might be that intelligence shows that Eritreans are being smuggled into the Netherlands by bus from Romania on a regular basis. So then the registration plate and type of vehicle is important. Then you can also look at the skin colour of the passengers inside. If you can see that."

Then, according to the officer, skin colour can only be one of the factors; no longer paying attention to that at all is less effective and more of a burden on groups that are not currently suspected of human trafficking, says Erwin. "If we know that Nigerians are taking a certain route to the Netherlands, then it's very hard to explain why you are pulling someone Chinese out of the line." Less directed checks, in Erwin's view, means that less illegal immigration and human trafficking will be stopped.

and:

Along the A12 motorway near Zevenaar, motorbike RNM officer Mart gives a number of examples of selections based on ethnicity that he applies. "Czech cars with Asian people inside them can be very interesting to us. In the past we saw a lot of human trafficking going on like that. It can also be minivans from Berlin with Arabs inside. Often smuggling Syrians." It would seem virtually impossible for Mart to not let the ethnicity factor weigh at all if he pulls up alongside a van from Berlin and it's full of people who look Arabic. There's no chance that he's going to let that van keep driving.

8.9. This article shows that the methods are no different than those described in the research of Van der Woude:[23] the very research which, according to the RNM (SOD, paragraph 7.5.1) prompted the RNM to take steps to prevent discrimination.

8.10. It is for all these reasons that in this appeal, the appellants maintain the claims they submitted in the first instance, and maintain them in full.

9. State's response to the judgment

9.1. In response to the letter from The Council of Europe, parliamentary questions were asked, which were answered by the State Secretary of Justice and Security on 24 November 2021.[24] The answers confirmed that ethnicity is used as an indicator in the performance of MSM checks, although it was emphasized that ethnicity cannot be used independently as a sole indicator. The State Secretary writes that the object of MSM can only be achieved in a manner that has no discriminatory effect, and that explicit attention is being given to this. According to the State Secretary, MSM has the aim of combating illegal immigration,

[23] See summons, paragraphs 87 and 88, and Exhibit 4: M.A.H. van der Woude, J. Brouwers & T. J.M. Dekkers, *Beslissen in grensgebieden* (Decision-making in Border Areas), The Hague 2016: Boom Criminologie.

[24] Parliamentary Papers II 2021/22, Appendix, 813, Responses to Parliamentary Questions on the Council of Europe's open letter: Dutch court normalises discrimination by RNM, 24 November 2021.

migration criminality and cross-border criminality at the earliest possible stage. Concerning the risk profiles and selection decisions for MSM, the State Secretary indicates that ethnicity can be a component:

> *The profiles that the RNM uses at this time are composed on the basis of figures, information, intelligence and indicators. Indicators include, for example, the travel route followed and the composition of the travelling company, but ethnicity can also be a selection indicator. The determination of who is checked is made in part on the basis of the indicators. The selection decision for the MSM checks is thereby based on objective criteria such as figures and trends, modus operandi, data from experience and information from national and international partners. Additionally, deviations from the normal picture, risk indicators and specific signals on the part of individual persons are also considered. Ethnicity can be a part of this, but always in combination with other objective indicators or information for the purposes of the selection decisions as outlined above.* [emphasis added by attorney]

9.2. On 14 December 2021 the Minister of Internal Affairs and Kingdom Relations took a (new) position on behalf of the cabinet with regard to ethnic profiling.[25] This position was based in part on the review framework for the use of race and nationality in digital and analogue risk profiles that the Netherlands Institute for Human Rights ("**CRM**") published on 1 December 2021 ("**CRM Review Framework**").[26]

9.3. The minister writes that risk profiles make a distinction between groups of citizens because one person is controlled (or subjected to extra control) and the other is not. She emphasises that government organizations are aware that this distinction entails the risk of discrimination. According to the minister, however, there is no discrimination if the following cumulative requirements are met: making a distinction serves a justified purpose, the distinction is an appropriate and suitable measure, and the requirements of subsidiarity and proportionality are met.[27]

9.4. From the CRM Review Framework the minister identifies three cases of risk profiles for which there can never under any circumstances be a justified distinction; of these, two of them are relevant to these proceedings. There can never be a justified distinction where the risk profile is only oriented towards a single ethnicity or nationality, or when race is the only or the decisive selection criterion within the risk profile. In regard to the cases where there could potentially be a justified distinction, the minister considers as follows:

> *It appears from the CRM Review Framework that in some other cases apart from the three indicated above, a distinction could be justified. This*

[25] Parliamentary Papers II, 2021/22, 30 950, no. 281 (Letter to Parliament, 14 December 2021).

[26] Netherlands Institute for Human Rights, *Discriminatie door risicoprofielen: een mensenrechtelijk toetsingskader* (Discrimination through risk profiles: a human rights review framework), Deventer (November 2021), appendix to Parliamentary Papers II 2021/22, 30 950, no. 281.

[27] Parliamentary Papers II, 2021/22, 30 950, no. 281 (Letter to Parliament, 14 December 2021), p. 2.

discretion is not the norm. It is the exception. I consider it important to emphasize that this discretion in the definition can only be used in exceptional situations, and only when the requirement of the strict review in regard to the "objective justification" as described by the Institute is met.

The European Court of Human Rights requires that for any distinction that is based in part on ethnicity, origin or nationality there must be a very compelling reason justifying the distinction. From the case law of the European Court of Human Rights, it is clear that such a distinction is very difficult to justify (virtually impossible) and practically always leads to violation of the prohibition on discrimination. It must be demonstrated incontrovertibly that the distinction is not only suitable for achieving a legitimate objective, but that it is also necessary.

9.5. In reference to the present proceedings, the minister considers that the District Court evidently demonstrated the principle of the serious justification. In regard to the criticism with which the judgment was met, the minister considers:

Often, based on the criticism and commentary the conclusion is that in all cases the use of origin-related criteria in risk profiles is unjustified. I conclude that the CRM Review Framework does not dictate a general prohibition. Clearly, there can be serious reasons for nonetheless using origin-related selection criteria so long as these are compatible with the legal frameworks and protected with the necessary guarantees. This is what is referred to as the legal minimum frameworks, but as already stated above: this discretion is intended for exceptional cases and is not the norm.

9.6. This shows that evidently, the minister is not willing to stop the discriminatory practices of the RNM and has not proposed any measures for effective anti-racism policy in MSM checks.

10. Legal framework concerning discrimination

10.1. Introduction

10.1.1. In the following, Amnesty International et al. will outline the legal framework within which their claims must be assessed. In this discussion they will devote the most attention to the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights, because the District Court applied this standard framework (and only this framework). Amnesty International et al. will not explicitly discuss every basis for every claim in the first instance all over again, but do request that these bases for the claims be considered repeated and inserted here.

10.2. The Constitution

10.2.1. Article 1 of the Dutch Constitution determines:

All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.

10.3. **The ICERD**

10.3.1. The International Convention on the Elimination of All Forms of Racial Discrimination ("**ICERD**") is a United Nations human rights convention that was adopted on 21 December 1965 and which went into effect on 4 January 1969.

10.3.2. Article 1 of the ICERD presents a definition of racial discrimination:

> *In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

10.3.3. Article 2 (1) (a), (b) and (c) of the ICERD prohibits the contracting states from using or defending racial discrimination and mandates that they abolish any laws and prescriptions that could lead to racial discrimination or that could allow such discrimination to continue:

> *1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:*
>
> *(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;*
>
> *(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;*
>
> *(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;*

10.3.4. Article 5 (opening lines and under a) of the ICERD obliges the contracting states to eliminate racial discrimination and guarantee equal treatment:

> *5. In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
>
> *(a) The right to equal treatment before the tribunals and all other organs administering justice;*

10.3.5. Pursuant to Article 8(1) ICERD, a Commission for the elimination of racial discrimination ("**CERD**") has been convened. The CERD can make proposals and general recommendations based on the review of the reports and

intelligence that the CERD receives from the states that are party to the ICERD. These proposals and general recommendations, along with any commentary thereon from the states that are party to this Convention, are proposed to the General Assembly of the United Nations (Article 9(2), ICERD). On 17 December 2020 the CERD adopted general recommendation no. 36, which pertains to the prevention and fighting of 'ethnic profiling' by law enforcement officials: General recommendation No. 36 (2020) on preventing and combating racial profiling by law enforcement officials ("**CERD Recommendation 36**").

10.3.6. Whenever distinction is made on the basis of race for the selection of persons for a check by law enforcement agencies such as the RNM, this can be called ethnic profiling or racial profiling. This is a form of 'racial discrimination' and a violation of international human rights conventions.[28] On this, CERD Recommendation 36 says:

> *18. For the purposes of the present general recommendation, racial profiling is understood as it is described in paragraph 72 of the Durban Programme of Action, that is, the practice of police and other law enforcement relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity. In this context, racial discrimination often intersects with other grounds, such as religion, sex and gender, sexual orientation and gender identity, disability, age, migration status, and work or other status.*
>
> *19. Racial profiling by law enforcement officials may also include raids, border and custom checks, home searches, targeting for surveillance, operations to maintain or re-establish law and order or immigration decisions. These actions may variously take place in the context of street policing and antiterrorism operations.*

10.4. **The ICCPR**

10.4.1. The International Covenant on Civil and Political Rights ("**ICCPR**") is a convention that was established on 16 December 1966 at the initiative of the United Nations. The ICCPR has been applicable in the Netherlands since 11 March 1979.

10.4.2. Article 26 of the ICCPR sets out an anti-discrimination provision:

> *All persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

[28] UN Human Rights Committee, 27 July 2009, CCPR/C/96/D/1493/2006, no. 1493/2006 (Williams Lecraft v. Spain) ("**Williams Lecraft/Spain**"): see paragraph 10.4.4 below.

10.4.3. Article 28, ICCPR, mandates the creation of a Committee for Human Rights (the "**UN Human Rights Committee**"). Pursuant to the Optional Protocol to the ICCPR, the UN Human Rights Committee has the authority to receive notifications of individual persons who allege to have been the victims of any violation of an ICCPR right. The UN Human Rights Committee handles these notifications and then makes its conclusions known to the State being accused and to the person submitting the notification (Article 5 (3) (4) of the Optional Protocol).

10.4.4. On 27 July 2009 the UN Human Rights Committee released its conclusions on the matter of Rosalind Williams Lecraft v. Spain (**Exhibit 94**).[29] On 6 December 1992, Ms Williams Lecraft was travelling by train with her husband and son from Madrid to Valladolid. Upon disembarking from the train, she (and she alone) was approached by an officer of the national police who asked her for identification. Upon being asked, the agent stated that he was obliged to check the identity of people "like her", because, he claimed, "many of them" are illegal immigrants. The Spanish Constitutional Court did not determine that the police officer's actions were dictated by racism: *"...the police took the criterion of race merely as indicating a greater probability that the person concerned was not Spanish."* The Spanish State presented a similar argument to the UN Human Rights Committee:

> *4.2 ... Controlling illegal immigration is perfectly lawful and there is nothing in the Covenant to prevent police officers from carrying out identity checks for that purpose... The Public Security (Organization) Act and the Decree on the National Identity Document also empower the authorities to carry out identity checks and require everyone, including Spanish citizens, to show identity documents.*
>
> *4.3 There are relatively few blacks in the Spanish population at present, and they were even fewer in number in 1992. On the other hand, one of the major sources of illegal immigration into Spain is sub-Saharan Africa. The difficult conditions in which these people often arrive in Spain they are frequently the victims of criminal organizations constantly attract media attention. If one accepts the legitimacy of the control of illegal immigration by the State, then one must surely also accept that police checks carried out for that purpose, with due respect and a necessary sense of proportion, may take into consideration certain physical or ethnic characteristics as being a reasonable indication of a person's non-Spanish origin.*

10.4.5. The UN Human Rights Committee considered differently. While it is true that identity checks for the purposes of controlling illegal immigration in themselves serve a legitimate purpose, physical or ethnic characteristics of a person cannot independently constitute an indication of that person's potential illegal residence in a country:

> *7.2 ... The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal*

[29] Williams Lecraft/Spain.

immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination.

10.4.6. Because Ms Williams Lecraft was selected for a check only on the basis of her appearance, the UN Human Rights Committee determined that Spain had violated Article 26, ICCPR (paragraph 7.4 of the judgment).

10.5. **The European Commission against Racism and Intolerance: recommendations**

10.5.1. The European Commission against Racism and Intolerance ("**ECRI**"), an independent human rights monitoring body established by the Council of Europe in 1993, has adopted General Policy Recommendation No. 7 on National Legislation to Combat Racism And Racial Discrimination ("**ECRI Recommendation 7**"). This recommendation calls upon the governments of the Council of Europe Member States to (a) introduce legislation against racism and racial discrimination, where such legislation does not already exist or is incomplete, and (b) ensure that the primary elements enumerated in the recommendation are incorporated into that legislation. ECRI Recommendation 7 defines racial discrimination as follows:

I. Definitions

1. For the purposes of this Recommendation, the following definitions shall apply:

a) (...)

b) "direct racial discrimination" shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

c) "indirect racial discrimination" shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification. This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

10.5.2. The Recommendation includes, in part, the following specific recommendations:

> ***III. Civil and administrative law***
>
> *(...)*
>
> *4. The law should clearly define and prohibit direct and indirect racial discrimination.*
>
> *(...)*
>
> *8. The law should place public authorities under a duty to promote equality and to prevent discrimination in carrying out their functions.*
>
> *(...)*
>
> *11. The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination.*

10.5.3. The ECRI adopted General Policy Recommendation N°11 on combating racism and racial discrimination in policing on 29 June 2007. This recommendation calls upon the governments of Council of Europe Member States to clearly define racial profiling and prohibit it by law:

> *1. (...) For the purposes of this Recommendation, racial profiling shall mean:*
>
> *"The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities..."*

10.5.4. The ECRI explains the recommendation in more detail in its accompanying Explanatory Memorandum, which indicates that the legitimate goal of fighting criminality can only justify distinctions by race in a very limited set of circumstances. The use of characteristics such as race is essentially never justifiable beyond situations in which the police are acting on the basis of a specific suspect description or point of connection (suspicious behaviour or intelligence collected) pertaining to the identifying characteristics of an existing, specific suspect:

> *29. ECRI stresses that even when, in abstract terms, a legitimate aim exists (for instance the prevention of disorder or crime), the use of these grounds in control, surveillance or investigation activities can hardly be justified outside the case where the police act on the basis of a specific suspect description within the relevant time-limits, i.e. when it pursues a specific lead concerning the identifying characteristics of a person involved in a specific criminal activity. In order for the police to avoid racial profiling, control, surveillance or investigation activities should be strictly based on individual behaviour and/or accumulated intelligence.*
>
> *(...)*

35. The definition of racial profiling used by ECRI contains a list of grounds, which is a non-exhaustive list. In addition to the grounds explicitly mentioned, other grounds on which racial profiling can intervene include, for instance, a person's country of origin. An illustration of this are certain checks carried out on passengers on board flights originating from specific countries. (...) The term "grounds" used in the definition of racial profiling must include grounds which are actual or presumed. For instance, if a person is questioned on the presumption that he or she is a Muslim, when in reality this is not the case, this would still constitute racial profiling on grounds of religion.

