

[This is an unofficial translation]¹

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Instance	The District Court of The Hague
Date of decision	22 September 2021
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Case number	C-09-589067-HA ZA 20-235
Official relations	Interlocutory judgment: ECLI:NL:RBDHA:2021:10080
Fields of law	Civil law
Particulars	Proceedings on the merits First Instance - three-judge chamber

Summary

Today the District Court rendered judgment in a case against the State on the use of ethnicity by the Royal Netherlands Marechaussee (“RNM”) in its Mobile Security Monitoring checks (“MSM checks”). The District Court sees no reason for a general prohibition on the use of ethnicity in this form of monitoring foreign nationals.

Ethnicity

The case was brought against the State by Amnesty International, NJCM, the foundation RADAR, Controle Alt Delete and two individual claimants. These parties assert that the way in which the RNM, which performs these MSM checks, uses ethnicity is unlawful and in violation of the prohibition on discrimination.

What is the MSM?

The MSM is a form of monitoring foreign nationals in the border areas at the internal borders of the European Union. Its object is to take action against illegal residence in the Netherlands. MSM checks are routinely carried out at airports on flights from EU member states, as well as on the roads and waterways in the German and Belgian border regions. The MSM is not meant for the investigation of any criminal offences. It is an inspection that is intended to establish the identity, nationality and residence status of persons. This is permitted even if there are no indications or suspicions of illegality.

MSM checks are planned on the basis of general risk profiles in which ethnicity does not play a role. During an action, the risk profile is used as a basis on which to make specific selection decisions that result in persons being selected for a check.

No discrimination

The RNM uses ethnicity as a possible indicator for the purposes of making these specific selection decisions. The District Court rules that

¹ This translation was commissioned by the civil society coalition that filed suit against the Dutch state seeking to end ethnic profiling by the Royal Netherlands Marechaussee.

the way in which this happens does not amount to discrimination. The MSM checks are intended to establish residence status. Nationality can play an important role in this determination, and ethnicity can be an objective indication of a person's assumed nationality. Ethnicity is never the sole indicator, and the selection decisions must be explainable. Selection by random sampling, or making no selections at all and simply checking everyone, is not a reasonable alternative for the MSM. Therefore, the District Court rejects the claims of the claimants, which were directed towards obtaining a general prohibition on the use of ethnicity in MSM checks.

References Rechtspraak.nl

Decision

judgment

DISTRICT COURT OF THE HAGUE

Commerce team

case number/cause-list number: C/09/589067 / HA ZA 20-235

Judgment of 22 September 2021

in the matter of

1. **[Claimant 1]**
residing in [City 1],
2. [Claimant 2]
residing in [City 2], [Country],
3. **the foundation STICHTING RADAR INC,**
established in Rotterdam,

Claimants,

Attorney: mr. A.M. van Aerde, Amsterdam

and

4. **Nederlands Juristen Comité voor de Mensenrechten (NJCM)** [Dutch Section of the International Commission of Jurists],
established in Leiden,
5. **Amnesty International (Dutch Section),**
established in Amsterdam,
6. **Controle Alt Delete,**
established in Amsterdam,

Claimants,

Attorney: mr. J. Klaas, Amsterdam,

v.

the State of the Netherlands (the Ministry of Defence and the Ministry of Justice and Security,
seated in The Hague,

Defendant,

Attorney: mr. C.M. Bitter, The Hague

The claimants will be referred to hereinafter collectively as Amnesty International et al. Each individually will be referred to as [Claimant 1], [Claimant 2], foundation RADAR, NJCM, Amnesty International and Controle Alt Delete respectively. The claimants under 3-6 will be jointly referred to as "the interest groups". The defendant will be referred to as the State.

1 The course of the proceedings

- 1.1. The course of the proceedings is evidenced by the following:
 - the interlocutory judgment of 19 May 2021, and the documents identified therein, in which Amnesty International is designated as exclusive representative and in which decisions on the admissibility of the parties are made;
 - the official report of the oral session of 15 June 2021. Although this was drafted without the parties being present, the parties were given the opportunity to raise any objections in regard to factual inaccuracies in the report. By letter of 26 July 2021, Amnesty International et al. used this opportunity. This letter is included in the case file and the District Court is rendering this judgment in observance of the remarks made therein.
- 1.2. The date for the rendering of judgment was set at this date.

2 Introduction

- 2.1. This matter concerns the checks that are part of the Mobile Security Monitoring (MSM) performed by the Royal Netherlands Marechaussee (RNM) on individuals entering the Netherlands from other EU member states. Border checks at the border crossings are not permitted, although checks with the aim of combatting illegal immigration into the Netherlands are allowed.

