

On the twenty-fourth of February two thousand and twenty,  
at the request of

1. [Claimant 1],  
residing in [city] ("**claimant 1**"),
2. [Claimant 2],  
residing in [city] [country] ("**claimant 2**"),
3. **the foundation Stichting RADAR Inc.**,  
with its registered office and principal place of business in Rotterdam ("**RADAR**"),

electing address for service at the office address of Houthoff at Weena 355 in (3013 AL) Rotterdam, from which firm A.M. van Aerde, LLM, E.S. Oudshoorn, LLM and A.P.J. de Rond, LLM will be handling this matter as attorneys,

as well as at the request of

4. **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**"),
5. **Amnesty International Dutch Section**,  
an association with full legal capacity with its registered office and principal place of business in Amsterdam ("**Amnesty Netherlands**"),
6. **Controle Alt Delete**,  
a national platform without legal capacity with its principal place of business in Amsterdam,

electing address for service in this matter at the office address of PILP-NJCM [the Public Interest Litigation Project, part of the Dutch Section of the International Commission of Jurists] at Nieuwe Achtergracht 164, (1018 WV) Amsterdam, from which firm J. Klaas, LLM and M. Hendrickx, LLM will be handling this matter as attorneys,

jointly "**claimant 1 et al.**",

I have summoned to appear in proceedings:

**the State of the Netherlands (the Ministry of Defence and the Ministry of Justice and Security, and specifically the Royal Netherlands Marechaussee),**

a legal entity under public law with seat in The Hague (“**the State**”), serving my **writ**, pursuant to Section 48 of the Dutch Code of Civil Procedure (“**DCCP**”), at the office of the Procurator-General to the Supreme Court of the Netherlands, with its registered office at (2511 CB) The Hague at the address Korte Voorhout 8, and leaving a copy thereof with:

1. **summoned** to appear on 25 March 2020 at 10.00 AM, not in person but represented by counsel, in the session of the District Court of The Hague at the court building at Prins Clauslaan 60, 2595 CJ in The Hague;
2. **giving notice** that if the State does not appear in the proceedings represented by counsel no later than at the aforesaid session or fails to pay the court registry fees owed on the basis of its appearance in a timely manner, the district court will render a default judgment against it and award the claims as formulated in the following, unless the prescribed terms and formalities are not observed and/or unless the district court finds the claim wrongful or unfounded;
3. **giving notice** that if the State does appear, it will be charged court registry fees that must be paid within four (4) weeks after appearance in the proceedings, the amount of which is listed in the most recent annex to the Court Fees (Civil Cases) Act, published on <http://www.kbvg.nl/griffierechtentabel>

and that indigent persons will be levied a lower court registry fee established for indigent persons by or under the law, if at the moment at which the court registry fees are levied the person has submitted:

- a copy of the decision to grant legal aid, as referred to in Article 29 of the Legal Aid Act, or, if this is not possible as a result of circumstances not reasonably attributable to the defendant, a copy of the request for a legal-aid case as referred to in Article 24 (2) of the Legal Aid Act; or
  - a declaration by the board of the Legal Aid Council, as referred to in Article 7 (3) € of the Legal Aid Act, indicating that the defendant's income is not in excess of the income referred to in the order in council under Article 35 (2) of that act;
4. **giving notice** that [claimant 1] et al. is obliged, upon pain of inadmissibility, to register this summons in the central registry for class actions as referred to in Book 3, Section 305a (7) of the Dutch Civil Code ("**DCC**");
  5. **giving notice** that this registration has the result that – unless the district court declares the claims of [claimant 1] et al. summarily inadmissible – the court will uphold the matter until a term of three months after the registration in the central registry has passed;
  6. **giving notice** that after the lapse of this term, the handling of the matter will be continued at its current state unless, pursuant to Section 1018d (2) DCCP, this term is extended or another class action for the same event is filed; that the district court will set the cause-list date as referred to in Section 128 (2) DCC for filing the statement of defence at a term of six weeks after the term referred to in Section 1018c (3) DCCP has elapsed.

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## 1. Introduction

1. This summons pertains to ethnic profiling by the *Koninklijke Marechaussee* or Royal Netherlands Marechaussee (“**RNM**”) and/or its employees as part of the practice known as Mobile Security Monitoring checks (hereinafter: “**MSM checks**”). Ethnic profiling is discriminatory, stigmatising, harmful, unlawful and needs to stop.
2. For the purposes of this summons, we define ethnic profiling as: the use by the RNM, without objective and reasonable justification, of criteria such as race, colour, language, religion, nationality or national or ethnic origin during MSM checks. This definition is derived from the definition formulated and applied by the European Commission against Racism and Intolerance (“**ECRI**”)<sup>1</sup> (0).<sup>2</sup>
3. Claimants 1 and 2, [claimant 1] and [claimant 2], experienced the conduct in question, ethnic profiling, by the RNM first-hand as part of the MSM checks. Claimants 3, 4, 5 and 6 are all organisations that are active in one way or another in the field of human rights. In this matter, they are defending the general collective interest of everyone who runs the risk of being ethnically profiled. The claims in this matter are oriented towards putting an end to the contested ethnic profiling by the RNM as part of the MSM checks.

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<sup>1</sup> The European Commission against Racism and Intolerance (ECRI) is an independent human rights monitoring body established by the Council of Europe in 1993.

<sup>2</sup> The ECRI definition reads as follows: “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” (0, recommendation I.1, p. 4).

The claimants use the term ‘race’ (which further comprises: colour of skin, origin or ethnic or national background) purely in a legal context. The claimants prefer to use terms such as ‘ethnicity’, ‘colour of skin’, or ‘ethnic background’. It should be noted that (like ‘race’), these terms must be interpreted broadly, and additionally prove to have frequent overlap with religion and religious persuasion. In the English-speaking world, the term ‘racial profiling’ is commonly used; Amnesty International uses both ‘racial profiling’ and ‘ethnic profiling’. See also 0: Amnesty International report, *Proactief politieoptreden vormt risico voor mensenrechten* [Proactive police action poses threat to human rights], 2013, p. 5.

4. This summons will use the terms ‘non-white’ and ‘white’. This is a deliberate choice. The claimants use the term ‘non-white’ as the umbrella term for all people and groups of people who, as a result of their ethnicity, are victimised by the RNM during MSM checks, in contrast to ‘white’ people. For the background of this choice of terminology, see **Exhibit 3**.