10.6. **The European Convention on Human Rights**

10.6.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms ("**ECHR**") is a convention that was drafted within the Council of Europe and was signed in Rome on 4 November 1950.

10.6.2. Article 14 of that convention determines:

Article 14. Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

10.6.3. Protocol No. 12 to the ECHR ("**Protocol 12**") was agreed by the member states of the Council of Europe on 4 November 2000.

10.6.4. Article 1 of Protocol 12 determines:

Article 1. General prohibition of discrimination

*1 The enjoyment of the rights and freedoms set forth in this Convention shall be secured without **discrimination** on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

2 No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

10.6.5. Whereas Article 14 ECHR is seen as an accessory right, which can only be invoked in connection with another human right, this is not the case for Article 1 of Protocol 12. The Netherlands approved Protocol 12, which means that it has direct effect in the Dutch legal system.[30]

<u>European Commission for Human Rights as applicable at that time</u>

10.6.6. Discrimination on the basis of 'race' can in fact be so severe that according to the European Commission for Human Rights, which at the time (1973) was the chief European human rights body, may even constitute a violation of the

[30] Approved by Kingdom Act of 13 May 2004 (Bulletin of Acts and Decrees 2004, 302); ratified on 28 July 2004 (Treaty Series 2004/229); effective date 1 April 2005 (Treaty Series 2005/184).

prohibition on inhuman or degrading treatment or punishment prohibited by Article 3 ECHR:[31]

> *207. ...as generally recognized, a special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.*

European Court of Human Rights: case law

10.6.7. In assessing whether a situation is one of discrimination, the European Court of Human Rights considers two cumulative points. These are:

a. whether there is a difference in treatment;

b. whether there is an objective and reasonable justification for that unequal treatment; this would require both:

(i) a legitimate goal;

(ii) a reasonable proportion between the goal and the means, in the sense that the difference in treatment must be a suitable, necessary and proportional means to achieving the defined goal.

For more on this system of assessment, see **Exhibit 95**.[32]

10.6.8. The European Court of Human Rights uses a number of different methods to make the determination of whether treatment is unequal. Wherever it is asserted that there is a distinction on a problematic ground such as race, then the European Court of Human Rights applies the “but for” test. Here the European Court of Human Rights investigates whether the treatment would have been more favourable if not for (“but for”) a certain personal characteristic. This way the Court investigates whether there is a decisive characteristic. Applying this to our example, the question becomes: would [appellant 1] (under the risk profile “Nigerian, walking fast, well-dressed”) have been treated less unfavourably (in the sense of not being stopped for check) if he had been white? If the answer to this question is yes, the Court then considers whether there is an objective and reasonable justification for this difference (**Exhibit 96**).[33]

10.6.9. In cases in which states have only a small margin of appreciation, strict requirements are set on the ‘reasonable proportion’ between goal and means as described above. It must not only be established that the means is suitable for

[31] European Commission of Human Rights, 14 December 1973, nos. 4403/70 and others (*East African Asians case*), paragraph 207.

[32] J.H. Gerards, ‘Gelijke behandeling en het EVRM. Artikel 14 EVRM: van krachteloze waarborg naar ‘norm met tanden’?’ (Equal treatment and the ECHR. Article 14 ECHR: from toothless guarantee to norm with teeth?), *NJCM-Bulletin*, Year 29 (2004), no. 2 ("**Gerards 2004**").

[33] J.H. Gerards, *Sdu Commentaar Europees Verdrag voor de Rechten van de Mens*, article 14, notes 2.2.2 and 2.2.3.

achieving the set goal, but also that the difference in treatment is necessary in order to reach that goal. On this, see the European Court of Human Rights' considerations in in *Karner/Austria*:[34]

> *41. (...) In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation,* ***the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people in this instance persons living in a homosexual relationship from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion****.*
>
> *42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.* (emphasis added by attorney)

10.6.10. In Timishev v. Russia, the European Court of Human Rights cited the aforesaid 1(1) ICERD and Article 1 (b) and (c) of ECRI Recommendation 7 as "relevant international instruments".[35] Concerning the terms ethnicity and race, the European Court of Human Rights considered the following:

> *55. Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.*

10.6.11. The European Court of Human Rights then determined that discrimination on the basis of a person's actual or perceived ethnicity is a form of racial discrimination. The Court continued by noting that racial discrimination is a particularly reprehensible form of discrimination that, in view of its very dangerous consequences, requires "special vigilance and a vigorous reaction" on the part of the authorities:

> *56. A differential treatment of persons in relevantly similar situations, without an objective and reasonable justification, constitutes discrimination (see (...)). Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination (see the definitions adopted by the United Nations and the European Commission against Racism and Intolerance paragraphs 33 and 34 above). Racial discrimination is a particularly*

[34] European Court of Human Rights 24 July 2003, no. 40016/98, ECLI:CE:ECHR:2003:0724JUD004001698 (Karner v. Austria).

[35] Timishev/Russia, paragraphs 33-34.

> *invidious kind of discrimination and, in view of its perilous consequences. requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's Vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see (...)).*
> [emphasis added by attorney]

10.6.12. As soon a difference in treatment is demonstrated, the burden of proof shifts and it is up to the government to demonstrate that this difference in treatment can be justified. In Timishev, Russia was not able to demonstrate that the difference in treatment was justified. According to the European Court of Human Rights, such a justification is not even *conceivable* in a case in which the difference in treatment is based solely or to a decisive degree on a person's ethnic background:

> *57. Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified (see (...)) The Court has already established that the Government's allegation that the applicant had attempted to obtain priority treatment was not sustainable on the facts of the case (see paragraphs 42-43 above). Accordingly, the applicant was in the same situation as other persons wishing to cross the administrative border into Kabardino-Balkaria.*
>
> *58. The Government did not offer any justification for the difference in treatment between persons of Chechen and non-Chechen ethnic origin in the enjoyment of their right to liberty of movement. In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.*

10.6.13. In its decision in D.H. and others v. Czech Republic, the European Court of Human Rights reiterated that racial discrimination is a particularly egregious form of discrimination that, in view of its very dangerous consequences, demands an extraordinary level of vigilance on the part of the authorities and a robust response, and also stated that by definition there can be no justification for a difference in treatment if that difference is based solely or to a decisive degree on a person's ethnic background.[36] To this the Court adds that the notion of a justification for difference in treatment that is based on a person's race, skin colour or ethnic background must be interpreted as strictly as possible:[37]

[36] European Court of Human Rights 13 November 2007, no. 57325/00 , ECLI:CE:ECHR:2007:1113JUD005732500 (D.H. and others v. the Czech Republic), paragraph 176.

[37] D.H. and others v. the Czech Republic, paragraph 196. See also with respect to discrimination on other grounds, such as nationality or sexual orientation: European Court of Human Rights 16 September 1996, no. 17371/90, ECLI:CE:ECHR:1996:0916JUD001737190 (Gaygusuz v. Austria), paragraph. 42; Karner v. Austria,

> *196. The Court reiterates that a difference in treatment is discriminatory if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realized (see (...)). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible...*

10.6.14. In Biao v. Denmark, a case concerning discrimination against people who acquired Danish nationality later in life (and who therefore were of an ethnic background that was not Danish), the European Court of Human Rights expressed this such that legislation that would have the consequence of a distinction on the basis of race can only be justified by "compelling or very weighty reasons" that are independent of ethnic background:[38]

> *...it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 [in conjunction with] Article 8 of the Convention.*

10.6.15. One of the reasons that the European Court of Human Rights takes the "very weighty reasons" approach lies in the protection of vulnerable groups of minorities who in the past were very severely discriminated against and who still, to this day, run a greater risk of discrimination and social exclusion. This is the reason that the Court considers that measures affecting such groups must be evaluated even more critically:[39]

> *...if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past... then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question (cf. also the example of those suffering different treatment on the ground of their... race... The reason for this approach, which questions certain classifications per se, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs...*

10.6.16. Generally prevailing negative opinions about certain groups, for example that a person with dark skin is probably not legitimately residing in the Netherlands, can never be acceptable as a justification for unequal treatment.[40] In Lingurar v. Romania, which concerned discrimination through ethnic profiling, the European

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paragraphs 40-42; European Court of Human Rights 2 March 2010, no. 13102/02, ECLI:CE:ECHR:2010:0302JUD001310202 (Kozak v. Poland), paragraph 92.

[38] European Court of Human Rights 24 May 2016, no. 38590/10, ECLI:CE:ECHR:2016:0524JUD003859010 (Biao v. Denmark), paragraphs 114, 130.

[39] European Court of Human Rights 20 May 2010, no. 38832/06, ECLI:CE:ECHR:2010:0520JUD003883206 (Alajos Kiss v. Hungary), paragraph 42.

[40] European Court of Human Rights 20 June 2017, nos. 67667/09, ECLI:CE:ECHR:2017:0620JUD006766709 (Bayev and others v. Russia), paragraph 68.

Court of Human Rights ruled that there can never be an objective and reasonable justification for racial stereotyping or associating certain criminal or other activity with an ethnic group:[41]

> *76. ...the Court considers that the manner in which the authorities justified and executed the police raid shows that the police had exercised their powers in a discriminatory manner, expecting the applicants to be criminals because of their ethnic origin. The applicants' own behaviour was extrapolated from a stereotypical perception that the authorities had of the Roma community as a whole. The Court considers that the applicants were targeted because they were Roma and because the authorities perceived the Roma community as anti-social and criminal. This conclusion... goes beyond a simple expression of concern about ethnic discrimination in Romania... It shows concretely that the decisions to organise the police raid and to use force against the applicants were made on considerations based on the applicants' ethnic origin. The authorities automatically connected ethnicity to criminal behaviour, thus their ethnic profiling of the applicants was discriminatory.* [emphasis added by attorney]

10.6.17. As the District Court considered, in theory anyone can be stopped and pulled aside for an MSM check (paragraph 8.3): this does not require a reasonable suspicion of illegal immigration or guilt of a crime. From this perspective, the authority to stop people is therefore quite broad. With respect to similarly broad discretionary police powers, in Gillan and Quinton v. the United Kingdom the European Court of Human Rights determined that such powers inherently entail a risk of discriminatory action that manifests very quickly:[42]

> *In the Court's view, there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer. While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration...*

10.6.18. This risk of discrimination is, according to the European Court of Human Rights, all the more problematic because for the persons who are subjected to a "stop and search" it will be difficult or even impossible to demonstrate (particularly in any subsequent court proceedings) that the police authority was used incorrectly, especially when the police officer does not need to demonstrate a reasonable suspicion:[43]

> *The Government argue that safeguards against abuse are provided by the right of an individual to challenge a stop and search by way of judicial review or an action in damages. But the limitations of both actions are clearly demonstrated by the present case. In particular, in the absence of any*

[41] European Court of Human Rights 16 April 2019, no. 48474/14, ECLI:CE:ECHR:2019:0416JUD004847414 (Lingurar v. Romania), paragraph 76.

[42] European Court of Human Rights 12 January 2010, no. 415/05, ECLI:CE:ECHR:2010:0112JUD000415805 (Gillan and Quinton v. the United Kingdom), paragraph 85.

[43] Gillan and Quinton v. United Kingdom, paragraph 86.

obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised.

10.6.19. The conclusion of the European Court of Human Rights is that the broad, discretionary "stop and search" authorities under the British Terrorism Act 2000 are not sufficiently limited, nor are they subject to adequate guarantees against abuse ("neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse"). Consequently, the European Court of Human Rights determined that these authorities are not "in accordance with the law" (and that therefore Article 8 of the ECHR was violated).[44]

Literature

10.6.20. Professor Gerards (Utrecht University) has shown, on the basis of an extremely extensive and thorough analysis of the case law of the European Court of Human Rights, what the application of the "very weighty reasons test" by the European Court of Human Rights means in practice (**Exhibit 97**):[45]

Application of this test in practice implies a very narrow margin of appreciation for the States[64], and application of the very weighty reasons test almost automatically results in a finding of a violation[65]. Although there are exceptions, the test is, just like its American counterpart the US Supreme Court's strict scrutiny test mostly "strict in theory, but fatal in fact".[66]

10.6.21. Professor Gerards derives from the judgments in Timishev v. Russia and Biao v. Denmark that a difference in treatment that is exclusively or to a decisive degree based on a person's ethnic background can never be justified. She then addresses the case in which other arguments are also raised to justify the difference in treatment. Such arguments cannot be in any way related to ethnic background, and the conclusion is that the "very weighty reasons" standard is "strict in theory, but fatal in fact" (**Exhibit 97**):[46]

If there are other grounds and arguments which have been presented as justification, the Court may undertake to review such arguments, yet it sets very high demands and it usually wilt find a violation of the prohibition of

[44] Gillan and Quinton v. United Kingdom, paragraphs 85-87.