In practice, MSM checks are routinely carried out at airports on flights from EU member states, as well as on the roads and waterways in the German and Belgian border areas. The check serves to establish identity, nationality and, most importantly, residence status. In these checks, people are taken out of the line after leaving the aircraft or, for example, from a touring car after crossing the border in order to check who they are and whether they are permitted to be in the Netherlands.

[Claimant 1] and [Claimant 2] were subjected to these MSM checks. During the hearing, each described their experience of this process. They are convinced that they were only selected for the checks on the basis of their skin colour, and that because of their skin colour, they are checked more often than others when they arrive in the Netherlands by plane.

It is not in question that being selected from the line for a check, as happens with the MSM, can have a major impact on the persons being checked, certainly where the persons in question (as is the case with [Claimant 1] and [Claimant 2]) have the idea that this is only happening because of their skin colour.

According to Amnesty International et al., this is the case here. They claim that in the MSM checks the RNM is making prohibited distinction by ethnicity, which constitutes discrimination.

- 2.2. In these proceedings, Amnesty International et al. raise the central question of whether there are grounds for a general and unqualified prohibition on the use of ethnicity in a specific form of monitoring, namely monitoring of foreign nationals in the border areas with the aim of combating illegal residence, this being (as already stated) the MSM.
- 2.3. The District Court assesses this central question on the basis of the positions taken by the parties and in observance of the nature, objective and performance of the MSM in consideration of the prohibition of discrimination. It comes to the conclusion that there is no basis for a general prohibition as sought by Amnesty International et al. with respect to the MSM. In the following the District Court will first outline the facts on which it bases its decision. It will then review the claims and, in brief, both the basis of the claims and the defences of the State. This will then be followed by the ruling, in which the court will reiterate the admissibility decisions of the interlocutory judgment of 19 May 2021 for the record, define the parameters of the dispute, outline the review framework and, finally, assess the claims. This judgment concludes with the decision on these claims, which are rejected, and a decision on the cost of the proceedings.

3 The facts

The Royal Netherlands Marechaussee

- 3.1. The RNM is a branch of the Dutch military. Its duties include border control and the enforcement of the Schengen Borders Code¹ (SBC), the performance of monitoring foreign nationals and combatting human trafficking and fraud with travel and identity documents. Additionally, the RNM also provides assistance to and works with the police for the purposes of fighting cross-border criminality, and conducts policing activities at the airports Schiphol, Rotterdam, Eindhoven, Maastricht, Twente and Eelde.²

Monitoring foreign nationals and Mobile Security Monitoring (MSM)

- 3.2. Under the SBC, border controls can be conducted on the external borders of the member states of the European Union. Border controls at the internal borders of the member states are not permitted. Persons can freely cross the internal borders of the member states regardless of nationality.³
- 3.3. The lack of border control at the internal borders of the member states does not preclude the performance of police activities and monitoring of foreign nationals in border areas, as long as this does not have the object or effect of de facto border control.⁴
- 3.4. There are two forms of monitoring foreign nationals that allow a person to be stopped for the purposes of establishing their identity, nationality and residence status.⁵ This is permitted:
 - i) if there are facts and circumstances that, according to objective standards, give rise to a reasonable suspicion of illegal residence, or

- ii) to combat illegal residence after a border crossing.

- 3.5. The RNM uses the MSM check in the course of the monitoring of foreign nationals referred to under 3.4 sub (ii) for the purposes of preventing illegal residence after crossing the border. This form of monitoring is regulated in article 4.17a of the Aliens Decree 2000_g (AD 2000).

In order to ensure that MSM checks do not have exactly the same effect as border controls (on the internal borders), these checks are subject to maximums in terms of number, frequency and scope, and they can only be performed:

- a. at airports upon arrival of flights from the Schengen area;
 - b. in trains within 30 minutes after passing the border with Germany or Belgium, or up to the second station after passing one of these borders if this has not happened within 30 minutes;
 - c. on roads and waterways, within 20 kilometres from the German or Belgian border.
- 3.6. MSM checks can be performed on anyone, and therefore are not limited to only persons crossing the border or assumed to have crossed the border, nor is having information pertaining to a specific person required for such checks. For the purposes of MSM checks, a person can be stopped even if there are no indications of illegal residence relating to that person._z
- 3.7. The MSM is planned and conducted on the basis of information and historical data about illegal residence after crossing the border (also referred to as “*Intelligence Led Operations*”, or ILO. Such information may come from the RNM itself or from other government institutions in the Netherlands or elsewhere, such as the police, customs authorities or the Immigration & Naturalization Service. Additionally, to a limited degree the monitoring may be conducted with the intent to obtain information about such illegal residence._g