#### **1.1. Ethnic profiling during MSM checks**

5. The RNM is an arm of the Ministry of Defence, and its tasks include carrying out various kinds of inspections and checks at Europe’s internal and external borders. Because the execution of the MSM task falls under the responsibility of the State Secretary of Justice and Security, this summons also names the Ministry of Justice and Security as the relevant ministry within the definition of the last sentence of Section 48 DCCP.
6. At Europe’s internal borders, the RNM carries out MSM checks using risk profiles that comprise a number of components, one being physical characteristics; this component includes the subject’s ethnicity (or assumed ethnicity). The selection decision (whether to inspect a person for an MSM check) is based in part (either consciously or unconsciously) on physical characteristics such as ethnicity.
7. MSM checks represent a very broadly formulated power of enforcement under immigration law to conduct inspections, under which individuals may be stopped even before their passport is examined, and without any specific suspicion with regard to the person. MSM checks are a legal instrument used to combat illegal immigration following a border crossing, and are used to fight human trafficking and travel and identity document fraud. To do this, persons are stopped and inspected for the purpose of establishing their identity, nationality and immigration status. The fight against other cross-border crime is explicitly defined as outside the authority of the RNM.<sup>3</sup>
8. In practice, the RNM has very broad discretionary authority in carrying out MSM checks. There are almost no guidelines for individual officers regarding who should

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<sup>3</sup> 0: M.A.H. van der Woude, J. Brouwers & T.J.M. Dekkers, *Beslissen in grensgebieden* [Decisions in border areas], The Hague 2016: Boom Criminologie, p. 64; see also *Parliamentary Documents II* 1992/93, 22 562, p. 23.

be selected for these checks, or how. This is problematic, because whenever intuitive and subjective decisions are made, stereotypes and prejudices play a role, whether consciously or unconsciously. The lack of clear instructions inevitably leads to ethnic profiling or discrimination in the process of MSM checks.

9. Moreover, ministerial policy (as well as RNM policy) is that ethnicity is a permissible element of risk profiles and selection decisions for MSM checks without there being individual indications and/or suspicions about the person being subjected to the check. In response to publicity and questions from parliament, the Ministers of Justice & Security and of Defence, as well as the RNM, have stated that they consider ethnicity a valid criterion for selection decisions within the context of MSM checks.<sup>4</sup> However, using ethnicity as a criterion for such selection decisions is, in effect, making prohibited distinctions that are in conflict with anti-discrimination law, and which are therefore unlawful. There is no objective or reasonable justification for making such a decision, nor is the distinction necessary or proportionate. Furthermore, ethnic profiling has been shown to be ineffective.

## **1.2. Essence of the matter**

10. [Claimant 1] and [claimant 2] have been ethnically profiled by the RNM on multiple occasions. Both men initiated a complaint procedure with the RNM and subsequently the National Ombudsman in regard to these instances, but this did not have the effect of ending the ethnic profiling as part of MSM checks. It is apparent that, due to the colour of their skin or their ethnicity, [claimant 1] and [claimant 2] continue to have a greater chance of being selected for an MSM check than people who are 'white'.
11. [Claimant 1] and [claimant 2], along with the other claimants in this case, are therefore asking this court to protect their rights. With these proceedings, they are

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<sup>4</sup> *Appendix to the Proceedings II*, 2016/17, 1900, p. 2 (Response from State Secretary Dijkhoff (Security and Justice) and Minister Hennis-Plasschaert (Defence) to parliamentary questions from member Van Dijk (PvdA) concerning the report that the Royal Netherlands Military Constabulary discriminates at Rotterdam The Hague Airport, 19 May 2017; and *Appendix to the Proceedings II*, 2017/18, 2340, p. 3 (Response from Minister Bijleveld-Schouten (Defence) and the State Secretary of Justice and Security, to parliamentary questions from member Belhaj (D66), 8 June 2018).

attempting to ensure that they, as well as everyone else with a 'non-white' appearance, no longer have to face ethnic profiling by the RNM.

12. This summons is structured as follows:
  - Section 2 introduces the six different claimants in this matter and explains their capacity;
  - Section 3 explains that the claimants' claims are admissible;
  - Section 4 presents an overview of the facts in this case;
  - Section 5 describes the national and international legal framework on ethnic profiling;
  - Section 6 applies the applicable rules of law to the facts in this case, and arrives at the conclusion that ethnic profiling is wrongful and that the RNM cannot use it in risk profiling, nor as an element of the selection of persons for MSM checks;
  - Section 7 presents an explanation of the claimants' claims;
  - Section 8 identifies and refutes the defences of the State insofar as they are known;
  - Section 9 catalogues the evidence and makes an offer to furnish further evidence;
  - Section 10 outlines the relief sought.

## **2. Parties**

13. In this case against the Ministry of Defence on ethnic profiling, alongside [claimant 2] and [claimant 1], a number of organisations have also joined as claimants. These organisations represent all of the interests that are closely connected with the nature of this case, namely the protection of human rights and, in particular, compliance with the prohibition on discrimination.
14. The content of the following sections will address not only the experiences of [claimant 2] and [claimant 1], but also the work of NJCM/PILP-NJCM, Amnesty Netherlands, RADAR and Controle Alt Delete.

## **2.1. [Claimant 1]**

15. [Claimant 1] (also known as: [claimant 1]) [claimant 1] resides in [city]. He worked for [employer], long held the position of [job] in [city], is coordinator and co-founder of [foundation] and is a board member of a number of civil society organisations.
16. [Claimant 1] is very often singled out by the RNM for screening at border checks, at airports and at the border between [country] and the Netherlands. He has experienced these checks as extremely trying, stigmatising and discriminatory.
17. In April 2018, [claimant 1] was once again pulled from the line by the RNM for a security check, this time at the airport in [location of airport]. As a result of this incident, [claimant 1] filed a complaint with the RNM. During the handling of this complaint, it became clear that [claimant 1] had indeed been selected for the security check in part on the basis of the colour of his skin. The RNM upheld his complaint (for more details, see Section 4.3.1).
18. In these proceedings, [claimant 1] is not seeking compensation for past damages, but a change in the 'status quo' for the future. Ethnic profiling must stop, because it affects, stigmatises and discriminates against [claimant 1] and others who are 'non-white'. Because, despite multiple discussions with [claimant 1] and calls from [claimant 1] and others to stop this conduct, the RNM persists in using ethnic profiling, [claimant 1] believes that he has no other option but to participate in these proceedings.
19. [Claimant 1] himself has an interest in these proceedings, because he will continue to cross international borders on a regular basis and may continue to be pulled from security lines by the RNM in the future due (at least in part) to his ethnicity/skin colour.

## **2.2. [Claimant 2]**

20. [Claimant 2] is a Dutch citizen and resides in [country]. As a [job title], he flies to and from the Netherlands frequently, and also regularly crosses the Dutch border to visit family.
21. [Claimant 2] is frequently pulled from the line for passport control at [location of airport] by the RNM. [Claimant 2] noticed that he was being pulled from the line,

despite the fact that many others with a similar profile but a different skin colour were consistently allowed to go through (more details provided in Section 4.2).

22. [Claimant 2] filed a complaint about this with the RNM, but this complaint was reviewed and rejected. The complaint was subsequently brought to the National Ombudsman's office, which upheld the complaint (see Section 4.2.2). His case was proven to be one of ethnic profiling. The RNM was not able to demonstrate that [claimant 2] had been pulled from the line for any reason other than the colour of his skin.
23. [Claimant 2] experienced this ethnic profiling as discriminatory and stigmatising. It is painful to be treated differently simply because of the colour of your skin or because of your ethnicity.
24. [Claimant 2] will continue to fly to and from Dutch airports in the future. He therefore has a direct interest in a policy that is not discriminatory and, as such, in a judicial ruling on this.
25. What [claimant 2] is attempting to achieve with these proceedings is that he, and others who are 'non-white', will no longer be ethnically profiled by the RNM. For [claimant 2], the important thing in these proceedings is not so much what happened in the past, and as such he is not seeking compensation of damages. What he would like to see is a change in the rules and their application so that he and others are no longer pulled from the line based (whether entirely or partially) on their ethnicity, or that people of colour or with an immigrant background are not subjected to MSM checks more often than white Dutch people without objective and reasonable justification.