[45] J.H. Gerards, The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination', in: M. Baiboni (ed.), *The principle of discrimination and the European Convention on Human Rights*, Editoriale Scientifica, 2017 ("**Gerards 2017**"), p. 9-10. Footnotes 64, 65 and 66 refer to:
"64 Cf. O.M. Arnardóttir, 'The Differences that Make a Difference' (op. cit.), 655.
65 See more elaborately on this J.H. Gerards, 'Diverging Fundamental Rights Standards and the Role of the European Court of Human Rights', SSRN-paper version, op. cit.
66 On this, see further J. H. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', op. cit. For the quotation, see G. Gunther, 'Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection', in *Harvard Law Review*, vol. 86, 1972, 1."

[46] Gerards 2017 (Exhibit 97), p. 10. Footnotes 77 and 78 refer to:
"77 See e. g. ECtHR, 22 December 2009, Sejdió and Finci v. Bosnia and Herzegovina, nos. 27996/06 and 34836/06.
78 ECtHR, GC, Biao v. Denmark (op cit.), par. 114"

discrimination.[77] *Importantly, moreover, also when the case concerns indirect discrimination, it falls to the government to put forward 'compelling or very weighty reasons unrelated to ethnic origin'.*[78]

Thus, it is clear from the Court's case law that the very weighty reasons test in racial discrimination cases really is "strict in theory, but fatal in fact". Clearly, the rationale for the "suspectness" of this ground is found in the very nature of racial discrimination, which is inherently and morally reprehensible, as well as in the dangerous societal consequences of this type of discrimination.

10.6.22. Professor Terlouw (Radboud University) makes the same point in her discussion notes for the roundtable discussion on Ethnic Profiling (24 November 2021) of the standing committee for Internal Affairs (**Exhibit 98**, "Terlouw Discussion Notes"):[47]

Note that checks on the basis of ethnicity are, both for MSM checks and the performance of general police tasks, a violation of the prohibition on discrimination unless there are very weighty reasons for doing so – which there are not…

The European Court of Human Rights sets extra very weighty requirements on the justification for discrimination on the basis of race/ethnicity. This can only be permissible in the event of "very weighty reasons". In reality, the scale is calibrated in such a way that the interest in the discriminatory action must weigh very heavily indeed for it to present any kind of justification.

10.7. **Union law**

10.7.1. Union law prohibits discrimination on the same grounds as the ECHR, and makes explicit the prohibition on discrimination within the scope of the Union law conventions in Article 21 of the Charter of the Fundamental Rights of the European Union ("**Charter**") and Article 18 of the Treaty on the Functioning of the European Union ("**TFEU**"). Article 21 of the Charter determines:

Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

10.7.2. Article 18 of the TFEU determines:

[47] Prof. A.B. Terlouw, Discussion Notes for roundtable discussion of 24 November 2021 ("**Terlouw Discussion Notes**") , p. 2.

Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited...

10.7.3. Article 52(3) of the Charter further determines that the content and scope of the Charter rights must be at least equal to those of the corresponding ECHR rights. However, it is possible that Union law offers broader protection than the ECHR, according to Article 52(3) of the Charter.

10.7.4. The prohibitions on discrimination of Article 21 of the Charter and Article 18 of the TFEU apply to MSM checks, because they violate the right to move and reside freely of Article 20(2)(a) and 21 of the TFEU, and because MSM checks are governed by Article 23 of the Schengen Borders Code.[48]

10.7.5. On the basis of the prohibitions on discrimination under Union law, Union citizens must, for the purposes of Union law, be considered equivalent to subjects of the member state. A member state may not treat Union citizens from another member state residing on their territory differently than subjects of that member state, and this also includes from the perspective of fighting criminality.[49]

10.7.6. 10.7.6. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ("**Racial Equality Directive**") is the specific implementation of the principle set out in Article 21 of the Charter prohibiting discrimination on the basis of race and ethnic background.[50] The case law of the Court of Justice of the European Union ("**CJEU**") makes clear that making a distinction on the basis of stereotypes and prejudices about certain groups of people can lead to direct and/or indirect discrimination on the basis of race, even if other reasons for the distinction are given:[51]

The same applies to the fact relied on by the KZD in its observations submitted to the Court that, in various cases that were brought before the KZD, CHEZ RB asserted that in its view the damage and unlawful connections are perpetrated mainly by Bulgarian nationals of Roma origin. Such assertions could in fact suggest that the practice at issue is based on

[48] Regulation 2016/399 of the European Parliament and the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ("**Schengen Borders Code**"), as subsequently amended.

[49] CJEU 16 December 2008, C-524/06, ECLI:EU:C:2008:724 (Heinz Huber v. Germany), points 69-81, and specifically points 77-79.

[50] CJEU 16 July 2015, C-83/14, ECLI:EU:C:2015:480 (CHEZ Razpredelenie Bulgaria), paragraph 58; see also: CJEU 12 May 2011, C-391/09, EU:C:2011:291 (Runevic-Vardyn and Wardyn), paragraph. 43; CJEU 21 January 2015, C-529/13, EU:C:2015:20 (Felber), paragraphs 15 and 16; see also CJEU 3 September 2014, C-201/13, ECLI:EU:C:2014:2132 (Deckmyn and Vrijheidsfonds), paragraph 30: "...attention should be drawn to the principle of non-discrimination based on race, colour and ethnic origin, as was specifically defined in Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), and confirmed, inter alia, by Article 21(1) of the Charter of Fundamental Rights of the European Union."

[51] CHEZ Razpredelenie Bulgaria, points 82, 85, 91, 109, 128.

ethnic stereotypes or prejudices, the racial grounds thus combining with other grounds...

In such circumstances, CHEZ RB, as respondent, would have the task of rebutting the existence of such a breach of the principle of equal treatment by proving that the establishment of the practice at issue and its current retention are not in any way founded on the fact that the districts concerned are districts inhabited mainly by Bulgarian nationals of Roma origin, but exclusively on objective factors unrelated to any discrimination on the grounds of racial or ethnic origin...

...that Article 2(2)(a) of Directive 2000/43 must be interpreted as meaning that a measure such as the practice at issue constitutes direct discrimination within the meaning of that provision if that measure proves to have been introduced and/or maintained for reasons relating to the ethnic origin common to most of the inhabitants of the district concerned...

[...it must be interpreted as meaning that]... assuming that a practice, such as that at issue in the main proceedings, does not amount to direct discrimination within the meaning of Article 2(2)(a) of the directive, such a practice is then, in principle, liable to constitute an apparently neutral practice putting persons of a given ethnic origin at a particular disadvantage compared with other persons, within the meaning of Article 2(2)(b)...

...[that it is only] capable of being objectively justified by the intention to ensure the security of the electricity transmission network and the due recording of electricity consumption only if that practice did not go beyond what is appropriate and necessary to achieve those legitimate aims and the disadvantages caused were not disproportionate to the objectives thereby pursued. That is not so if it is found, a matter which is for the referring court to determine, either that other appropriate and less restrictive means enabling those aims to be achieved exist or, in the absence of such other means, that that practice prejudices excessively the legitimate interest of the final consumers of electricity inhabiting the district concerned, mainly lived in by inhabitants of Roma origin, in having access to the supply of electricity in conditions which are not of an offensive or stigmatising nature and which enable them to monitor their electricity consumption regularly.

10.7.7. From the citation above the conclusion must be that the existence of whatever other reasons there may be for the distinction made, alongside the racial reasons (ethnic stereotypes and prejudices), cannot justify the distinction made. It is up to the party making the distinction to demonstrate that the distinction is in no way based on or has anything to do with reasons relating to race. If the defendant party does not succeed in doing so, then the distinction is a direct distinction, which according to the Race Equality Directive can never be justified, so constitutes discrimination. If the discrimination cannot be qualified as direct discrimination, then according to the CJEU it may still be indirect discrimination unless there is an objective and reasonable justification for it.

10.8. **Netherlands Institute for Human Rights**

10.8.1. Concerning the review of the very weighty reasons that the District Court applied in the present proceedings in the first instance, the Netherlands Institute for Human Rights concluded as follows:

> *Likewise, in the RNM case, the court reviewed the weighing of interests conducted by the State less thoroughly than in other contexts, as a result of which the use of ethnicity as a selection criterion in MSM checks could be shown to be objectively justifiable. Here it must be noted that in response to this judgment the Institute called for application of a more penetrating proportionality review for the use of ethnicity as a selection criterion in MSM checks. Specifically, the Institute asserted that in consideration of the seriousness of the distinction made, there must be a deeper review of the question of whether, and if so why, the positive effects of the selection by ethnicity for MSM checks do actually outweigh the very negative effects that this method has on the subjects involved. Obviously, the specific context in which a distinction is made can colour, but not completely undermine, the "very weighty reasons" test.*

10.8.2. Although the Institute's analysis can of course be subjected to some commentary (for example, Amnesty International et al. believe that the Institute did overlook a number of fundamental points of criticism), this quote reveals in any event that the Institute was very critical, and rightly so, of the judgment and the use of race as a selection criterion in MSM checks.

10.9. **Parliamentary Assembly, Council of Europe**

10.9.1. 10.9.1. On 28 January 2021 the Parliamentary Assembly of the Council of Europe ("**PACE**") adopted a resolution about ethnic profiling in Europe (**Exhibit 99**).[52] This resolution declares that ethnic profiling, despite being "discriminatory by nature and […] therefore illegal", is still a widespread phenomenon throughout Europe.[53] The resolution calls upon member states to take action to stop ethnic profiling.[54]

11. RNM method in MSM checks

11.1. The RNM has a number of different tasks. In regard to these tasks, the District Court considered (paragraph 3.1):

> *The RNM is a branch of the armed forces. It is charged, in part, with the monitoring of the borders and the enforcement of the Schengen Borders Code (SBC), the performance of aliens monitoring, the fighting of human trafficking and fraud with travel and identity documents. In addition, it also provides assistance to and works with the police for the purposes of fighting cross-border criminality, and performs the police task at the airports Schiphol, Rotterdam, Eindhoven, Maastricht, Twente and Eelde.*

[52] PACE, Ethnic profiling in Europe: a matter of great concern, Resolution 2364 (2021) ("**PACE Resolution**").
[53] PACE Resolution, paragraph 3.
[54] PACE Resolution, paragraph 7.

11.2. The RNM uses MSM checks in performance of a form of aliens monitoring, specifically, the fighting of illegal immigration after crossing a border.[55] This is regulated in section 50 of the Aliens Act 2000 in conjunction with section 4.17a of the Alien Decree 2000.

11.3. There is no legal basis for the use of MSM for any purpose other than aliens monitoring. However, the RNM also used the MSM, formerly 'Mobile Monitoring of Aliens' and now 'Mobile Security Monitoring', to fight cross-border criminality, including human trafficking and fraud with travel and identity documents.[56] This is evident from a number of sources, including the description of the purpose of MSM in official policy and other documents:[57]

> *The goal of these checks is to fight illegal immigration and combat forms of cross-border criminality.*

The Commander of the RNM described this in the same way in his discussion notes for the roundtable discussion on ethnic profiling with the standing committee for Internal Affairs on 24 November 2021 (**Exhibit 92**):

> *... The RNM monitors the border crossings of persons and fights forms of border related criminality, at places such as the external borders of Europe, at airports, in seaports and along the coast. But also at the internal borders of the Schengen area by means of "Mobile Security Monitoring" (MSM).*

11.4. Researchers have concluded that the MSM constitutes an intertwining of aliens monitoring and certain forms of criminal law enforcement, and that this intertwining is a fundamental characteristic of the MSM (**Exhibits 100 and 101**).[58] In this regard, Professor Terlouw states (Terlouw Discussion Notes, **Exhibit 98**):

> *Within the context of these MSM checks, the RNM is not permitted to check on the basis of the general police task oriented towards the prevention or investigation of certain forms of criminality. This other policing task only arises after and if there are concrete indications that may arise during an MSM check – not before. <u>There is a wrongful intertwining of the two tasks (in the professional jargon, this is referred to as an intertwining of spheres), as a result of which monitoring of immigration status is being drawn into the criminal sphere.</u> Note that checks on the basis of ethnicity are, both for MSM checks and the performance of general police tasks, a violation of the*

[55] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraphs 3.5-3.6.

[56] Section 4(1)(g), Police Act; also, Exhibit 4: Van der Woude et al. (2016), pp. 64, 65 and 253.

[57] Parliamentary Papers II 2011/12, 19637, 1393; Parliamentary Papers II 2011/12, 19637, 1485; Parliamentary Papers II 2010/11, 32317, 68.

[58] Exhibit 100: Van der Woude, Dekkers and Brouwer, *Over crimmigratie en discretionair beslissen binnen het Mobiel Toezicht Veiligheid . . . of Vreemdelingen … of Veiligheid?* (On crimmigration and discretionary decisions within the Mobile Security Monitoring… Or Aliens Monitoring… Or Security Monitoring?), Tijdschrift voor Veiligheid 2015 (14) 2 ("Van der Woude, Dekkers and Brouwer 2015"), p. 31; Exhibit 101: Brouwer, Van Der Woude, Van Der Leun, *Op de grens van het vreemdelingentoezicht: discretionaire beslissingen binnen het Mobiel Toezicht Veiligheid* (On the border of aliens monitoring: discretionary decisions within the Mobile Security Monitoring system), Tijdschrift voor Veiligheid 2017 (16) 2/3.

prohibition on discrimination unless there are very weighty reasons for doing so – which there are not… [emphasis added by attorney]

...

The MSM checks are, in theory, legitimate unless the RNM is in actuality performing the police task. In that event, this becomes a situation of detournement de pouvoir.

11.5. The District Court considered in regard to MSM checks that these are maximised in number, frequency and scope in order to ensure that they do not become a veiled form of border controls on the internal borders.[59] The National Tactical Command uses risk profiles to determine what specific flights, trains, roads or waterways will be subject to an MSM check action.[60] The District Court considers:

These risk profiles are the result of a central analysis of available information and describe a certain migration phenomenon and the risks linked to it on the basis of a set of cohesive characteristics (hereinafter: profile indicators). The selection of a specific flight, train, road or waterway is made by comparing, in an automated process, a risk profile against the information available concerning that flight, train, road or waterway. If at a certain location at certain times there are a relatively high number of "matches" with the indicators of a certain risk profile, this can prompt an MSM check action.