The performance of the MSM

- 3.8. Date, location and specific flight, train, road or waterway of an MSM check action to be executed are determined at the central level by the RNM's National Tactical Command unit (NTC) on the basis of general (risk) profiles produced for the purposes of making such decisions.
- 3.9. These profiles are the result of an aggregate analysis of available information and describe a given migration phenomenon and the risks associated with it on the basis of a set of related characteristics (hereinafter: “profile indicators”). A specific flight, train, road or waterway is selected by running a computerized comparison of the information available concerning that flight, train, road or waterway against a (risk) profile. When there is a relatively high number of “hits” against the indicators of a given (risk) profile at a certain location at certain times, this may prompt an MSM check action.
- 3.10 The decision during an MSM check action to actually subject a person to a MSM check (the selection decision) is made by the RNM at the location during the action. This is done on the basis of the profile and profile indicators, as well as the factual, mostly personal data or characteristics (hereinafter selection indicators) relevant (fitting within the profile) for a concrete selection decision.² To this end, the RNM uses the behaviour detection method known as “predictive profiling”. The persons to be checked are then stopped in order to establish their identity, nationality and residence status.

[Claimant 1] and [Claimant 2]

- 3.11 [Claimant 2] is a Dutch citizen and resides in [Country]. As a pilot, he flies to and from the Netherlands frequently, and also crosses the Dutch border for family visits on a regular basis. [Claimant 1] is a Dutch citizen, resides in [City 1] and is socially and politically active. Both were

² Original text: “Dit gebeurt aan de hand van het profiel en de profielindicatoren én voor de concrete selectiebeslissing relevante (binnen het profiel passende) feitelijke, veelal persoonsgebonden gegevens of kenmerken (hierna selectie-indicatoren).”

subjected to MSM checks upon arrival at Dutch airports ([Claimant 2] refers to a number of checks in 2015 and [Claimant 1] identifies one check in 2018 specifically) for which they believe that their skin colour was, in all cases, the reason for the check. Each of them submitted a complaint concerning the incident(s) in question ([Claimant 2] supported by foundation RADAR and [Claimant 1] supported by the NJCM's Public Interest Litigation Project (PILP)).

- 3.12. The RNM declared [Claimant 2]'s complaint to be unfounded, and [Claimant 1]'s complaint was found to be partly well-founded. Neither claimant could agree with these findings, and both therefore took their cases to the National Ombudsman. On 29 March 2017 the National Ombudsman found [Claimant 2]'s complaint to be well-founded.⁹ The National Ombudsman has not yet assessed [Claimant 1]'s complaint.

National Ombudsman's report

- 3.13. By way of recommendations in its report of 29 March 2017 (in regard to [Claimant 2]'s complaint) to the Ministers of Defence and of Justice & Security, the National Ombudsman stated that the ministers should consider structuring the MSM process at the airport in Rotterdam such that the MSM check is used on the basis of objective criteria so as to avoid the appearance of discrimination (on the basis of skin colour). During a visit to Rotterdam airport in the summer of 2018, the deputy Ombudsman observed that the RNM had implemented the recommendations of the report.

The interest groups

- 3.14. Amnesty International is an association that works around the world to ensure that governments respect human rights.
- 3.15. RADAR is a foundation that promotes equality and acts as a watchdog for discrimination by police organisations, in part by handling complaints, dialogue with stakeholders, public relations, lobbying and public awareness campaigns, as well as legal actions. Since 2012 it has been active and visible on the theme of "ethnic profiling" by police organisations.
- 3.16. NJCM is an association dedicated to protecting and promoting the fundamental rights and freedoms of humanity. The PILP is a unit within NJCM focused on setting up and conducting strategic litigation for human rights in the Netherlands.
- 3.17. Controle Alt Delete is a national platform without legal personality working to fight ethnic profiling through a number of different avenues such as PR campaigns, lobbying, promoting changes in practice and supporting and mediating in complaints.
- 3.18. Through the PILP, the interest groups, [Claimant 1] and [Claimant 2] appealed to the State by letters of 28 November 2019 and 16 January 2020 to stop the RNM using risk profiles and making selection decisions based on ethnicity in the conduct of the MSM. This did not result in changes being made to the process.