### **2.3. NJCM**

26. Founded in 1974, the NJCM is active in supporting a number of causes, including the advancement, improvement and protection of the fundamental rights and freedoms of mankind at the national and international level, and specifically the obligation of the government to recognise the fundamental rights and freedoms and respect them in its actions and omissions (0: Charter of the NJCM).

27. The Public Interest Litigation Project (“**PILP**”) is the arm of the NJCM that focuses on strategic human rights litigation in the Netherlands. The PILP is coordinating these proceedings for the NJCM.
28. Both the NJCM and the PILP have made multiple public statements about their encounters with the government and international institutions with respect to ethnic profiling (see e.g. **0**).
29. The NJCM is acting in these proceedings on the basis of Section 3:305a DCC, both out of general interest (the interest in the government’s compliance with human rights) and collective interest (the shared interest of all who have been or could be victims of ethnic profiling).

#### **2.4. Amnesty**

30. Amnesty International has over 7 million members in over 150 countries. The organisation also has national sections in 70 countries, Amnesty Netherlands being one of them.
31. Amnesty strives for a world in which everyone enjoys all the rights set out in the Universal Declaration of Human Rights and other international human rights documents, treaties, declarations and charters (**0**: Statute of Amnesty International). This effort takes the form of research and action aiming to prevent and end severe violations of all these rights.
32. Amnesty has long been at the forefront in speaking out against ethnic profiling, including in reports, media, events and discussions with government and government institutions (see, for example, **0**). Through information campaigns and education, Amnesty Netherlands is also contributing to concrete solutions to the problem (**0**). The efforts of Amnesty Netherlands have been part of the impetus for a discussion in society about, and recognition of, the problem of ethnic profiling by law enforcement agencies, including the RNM. The Minister of Justice and Security

and the police have developed and partially implemented interventions to help reduce the risk of ethnic profiling (see also 4.8).<sup>5</sup>

33. Amnesty Netherlands has frequently been involved behind the scenes in various lawsuits, and has also acted as a co-claimant (**0**). Amnesty Netherlands is currently a co-claimant in a case against the municipality of Maastricht concerning restrictions that were imposed on a demonstration, which Amnesty Netherlands considers too far-reaching (see the section on legal actions in **0**).
34. Amnesty Netherlands is acting in these proceedings on the basis of Section 3:305a DCC, both out of general interest (the interest in the government's compliance with human rights) and collective interest (the shared interest of all who have been or could be victims of ethnic profiling).

## 2.5. RADAR

35. The Stichting Regionale Anti Discriminatie Actie Raad [RADAR Anti-Discrimination Agency, a non-profit foundation] (hereinafter: "**RADAR**") has as its goal the promotion and support of equal treatment and the effective prevention and combating of discrimination in units of the police on any grounds, and everything relating thereto or which may be beneficial to these goals, directly or indirectly and in the broadest sense of the word (**0**: RADAR Charter).
36. The foundation endeavours to achieve its goals in part by:
  - a. offering services relating to effectively preventing and combating discrimination on any grounds by means of complaint handling, investigation, consultation, cooperation, information campaigns, policy and public advocacy, the application of legal remedies and other actions;
  - b. all other legal means that may be beneficial to achieving the goal.
37. Since 2012, when RADAR began identifying indications that ethnic profiling is a systemic problem, the foundation has been engaged on this subject. According to

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<sup>5</sup> See, for example, Minister of Justice and Security, Letter to Parliament, 3 October 2016, *Parliamentary Documents II* 2016/17, 30 950, no. 105; **Error! Reference source not found.**: Police Press Release, 'Action Framework for Proactive Searches', 11 December 2017.

its charter, RADAR promotes the interests of people who are confronted with discrimination. RADAR considers ethnic profiling to be a form of discrimination.

38. In the period from 2013-2015, RADAR conducted a project called 'Tackling ethnic profiling by the police' (0). In the context of this project, RADAR published a critical report in 2015 entitled 'Effects of selectivity experienced in police checks: an explanation based on interviews and focus group discussions in Rotterdam and Breda' (0). This report reveals that 'non-white' young people in Rotterdam and Breda regularly feel that they are being ethnically profiled by the police, and that this is damaging to their confidence in the police. Based on the results of this report, RADAR urged the police units in Rotterdam and Zeeland West-Brabant to take appropriate measures.
39. Within the context of this project, RADAR has also held numerous public consultation sessions in recent years, in cooperation with various partners, and supported or contributed to debates on the subject of ethnic profiling with the goal of getting the subject of ethnic profiling on the agenda in society and opening the topic for discussion among police, local authorities and the public.
40. RADAR also serves as a channel through which victims of discrimination can file complaints about incidents they have experienced. Each year, RADAR receives multiple complaints about the police and the RNM. Some of these complaints pertain to ethnic profiling. One of them also related to the case of [claimant 2] concerning ethnic profiling by the RNM at [location of airport]. RADAR also had contact with [claimant 1] concerning his experience with ethnic profiling.
41. RADAR initially handled [claimant 2]'s case, both in the RNM complaint procedure and with the National Ombudsman's office. Although RADAR appreciates the report and the determination of the Ombudsman's office (2017) with respect to [claimant 2]'s case, RADAR is of the opinion that the government and the RNM have still not taken sufficient action to prevent ethnic profiling in Mobile Security Monitoring at the borders. The case of [claimant 1], who believes he was ethnically profiled/discriminated against based on an incident at [location of airport] in late April 2018, and the fact that RADAR's sister organisations, such as the Kennemerland Bureau for Discrimination Cases (in Haarlem) have to deal with

comparable cases pertaining to the methods of the RNM at Schiphol Airport on a regular basis, only reinforce RADAR's opinion on this.

42. In consideration of its charter, its position on ethnic profiling by the RNM, the position of the RNM and the government on the subject, and the cases of [claimant 2] and [claimant 1], RADAR is joining in this case to fight ethnic profiling by the RNM in the legal arena.
43. RADAR has full legal competence to litigate in a variety of potential proceedings with regard to equal treatment and discrimination, as determined (in part) by Sections 2.1 and 2.2 of the charter of the foundation.<sup>6</sup> The organisation conducts legal proceedings on a regular basis and is consistently recognised as an interested party in those cases.<sup>7</sup>
44. RADAR is acting in these proceedings on the basis of Section 3:305a DCC, both out of general interest (the interest of the government's compliance with human rights) and collective interest (the shared interest of all who have been or could be victims of ethnic profiling).