11.6. During an MSM check action the selections for the MSM check are made. The District Court considers that (paragraph 3.6):

MSM checks can be applied to anyone, meaning not only to border-crossers or presupposed border-crossers. Nor is it necessary to possess information concerning a specific person. In the context of an MSM check, a person can be stopped without there being indications specific to that person of illegal immigration.

11.7. As such, the proactive nature is a characteristic of MSM. There need not be indications specific to a person of illegal immigration for the person to be selected for an MSM check. The decision-making discretion for individual officers to select a person for an MSM check is therefore extremely broad, and the risk of discrimination is similarly broad (see the European Court of Human Rights in Gillian and Quinton v. United Kingdom: paragraphs 10.6.17-10.6.19, above).[61] That decision-making discretion is, moreover, made even broader by the interweaving of aliens monitoring and criminal law enforcement.

11.8. It is also clear that the RNM uses race in the selection decisions.[62] For these selection decisions a risk profile is used (the selection profile, even if the District Court does not name this in such specific terms), by which the "predictive profiling

[59] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraph 3.5.
[60] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraphs 3.8-3.9.
[61] See also summons, paragraphs 4.1.3 and 4.5.
[62] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraph 8.6.

behaviour detection method" is applied.[63] This risk profile is a combination of the profile and the profile indicators by which an MSM check action is initiated and the selection indicators, namely the "factual, generally person-specific information or characteristics relevant (fitting within the profile) to the specific selection decision".[64]

11.9. The legal basis for MSM entails that the selection must in the first place be coloured by the immigration law foundations of MSM (**Exhibit 100**).[65] Only after a person has been stopped to have his or her immigration status checked can a concrete suspicion of any criminal violation arise. That is, however, not how MSM is set up in practice. The selection for a check may be also prompted from criminal law considerations. And race can also play a role in this. This is shown, in part, from the examples of paragraphs 11.10-11.14:

11.10. The findings from the study by Van der Woude et al. cited in the summons in the first instance:[66]

> *Many officers of the RNM associate certain nationalities or ethnic groups with specific criminal and immigration-law behaviour. For example, Bulgarians and Romanians in particular are frequently linked to human trafficking, fraud and theft, and Moroccans with drug-related crimes. Then there are, for example, Nigerians, who are regularly named in connection with illegal residency. This knowledge is commonly shared within the organisation, primarily informally between co-workers, but also in the briefings put together by the information department of the relevant brigade prior to the MSM checks.*

11.11. The indicators used in the selection as part of MSM on [appellant 1] were derived from both immigration law and criminal law. According to one of the officers of the RNM who was working on that occasion, [appellant 1] was selected because:[67]

> *...the selection criteria were: non-Dutch appearance, walking quickly and smartly dressed... these selection criteria were drafted on the basis of police information with respect to Nigerian money smugglers.*

11.12. See also the assertions of the State in the first instance (SOD, paragraph 5.4.3; State Pleadings, paragraph 3.13):

> *Ethnicity, nationality (which may or may not be derived from the vehicle), specific cultural norms and behaviours or other external characteristics can also be involved in the selection decision. This is obvious, in view of the fact*

[63] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraph 3.10. According to the Netherlands Institute for Human Rights, a risk profile is a collection of one or more selection criteria on the basis of which a certain risk of norm violation is assessed and a selection decision is made (automatically or by a government official): Netherlands Institute for Human Rights review framework, p. 12.
[64] Judgment of the District Court, ECLI:NL:RBDHA:2021:10283, paragraphs 3.9-3.10.
[65] Van der Woude, Dekkers and Brouwer 2015 (Exhibit 100), p. 31.
[66] Summons, paragraphs 87-88; exhibit 4: Van der Woude et al. (2016), p. 135.
[67] Summons, paragraphs 95, 114-117; exhibit 52: statement 3d of the officers involved, p. 1.

that the goal and scope of MSM is a form of aliens monitoring. Use of such characteristics is nonetheless only possible if that can be objectively justified, and exclusively in combination with other objective indicators that point to deviations from the norm and, following on from this, to illegal migration and/or criminality relating thereto. (emphasis added by attorney)

11.13. In the hearing, a representative of the RNM declared as follows:

You ask whether if the selections were made on a more information-driven basis and more on the basis of the behaviour of persons, whether it would still be necessary to include ethnic characteristics in the profile. The skin colour is never the only element of a profile, but in some situations ethnic characteristics are nonetheless needed for an MSM profile. If the ethnic characteristics were left out of a profile that would detract from the system of Information-Driven Action (IGO). The checks would become less effective. [emphasis added by attorney]

11.14. See also the article in national newspaper NRC on 24 November 2021:

The question remains: when exactly do skin colour and other ethnic characteristics play a role in the selection? "It's always a combination of factors," Erwin says. "It might be that intelligence shows that Eritreans are being smuggled into the Netherlands by bus from Romania on a regular basis. So then the registration plate and type of vehicle is important. Then you can also look at the skin colour of the passengers inside. If you can see that."

Then, according to the officer, skin colour can only be one of the factors: no longer paying attention to that at all is less effective and more of a burden on groups that are simply not suspected of human trafficking, says Erwin. "If we know that Nigerians are taking a certain route to the Netherlands, then it's very hard to explain why you are pulling someone Chinese out of the line." Less directed checks, in Erwin's view, means that less illegal immigration and human trafficking will be stopped...

Along the A12 motorway near Zevenaar, motorbike RNM officer Mart gives a number of examples of selections based on ethnicity that he applies. "Czech cars with Asian people inside them can be very interesting to us. In the past we saw a lot of human trafficking going on like that. It can also be minivans from Berlin with Arabs inside. Often smuggling Syrians."

It would seem virtually impossible for Mart to not let the ethnicity factor weigh at all if he pulls up alongside a van from Berlin and it's full of people who look Arabic. There's no chance that he's going to let that van keep driving.

11.15. In short, the RNM uses the MSM checks to combat illegal immigration after border crossing as well as cross-border criminality. In the performance of MSM checks the RNM makes use of risk profiles in order to select people for checking. In some cases, race is a component of the risk profiles. Whatever the case, it is established that race can play a role in the selection decision. In addition, individual officers of the RNM have such wide discretionary latitude that even if

race could no longer be used as an official profile indicator and for selection decisions, there would be a risk of making more intuitive and subjective decisions in which stereotypes and prejudices would consciously or unconsciously play a role, and which would constitute discrimination.

12. Grounds for Appeal

12.1. [Appellant 1] and [appellant 2] cannot accept the judgment being appealed, and therefore argue the following grounds for appeal against it:

13. Ground for Appeal 1: clarification of standpoint of Amnesty et al. (District Court, paragraph 6.3)

13.1. **Ground for Appeal 1: At paragraph 6.3 the District Court wrongly considered that Amnesty International et al.'s intention was "...to ban the use of unchangeable physical characteristics *that could indicate a certain origin or background*, and particularly skin colour and/or race"** [emphasis added]**, or at least the District Court wrongly assigned significance to this consideration.**

13.2. Insofar as the disputed consideration entails that Amnesty International et al. took the position that unchangeable physical characteristics, and specifically skin colour and/or race, could indicate a certain origin and/or background, this is incorrect. This is not the position of Amnesty International et al. On the contrary, Amnesty International et al.'s position is that unchangeable physical characteristics do not indicate a certain origin and/or background. They cannot indicate anything except the existence of those physical characteristics. Amnesty International et al.'s actual position is opposition to the use of race for risk profiles and for the selection decision.

14. Ground for Appeal 2: the review framework surrounding discrimination (District Court, paragraph 7.5)

14.1. **Ground for Appeal 2: At paragraph 7.5, the District Court wrongly presented an incorrect statement/interpretation of the discrimination review framework that the European Court of Human Rights developed over the years. Then, basing itself on this incorrect understanding of the point of law, the District Court then determined as it did in paragraphs 8.6 through 8.19, which led the District Court to reject the claims.**

14.2. The account of the applicable law in regard to the prohibition on discrimination in paragraph 7.5 gives no indication that the District Court recognizes how narrow the room for justifying a difference in treatment on the basis of race actually is. The District Court considers that "the State has discretionary power ('a margin of appreciation') in determining situations in which it considers making a distinction justified". Likewise, at paragraph 8.6, the District Court considers that the State is "making use of the discretionary power that it has in the identification of situations in which it considers making such a distinction justified".

14.3. This is incorrect for two reasons. Firstly, the term "margin of appreciation" pertains to the depth of the European Court of Human Rights' review, and not to any "policy freedom" that the state may have.

14.4. The margin of appreciation doctrine was developed by the European Court of Human Rights in order to establish the scope of and depth of the review that the European Court of Human Rights needs to apply to the question of whether a restriction imposed by a State Party is necessary in the interest of one of the objectives enumerated in Articles 8-11 of the ECHR and how much discretionary freedom must be left to the national authorities (**Exhibit 102**).[68] If the European Court of Human Rights leaves the State Party a certain freedom of discretion or margin, the Court's review must be restrained. Thus the margin of appreciation doctrine pertains to the relationship between the European Court of Human Rights and the State Parties, and not to any "policy freedom" that the State may have to determine what situations it considers making a distinction based on race to be justified.

14.5. The margin of appreciation doctrine can therefore not simply be transposed to the national level, in the sense that the Dutch court, in a situation of broad discretionary freedom from the European Court of Human Rights, also give the legislator and public administration a broad discretionary freedom and conduct its own review with restraint. The intensity of the review by the national court and the relationship to public administration and the legislator is a question of national law.

14.6. Secondly, the State does not have such "discretionary freedom" where it comes to the prohibition on discrimination: this is, after all, an absolute prohibition directed towards the government in wording that is unambiguous and crystal-clear. This is seen, for example, in Article 1 (1) and (2), to Protocol 12 of the ECHR (see paragraph 10.6.4 above). The prohibition on discrimination weighs extremely heavily, and the clause of the convention does not give the government any "discretionary" authority to depart from it. While it is true that the case law of the European Court of Human Rights does theoretically accept the possibility that a difference in treatment could be justified, specifically if this has an "objective and reasonable" justification, namely if it serves a "legitimate aim" and that there is a "reasonable relationship of proportionality" between the discriminating measure and the aim strived for, but on the notion of a justification of the difference in treatment on the basis of race, skin colour or ethnic background, the European Court of Human Rights remains steadfastly consistent on this point (see paragraphs 10.6.8-10.6.14 above):[69]

[68] N. Jak & J. Vermont, *De Nederlandse Rechter en de Margin of Appreciation: De rol van de margin of appreciation in de interne horizontale relatie tussen de rechter, de wetgever en het bestuur* ("The Dutch court and the Margin of Appreciation: the role of the margin of appreciation in the internal horizontal relationship between the court, the legislator and public administration"), NJCM-Bulletin, Year 32 (2007), no. 2. P. 125.

[69] See the references in footnote 37.

Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible.

14.7. This is why the State must have "very[70] weighty reasons" for the difference in treatment of persons on the basis of their race. Professor Gerards states that application of the "very weighty reasons test" will virtually automatically establish a violation. The test is "strict in theory, but fatal in fact": see paragraph 10.6.20 above. Although a state can attempt to justify a difference in treatment on the basis of race, the European Court of Human Right sets extremely high requirements on any such justification, and determines that normally the discrimination prohibition will be violated; see paragraph 10.6.21 above.

14.8. Professor Terlouw calls the requirements to be set on a justification of a difference in treatment on the basis of race, skin colour or ethnic background "extra very weighty" (see paragraph 10.6.22 above).[71]

14.9. This threshold is so high that in practice it will never actually be met. Insofar as is known to Amnesty International et al. (apart from positive action)[72], the European Court of Human Rights has never in any case accepted that there was a reasonable, objective justification for difference in treatment on the basis of race. That is only logical, because it is virtually impossible to envision a situation in which there would be a reasonable, objective justification for a difference in treatment on the basis of race.[73] Clearly, apart from exceptional circumstances that are not present in this case[74], it would never be necessary to treat people differently on the basis of their race, and no good and could be served by doing so (cf. Timishev v. Russia, paragraph 56; see also paragraph 10.6.11 above and Gerards, paragraph 10.6.21 above).

15. Ground for Appeal 3: arguments were wrongly left undiscussed (District Court, paragraphs 4.2, 7.6)

15.1. **Ground for Appeal 3: At paragraph 4.2, the District Court wrongly failed to discuss all the grounds raised by Amnesty International et al., and at paragraph 7.6 the District Court considered that it was not necessary to**

[70] At paragraph 8.9 of its judgment the District Court refers to *zwaarwegende redenen*. A strict translation of this Dutch would be "weighty reasons", but the correct term would have been "very weighty reasons" (in Dutch: *zeer zwaarwegende redenen*). Insofar as this indicates that the District Court applied too lenient of a standard, this reveals an incorrect understanding of this point of law on the part of the District Court.

[71] Terlouw Discussion Notes (Exhibit 98).

[72] European Court of Human Rights (Grand Chamber) 22 December 2009, nos. 27996/06 and 34836/06, ECLI:CE:ECHR:2009:1222JUD002799606 (Sejdió and Finci v. Bosnia and Herzegovina), paragraph 44.

[73] In her Discussion Notes (Exhibit 98), Terlouw considers that discrimination on the basis of ethnicity "[could] only be justified in extremely exceptional cases, for example if there were a specific pathology inherent to having a dark skin colour". Differences in treatment on the basis of race would also be permissible if race was an essential and decisive professional requirement (cf. article 4, Race Equality Directive) in the event of a suspect or perpetrator description or potentially in the case of positive action. No such exceptions apply in this case.