4 The dispute

- 4.1. Amnesty International et al. ask the court to, where possible with immediate enforceability:
 - 1.a. issue a declaratory judgment that the compiling and use of risk profiles for the purposes of MSM checks that include ethnicity is in violation of the prohibition on discrimination;

- 1.b. issue a declaratory judgment that making selection decisions in the implementation of MSM checks that are based on ethnicity violates the prohibition on discrimination;
 - 2.a. prohibit the State from compiling and using risk profiles for MSM checks that include ethnicity;
 - 2.b. prohibit the State from making selection decisions in the implementation of MSM checks based in whole or in part on ethnicity;
 3. order the State to ensure that no direct or indirect discrimination takes place in the implementation of the MSM checks;
 4. order the State to pay the cost of the proceedings, plus the subsequent costs and statutory interest.
- 4.2. Amnesty International et al. base their claims on the argument that ethnic profiling is inherent to the MSM because in the drafting of the (risk) profiles for the MSM and in the selection decisions for stopping persons in the performance of the MSM, ethnicity is used as a relevant criterion. This, according to Amnesty International et al., is in violation of the prohibition on discrimination set out in article 14 of the European Convention on Human Rights (ECHR), article 1 of Protocol No. 12 to the ECHR, article 1 of the Dutch Constitution, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 26 of the International Covenant on Civil and Political Rights (ICCPR), article 10 of the Treaty on the Functioning of the European Union (TFEU), article 2 of the Treaty on European Union (TEU), article 7 of the Schengen Borders Code (SBC) and articles 20 and 21 of the Charter of the Fundamental Rights of the European Union. As such, in the view of Amnesty International et al., the State is acting unlawfully. The checks to which [Claimant 1] and [Claimant 2] have been subjected were the result of ethnic profiling and, according to Amnesty International et al., highlight the unlawfulness of the RNM's methods in the performance of the MSM.
 - 4.3. The State argues that Controle Alt Delete's claims are inadmissible and that all other claims must be rejected. The State disputes that the RNM discriminates when it uses ethnicity in the performance of the MSM.

The assessment

5 Class action and the claims of [Claimant 1] and [Claimant 2]; admissibility

- 5.1. The summons contains claims in a class action as defined in article 3:305a of the Dutch Civil Code (DCC). These are the claims of Amnesty International, RADAR, NJCM and Controle Alt Delete, which fall under the system of title 14a of Book 3 of the Dutch Code of Civil Procedure (DCCP). Admissibility of such class action claims is subject to a number of requirements that must be assessed *ex officio* by the court. The claims of [Claimant 1] and [Claimant 2] are brought by these respective claimants, each on their own behalf. The MSM checks to which they were subjected additionally serve in part as substantiation and illustration of the class action claims of their fellow claimants, the interest groups. The admissibility requirements for class action claims do not apply to the claims of [Claimant 1] and [Claimant 2].
- 5.2. The District Court ruled on the admissibility of the claims in its interlocutory judgment of 19 May 2021. In that judgment, the court ruled that with the exception of Controle Alt Delete, the claimants' claims are admissible.
- 5.3. Consequently, Controle Alt Delete's claims are declared inadmissible. Where in the following the court refers to Amnesty International et al., this does not include Controle Alt Delete.

6 Parameters of the dispute

The individual claims in respect of the class action claims

- 6.1. [Claimant 1] and [Claimant 2] have filed the same claims as the interest groups and base their claims on the same arguments. In the session the claimants explained that the claims of [Claimant 1] and [Claimant 2] run in parallel with the class action claims: if the class action claims are awarded then this will satisfy their individual interests, and vice versa. In consideration of the claims, the question of whether the MSM checks performed with regard to [Claimant 1] and [Claimant 2] were unlawful is not at issue. As such, [Claimant 1] and [Claimant 2] have no individual interest in the claims. Their claims therefore share the fate of the class action claims and will be assessed with them.

Ethnic profiling and ethnicity

- 6.2. Amnesty International et al. take the position that ethnic profiling is inherent to the MSM. Their claims are intended to put an end to the use of ethnicity as a distinguishing criterion in the MSM.

In common Dutch usage, the terms *etnisch profileren* ("ethnic profiling") and *etniciteit* ("ethnicity") do not have a particularly clear and unequivocal meaning. In the context of these proceedings, Amnesty International et al. use the following definition¹⁰ of ethnic profiling:

"The use by the RNM, with no objective and reasonable justification, of criteria such as race, colour, language, religion, nationality or national or ethnic origin when performing MSM checks."

- 6.3. One might conclude from this description that Amnesty International et al. intend to obtain a prohibition on the use of race, colour, language, religion, nationality and origin in MSM checks. However, it becomes clear from the case documents and Amnesty International et al.'s explanation in the session that their goal is to ban the use of unchangeable physical characteristics that could indicate a given origin or background, and specifically skin colour and/or race. The District Court therefore understands the claims of Amnesty International et al. in this way. Where in the following the District Court refers to the use of ethnicity or origin as part of the MSN checks, it does so in this way.