## **2.6. Controle Alt Delete**

45. Controle Alt Delete ("CAD") is a national platform that has been working against ethnic profiling since 2013. CAD does not have a separate legal form.
46. CAD is known, in part, for a video that it produced about the 'bike thief in the Vondelpark', in which we see three young men of similar age and stature, wearing the same clothes, but each with a different skin colour, trying to cut the lock on a bicycle. In the video, which was produced in cooperation with Sunny Bergman for the documentary *Zwart als Roet* [Black as Soot], we see that passers-by respond very differently to the three young men (0).

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<sup>6</sup> 0: Charter of RADAR.

<sup>7</sup> Including, recently, the Court of Appeal of Amsterdam 18 December 2018, case K18/230290, section 5.1 (not published); and District Court of Rotterdam 2 February 2009, ECLI:NL:RBROT:BI1785; District Court of Rotterdam 2 February 2009, ECLI:NL:RBROT:BI1786; District Court of Rotterdam 2 February 2009, ECLI:NL:RBROT:BH1711.

47. CAD assists people who wish to file a complaint with the police, the RNM and municipal authorities about negative experiences. In two years, CAD has supported some 100 people with their complaints about ethnic profiling, improper treatment or police violence. CAD acts as an advisor or attorney, depending on the needs of the complainant. CAD offers a listening ear and helps people find their way to other institutions and professionals, such as psychologists, for relief and assistance. Alerts that CAD receives are forwarded to relevant police personnel and described in an annual report (0).
48. CAD reflects on developments in society and within the organisation of the police in a critical and constructive way.
49. The platform catalogues instances of ethnic profiling by hosting meetings and dialogue evenings (0) and by producing or assisting in the production of films and videos with critical social commentary (such as 0). CAD gives workshops, readings and presentations. On the platform's website at <https://controlealtdelete.nl/>, it publishes blogs and research summaries. The central focus of all CAD's work is on offering constructive solutions for positive change in policy and practice.
50. CAD is acting in these proceedings on the basis of Section 3:305a DCC, both out of general interest (the interest of the government's compliance with human rights) and collective interest (the shared interest of all who have been or could be victims of ethnic profiling).

**3. Admissibility of [claimant 1] et al.**

51. [Claimant 2] and [claimant 1] have sufficient interest in their claims as defined in Section 3:303 DCC. Their fundamental rights have been directly assailed by the actions of the RNM. Additionally, the chance that they will continue to have their fundamental rights violated in a similar manner in the future is sufficiently plausible, given that the RNM has not adjusted its methods in the wake of the contested incidents, and the Minister has even taken the position that selection decisions for MSM checks may be made based on ethnicity.
52. The specific circumstances of [claimant 2] and [claimant 1] do not exist in a vacuum: they are also illustrative of unlawful actions by the RNM as part of MSM

checks in general. It is for this reason that claimants 3, 4, 5 and 6 are also participating in this matter. Their claims are likewise admissible, on the grounds of Section 3:305a DCC.

53. On the basis of Section 3:305a (1) DCC, a foundation or association with full legal capacity may file a claim in court that extends to the protection of similar interests of other persons, insofar as that foundation or association represents these interests pursuant to its articles of association or charter, and these interests are adequately enshrined in those documents. Section 3:305a allows both class actions and general interest actions. The difference lies in the fact that in class actions, the persons whose interests are at stake can be individualised, whereas in general interest actions, this is not possible because the interests are of such a general nature that they constitute an aspect of virtually everyone's life.<sup>8</sup>
54. Claimants 3, 4 and 5 all (according to their charters) represent the general interest that the fundamental rights and freedoms of mankind are respected and/or, more specifically, that action is taken against prohibited discrimination and/or ethnic profiling.<sup>9</sup> These interests lend themselves to bundling as they have been in this matter. Without this bundling, the efficient protection of the law intended to keep these interests from being violated (something that affects large groups of the (non-white) public collectively, with the consequences for the public that it is difficult to predict when these interests are being violated) would be made significantly more difficult.<sup>10</sup>

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<sup>8</sup> Prof. A.W. Jongbloed, *GS Vermogensrecht*, article 3:305a, Dutch Civil Code, note 8 ("Class actions and general interest actions"), current up to and including 26 October 2018. For an example of a general interest action, see Supreme Court, 27 June 1986, *NJ 1987/743 (Nieuwe Meer)*, Section 3.2: three environmental associations sued the municipality of Amsterdam to stop the municipality from dumping material dredged from the Amsterdam canals into the nearby lake of Nieuwe Meer. The Supreme Court found the associations' suit admissible because the interests involved lend themselves to bundling, and without such bundling there would have been considerable impediments to the effective protection of law.

<sup>9</sup> 0: Charter of the NJCM; 0: Statute of Amnesty International; 0: Charter of RADAR.

<sup>10</sup> Cf. Supreme Court, 27 June 1986, *NJ 1987/743 (Nieuwe Meer)*, Section 3.2. See also J.de Boer, *De collectieve actie in verband met discriminatie van een collectiviteit* [The class action in connection with discrimination of a collective], *Netherlands Law Journal* 1987 issue 26, p. 818.

55. As an additional factor, persons who are ethnically profiled as part of MSM checks cannot be obligated to individually litigate against the government. An individual cannot be expected to take on the burden, cost and risk of a civil action, then demonstrate the systemic nature of ethnic profiling during MSM checks and provide statistical evidence where required.<sup>11</sup> Finally, what is at stake here is nothing less than the fundamental values of the Netherlands: the idea that no one in the Netherlands is subject to unwarranted unequal treatment.
56. The present proceedings were brought with an idealistic objective, without financial interest, and without seeking compensation in financial terms. This means the 'lighter' system set out in Section 3:305a (6) DCC is applicable. In such cases, a review against the requirements of paragraphs 2 and 5 of Section 3:305a is not required. It should be noted that paragraphs 2 and 5 were not introduced with the object of blocking parties like claimants 3, 4, 5 and 6 from such cases, but in order to prevent incidents involving commercial special-interest organisations (also referred to as 'claim cowboys'), as has happened in the past.<sup>12</sup> Should this court nonetheless be of the opinion that this case does require a review against the admissibility requirements of paragraphs 2 and 5 of Section 3:305a, then at any rate claimants 3, 4 and 5 pass that review, as will be demonstrated below.

### **3.1. The interests are adequately protected (Section 3:305a (2) DCC)**

57. Claimants 3, 4 5 and 6 must be considered representative for the protection of the interests outlined above. The persons who are ethnically profiled will all benefit appropriately from the claims filed, i.e. by the discontinuation and continued prevention of unequal treatment in the performance of MSM checks. In addition, RADAR has a supervisory body as described in paragraph 2 (a). Although claimants 3, 4, and 6 do not have such a supervisory body, this is only logical as they are not commercial claim organisations.<sup>13</sup> Further, claimants 3, 4 and 5 in any event all meet the governance requirements as set out in paragraph 2 (b)<sup>14</sup>, all

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<sup>11</sup> J.de Boer, *De collectieve actie in verband met discriminatie van een collectiviteit* [The class action in connection with discrimination of a collective], *Netherlands Law Journal* 1987 issue 26, p. 818.

<sup>12</sup> Parliamentary Documents II, 2016/17, 34608, no. 3 (Explanatory Memorandum), p. 8.