[74] See previous footnote.

address in regard to all treaty law clauses invoked by Amnesty International et al. whether these have direct effect, because such a discussion would not lead to a different result, on the basis of which considerations the District Court then determined that it would only review the claims against Article 1 of Protocol 12 to the ECHR and would leave aside the other grounds invoked by the claimants

15.2. In paragraphs 4.2 and 7.6, the District Court ignored the other grounds argued by Amnesty International et al. In part, Amnesty International et al. invoked Articles 2 and 5 ICERD (see paragraph 10.3 above), Article 2 in conjunction with Article 26 ICCPR (see Article 10.4 above), Articles 2, 3 and 6 of the Treaty on the European Union (hereinafter: "**TEU**")[75], Article 18 of the Treaty on the Functioning of the European Union (hereinafter: "**TFEU**")[76], Article 2 of the Race Equality Directive (Directive 2000/43/EC), Article 2 Protocol 4 of the ECHR and Article 10 of the Data Protection Directive (Directive 2016/680/EU). The District Court wrongly opted to not discuss these grounds for the claims.

15.3. The District Court should have included these other grounds for the claims in its ruling because, contrary to what the District Court stated at paragraph 7.6, a review against these treaty clauses does actually lead to a different result. This will be explained in the following.

15.4. Articles 2(1)(a) and 5(a) ICERD mandate even stricter standards than their counterpart clauses in the ECHR. This can be derived from the definition that the CERD applies for racial profiling, which is: "the practice of police and other law enforcement relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity" (see paragraphs 10.3.5-10.3.6 above). Moreover, the ICERD dictates concrete and more far-reaching obligations for States to do everything possible to prevent racial discrimination (see paragraphs 10.3.3 and 10.3.6 above).

15.5. Article 26 ICCPR also mandates an even stricter standard than the corresponding clauses in the ECHR. This standard is interpreted by the UN Human Rights Committee such that physical or ethnic characteristics of a person cannot in themselves constitute any indication of that person's potential illegal immigration status in a country (see paragraphs 10.4.4-10.4.5 above).

15.6. The sources of law referred to above moreover confirm the international consensus on 'racial discrimination' and ethnic profiling, and as such are part of the interpretation of the prohibition on discrimination of Article 1 of Protocol 12 to the ECHR. For this reason, too, the District Court should have considered these clauses and precedents in its ruling on the claims.

15.7. Additionally, as argued extensively at paragraph 10.7 above and in the summons[77], the framework of European law, from the TFEU to the Schengen

[75] Treaty Series 1992 , 74.
[76] Treaty Series 1957 , 91.
[77] Summons, paragraphs 196-233.

Borders Code, cannot be simply considered equivalent to the anti-discrimination review of Article 1 of Protocol 12.

15.8. In short, the District Court should have included the grounds for the claims as described above in its ruling because, contrary to what the District Court ruled at paragraph 7.6 of its judgment, review against these clauses would in fact lead to a different result, namely to the finding that the obligations derived from Articles 2 and 5 ICERD, Article 26 ICCPR, Article 21 of the EU Charter, Article 18 of the TFEU, and Article 1 of Protocol 12 to the ECHR, were all violated.

16. Ground for Appeal 4: structure of MSM methods and practice (District Court, paragraphs 8.2-8.4)

16.1. **Ground for Appeal 4: The considerations of the District Court In paragraphs 8.2 to 8.4 paint an incorrect picture of the structure of MSM and the RNM's methods in practice.**

16.2. The District Court determined that the legitimacy of the structure of MSM itself is not in dispute between the parties (paragraph 8.2). The District Court considered that in an MSM check, theoretically anyone could be stopped and pulled aside for a check (paragraph 8.3). The District Court determined that MSM is not designed to investigate criminal offences, but that in the performance of MSM in specific cases a suspicion could arise of criminal offences in connection with illegal migration, such as human trafficking and fraud with travel or identity documents (paragraph 8.4).

16.3. In itself it is correct that, according to the law (section 50 Aliens Act 2000 in conjunction with Article 4.17a Aliens Decree 2000), MSM is exclusively exercised for the purposes of monitoring of aliens and on the basis of information or data from experience concerning illegal immigration after a border crossing or, to a limited degree, with the intention of obtaining information about illegal immigration (Article 4.17a(2) Aliens Decree 2000).

16.4. However, with the considerations disputed here the District Court failed to appreciate that in practice MSM checks and the risk profiles and selection decisions used as part of that process are not only directed towards fighting illegal immigration after a border crossing, but are also focused on fighting cross-border criminality and in practice are used as such. This is evident from the RNM's description of the process as set out in paragraph 11 above.

16.5. The RNM uses an administrative law monitoring authority to conduct proactive checks, and these are also oriented towards fighting criminality (specifically, cross-border criminality). Contrary to what the District Court determined, (1) in practice MSM is in fact oriented towards fighting criminality (see paragraphs 11.3-11.4 above), and (2) the MSM is also used as such in practice (see paragraphs 11.10-11.15 above). The determinations of the District Court in paragraphs 8.2 and 8.4 that the structure of MSM itself is not in dispute between the parties and that MSM does not have the object of investigating and prosecuting criminal offences are, therefore, both incorrect.

16.6. Although the legal basis for MSM entails that the selection of people for a check must in the first place be coloured by the immigration law basis of MSM, the interweaving with criminal-law enforcement is a fundamental characteristic of MSM (see paragraph 11.4).[78] A characteristic here is that MSM is used as a mechanism to perform proactive checks that are also oriented towards fighting criminality (specifically, cross-border criminality) and in which there is therefore no reasonable suspicion of guilt of a criminal offence.

16.7. In any case, in the MSM checks the RNM also works with risk profiles about cross-border criminality in which race is an indicator, and in the performance of MSM checks the RNM makes selection decisions on the basis of race in the context of cross-border criminality: see paragraphs 11.9-11.15.

16.8. It is a logical consequence of the foregoing that the use of MSM is also oriented towards fighting criminality (paragraphs 11.3-11.4) and that the RNM also does so in practice (paragraphs 11.10-11.15). This makes MSM inherently an interweaving of immigration-law and criminal-law tasks.

16.9. 16.9. This interweaving of immigration-law and criminal-law tasks is so problematic precisely because the RNM uses it to bypass the threshold of reasonable suspicion of guilt of a criminal offence where during an MSM check it is in fact performing a police task. During an MSM check, “theoretically anyone” could be stopped and pulled aside for a check (District Court, paragraph 8.3) without the requirement of a reasonable suspicion of guilt of a criminal offence, even if the risk profile pertains to cross-border criminality. Although in theory anyone could be stopped, only those people who conform to the risk profile at the personal level, in which race is (at least sometimes) an indicator, are actually selected. Race is not an objective indicator of guilt of any criminal offence, and must never be used as such.[79]

17. Ground for Appeal 5: profile indicators not neutral and objective (District Court, paragraph 8.5)

17.1. **Ground for Appeal 5: At paragraph 8.5 the District Court wrongly considers that the profile indicators (in regard to the risk profiles on the basis of which the MSM check actions are planned) are always neutral and objective, and that ethnicity is not a profile indicator in the profiles that the RNM uses for MSM.**

17.2. With this disputed consideration the District Court failed to appreciate that the RNM does indeed use race as a profile indicator. It should further be noted that the District Court also failed to appreciate that the profile indicators are not in all cases neutral and objective.

17.3. Firstly, Amnesty International et al. gave multiple examples in the first instance showing that the RNM uses risk profiles in which race is an indicator.[80] The State

[78] Van der Woude, Dekkers and Brouwe 2015, p. 31 (Exhibit 100).
[79] Summons, paragraph 147.
[80] In part, the Amnesty Pleadings at paragraph 4.5 et seq.

disputed this but did not put forward any evidence for that dispute. The District Court should not have been satisfied, certainly in view of the fact that the subject of these proceedings is the right to not be discriminated against on the basis of race, with the State's simple dispute of that assertion and should have set higher standards on the argumentation of that dispute by the State. This applies all the more so in consideration of:

a. ECRI Recommendation 7, point 11 (see paragraph 10.5.1 above)

b. the standing case law of the European Court of Human Rights (see paragraph 10.6.12 above)

c. the fact that the State also wrongly presented age and sex as neutral criteria, even though these are legally protected grounds on the basis of which no distinction may be made

d. the fact that at issue here is evidence in the domain of the State which the State does not wish to provide to the appellants. Amnesty International et al. requested the State to provide various evidence, including the risk profiles that have been used in the past year. The State refused to provide this evidence (**Exhibit 103**). After that, NJCM then filed a request under the Government Information (Public Access) Act to obtain it (**Exhibit 104**). Upon confirmation of receipt of that request, and thus without waiting for any actual review of the request, the State indicated that it would not be providing any risk profiles ("No current indicators and risk profiles will be disclosed pursuant to the Government Information (Public Access) Act"; **Exhibit 105**). At the time of writing this statement of appeal, the State has not as yet rendered a decision on that Government Information (Public Access) Act request, and because of this NJCM has notified the State that it is in default of responding to that request (**Exhibits 106** and **107**). The legal consequence of this must be that the court must accept as established Amnesty International et al.'s assertion that the RNM uses race as a profile indicator in the risk profiles, or else consider these assertions provisionally proven barring evidence to the contrary produced by the State.[81]

17.4. In any event, it is established that race is a component of the risk profiles that are used by the RNM in the selection decisions for persons to be subjected to an MSM check. This is also evidenced, for example, from a statement of a representative of the RNM in the hearing:[82]

[81] Supreme Court 15 November 2006, ECLI:NL:HR:2006:AZ1083 (NoordNederlands Effectenkantoor/Mourik), paragraph 3.4: "In principle, it is left to the policy of the court ruling on the facts to determine what sanction the court deems appropriate under the given circumstances when a party bearing a heavier obligation to furnish facts fails to meet that obligation. Having said that, the rule will generally be that rather than reversing the burden of proof, the court should instead, on the basis of article 149(1) Dutch Code of Civil Procedure, either accept the assertions of the party on which the burden of proof rests as established facts by virtue of being insufficiently disputed, or consider these assertions provisionally proven barring evidence to the contrary produced by the party on which the heavier obligation to furnish facts rests."

[82] Official report of hearing in the first instance, paragraph 15; see also Leijtens, roundtable discussion, cited at paragraph 8.4 above.

You ask whether if the selections were made on a more information-driven basis and more on the basis of the behaviour of persons, whether it would still be necessary to include ethnic characteristics in the profile. The skin colour is never the only element of a profile, but in some situations ethnic characteristics are nonetheless needed for an MSM profile. If the ethnic characteristics were left out of a profile that would detract from the system of Information-Driven Action (IGO). The checks would become less effective.

17.5. In consideration of the foregoing, the District Court therefore wrongly considered that race is not a component of the risk profiles that are used during the MSM check.

17.6. Secondly, with this disputed consideration the District Court failed to appreciate that the use of seemingly neutral indicators such as 'head covering' can also very much constitute indirect discrimination, because the use of such indicators specifically disadvantages persons of a particular race in comparison to other persons of another race.[83] It is for this reason (in part) that Amnesty International et al. requested the Court to order the State to ensure that no direct or indirect discrimination takes place in the performance of MSM checks.

18. Ground for Appeal 6: the proportionality review (District Court, paragraph 8.8)

18.1. **Ground for Appeal 6: The District Court wrongly considered at paragraph 8.8 that the proportionality review of Article 1 of Protocol 12 to the ECHR consists only of the assessment of the suitability of the means, the proportionality and the subsidiarity, and does not also comprise whether the use of ethnicity in selection decisions is necessary.**

18.2. Amnesty International et al. understand this consideration such that the District Court here places first and foremost how it must investigate whether there is a reasonable and objective justification for the use or potential use of race as a selection indicator in selection decisions as part of MSM:

- is the means suitable for achieving the intended aim, i.e., can the use of race in selection decisions contribute to the effectiveness of MSM?
- does the use of race in selection decisions go no further than is necessary to do so (proportionality)?
- are there no reasonable alternatives for the use of race in selection decisions (subsidiarity)?

18.3. The District Court then proceeds to apply the review described above in paragraphs 8.9 (suitable means), 8.10 (proportionality) and 8.11-8.12 (subsidiarity).

18.4. However, with the conditions it sets out at paragraph 8.8, the District Court fails to appreciate that there must be a review of whether there are very weighty reasons for making a distinction on the basis of race, by which the Court must

[83] See Biao/Denmark (footnote 38 above) as well as summons, paragraphs 186, 226, 227, 228 and 249.

evaluate whether there is a reasonable relationship between the aim and the means, in the sense that the distinction must constitute a suitable, necessary and proportional means for achieving the defined aim. The District Court wrongly neglects to apply the necessity review (see paragraph 10.6.9 above), and investigates only whether the distinction on the basis of race is suitable and proportional.

18.5. According to the European Court of Human Rights, because there is a distinction on a suspect ground, it is relevant to the justification review whether the distinction made on the basis of race is indispensable for the achievement of the aim.[84] Here the question must be asked: is the aim unattainable in practice without making the distinction in question?

18.6. The means, making a distinction on the basis of race, is not indispensable for risk profiles at the individual level and selection decisions for checks that pertain to combating illegal immigration after crossing a border. Clearly, it has not been proven effective as an indicator for illegal immigration after crossing the border, because ethnicity says nothing about residence status, which Amnesty International et al. explain in detail at Ground for Appeal 7.

18.7. A distinction on the basis of race is a means that is, in any event, not necessary in a democratic society. More to the point, it is necessary in a democratic society to not make such a distinction, because doing so undermines the foundations and fundamental principles of our society.

18.8. Additionally, the RNM has indicated that it wishes to stop using race as an indicator in risk profiles and selection decisions (see paragraph 8.1 above). That means that MSM can evidently be implemented without treating people differently on the basis of their race. This constitutes a significant indication that the use of race is not necessary for aliens monitoring at all. If the use of race is not necessary in that process, it cannot be considered a proportionate means.

18.9. That aside, it is up to the State to demonstrate that making a distinction on the basis of race is necessary. See ECRI Recommendation 7 at point 11 (see paragraph 10.5.1 above) and the standing case law of the European Court of Human Rights, which indicates that once a difference in treatment has been demonstrated, it is up to the State to justify that distinction ("Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified"; see paragraph 10.6.12 above). The District Court should have considered this in the disputed consideration of its judgment.