Profiles and selection decisions

- 6.4. The assessment of the question of whether the use of ethnicity in MSM checks is always in violation of the prohibition on discrimination is, in consideration of the assertions of Amnesty International et al., concentrated on the profiles and the selection decisions. First, the court will address the profiles that are the basis for the MSM check actions (see paragraph 3.9) under 8.5 below. Next, at 8.6 and the paragraphs thereafter, the court will address the use of ethnicity as a selection indicator in concrete selection decisions (see paragraph 3.10). Before the court gets to these assessments, it will first discuss the review framework in the following section.

7 Review framework for discrimination

- 7.1. The general assumptions of equal rights and (following on from this) non-discrimination are fundamental elements of national and international law. The right to equal treatment and the prohibition on discrimination is embedded in the law in various ways, including article 14 of the ECHR and article 1 of Protocol No. 12 to the ECHR¹¹ (hereinafter: Protocol No. 12), both of which are invoked, among others, by Amnesty International et al.

- 7.2. Article 14 of the ECHR contains a prohibition on discrimination in connection with the exercise of the rights guaranteed in the ECHR. It is what is known as an “accessory right”: it cannot be invoked independently, but only in connection with an appeal to the violation of another provision of the ECHR.
- 7.3. Article 1 of Protocol No. 12 contains an independent prohibition on discrimination that does not need to be invoked in connection with another material right under the ECHR. As such, article 1 of Protocol No. 12 has a broader scope than article 14 of the ECHR. The Netherlands approved Protocol No. 12¹², and as a result it has direct effect in the Dutch legal system. The text of article 1 of Protocol No. 12 reads:
- “1. The enjoyment of any right set forth by law 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.”*
- 7.4. The scope of the protection that article 1 of Protocol No. 12 intends to offer against discrimination is at least equal to the prohibition on discrimination (as an accessory right) set out in article 14 of the ECHR. Consequently, the case law of the European Court of Human Rights on the interpretation and application of article 14 of the ECHR also applies to article 1 of Protocol No. 12¹³, and is therefore the line to be followed by this court.
- 7.5. On the basis of the standing case law of the European Court of Human Rights concerning the prohibition on discrimination of article 14 of the ECHR, a difference (distinction) in treatment constitutes discrimination when there is no objective and reasonable justification for it. There is no such justification when the distinction serves no legitimate aim and/or where it is a means that is not proportionate to such an aim. If the complainant demonstrates a difference in treatment, it is then up to the State to demonstrate, in turn, that there is an objective and reasonable justification for it. The State has discretionary power (“a margin of appreciation”) to determine the situations in which it considers making a distinction justified. The scope of that discretion is determined in part by the subject at issue and the circumstances of the case. According to the European Court of Human Rights, there must be “very weighty reasons” for making a justified distinction on the basis of ethnic origin and nationality. A difference in treatment that is based “exclusively or to a decisive extent” on ethnicity is never justified, according to the case law of the European Court of Human Rights.¹⁴
- 7.6. In the following, the District Court will review the claims against article 1 of Protocol No. 12. Even aside from the question of whether all the other articles (and case law) cited by Amnesty International et al. have direct effect in the Dutch legal system and whether this court is in a position to conduct a review against them, any such review would only lead to the same result as the review against article 1 of Protocol No. 12. For this reason the District Court will leave aside the discussion of the other grounds raised by Amnesty International et al.

8 The assessment of the claims

- 8.1. The scope of the claims of Amnesty International et al. is, in sum, a request that the District Court determine that the use of ethnicity in the MSM is in all cases in violation of the prohibition of discrimination and that for this reason the District Court must forbid the RNM from this use of ethnicity in any and all circumstances. The District Court sees insufficient grounds for awarding the claims with this broad scope. The simple fact that ethnicity plays a role in the context of the MSM is not discriminatory by definition and can therefore not constitute grounds for a general prohibition. The District Court will explain this in the following.

The nature and object of the MSM

- 8.2. The MSM is a form of monitoring foreign nationals that is exercised on the basis of article 50 of the Aliens Act 2000. It is a statutory task charged as such to the RNM. This monitoring focuses on illegal

residence after border-crossings and its intent is to fight illegal residence in the Netherlands. It is not a matter of contention that to do this the RNM must in each case be able to establish a person's residence status and, in the process, the person's nationality. The legitimacy of the existence and intent of the MSM itself is not a matter of dispute between the parties.