<sup>13</sup> Parliamentary Documents II, 2016/17, 34608, no. 3 (Explanatory Memorandum), p. 8.

<sup>14</sup> Article 17 of 0; article 5, article 16 of charter and article 9 of general regulations of 0; 0.

have an accessible and transparent website (0)<sup>15</sup>, and claimants 3, 4, 5 and 6 all have sufficient financial resources and the experience and expertise needed to conduct the proceedings (under (e)). This is evidenced in part by the actions they have already pursued, which are summarised in chapter 2 of this summons, and their efforts are listed in the following section.

### **Efforts by Amnesty Netherlands, CAD, RADAR and NJCM**

58. In recent years, co-claimants 3, 4, 5 and 6 have undertaken scores of actions and, in pursuing them, work towards carrying out their official, declared objective: to shine a spotlight on the problem of ethnic profiling by law enforcement and the need to eliminate this practice. They have also made a number of recommendations to that end. The majority of the activities by these organisations have been oriented towards the police, but ethnic profiling by the RNM has also been addressed. The various activity types are described below.
59. Research, monitoring and analysis: Amnesty Netherlands, Controle Alt Delete and RADAR have released numerous publications describing the problem of ethnic profiling, and have also reported on incidents, new research and policy developments on the subject.<sup>16</sup>
60. Lobbying and advocacy: The NJCM has, on multiple occasions, publicly stated its position against ethnic profiling in its encounters with the government and international institutions.<sup>17</sup> Amnesty Netherlands, Controle Alt Delete and RADAR have all had regular contact over the years with parliamentarians and officials at the national and local levels to exchange ideas about the measures needed to

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<sup>15</sup> The websites of these organisations are: <https://njcm.nl/>; <https://www.amnesty.nl/>; <https://radar.nl/>.

<sup>16</sup> 0: Amnesty report (2013), pp. 85-87; 0; 0: Report by Amnesty International Netherlands in cooperation with Open Society Justice Initiative, *Gelijkheid onder druk: De impact van etnisch profileren* [Equality under pressure: The impact of ethnic profiling], 2013; 0: RADAR news item, *Marechaussee Rotterdam The Hague Airport Discrimineert* [Military Constabulary Torrey discriminates at Rotterdam The Hague Airport], April 2017; 0: Controle Alt Delete report *Kies een kant* [Choose a side] (2017); page 16 of this report discusses a study of the MSM checks by the RNMC; 0: Controle Alt Delete blogs and videos, 2013 to the present, <https://controlealtdelete.nl/blogs>; Controle Alt Delete *Weggestuurd en gecontroleerd door de RNM* [Sent away and searched by the RNMC], August 2016; 0: Controle Alt Delete article, 'Flying While Black', June 2018; 0: Controle Alt Delete article, *De impact van etnisch profileren* [The impact of ethnic profiling], October 2018.

<sup>17</sup> Such as in 0: the briefing given to ECRI on 15 June 2018.

reduce ethnic profiling that the Minister and local governments can/must put in place (0). These organisations are also in ongoing dialogue with police officials on the approach to ethnic profiling. Since 2017, representatives from the Ministry of Defence have also participated in the periodic meetings between civil organisations (including those mentioned here), the police and the Ministry of Justice and Security concerning the approach to discrimination and ethnic profiling. These discussions also included the subject of ethnic profiling at the border.

61. Complaint handling: RADAR and Controle Alt Delete offer advice to members of the public who have experienced discrimination by law enforcement, and assist them in their complaint procedures. By submitting a complaint, the applicant is seeking recognition for the discrimination they have experienced and hoping for a change in procedures to prevent this from happening to themselves or others again (0: RADAR and CAD complaint procedures).
  62. Information campaigning and awareness-raising: Amnesty Netherlands and Controle Alt Delete host informational meetings that are open to the public for discussion on ethnic profiling; RADAR is sometimes a partner in these meetings. Amnesty Netherlands and Controle Alt Delete have developed a flyer to help inform the public about their rights during police checks (0).
  63. Amnesty Netherlands has teaching materials and has offered guest lectures on ethnic profiling for years now (0). Controle Alt Delete and RADAR also have their own informational materials and resources about discrimination and ethnic profiling. Controle Alt Delete did the research for the documentary *Verdacht* [Suspect] and held numerous public information sessions organised by relevant individuals and professionals to discuss ethnic profiling and the approach to it. Controle Alt Delete has in the past released a number of videos about ethnic profiling (0). Members of the police forces have also come to contribute to information meetings at the invitation of Amnesty Netherlands and Controle Alt Delete on a number of occasions (0).
- 3.2. No profit motive, presence of specific interests and associations (Section 3:305a (3) DCC)**

64. Likewise, the admissibility requirements as described in the third paragraph of Section 3:305(a) DCC have been met. The directors involved in the establishment of claimants 3, 4 and 5, as well as their successors, have no profit motive that is achieved via claimants 3, 4 and 5 (subparagraph (a)). Secondly, there is a sufficiently close association with the Dutch legal environment (subparagraph (b)). The RNM is an arm of the Ministry of Defence of the State of the Netherlands and has its registered offices in The Hague in the Netherlands. The MSM checks by the RNM also take place in the Netherlands, namely at Dutch airports upon arrival via flights from Schengen countries, on trains, on roads and on waterways. As examples, the experiences of [claimant 1] and [claimant 2] took place at [location of airport] and [location of airport], respectively.
65. Finally, Section 3:305a (3) (c) DCC stipulates the condition that the foundation or association in question must first have made adequate attempts to achieve its goals by means of consultation. [Claimant 1] et al. did enter into discussions with the RNM, but without success.<sup>18</sup>
66. That consultation between [claimant 1] et al. and representatives of the RNM took place at the Ministry of Defence on 14 January 2020. In that meeting, both [claimant 1] et al. and the RNM were given the opportunity to express their positions.<sup>19</sup> Although the RNM declared in this meeting that it was willing to make efforts to find a solution, the RNM has yet to change its position on the use of ethnicity in risk profiling and as a basis for selection decisions (for more discussion of this position, see section 4.1).<sup>20</sup>

### **3.3. Other admissibility requirements (Section 3:305a (5) DCC)**

67. Claimants 3, 4 and 5 have drafted a management report and annual accounts, and published them on their websites, in accordance with the requirement of Section 3:305a (5) DCC. (0). Additionally, [claimant 1] et al. will, within two days after the

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<sup>18</sup> 0: Letter from [claimant 1] et al. to the Ministry of Defence and the RNMC with the request for consultation, 28 November 2019.

<sup>19</sup> Claimants 1 and 2 were not present in this meeting personally, but were represented by their attorneys.

<sup>20</sup> 0: Letter from [claimant 1] et al. to the Ministry of Defence, the Ministry of Justice and Security and the RNMC, 16 January 2020.

filing of this summons, make a note of said filing in the central registry for class actions (Section 3:305a (7) DCC, in conjunction with Section 1018c (2) DCCP).