18.10. In conclusion, the District Court should therefore have (also) assessed whether the difference in treatment on the basis of race is necessary (meaning: indispensable). That consideration should have led the District Court to the determination that there is no necessity for this distinction. Consequently, there cannot be an objective and reasonable justification in the sense of "very weighty reasons"; see paragraphs 10.6.13-10.6.15 and 10.6.20-10.6.22 above for the

[84] Gerards 2004 (Exhibit 95), p. 195. See also Karner v. Austria, paragraphs 40-42.

use of race in the context of MSM as an indicator in risk profiles and selection decisions.

19. Ground for Appeal 7: ethnic physical characteristics as selection criterion (District Court, paragraph 8.9)

19.1. **Ground for Appeal 7: In paragraph 8.9 the District Court considered that MSM is oriented towards fighting illegal immigration in the Netherlands, so that the acquisition of concrete clarity on identity, nationality and immigration status of an individual is the central focus of the checks. The District Court then wrongly considered**:

> *(i) "**The ability to establish the nationality or geographic origin of a person is of compelling importance for the effectiveness of MSM, because these can be the determining factors in a person's immigration status in this country."***
>
> *and then:*
>
> *(ii) "**Ethnic physical characteristics are not necessarily always, but could in some cases be an objective indication of someone's origin or nationality.**"*
>
> *and then:*
>
> *(iii) "**The fact that this is done on the basis of an assumption about presumed nationality does not detract from this. After all, the check takes place for the very reason that the nationality is not already known."***

19.2. Amnesty International et al. understand paragraph 8.9 of the judgment such that here the District Court is assessing whether the means (the use of race in selection decisions) is suitable for achieving the aim sought (effective MSM). In the following, Amnesty International et al. direct grounds for appeal against all three of the determinations set out above.

19.3. **Re: i. The ability to determine a person's geographic origin**

19.3.1. As the District Court considers, MSM is oriented towards fighting illegal immigration in the Netherlands. As part of this system, the RNM can stop persons to establish their identity, nationality and immigration status.[85] MSM is therefore not set up to establish a person's geographic origin, so "the ability to establish" that origin is similarly irrelevant (and certainly not "of weighty importance") to the effectiveness of MSM.

19.3.2. Nor does the judgment make clear what exactly the District Court means by the "geographic origin" of a person. If by this the District Court is referring to a person's place of birth, that says nothing about the legitimacy of residence status. Likewise, the nationality of a person says very little: a Dutch citizen may have been born in Rotterdam, or in Kiev, or in Kabul.

[85] See section 50(1) Aliens Act 2000 and article 4.17a(1) Aliens Decree 2000.

19.3.3. In short, the geographic origin is not decisive for person's residence status in this country (**Exhibit 89**)[86], and thus of no interest, let alone weighty interest, as the District Court considered.

19.4. **Re: ii. Ethnic physical characteristics as objective indication of origin or nationality**

19.4.1. The District Court then considers: "Ethnic physical characteristics are not necessarily always, but could in some cases be an objective indication of someone's origin or nationality". Here the District Court is evidently considering that the use of race in selection decisions is suitable for achieving the intended aim. Partly on the basis of this consideration, the District Court reaches the conclusion at paragraph 8.13 that generally speaking there is a reasonable and objective justification for the use of race or the potential use of race as a selection indicator in selection decisions in the context of MSM. Amnesty International et al. have major, serious objections to this determination

19.4.2. Amnesty International et al. wish to preface these objections by noting that it is up to the State to prove that there is an "objective and reasonable justification" for the difference in treatment of people during MSM checks. It is, therefore, the State that bears the burden of proof for the assertion that for the effectiveness of MSM it is necessary, suitable and proportionate to treat people differently according to their race (10.6.12). This could only be the case if the State has "very weighty reasons" for the difference in treatment: this is to be assessed as strictly as possible (see paragraphs 10.6.13-10.6.15, 10.6.20-10.6.22 and 14.6-14.9 above).

19.4.3. According to the District Court, ethnic physical characteristics are not necessarily an objective indication of someone's origin or nationality, but they could be in some cases. Amnesty International et al. dispute that ethnic physical characteristics are an indication of a person's origin, nationality or residence status. The determination that in the year 2021-2022, race could be an objective indication of a person's origin or nationality is unacceptable to Amnesty International et al. (and any others). This position is completely incorrect and is based on an outdated, problematic and inaccurate image of citizenship that essentially comes down to the idea that there is a typical Dutch person, and that Dutch person is white. This idea is wrong, for multiple reasons.

19.4.4. First of all, the Netherlands has had residents and citizens with a non-white skin colour for four hundred years and counting (**Exhibit 108**).[87]

19.4.5. Secondly, for centuries the Netherlands had a colonial empire with many non-white subjects. Many of these established themselves in the European Netherlands over the years, and some of these areas outside Europe still belong to today's kingdom of the Netherlands.

[86] Terlouw & Grutters 2021.

[87] Harmen van Dijk, *De eerste zwarte Amsterdammers waren geen slaven maar trotse zeevaarders* ("The first black people of Amsterdam were not slaves, but proud seafarers"), article in *Trouw*, 7 March 2020 ("They came in the early 17th century with Portuguese Jews, who were fleeing the Inquisition").

19.4.6. Thirdly, the Netherlands has been a migration country since its very beginnings. From the Portuguese Jews and the French and Flemish Protestants to the Italian, Turkish and Moroccan guest workers and refugees from every corner of the world: "the Dutch person" as a member of a homogenous ethnic group does not exist and has never existed.

19.4.7. Migration has had the effect that in 2021, according to the Statistics Netherlands, the national statistics office, one out of every four Dutch citizens have a migration background. In The Hague, Rotterdam and Amsterdam, the cities with the country's biggest airports, more than half of the residents have a migration background (**Exhibit 109**).[88] Looking at the big picture, estimates indicate that only 2% of Dutch people do not have any foreign ancestors.[89]

19.4.8. In 2020, 91% of residents of the Netherlands had *Dutch citizenship*. This figure unquestionably includes a large number of non-white people. But likewise, the 9% of residents of the Netherlands *without* Dutch citizenship includes both white and non-white people. The majority (62%) of people in the Netherlands who do not have Dutch citizenship consists of labour migrants and expats from Europe (**Exhibit 110**).[90] This latter group of course includes a variety of people, ranging from white German exchange students to businessmen of colour from the United Kingdom.

19.4.9. In short, many people *without* Dutch citizenship could, in the eyes of the personnel of the RNM, look 'Dutch' (read: white), while many people who do have Dutch citizenship would (according to the RNM) look 'non-Dutch' (read: non-white). This should make clear that race is not an objective indicator of nationality.

19.4.10. Neither race, nor the colour of a person's skin, nor the shape of their hair, the jawline, or the position of the eyes says anything about the question of whether the person is a citizen of the Netherlands, or India, or Nigeria, or anywhere else.

19.4.11. The District Court's determination that these things can say something about a person's origin or nationality is incorrect. Even if a person could determine what 'a Nigerian', or 'the average Nigerian', looks like, then many people who fit that stereotype might well be a Dutch person or a British person. And many people who do not fit the stereotype could very well be Nigerian: there are no fewer than 250 different population groups in Nigeria, from the Hausa and the Yoruba to the descendants of British colonists.

19.4.12. The assertion that what a person looks like can be an indication of that person's nationality or presupposed nationality is therefore not only incorrect, unworkable and ineffective (in addition to being irrelevant, certainly in determining immigration status), but it is also extremely injurious and hurtful to all Dutch people who are not white.

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[88] https://www.cbs.nl/nl-nl/dossier/dossier-asiel-migratie-en-integratie/hoeveel-mensen-met-een-migratieachter-grond-wonen-in-nederland-

[89] https://vijfeeuwenmigratie.nl/

[90] https://opendata.cbs.nl1/statline/#/CBS/nl/dataset/03743/table

19.4.13. The working practices of the RNM that use race in the risk profiles (see paragraph 17 above) and the selection decisions suggest that non-white people are more often illegitimate where it comes to residence status, and therefore should be pulled out of the line. The consequence is that with this as the method, non-white people (including Dutch citizens) are pulled out of the line earlier and more often than white people.

19.4.14. On the basis of the District Court's consideration, the race of appellants [appellant 2] and [appellant 1] can continue to play a role in the decision to be pulled from the line forever. After all, they are black, so they *might* not be illegal immigrants, but it could be that they do not have valid residence status. This is an affirmation of exactly the problematic issue that caused them (and all appellants) to begin this litigation. For them, and for all residents of the Netherlands, it is important that this consideration of the District Court is not allowed to stand.

19.4.15. The reason for the RNM to make a distinction by race is evidently that the RNM considers it more likely that people of a certain race or nationality/presupposed nationality are illegally resident in the Netherlands and/or are engaging in border-related criminality (see ground for appeal 4, paragraph 16) more often than people of other races.[91] Here assumptions, both conscious and unconscious, play a role. This practice reveals racial stereotypes about particular population groups based entirely on race. General, negative assumptions about certain groups, such as the assumption that persons of a certain nationality or race are frequently guilty of certain criminal activity, are by definition discriminatory and cannot provide any justification for unequal treatment (see paragraph 10.6.16 above).

19.4.16. Amnesty International et al. also see their assertion that race says nothing about a person's citizenship or residence status confirmed by the judgment in Williams Lecraft v. Spain (paragraph 10.4.5),[92] the various commentary on the case in the media (paragraph 7 above) and Professor Terlouw, who notes:[93]

- *The effectiveness of checks based on ethnicity has never been demonstrated. The obligation to demonstrate the effectiveness is borne by the RNM, which is conducting the discriminatory checks. It is also unlikely that the checks are effective because ethnicity says nothing about residence status.*
- *If a measure is not effective, then by definition it cannot be proportional.*

[91] Even though the selection decision within the context of the MSM checks absolutely cannot be based on presupposed criminal conduct, exactly this does happen: Mr [appellant 1] was pulled from the line on the assumption that he might be a potential money smuggler.

[92] Williams Lecraft v. Spain, paragraph 7.2: "the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country".

[93] Terlouw Discussion Notes, p. 2.

19.4.17. In short, the District Court's determination that external ethnic characteristics do not necessarily, but could, constitute an objective indication of someone's origin or nationality, is incorrect.

19.4.18. Finally, even if it were correct (which it is not) that ethnic physical characteristics could be an objective indication, but are not necessarily an objective indication, of a person's origin or nationality, as the District Court determines, then there is still no doubt that the simple possibility that ethnic physical characteristics are an indication of a person's origin or nationality is far too negligible to get over the "very weighty reasons" threshold. It is completely implausible that the RNM has very weighty reasons to make a distinction by race when doing so does not offer any certainty, let alone decisive certainty, concerning a person's origin, nationality or residence status (which it does not). If race is not a proven indicator of immigration status, by definition it cannot be a 'suitable', let alone indispensable, means: see ground for appeal 6 at paragraph 18, above, in the definition of the ECHR.

19.5. **Re: iii. Selection on the basis of presupposed nationality**

19.5.1. Finally, at paragraph 8.9, the District Court considered: "Ethnic physical characteristics are not necessarily always, but could in some cases be an objective indication of someone's origin or nationality. The fact that this is done on the basis of an assumption about presumed nationality does not detract from this. After all, the check takes place for the very reason that the nationality is not already known."

19.5.2. However, when the RNM selects someone for a check on the basis of an assumption about the person's nationality, that nationality is only an assumption, which means in practice the RNM is not selecting by nationality at all, but by race. Obviously, prior to the selection decision, the RNM cannot see the nationality of the person: an officer can only establish that nationality after inspecting a passport or other form of identification. Distinction by nationality or nationalities therefore entails, in the practice of implementing MSM, a distinction by race, which the European Court of Human Rights as identified as a form of racial discrimination ("Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination"; see paragraph 10.6.11 above).

20. Ground for Appeal 8: ethnicity as indicator or decisive indicator in "formula" (District Court, paragraph 8.10)

20.1. **Ground for Appeal 8: At paragraph 8.10 the District Court wrongly determines that the use of ethnicity as a selection indicator does not go further than reasonably necessary. In this regard, the District Court determines wrongly as follows:**

a. If someone's ethnicity plays a role, this is one element of a formula made up of interrelated indicators for a specific selection decision. The fact that this might ultimately be the decisive factor in the formula is indeed conceivable, but that is not, in consideration of the aim of MSM, disproportionate by definition or generally speaking.

b. Nor does this mean that the use of ethnicity in the MSM process will inevitably lead to a difference in treatment that is purely or to an overwhelming degree based on ethnicity.

c. The fact that a given selection indicator (whether that is skin colour, age, gender, behaviour or something else) is decisive at a given moment for the decision of whether or not to conduct a check does not for that reason make it the only relevant or the most significant indicator.

20.2. Amnesty International et al. dispute that the use of race as selection indicator does not go further than reasonably necessary and thus that it is proportionate, and formulate the following grounds for appeal against the determinations cited above.

20.3. **Re: a. Ethnicity (race) as decisive element in the formula of interconnected indicators for a concrete selection decision**

20.3.1. The District Court determines wrongly at paragraph 8.10 that it is not "disproportionate by definition or generally speaking" if someone's ethnicity is "ultimately the decisive factor" in the formula of interconnected indicators for a concrete selection decision.

20.3.2. This determination is, first and foremost, incorrect in consideration of the prevailing line of case law of the European Court of Human Rights. Whenever race is "ultimately the decisive factor" for a selection decision (the "but for" test; see paragraph 10.6.8 above), this means by definition that there is a difference in treatment that is based "to a decisive extent" on race. The fact that there are other indicators involved in the formula does not change this fact. A difference in treatment that is based "exclusively or to a decisive extent" on race can never be objectively justified, not even in the context of aliens monitoring (see paragraph 10.6.12 above).