- 8.3. In theory, any person could be stopped for a MSM check. Unlike the form of monitoring foreign nationals outside the border areas, as referred to under paragraph 3.4 sub (i), a reasonable suspicion of illegal residence is not required for the MSM checks. Amnesty International et al. mistakenly build their position partly on the assumption that this reasonable suspicion is a requirement for the MSM checks. Where Amnesty International et al. derive arguments from the conception that legitimate conduct of MSM checks requires that there be a reasonable assumption of illegal residence, the District Court will ignore these arguments.
- 8.4. The objective of the MSM is not to investigate and prosecute criminal offences. The State has explained, without dispute, that in the process of conducting the MSM, in specific cases suspicions may arise of criminal offences relating to illegal migration, such as human trafficking or fraud with travel or identity documents, but that this is not what the MSM is intended to uncover or investigate. Likewise, a check as part of the MSM is not conducted with a view to such suspicions, but it could lead to them where appropriate. The claims of Amnesty International et al. pertain to the use of ethnicity as part of the MSM checks. Consequently, in this matter it is not the court's task to assess whether ethnicity might give rise to a ground for any *suspicion*, of illegal residence or anything else.

In regard to the profiles

- 8.5. Amnesty International et al. have asserted that ethnicity is or can be an indicator of a profile (and thus that it can be a profile indicator; see 3.9) on the basis of which the MSM check actions can be planned. The State disputed this with argumentation. It is established that the profiles for the MSM are compiled by the NTC on the basis of data collected and analysed centrally and that they contain a description of certain phenomena or trends in migration. The profile indicators, which together make up the profile, are, according to the State, always neutral and objectifiable, and generally pertain to quantifiable information such as airport of departure, destination airport, the nature of the airline ticket (one-way or return) or the composition of the group travelling (age, gender). According to the State, ethnicity is never used as a profile indicator in these profiles. Amnesty International et al. did not substantiate their assertions to the contrary and did not provide any indications that would show that the procedure described by the State with respect to the profiles is not factually accurate. The District Court therefore assumes that ethnicity is not a profile indicator in the profiles that the RNM uses in the MSM. This means that the claims with respect to the profiles must be rejected.

In regard to the selection decisions

- 8.6. In the course of an MSM check action, the selection decisions are always made by the RNM officers working at the location (see 3.10). The specific question here is what persons are to be subjected to an MSM check. These decisions are focused on persons who fit within the profile and the context of the check action in question. Indicators for selecting a person for a check are derived from that profile and the modus operandi associated with the context, and are based on characteristics derived through the predictive profiling method. It is not in dispute that under this working method by the RNM, ethnicity can play a role in these selection decisions. The fact that in the performance of the MSM checks, this will lead or could lead to a difference in treatment between people that is partly based on ethnic physical characteristics is likewise not in dispute. This is not by definition in violation of article 1 of Protocol No. 12. Here the State is making use of the discretionary power it has in the determination of the situations in which it considers the making of a distinction justified. There must, however, be an objective and reasonable justification allowing to make such a distinction in the methods of the RNM.
- 8.7. Firstly, this requires that the MSM serves a legitimate goal. Obviously, if the goal the distinction serves is not sound, then for this reason in itself the distinction cannot be sound. It is not in discussion between the parties that the MSM serves a legitimate goal.