#### **4. Facts and circumstances**

68. This chapter discusses the MSM checks conducted by the RNM. First, we will present the legislation on which these checks are based on how they are carried out (section 4.1). Next, we will address how the MSM checks were specifically carried out on [claimant 2] (section 4.2) and [claimant 1] (section 4.3).
69. We will then review the currently existing remedies and measures in place against ethnic profiling: the RNM complaint procedure (section 4.4) and the steps taken by the RNM itself (section 4.5). [Claimant 1] et al. have concluded that these remedies and measures are inadequate.
70. From there, we will demonstrate that ethnic profiling is not even effective in the fight against illegal immigration and/or criminal activity (section 4.6), despite the fact that the social costs (including in financial terms) of ethnic profiling are high (section 4.7).
71. The problem of ethnic profiling is not exclusive to the RNM, but also occurs within the police. For this reason, it is also worth examining the steps police forces take to combat it (section 4.8). Although these measures are not adequate, they do show that the police are setting a much better example than the RNM.
72. This chapter will then present several conclusions in section 4.9.

#### **4.1. MSM checks by the RNM**

##### **4.1.1. Regulatory framework**

73. The RNM performs several different types of checks within Europe's internal and external borders, including MSM checks for border control and fighting illegal immigration. Along with fighting illegal immigration, the RNM is tasked with combating human trafficking and travel and identity document fraud.<sup>21</sup>

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<sup>21</sup> Section 4(1) (g), Police Act 2012. It was around 2008 that the name of this type of search was changed, from (formerly) 'Mobile Monitoring of Aliens' (*mobile toezicht vreemdelingen*) to 'Mobile Security Monitoring' (*mobile*

74. MSM checks are a monitoring task in which people who are not suspects in a criminal-law sense and against whom there are no discernible and specific individual indications of involvement in any offenses or crimes are stopped and searched. Such proactive action on the part of enforcement agents is, by its nature, sensitive to ethnic profiling.
75. The legal basis for MSM checks is Article 50 of the Aliens Act 2000 (hereinafter: “**AA 2000**”). The RNM may stop people to establish their identity, nationality and immigration status, either on the basis of facts and circumstances that, by objective standards, present a reasonable suspicion of illegal residence or for the purposes of fighting illegal residence after crossing the border.
76. According to Article 4.17a of the Aliens Decree 2000 (hereinafter: “**AD 2000**”), the authority to summarily stop persons after crossing the border for the purposes of combating illegal immigration can only be exercised in the context of monitoring foreign nationals who have just passed the border: at airports upon arrival via flights from the Schengen zone, in trains, on roads and on waterways. In the remainder of this summons, MSM checks at airports will be the example referred to. The arguments and assertions of [claimant 1] et al. concerning MSM checks and ethnic profiling during these checks also applies equally for the other transport modalities: rail, road and waterway. It should be clear, but for the record: ethnic profiling is always wrong, whether at airports, in trains, or on roads or waterways.
77. Article 4.17a (2) of the AD 2000 further stipulates that the MSM checks “*are carried out on the basis of information or data from experience concerning illegal immigration after border crossing*”; in addition, the checks “*may, to a limited degree, be done for the purposes of obtaining information about such illegal immigration*”.

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*toezicht veiligheid*). And this was more than just a name change; from then on, the RNMC began focusing on fighting cross-border crime. Officially, this is limited to a few specific forms of cross-border crime (human trafficking and identity fraud), but it seems that there is a perception among many of the officers of the RNMC that the task goes further than this. From enforcement agents deriving a specific authority from the Aliens Act 2000 (with an evident focus on Nigerian money smuggling), in practice the RNMC has seemingly shifted towards a broader investigative task. See also 0: Van der Woude et al. (2016), pp. 64, 65 and 253.

78. In regard to air travel, Article 4.17(a) (3) goes on to state that: *“The checks referred to in the first paragraph, part a, will be performed a maximum of seven times per week with respect to flights on the same flight route, with a maximum of one-third of the total number of planned flights per month on that flight route. Only a portion of the passengers will be stopped for these checks.”* Deviations to this particularly can be made by decision of the Minister, on the basis of Article 4.17b, AD 2000, if *“there are concrete indications that there is a considerable increase in illegal immigration after border crossing or if there are concrete indications that such an increase can be expected in the short term”*.
79. The Aliens Act Implementation Guidelines 2000 (A), chapter A2, contains the policy rules that pertain to the exercise of the supervision of foreign nationals. These policy rules are a supplement to or an implementation of other rules, such as Article 50, AA 2000. Article 2.1 outlines the following system to regulate the stopping of persons in order to establish their identity, nationality and immigration status:

*“The official charged with overseeing the border or supervising foreign nationals has the authority to stop persons in order to establish their identity, nationality and immigration status. This authority may be used when there are facts and circumstances that, when viewed by objective standards, create a reasonable suspicion of illegal residence or to combat illegal residence after crossing the border. The official charged with overseeing the border or supervising foreign nationals must assess the suspicion that the person does not have legitimate residence status in the Netherlands against objective standards. These objective standards are, in any event, based on at least one of the following conditions:*

- facts or circumstances of the situation in which the person was stopped;*
- indications about the person who has been stopped;*
- data from experience or the immediate environment obtained from the police, RNM or other government institutions.*

*A reasonable suspicion of illegal residence can, in any event, be assumed in the following situations:*

- *information from government institutions, such as the Municipal Social Services or the Social Affairs and Employment Inspectorate or Persons Database;*
- *indications from police investigations;*
- *indications the police obtained in the course of verifying personal data in the context of police work;*
- *an inspection in a residence or place of business where illegal persons were found at a previous inspection;*
- *(...);*
- *checking of passengers of a vehicle with regard to which, in the course of a traffic stop, it has become clear that the driver of the vehicle is in the Netherlands illegally.*
- *vehicles with which persons are transported to a place of business where illegal foreign nationals have previously been found.*
- *concrete tips (anonymous or otherwise) about illegal foreign nationals.*
- *a suspect without Dutch nationality who cannot identify himself/herself.*
- *an event or location frequented by many foreign nationals and where there is a suspicion of or knowledge of illegal foreign nationals being found on a regular basis.*
- *a reasonable suspicion of human trafficking.*
- *a reasonable suspicion of illegal employment within the context of the Foreign Nationals (Employment) Act.*
- *a reasonable suspicion of prostitutes who are in the Netherlands illegally.”*

80. Two things should be noted about this framework of rules. Firstly, this framework of rules offers very little guidance with respect to specific selection decisions. Although the system prescribes that the official charged with overseeing the border or supervising foreign nationals must review the suspicion of the lack of legitimate immigration status in the Netherlands against objective standards, what those standards should be is not made clear. According to the Aliens Act Implementation Guidelines, this must be at least based on “*facts and circumstances of the situation in which the person is stopped*”, “*indications about the person who is stopped*”, or

*“data from experience or the immediate environment obtained by the police, RNM or other government institutions”*. The first and third ‘conditions’ likewise offer no basis for concrete selection decisions. Although the second ‘condition’ does offer such a basis, MSM checks do not generally involve any indications concerning a person who is to be checked.