20.3.3. Secondly, there is nothing in paragraph 8.10 to indicate that the District Court had the applicable, very strict "very weighty reasons" review in mind. The fact that this review is so strict is also seen in the fact that when assessing complaints concerning distinctions made on suspect grounds (race, skin colour, national or ethnic background), the European Court of Human Rights frequently even leaves aside the evaluation of the relationship between means and aim.[94] In the European Court of Human Rights' view, the simple fact that a distinction is made on a suspect ground implicitly leads to the conclusion that the distinction is not permissible.[95] That conclusion can only be set aside if the *State* puts forward

[94] Gerards 2004 (Exhibit 95), p. 195; European Court of Human Rights 8 July 2003, (GC) no. 31871/96, ECLI:CE:ECHR:2003:0708JUD003187196 (Sommerfeld v. Germany), paragraph 93; cf. Timishev v. Russia, par. 58.

[95] See Sejdic & Finci v. Bosnia-Herzegovina; Gerards 2017 (Exhibit 97), p. 10; Gerards 2004 (Exhibit 95), p. 195.

very weighty reasons (that are not related to ethnicity)[96] that justify the unequal treatment.

20.3.4. The court having to assess whether the selected means is in reasonable proportion to the aim sought must, in that assessment, by definition evaluate the selected means and the aim sought. To put it another way: it is the question of whether the end justifies the means. However, there is no indication of such an assessment/evaluation in the judgment. Instead, the District Court wrongly failed to evaluate what "gain" for MSM the use of race in the selection of persons to be checked brings. Likewise, in the context of the proportionality review the District Court failed to evaluate what damage such use of race for making selection decisions inflicts. This implies that the District Court was unable to properly evaluate the proportionality.

20.3.5. Amnesty International et al. have extreme doubts about whether, and if so to what extent, MSM is made more effective at all by using race in the selection of persons to be checked. However, whatever those doubts may be, it is still up to the State to demonstrate this, and the State failed to do so (see also paragraphs 19.4.2 et seq. above). For Amnesty International et al., however, one thing is crystal clear: that the damage being suffered as a result of this practice is significant.[97] It is making many people in Dutch society feel excluded; the commotion in the wake of the judgment (see paragraph 7 above) offers a good indication of the scope of the problem. The fact that this damage in society is real is also evidenced by the fact that the RNM has announced, in the interests of its "legitimacy and the trust of society", that it intends to change this practice.

20.3.6. The foregoing is not diminished by the fact that race is "only one factor" in the larger formula. On the contrary, this in fact raises the question of why, if there are other factors in the formula, the RNM could not suffice with those other factors.

20.4. **Re: b. The use of ethnicity (race) in the MSM process does not inevitably lead to a difference in treatment that is purely or to an overwhelming degree based on ethnicity (race)**

20.4.1. Amnesty International et al. have in essence two objections to the disputed determination (paragraph 8.10, penultimate sentence).

20.4.2. Firstly, whether or not the difference in treatment in the MSN system is "purely or predominantly" based on race is not decisive: such a distinction is never permissible under any circumstances.[98] The determination that a difference in treatment that is not purely or predominantly based on race would not constitute discrimination is the outcome of an invalid *a contrario* reasoning. Clearly, even if the difference in treatment in MSM is not purely or predominantly based on race, that still does not by definition make it justified or lawful (as the State has

[96] European Court of Human Rights in Biao (footnote 38 above), paragraph 114; European Court of Human Rights 13 November 2007, no. 57325/00 (D.H. and others v. the Czech Republic).

[97] See summons, paragraph 4.7.

[98] Timishev v. Russia, paragraph 58; Supreme Court 1 November 2016, ECLI:NL:HR:2016:2454 (dynamic traffic control), paragraph 3.7.

argued).[99] For this the State would have to demonstrate that it has "very weighty reasons" for making the distinction (which the European Court of Human Rights essentially never accepts).[100] There is nothing in paragraph 8.10 of the judgment that shows that the District Court had this standard in mind. Certainly, the District Court did not knowingly investigate whether the reasons that the State argued for differences in treatment of persons on the basis of their race were "very weighty".

20.4.3. The fact that the District Court's *a contrario* reasoning is incorrect is also clear from CERD Recommendation 36 as cited at paragraph 10.3.6 above. It can be concluded from this recommendation that whenever race is used to any degree by the RNM as an indicator in risk profiles and to select persons for MSM checks, this is discrimination. The UN Human Rights Committee ruled similarly in Williams Lecraft v. Spain (paragraph 10.4.5). When race is used as an indicator for the RNM's selection decisions for MSM checks, then the selection is being made on the basis of generalizations based on race instead of on individual behaviour or objective evidence. In that light the RNM is basing itself to some degree ("to any degree") on race for the determination of what individual to select for an MSM check. This is discrimination on the basis of race.

20.4.4. Secondly, the District Court failed to appreciate that race, if it may be used as an indicator for selection decisions in MSM, will in fact always be a decisive or predominantly decisive selection indicator.[101] This is why in these proceedings the question of whether there is a difference in treatment is not in discussion. It is unthinkable that race, in a complex of indicators, will not to some degree or even to a decisive degree contribute to the selection decisions for MSM checks. Thus, race is in any case a decisive indicator for some in comparison to other people who conform to the profile used in all other aspects apart from the ethnic element. For example: the white, fast-walking, well-dressed man at the airport or the young woman travelling alone on a flight from Italy who according to the RNM look 'Dutch'. Both of these people conform to the risk profile being used at that moment except for one thing: their race. The decisive reason for not picking them from the line (and to instead pick [appellant 1] and the young black woman) is then based on their race ("BUT for"). The same goes for the Ford Escort example cited by the State. In their pleadings, Amnesty International et al. argued the following in this regard:

> *The State says: suppose that the police have information that shows that we need to be specially on the lookout for cars that are blue in colour, make and model is Ford Escort, manufactured in 2005-2015.*
>
> *In this case, only these cars will be stopped. Any car that is not a Ford, or not an Escort, or not made in those years, will be allowed to drive on. In other words: according to the State, blue is not the decisive element.*

[99] SOD, paragraph 8.2.
[100] See Sejdic & Finci v. Bosnia-Herzegovina; Gerards 2017 (Exhibit 97), p. 10.
[101] Amnesty Pleadings, paragraphs 4.1-5 (and elsewhere).

But here is the point: under these selection criteria, all yellow, white and red Ford Escorts from 2005-2015 are allowed to drive on. Only the blue ones will be stopped. Within the set of all Ford Escorts from those years, of all colours, the blue ones are always the target.

For these cars, their colour, as opposed to all other Ford Escorts from this period, is the decisive element. Here again, the selection is predominantly made based on colour. Just like [appellant 1]'s supposed non-Dutchness, or the supposed Nigerian nationality of the young women.

20.4.5. The above shows that race, if it is an element in a complex formula of indicators, will always play a decisive role in the selection decision where circumstances are otherwise the same. The use, to any degree whatsoever, of race as an indicator in risk profiles or in selection decisions for MSM checks is a violation of the prohibition on discrimination as set out in Article 1 of Protocol 12 to the ECHR and the other anti-discrimination bases cited by Amnesty International et al.

20.5. **Re: c. The selection indicator that is decisive at any given moment is not the only or most significant indicator for that reason**

20.5.1. The District Court accepts at paragraph 8.10 (last sentence) that race can be decisive in selecting a person. The District Court then goes on to determine that this does not necessarily make that indicator the only or the most significant indicator. This reasoning is illogical and cannot be followed. If an indicator is decisive, then that makes it by definition significant (because the indicator was decisive).

20.5.2. The fact that the indicator in question is decisive means that this indicator played the only role or a decisive role in the selection decision, and therefore the decision was based on discrimination.

21. Ground for Appeal 9: reasonable alternatives for practice (District Court, paragraph 8.11-8.12)

21.1. **Ground for Appeal 9: At paragraphs 8.11 and 8.12, the District Court determines wrongly that there are no reasonable alternatives for directed selection decisions (in which ethnicity can be a relevant factor).**

21.2. With this disputed consideration the District Court failed to appreciate that there are reasonable alternatives for directed selection decisions (in which race can be a relevant factor).

21.3. In order to determine whether the distinction made is proportional in consideration of the aim, the European Court of Human Rights reviews whether there are no other means of achieving the aim that do not violate the right to equal treatment (subsidiarity), in other words: whether the disadvantage suffered consists of the lowest possible level of damage that is necessary to achieve the aim. If there is a distinction on a suspect ground, such as race, then the European

Court of Human Rights will generally reach the conclusion that this distinction is not proportional and that there is no objective and reasonable justification for it.[102]

21.4. On 24 November 2021, in the roundtable discussion on ethnic profiling with the standing committee for Internal Affairs[103], the RNM declared that it no longer wished to use race as an indicator in risk profiles and selection decisions for MSM checks. This confirms that the RNM considers itself capable of effectively conducting MSN without making distinctions by race in the process. This means that there are apparently reasonable alternatives to the use of race in making selection decisions. For this reason alone, it is clear that the distinction on the basis of race is not proportional and does not meet the threshold of subsidiarity.

21.5. A reasonable alternative to making a distinction by race in MSM is simply to conduct MSM without making a distinction by race: for example, random sampling would be one option, as Professor Terlouw also points out:[104]

- *Finally, the alternative, a random sample by which, for example, after every 25 passengers the RNM checks the next two passengers, is not only simple enough to perform but also, by definition, not discriminatory.*

21.6. On this the District Court ruled that "purely random checks would significantly diminish the effectiveness of MSM, because this would render the action insufficiently information-driven and therefore not directed enough." As already noted: the assumption that making a distinction by race contributes to the effectiveness of MSM is explicitly disputed by Amnesty International et al. (see summons, paragraph 4.6, and Ground for Appeal 7 above), has not been demonstrated by the State, and even the RNM itself believes that it does not need to make this distinction. Additionally: if no longer making a distinction by race would "significantly diminish the effectiveness of MSM", this can only lead to the conclusion that race does, in fact, play a decisive role in MSM, in which case the District Court's determination to the contrary at paragraph 8.10 is, for that reason, incorrect.

22. Ground for Appeal 10: concerning Amnesty's effectiveness argument (District Court, paragraph 8.12)

22.1. **Ground for Appeal 10: At paragraph 8.12 the District Court ruled wrongly that because MSM does not pertain to fighting criminality, Amnesty International's comparison with and academic substantiation of the effectiveness argument (namely, that ethnic profiling is not effective) does not hold up, or at least the District Court wrongly considered this in its evaluation.**

22.2. Here the District Court once again (see Ground for Appeal 4) fails to appreciate that in practice MSM (1) does in fact have the aim of investigating and prosecuting criminal offences (see paragraphs 11.3-11.4 above), and (2) is used

[102] See Sejdic & Finci v. Bosnia-Herzegovina; Gerards 2017 (Exhibit 97), p. 10; Gerards 2004 (Exhibit 95), p. 195.
[103] RNM Discussion Notes (Exhibit 92).
[104] Terlouw Discussion Notes (Exhibit 98), p. 2.

in practice for that purpose (see paragraphs 11.10-11.15 above). This also means that the academic research put forward by Amnesty International et al. to substantiate the argument that ethnic profiling is not effective is in fact relevant to MSM, contrary to the District Court's determination.

22.3. With this disputed consideration the District Court also ignores the fact that the State has not submitted any academic evidence whatsoever to demonstrate the contrary, that making a distinction on the basis of race is actually effective in fighting illegal immigration after crossing a border or in making assessments in regard to persons concerning illegal immigration after crossing the border. Nor can the State demonstrate this, because race is not an objective indicator for immigration status, as described in more detail in Ground for Appeal 7 (section 19 above).

22.4. In view of the fact that the State did not put forward any evidence whatsoever concerning the effectiveness of the use of race as an indicator and risk profiles and for selection decisions for MSM, the District Court should not have ignored Amnesty International et al.'s academic substantiation that ethnic profiling is not effective, this including with respect to the MSM system that is used for the immigration law monitoring task of the RNM.

23. Ground for Appeal 11: follow-on ground for appeal (District Court, paragraphs 8.13-8.14)

23.1. **Ground for Appeal 11: follow-on ground for appeal against paragraphs 8.13-8.14**

23.2. In paragraphs 8.13-8.14 the District Court draws conclusions based on its previous determinations. If one of the grounds for appeal against those previous determinations succeeds, then the District Court's conclusions in paragraphs 8.13-8.14 must also be overturned.

24. Ground for Appeal 12: general prohibition justified and necessary (District Court, paragraphs 8.15-8.18

24.1. **Ground for Appeal 12: At paragraph 8.15 the District Court wrongly determines that the fact that discriminatory, and therefore wrongful, actions in individual cases can occur does not justify a general prohibition and that such a general prohibition would, at a minimum, require "that there be concrete indications for the conclusion that wrongful use of ethnicity in MSM checks happens on a more or less systematic basis"; at paragraph 8.17, that the conclusion that the existing practices are wrongful "cannot be based on a few individual cases"; and at paragraph 8.18 that neither the existence of the risk that the use of ethnicity in MSM checks in a specific case manifests itself in discriminatory action nor the realistic expectation that it will go wrong on occasion in practice justify the conclusion that in the implementation of MSM in practice, there is more or less systematic violation of Article 1 of Protocol 12 of the ECHR.**

24.2. All these determinations by the District Court are incorrect. The State's position is that the RNM is permitted to select people for checks in part based on their ethnicity, and that purely random checks would strongly diminish the effectiveness of MSM. Therefore, the State believes that the actions of the RNM at issue in this matter must always be an option, this at the discretion of the RNM. This position on the part of the State in these proceedings in itself entails that the appellants have an interest in a prohibition on this disputed conduct by the State. If it is wrongful to select people for checks in part or in full on the basis of their race, then every time that this happens this is wrongful, and therefore the requested prohibition is awardable for every time that this action may happen.

24.3. Awarding of the prohibition sought is clearly also useful and necessary following the recent change of course by the State. Clearly, in the disputed judgment the State sees a confirmation that it should be permissible to select people for checks on the basis of (or partly on the basis of) their race.[105] For this reason, the judgment must be overturned and the initial claims must be awarded.