- 8.8. Secondly, making this distinction must be a means proportionate to this goal: in other words, it must be a suitable means and it must not go further than necessary to achieve the goal. In the context of the MSM this means that the use of ethnicity in selection decisions must potentially contribute to the effectiveness of the MSM, that its use must not go further than necessary and that there must be no reasonable alternatives for it.
- 8.9. Because the MSM is directed towards combating illegal residence in the Netherlands, obtaining hard clarity about the identity, nationality and residence status of an individual is the central focus of the checks. The ability to establish the nationality or geographic origin of a person is a very weighty reason for the effectiveness of the MSM, because this could be decisive for a person's residence status here in this country. Ethnic physical characteristics do not necessarily have to be, but could be, an objective indication of a person's origin or nationality. The fact that this happens on the basis of an assumption about the *apparent* nationality does not detract from this. The check is in fact in part conducted precisely because the nationality is not already known.
- 8.10 According to the State, the use of ethnicity as a selection indicator does not go further than is reasonably necessary. The State has explained that when ethnicity plays a role as an indicator in the selection decisions in MSM checks, this is done solely in combination with other selection indicators for the concrete determination of whether persons conform to the profile relevant to the specific check action, which, taken together, could be an indication of illegal migration. Examples of this are the age of the traveller, the persons in the company of the traveller, and the traveller's route or flight information. Here the State has pointed out that the assumption of non-discrimination remains the primary consideration and that the selection decisions must be explainable. Amnesty International et al. did not dispute any of this, but did argue that nonetheless, ethnicity will always be the decisive factor and therefore leads to discrimination. This argument on the part of Amnesty International et al. does not generally hold up. If someone's ethnicity plays a role, this is as a component in a sum total of related indicators for a specific selection decision. That this would ultimately be the decisive factor in this sum total is indeed conceivable, but that is not disproportionate by definition or in general in consideration of the goal of the MSM. Nor does this mean that the use of ethnicity in the MSM in general will always lead to a difference in treatment that is exclusively or to a decisive extent based on ethnicity. The fact that a certain selection indicator (whether that is skin colour, age, sex, behaviour or anything else) is at any given moment decisive in whether or not to decide to select someone for a check does not make that indicator the only relevant one or the most weighty one for that reason.
- 8.11. Amnesty International et al. have argued that instead of making selection decisions based in part on ethnicity, the RNM could conduct checks based on random sampling or instead check every person on selected flights. According to them, studies have shown that the use of ethnicity is ineffective.
- 8.12. The State has rightly pointed out that MSM checks must not have the same effect as border checks at the internal borders. For this reason their number, frequency and scope are limited by paragraphs 3-5 of article 4.17a (3), AD 2000. On any given flight, only a portion of the passengers can be checked, in trains only a portion of the train and at most in four train cars, and on roads and waterways only a portion of the passing vehicles or ships can be stopped. All this precludes the alternative proposed by Amnesty International et al. of simply checking all passengers in a given instance. As the State asserted in the session without dispute, strictly random checks would strongly diminish the effectiveness of the MSM, because then the action would not be sufficiently information-driven and thus not sufficiently directed. Therefore, in view of the nature and the object of the MSM, combating illegal residence in the Netherlands, there has as yet been no reasonable alternative found for directed selection decisions in which ethnicity can, in part, be relevant. Amnesty International et al. base their effectiveness argument primarily on academic argumentation in the context of anti-crime measures. As already stated, this is not what the MSM pertains to, and therefore this comparison and its underlying argumentation does not hold up.
- 8.13. This leads to the conclusion that the State's argument that there is a reasonable and objective justification for the option to generally use ethnicity as a selection indicator in selection decisions as part of the MSM can be accepted.
- 8.14. There is therefore no basis for the determination that the use of ethnicity in making selection decisions in the context of the MSM would generally be in violation of the prohibition on discrimination set out in article 1 of Protocol No. 12.

The fate of the claims

- 8.15. The foregoing does not change the fact that in practice it can happen that skin colour or other ethnic physical characteristics may, in specific cases, in actuality be the exclusive or decisive reason for a check, or that in hindsight a selection decision may not prove to be explainable on the basis of the indicators of the profile for a specific MSM check action. The simple existence of the possibility of such discriminatory, and therefore unlawful, conduct in individual cases does not, however, justify a general prohibition as sought by Amnesty International et al. This would require, at a minimum, that there be specific indications for the conclusion that unlawful use of ethnicity in MSM checks is happening on a more or less systematic basis.
- 8.16. In this regard, Amnesty International et al. have pointed to how the MSM checks of [Claimant 2] and [Claimant 1] were handled, and to the study by Van der Woude et al. of MSM checks on roads.¹⁵ That study, they say, shows that individual officers of the RNM interpret the discretionary power that they have with regard to selection decisions "by feel" on the basis of a hard-to-define "gut feeling", within which ethnicity is a significant indicator.
- 8.17. Even if it is assumed that the checks conducted on [Claimant 1] in 2018 and [Claimant 2] in 2015 were discriminatory, and consequently unlawful (which as such is not the question before this court), then these examples do not justify the conclusion that there is an existing unlawful practice of conduct by the RNM. Such a conclusion cannot be based on a few individual instances. As an additional factor, the State has explained without dispute that there have in recent years been improvements implemented in the methods of the RNM to further reduce the risk of discrimination. For example, the State points out the implementation of the recommendations from the National Ombudsman's report *Uit de rij gehaald* ("Pulled out of the line"), the general professionalisation of and the standard training in the use of the instrument of predictive profiling (evidenced in part from the background document and analysis accompanying the strategic framework "Use of ethnicity in profiling"), and to improvements to the briefings that precede any MSM check action. This last point was implemented in part in response to the report by Van der Woude et al. Further, the State has rightly pointed out that this report was based on investigation in the period of November 2013-March 2015, which means that (partly considering the attention that the RNM has devoted since then to the prevention of discriminatory use of ethnicity in the MSM) it cannot be assumed that this describes the current situation.
- 8.18. It is realistic to assume that with the attention that the RNM is devoting to preventing ethnic profiling¹⁶, the risk that the use of ethnicity in MSM checks will in a given case result in discriminatory treatment has not been completely eliminated. Neither the simple existence of this risk, nor the realistic expectation that in practice it might well still go wrong in individual cases, justify the conclusion that in the implementation practice of the RNM there is any degree of structural violation of article 1 of Protocol No. 12. The RNM must still always, in any specific instance, be able to explain in concrete terms that a selection decision in an MSM check was not solely or predominantly based on ethnicity but rather was appropriate to the profile, the frameworks and the indicators of the MSM check. The working processes and protocols of the RNM must be based in part on the interpretability of the selection decisions in the MSM. The State has explained that the efforts of the RNM are directed towards this goal. Amnesty International et al. have brought the importance of these efforts to light in these proceedings, as well as the impact it has when the impression arises (right or wrong) that a person has been "pulled from the line" on the basis of the colour of their skin. This impact cannot be understated, and is also not in question.
- 8.19. The foregoing entails that an unqualified prohibition as argued for by Amnesty International et al. is not called for. The conclusion must therefore be that the claims of Amnesty International et al. are to be rejected.