81. The second thing to note here is that this policy does not formalise that the RNM is permitted to make distinctions based on ethnicity as part of MSM checks. The RNM may believe that ethnicity falls under one of the three ‘conditions’ referred to above; at least, the State Secretary, the Minister and the RNM have argued as much in the past. The State Secretary of Security and Justice and the Minister of Defence have made the following statements on the subject:<sup>22</sup>

*“Non-discriminatory action is the fundamental principle underlying every enforcement action taken by the RNM. We focus on this in education, training and daily briefings. In addition, information and e-learning modules are available via the (mobile) digital workplace, and officers are trained to hold each other accountable for improper conduct. Profiling is one of the major methods that enables the RNM to perform its duty to preserve the security in the Netherlands in an information-driven, professional and ethical way. For example, the RNM uses general profiling to combat particular phenomena. These profiles are confidential and used internally. They are based on experience and figures, information, assessments and risk indicators. The choice of who will be subject to a check is made using technical resources based on these profiles. Additionally, deviations from the norm, risk indicators and specific signals on the part of individual persons are also considered. Physical appearance (including ethnicity) may be relevant, but always in combination with other objective indicators or information.”*

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<sup>22</sup> *Appendix to the Proceedings II*, 2016/17, 1900, p. 2 (Response of State Secretary Dijkhoff (Security and Justice) and Minister Hennis-Plasschaert (Defence), 19 May 2017).

Over a year later, the Minister of Defence and the State Secretary of Justice and Security reiterated this principle:<sup>23</sup>

*“Non-discriminatory action is the assumption underlying every enforcement action taken by the RNM. Profiling is one of the major methods that enables the RNM to perform its duty to preserve the security in the Netherlands in an information-driven, professional and ethical way. The RNM uses profiles that are based on experience and figures, information, assessments and risk indicators. The choice of who is subject to a check is made using technical resources based on these profiles. Additionally, deviations from the norm, risk indicators and specific signals on the part of individual persons are also considered. Physical appearance (including ethnicity) can be a part of this, but always in combination with other objective indicators or information as indicated above.”*

82. These responses from the government make clear that the government considers it permissible to use ethnicity as a criterion for drafting risk profiles and making selection decisions during MSM checks. Inherent to this is that, in carrying out MSM checks, the RNM is making prohibited distinctions based on ethnicity.

#### **4.1.2. RNM considers distinction by ethnicity permissible**

83. The RNM has expressed the same perspective as the Minister of Defence and the State Secretary of Justice and Security. This can be seen in the document *Achtergrond en analyse bij het Strategisch kader 'Gebruik van etniciteit bij profileren'*<sup>24</sup> [Background and analysis to the Strategic Framework 'Use of ethnicity

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<sup>23</sup> *Appendix to the Proceedings II, 2017/18, 2340, p. 3* (Response from Minister Bijleveld-Schouten (Defence) and the State Secretary of Justice and Security, 8 June 2018).

<sup>24</sup> **0:** recommendation of RNMC, p. 4: *Ethnicity can be a relevant component of the indicators for selecting and checking someone. This indicator may be used by the RNMC, but always in combination with other indicators that justify a check. In addition, a check must be explainable and correct treatment of persons must be the highest priority. If this is not the case, then the check constitutes ethnic profiling and is therefore a form of discrimination, which must be avoided.*

in profiling'] and also in a response to the incident involving [claimant 1] (to be discussed in more detail in section 4.3 below):<sup>25</sup>

*“Profiling is an important tool for the Dutch Border Police. The profiles are based on experience and figures, information, assessments and risk indicators. Physical appearance (including ethnicity) can be relevant, but always in combination with other objective indicators or information.”*

84. This demonstrates that the RNM considers itself free to make distinctions by ethnicity as part of its tasks and powers. This makes the risk of prohibited discrimination inherent to the methods of the RNM: this approach is driving ethnic profiling and discrimination by the officers of the RNM. Such a method results in ethnic minorities being disproportionately stopped (both at the individual and aggregate level) for MSM checks without there being a reasonable and objective justification for doing so.

#### **4.1.3. Ethnic profiling due to broad discretionary power**

85. A requirement for stopping a person for the purposes of an MSM check is (at present) that there must be an objective, reasonable suspicion of illegal residency (see paragraph 79 above). The MSM checks are carried out on the basis of information or historical data about illegal residence after crossing the border.
86. Nowhere in the AA 2000, the AD 2000 or the Aliens Act Implementation Guidelines 2000 are requirements or criteria outlined regarding the nature of information, indications or historical data that could clearly be taken into consideration in selection decisions. Such clear guidelines for making selection decisions are absent from the relevant legislation, and are still absent in practice. This leaves a very broad discretionary power to the RNM and its officers in carrying out MSM checks.<sup>26</sup>

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<sup>25</sup> 0: Article in *Eindhovens Dagblad*, '[Job] [claimant 1] in [city] furious over 'ethnic profiling' at [location of airport]', 30 April 2018.

<sup>26</sup> 0: Van der Woude et al. (2016), p. 65.

87. In their study on MSM checks by the RNM<sup>27</sup>, Van der Woude et al. assert that this broad discretionary power must be limited by the principles of non-discrimination and equality.<sup>28</sup> Their research shows that officers often make selections instinctively, based on a gut feeling that is difficult to define in words, and that they think in terms of typologies, profiles and certain standard combinations.<sup>29</sup> One officer explains, for example:<sup>30</sup>

*“Surely it’s common knowledge, doesn’t matter where you come from, if you follow any media, that skimming is done by Romanians and that thefts on darker winter days are mostly Bulgarians, Romanians and Poles. Everyone knows that.”*

88. Van der Woude et al. write the following about this method of selection:<sup>31</sup>

*“The employees of the RNM questioned during the fieldwork placed a great deal of weight on the 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... Additionally, however, crimes such as money laundering, drug smuggling and weapons trading, all crimes that do not fall*

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<sup>27</sup> In this investigation, Van der Woude et al. observed over 800 hours of MSM checks conducted over the period of November 2013 to March 2015, interviewed dozens of RNMC officers, and spoke with more than 160 individuals who had been checked.

<sup>28</sup> O: Van der Woude et al., (2016), pp. 65, 66. Although the investigation focused on MSM checks of persons entering by road, the conclusion also applies to MSM checks at airports.

<sup>29</sup> O: Van der Woude et al. (2016), pp. 128, 135, 137: See p. 135: *“Many officers of the RNMC 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.”*

<sup>30</sup> O: Van der Woude et al. (2016), p. 135.

<sup>31</sup> O: Van der Woude et al., (2016), pp. 137, 138.