24.4. The disputed determination on the part of the District Court is additionally incorrect because the State bears a positive obligation to not discriminate, and this obligation is dictated (in part) by Article 1 of Protocol 12 to the ECHR. This obligation has a broad, general scope and therefore pertains to all cases of discrimination, including "incidents", and not only to "more or less systematic" discrimination (paragraph 8.15). The State is violating this convention and this obligation by allowing "incidental discrimination" – "the realistic expectation that it will occasionally go wrong in specific instances in practice" (paragraph 8.15).

24.5. Additionally, with the disputed determination the District Court ignores the fact that discrimination, or the risk of discrimination, is inherent to the working methods, by which the government permits the RNM to make distinctions by race in the selection of people for checks. Because making a distinction on the basis of race is a component of the method, the conclusion can only be that Article 1 of Protocol 12 to the ECHR "is being violated on a more or less systematic basis" (paragraph 8.18 of the judgment).

24.6. The disputed determinations are therefore incorrect. Incidentally, none of the changes in the working methods of the RNM identified in paragraph 8.17 of the judgment demonstrate that there is not an existing wrongful implementation practice of MSM that violates Article 1 of Protocol 12 to the ECHR on a more or less systematic basis.

25. Ground for Appeal 13: on the improvement of the methods of the RNM (District Court, paragraph 8.17)

25.1. **Ground for Appeal 13: At paragraph 8.17, the District Court wrongly considered that in recent years the methods of the RNM have been improved to reduce the risk of discrimination.**

[105] RNM Discussion Notes (Exhibit 92).

25.2. At paragraph 8.17 the District Court considered the improvements that the RNM has implemented in order to reduce the risk of discrimination. However, the District Court fails to appreciate (i) that the State has considerably more far-reaching obligations to eliminate discrimination than those described in paragraph 8.17, (ii) that the State has in no way demonstrated that the changed methods do reduce the risk of discrimination; and (iii) that the State may have introduced improvements to reduce the risk of discrimination, but has not addressed the cause of the problem in order to remove the risk of discrimination. It is clear that the improvements implemented do not change the fact that the State continues to maintain the position that it is entitled to make a distinction by race in the implementation of the MSN system.[106] This means that prejudices and 'gut feelings' therefore play a role, and can continue to play a role, in the implementation of MSM. The improvements that the RNM has introduced in recent years do not counteract ethnic profiling.

25.3. 25.3. Further, the District Court wrongly ignored the assertions of Amnesty International et al. in chapter 4.5 of the summons in regard to the measures that the RNM claims to have adopted in order to guarantee non-discriminatory treatment and/or to prevent discrimination or ethnic profiling in the implementation of MSM. This included the use of the behaviour detection method known as 'Predictive Profiling'.

25.4. The RNM's new intention to stop using race can be an important step forward in the fight against discrimination. However, the RNM wishes to continue to use nationality, which is derived from physical characteristics and thereby falls under the concept of race, as an indicator in risk profiles and selection decisions for MSM. Additionally, in chapter II Amnesty International et al. elaborated on the fact that there is still a great deal uncertain about how this intention on the part of the RNM will play out in practice and whether the RNM will institute guarantees to prevent direct and indirect discrimination in the process of MSM, and if so what those guarantees might be. Amnesty International et al. also produced an article from national newspaper NRC that showed that on 24 November 2021 the methods had not changed and that ethnic profiling was still standard practice among the RNM (**Exhibit 93**).

25.5. The foregoing also leads to the same conclusion, that the methods of the RNM have not been improved to such an extent that there is currently no (or even less) ethnic profiling and a reduced risk of discrimination.

26. Ground for Appeal 14: academic research is fully relevant (District Court, paragraph 8.17)

26.1. **Ground for Appeal 14: At paragraph 8.17, the District Court determines wrongly that the academic research invoked by Amnesty International et al. no longer accurately reflects the current situation.**

[106] RNM Discussion Notes (Exhibit 92).

26.2. With the disputed determination the District Court fails to appreciate that the State has put forward no academic research, or any research whatsoever, to substantiate the assertion that the RNM's methods have improved to the point that the research by Van der Woude et al., the data for which was collected in the period of 2013-2015, is no longer current.

26.3. The effectiveness of the measures that the RNM supposedly implemented in order to fight discrimination is disputed by Amnesty International et al., and moreover, this effectiveness has nowhere been substantiated by the State, neither with research nor by any other means. Since the publication of the study by Van der Woude et al., no other academic research has been published that would show that the data in these conclusions are in any way (let alone very much) outdated and no longer accurate.

26.4. Moreover, just as it was during the period of the research, race is still being used by the RNM as an indicator in risk profiles and selection decisions (alone or in combination with other indicators). As far as that goes, nothing has changed.

26.5. Amnesty International et al. have substantiated in a number of ways, including with the academic research put forward in the summons, the testimony of the private individuals in this matter and numerous media articles that the use of race as an indicator and risk profiles and selection decisions is still a fixed element of the method the RNM uses in MSM checks. This is, further, demonstrated from the recent NRC article (24 November 2021) in which officers of the RNM states that they do select on the basis of race (**Exhibit 93**), as well as the latest CERD report on the Netherlands from 21 August 2021 (**Exhibit 111**), in which the CERD expresses its concerns about:[107]

> *...reports that individuals continue to experience profiling by the police on the basis of their ethnicity, descent and skin colour, during traffic controls, identity checks, preventive searches and border stops.*

26.6. The summary rejection of the studies put forward by Amnesty International et al. as outdated, without any further substantiation or argumentation of that point, is therefore incorrect.

26.7. In addition, with the disputed consideration the District Court ignores the rules of apportionment of the burden of proof that apply specifically to issues of discrimination.[108] The State must prove, with argumentation and substantiation, that these studies no longer apply. Because the State did not do so, the District Court should not have been permitted to simply set aside this research.

27. Ground for Appeal 15: explainability does not eliminate discrimination (District Court, paragraph 8.18)

27.1. **Ground for Appeal 15: At paragraph 8.18 (as well as at paragraphs 8.10 and 8.15) the District Court wrongly determined that whether a selection**

[107] CERD, Concluding observations on the combined twenty-second to twenty-fourth reports of the Kingdom of the Netherlands, paragraph 15.

[108] Summons, paragraphs 184, 220, 224, 227 and 263.

decision is explainable is evidently relevant to the question of whether the decision is based on discrimination.

27.2. In the first instance, the State argued on the subject of the explainability of selection decisions that one of the underlying premises of Predictive Profiling is the explainability of the selection decision. Further, according to the State, this explainability would be increased by the fact that the selection can only be made on the basis of a composite of indicators.[109] The District Court evidently followed this argument on the part of the State. By so doing, in this disputed determination the District Court failed to appreciate that the explainability of a selection decision is irrelevant to the question of whether it involves discrimination.

27.3. Whether a selection decision can be effectively explained when that decision was based in part on the indicator race, in no way detracts from the damage caused by ethnic profiling and the decision's qualification as discrimination.[110] Obviously, explaining the decision plays no role whatsoever in the question of whether there is an objective and reasonable justification for making a distinction on the basis of race.

28. Position of the respondent

28.1. The position of the State is sufficiently ascertainable from the statement of defence in the first instance and the judgment.

29. Evidence and offer to furnish proof

29.1. Amnesty International et al. possess the evidence that they produced in the first instance and the evidence that they have attached to this statement of appeal.

29.2. Insofar as the Court of Appeal should rule that Amnesty International et al. bear any burden of proof, Amnesty International et al. offer to prove their arguments by means of hearing witnesses.

30. CLAIM

Amnesty International seek from this Court of Appeal:

1.a. a declaratory judgment that the compiling and use of risk profiles for the purposes of MSM checks by which race is used is in violation of the prohibition on discrimination;

1.b. a declaratory judgment that making selection decisions in the implementation of MSM checks that are based on race violates the prohibition on discrimination;

2.a. that the State be prohibited from compiling and using risk profiles for MSM checks that include race;

2.b. that the State be prohibited from making selection decisions in the implementation of MSM checks based in whole or in part on race;

[109] SOD, paragraph 5.4, 2.

[110] See also summons, paragraphs 128, 131 and 132.

3. that the State be ordered to ensure that no direct or indirect discrimination takes place in the implementation of the MSM checks;

4. that the State be ordered to pay the costs of the proceedings, plus the subsequent costs of €157.00 without service, or €239.00 with service, all to be paid within fourteen days after service of the judgment, and (in the event that the costs/subsequent costs are not paid within this term) to be increased with statutory interest over the costs/subsequent costs to be calculated as from fourteen days after the service of the judgment.

[signature]

Attorney

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List of exhibits to this statement of appeal

Exhibit 88: S. Qankaya, 'Rechter koppelt ten onrechte Nederlanderschap aan witheid' (Court wrongly links Dutchness with whiteness), article in *NRC*, 24 September 2021.

Exhibit 89: Prof. A.B. Terlouw and Dr C.A.F.M. Grütters, 'Hoe wit is een Nederlander?' (How white is a Dutch person?), *Asiel & Migrantenrecht* 2021, no. 9.

Exhibit 90: M.E. Gonzalez Pérez and H. Siebers, 'Etnisch profileren aan de grens leidt tot willekeur en discriminatie' (Ethnic profiling on the border leads to arbitrariness and discrimination), article in *Trouw*, 7 October 2021.

Exhibit 91: Letter from Momodou Malcolm Jallow (General Rapporteur on combating racism and intolerance of the Parliamentary Assembly of the Council of Europe) to Kasja Ollogren (Dutch Minister of Interior Affairs and Kingdom Relations), 5 October 2021.

Exhibit 92: RNM Discussion Notes for purposes of roundtable discussion on ethnic profiling with the standing committee for Internal Affairs (House of Representatives) on 24 November 2021.

Exhibit 93: W. Heek, 'We kunnen ook elke rode auto controleren. Kijken wat dat oplevert' (We can also check every red car. See what that gets us), article in *NRC*, 24 November 2021.

Exhibit 94: UN Human Rights Committee 27 July 2009, CCPR/C/96/D/1493/2006, no. 1493/2006 (Williams Lecraft v. Spain).

Exhibit 95: J.H. Gerards, 'Gelijke behandeling en het EVRM. Artikel 14 EVRM: van krachteloze waarborg naar 'norm met tanden'?' (Equal treatment and the ECHR. Article 14 ECHR: from toothless guarantee to norm with teeth?), *NJCM-Bulletin*, Year 29 (2004), no. 2.

Exhibit 96: J.H. Gerards, *Sdu Commentaar Europees Verdrag voor de Rechten van de Mens*, Article 14, notes 2.2.2 and 2.2.3.

Exhibit 97: J.H. Gerards, 'The Margin of Appreciation Doctrine, the Very Weighty Reasons Test and Grounds of Discrimination', in: M. Balboni (ed), *The principle of discrimination and the European Convention on Human Rights*, Editoriale Scientifica, 2017.

Exhibit 98: Discussion Notes by Prof. A.B. Terlouw for purposes of roundtable discussion on 24 November 2021.

Exhibit 99: Parliamentary Assembly of the Council of Europe 14 December 2020, Ethnic profiling in Europe: a matter of great concern, Resolution 2364 (2021).

Exhibit 100: Van der Woude, Dekkers and Brouwer, 'Over crimmigratie en discretionair beslissen binnen het Mobiel Toezicht Veiligheid. of Vreemdelingen ... of Veiligheid?' (On crimmigration and discretionary decisions within the Mobile Security Monitoring… Or Aliens Monitoring… Or Security Monitoring?), *Tijdschrift voor Veiligheid* 2015 (14) 2 , p. 31.

Exhibit 101: Brouwer, Van Der Woude, Van Der Leun, 'Op de grens van het vreemdelingentoezicht: discretionaire beslissingen binnen het Mobiel Toezicht Veiligheid' (On the border of aliens monitoring: discretionary decisions within the Mobile Security Monitoring system), *Tijdschrift voor Veiligheid* 2017 (16) 2/3.

Exhibit 102: N. Jak & J. Vermont, 'De Nederlandse Rechter en de Margin of Appreciation: De rol van de margin of appreciation in de interne horizontale relatie tussen de rechter, de wetgever en het bestuur' (The Dutch court and the Margin of Appreciation: the role of the margin of appreciation in the internal horizontal relationship between the court, the legislator and public administration), *NJCM-Bulletin*, Year 32 (2007), no. 2, p. 125.

Exhibit 103: E-mail correspondence between J. Klaas (Amnesty International) and C.M. Bitter (the State), 9 December 2021, 30 December 2021 and 10 January 2022.

Exhibit 104: Request under the Government Information (Public Access) Act on behalf of Amnesty International et al., 24 February 2022.

Exhibit 105: E-mail from Government Information (Public Access) official Ms Van der Pennen to Ms Hendrickx containing confirmation of receipt and notification of rejection, 17 March 2022.

Exhibit 106: E-mail from Government Information (Public Access) official Ms Van der Pennen to Ms Hendrickx containing adjournment of information request, 28 March 2022.

Exhibit 107: Letter from Ms Hendrickx to Government Information (Public Access) official Ms Van der Pennen containing notice of default, 29 April 2022.

Exhibit 108: Harmen van Dijk, 'De eerste zwarte Amsterdammers waren geen slaven maar trotse zeevaarders' (The first black people of Amsterdam were not slaves, but proud seafarers), article in *Trouw*, 7 March 2020.

Exhibit 109: Statistics Netherlands (CBS), 'Hoeveel mensen met een migratieachtergrond wonen in Nederland?' (How many people with a migration background live in the Netherlands?), (online article, consulted on 11 May 2022).

Exhibit 110: CBS Statline, 'Bevolking; geslacht, leeftijd en nationaliteit op 1 januari' (Population; gender, age and nationality on 1 January (online, amended on 23 March 2022).

Exhibit 111: CERD, Concluding observations on the combined twenty-second to twenty-fourth reports of the Kingdom of the Netherlands (advance unedited version), CERD/C/NLD/CO/R.22-24, date: 16 November 2021.