9 Final conclusion

- 9.1. Based on the reasoning as outlined in the foregoing, the court concludes that Controle Alt Delete's claims must be declared inadmissible and that the claims of Amnesty International, NJCM, RADAR, [Claimant 1] and [Claimant 2] must be rejected.
- 9.2. As the party ruled against, the claimants will be ordered to pay the State's costs in the proceedings. These are assessed up to this point at €656 in court registry fees and €1,689 in attorney fees (three points at €563 – rate II), and therefore a total of €2,345.

No separate ruling for the subsequent costs also claimed is necessary, because these are included in the costs ruling. The subsequent costs are accounted for in the decision.

10 The decision

The District Court:

- 10.1. declares that Controle Alt Delete's claims are inadmissible;
- 10.2. rejects the claims of Amnesty International, NJCM, RADAR, [Claimant 1] and [Claimant 2];
- 10.3. orders the claimants to pay the costs of the proceedings, estimated up to this point on the part of the State at €2,345, plus statutory interest on this amount commencing on the fifteenth day after the service of this judgment up to the date of full payment;
- 10.4. assesses the subsequent costs at €163 in attorney fees, and if this is not paid within fourteen days after notice of the judgment is given and subsequently the judgment has been served, plus an additional €85 in attorney fees and the cost of service of the judgment;
- 10.5. declares the cost ruling immediately enforceable.

This judgment is rendered by mr. J.M. Willems, mr. L. Alwin and mr. M.H. Erich, and pronounced in open court on 22 September 2021.^{1z}

¹ Regulation 2016/399 of 9 March 2016, L 77/1.

² Section 4(1) of the Police Act, with reference to the control of the borders and the SBC and, for monitoring foreign nationals, additionally sections 46(1) and 47(1) of the Aliens Act 2000.

³ Article 22, SBC.

⁴ Article 23, SBC and CJEU 22 June 2010, C-188/10 and C-189/10 (Melki and Abdeli).

⁵ Section 50, paragraph 1, Aliens Act 2000.

⁶ Decree of 30 May 2011 containing amendment of the Aliens Decree 2000 in connection with further rules on the monitoring for the purposes of combatting illegal residence after border crossing, Bulletin of Acts and Decrees 2011, 262.

⁷ See Explanatory Memorandum to the Decree, Bulletin of Acts and Decrees 2011, 262.

⁸ Article 4.17a(2) AD 2000 and the Explanatory Memorandum to the Decree.

⁹ Ombudsman's report *Uit de rij gehaald* ["Pulled out of the line"], report number 2017/044.

¹⁰ Amnesty International et al. derive this definition from the European Commission against Racism and Intolerance (ECRI).

¹¹ Protocol No. 12 to the European Convention on the Protection of Human Rights and the Fundamental Freedoms; Rome, 4 November 2000 (Treaty Series 2001, 18).

¹² On 28 July 2004; entered into effect on 1 April 2005.

¹³ European Court of Human Rights, 22 December 2019, 27996/06 and 34836/06 (*Sejdić and Finci v Bosnia and Herzegovina*).

¹⁴ See, for example, European Court of Human Rights 12 January 2010, no. 4158/05 (*Gilland and Quinton/UK*), European Court of Human Rights, 13 December 2005, no. 55762/00 and no. 55974/00 (*Timishev v Russia*), European Court of Human Rights, 24 May 2016, no. 38590/10 (*Biao v Denmark*).

¹⁵ M.A.H. van der Woude, J. Brouwers & T.J.M. Dekkers, *Beslissen in grensgebieden* ["Decisions in border areas"], Boom Criminologie, The Hague 2016.

¹⁶ The RNM acknowledges this in the same terms; see, for example, the background document and analysis for the strategic framework "Use of ethnicity in profiling".

¹⁷ type: 2641