*under the objective of the MSM checks as defined by law, were referred to with great regularity.*

*The associations that are ingrained in the minds of RNM officers and also incorporated into the Amigo-boras camera system could likewise lead to 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... [n]ationality and physical characteristics, including skin colour, in light of international antidiscrimination legislation and case law, [are] considered 'questionable criteria', and any distinctions made based on them are in fact by definition forbidden if these factors play a significant role. Likewise, a systemic focus on certain nationalities goes against the right to free movement of persons within the EU, because it in essence creates a veiled form of border control for individuals originating from those countries.*

*Although they are generally aware of the delicate situation with regard to selection on the basis of nationality and/or physical characteristics, RNM officers see this as a necessary evil directly dictated by the objective of the MSM as an instrument of immigration law."*

89. Within the broad discretionary freedom, physical appearance, including ethnicity, is therefore a major indicator the RNM uses for presumed nationality of a person and often, following on from that, particular criminal conduct. This can lead to systemic negative stereotyping of certain nationalities and groups, which is incompatible with the prohibition on racial discrimination.
90. Furthermore, while nationality plays an important role within the MSM process, it has been shown that the actual selection is frequently made on the basis of ethnicity ("*...officers place a great deal of weight on... the appearance of the passengers of the vehicle as indicators... to derive the presumed nationality of the passengers...*").<sup>32</sup> This is also evident from the check that was carried out on [claimant 1], which is discussed in section 4.3. In that case, the selection criteria

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<sup>32</sup> 0: Van der Woude et al., (2016), pp. 137, 138.

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. [Claimant 1] was nonetheless not stopped because of his Nigerian passport, but because he looked like a Nigerian, namely, a person with dark skin.

91. The findings of Van der Woude et al. largely align with an evaluation of the MSM commissioned by the Dutch government in 2001.<sup>33</sup> This evaluation similarly demonstrated that skin colour and ethnic origin play an important role in selection.<sup>34</sup> That evaluation also explicitly highlighted the stigmatising effects of checks on illegal immigration when performed on persons with legitimate residence status.<sup>35</sup> Several Moroccan-Dutch individuals who have experience with being regularly singled out for checks when going on holiday or commuting across the border describe it as: “*each time, all over again, that sense of questioning whether you have the right to be there.*”<sup>36</sup> The government never issued an official response to this evaluation, however, nor was it ever discussed in Parliament.<sup>37</sup>
92. Brouwer's findings in his recent dissertation on border checks in practice likewise demonstrate that skin colour, ethnic origin and factors such as ‘history’ play an important role in the selection of persons, because fixed selection criteria are lacking.<sup>38</sup>

*“[RNM officers] received very little information on how to recognise unauthorised immigrants. For example, neither the general education all RNM officers receive, nor the specific training to become a motor driver contains elements on the selection of vehicles or persons. [...] In general officers relied on their own judgments about how to filter out potential unauthorised immigrants. Besides the nationality of the license plate, the*

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<sup>33</sup> O: R. Witte, V. Wijkhuijs, A. Kaouass, M. Scholtes & S. Akkes, *Effectief Mobiel Toezicht Vreemdelingen. Eindrapportage* [Effective Mobile Monitoring of Aliens: Final Report], The Hague: 2001.

<sup>34</sup> O: Witte et al. (2001), p. 35.

<sup>35</sup> O: Witte et al. (2001), p. 68.

<sup>36</sup> O: Witte et al. (2001), p. 68.

<sup>37</sup> O: Amnesty Report (2013), p. 87.

<sup>38</sup> O: J. Brouwer, *Detection, detention, deportation: criminal justice and migration control through the lens of crimmigration*, Eleven International Publishing: 2020, p. 69–74.

*number of passengers and the state of the vehicle, they strongly relied on skin colour as a visible marker of 'foreignness' to detect potential unauthorised immigrants. Almost all RNM officers we met were white males and perceived non-whiteness as an important indicator of foreignness. In practice this meant that during our observations primarily black or Arab-looking people were stopped."*

*"Although most RNM officers were aware of the sensitivity of using racial or ethnic categories as a factor in their decisions and societal concerns about discrimination, they nonetheless often freely admitted that these categorisations played a role in their selection. As one of them said: "[...] Somebody's skin colour is for us the first sign of possible illegality".*

*"Overall there was a common understanding among RNM officers that "there is almost always something wrong" with members of these groups [Eastern European] in the border area is concerned. This led to extreme statements proclaiming that 9 out of 10 times Eastern European drivers have burglary tools in the trunk, or that Romanian looking people in a vehicle with a British or Spanish license plate were 9 out of 10 times thieves. These 'profiles' were based on shared ideas rather than on information provided by the organisation."*

93. Brouwer further observed that the RNM had no control mechanisms in place, which led to potential discrimination and tunnel vision:<sup>39</sup>

*"Although some individual officers did reflect upon the inherent risk of developing generalisations about crime among certain categories of foreigners, they never referred to this type of reflection as being part of the training and professionalisation on the job. Moreover, a more objective attempt to measure the success of existing practice-based profiling strategies – for instance by every now and then making a comparison with the outcomes of a random sample – is lacking. This high trust in and dependency on experience and sharing of experiences carries a risk of*

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<sup>39</sup> 0: Brouwer 2020, p. 79.

*institutionalised tunnel vision. The latter is not only a matter of potential discrimination, it may also lead to overlooking new developments.”*

94. An investigation of [claimant 2]’s complaint by the National Ombudsman also concluded that RNM officers select travellers based on their skin colour or ethnicity in combination with other criteria that the RNM deem relevant. There are no set criteria for this selection. Officers have stated that they are trained to recognise conspicuous or aberrant behaviour, and that the recognition of this behaviour must be developed primarily through experience until it becomes something of a ‘sixth sense’.<sup>40</sup> This means that it is, essentially, a subjective determination rather than something based on set criteria.
95. Similarly, [claimant 1]’s hearing in the complaint procedure filed with the RNM revealed that in light of the broad discretionary authority granted to RNM officers, it is sometimes extremely unclear who and how they should select, and the basis on which the selection must happen is frequently vague. MSM checks may be conducted on the basis of either old or new “intelligence” (information), or both, but RNM employees can also decide to conduct an MSM check simply at their own discretion. During the hearing, the officer in question stated that Italian and Polish passengers were checked on the basis of a general (random) check. Nonetheless, [claimant 1] was checked because he met the selection criteria that had been drafted on the basis of the police information pertaining to Nigerian money smugglers, specifically: non-Dutch appearance, walking quickly and smartly dressed. Here, however, the RNM takes inherently contradictory positions: as soon as a selection is made on the basis of selection criteria, the selection cannot, by definition, be considered random. Both of these conditions cannot be true at the same time. The officer in question confirmed that he thought that [claimant 1] was possibly a Nigerian man as described in the police information.<sup>41</sup>
96. It therefore appears that RNM officers at airports do use physical appearance as a significant factor, because there is no other framework for making these

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<sup>40</sup> 0: Investigation by the National Ombudsman, *Uit de Rij Gehaald* [Pulled out of the line], 2017/44, 29 March 2017, p. 4, 7.

<sup>41</sup> 0: Report of the hearing of the complaints committee with regard to the complaint of [claimant 1] [reference number], date [date], p. 1 and 3.

selections. This also came up during the same hearing, in which the officer involved in stopping [claimant 1] in this specific instance stated, in part, that “*the Aliens Act does not tell us what tools can be used to perform the selection*”, “*it could be said that there is a lack of tools in terms of the correct implementation of MSM checks*”, and that in making choices, he “*gave extra attention to physical characteristics*”. Another officer stated that “*when you do this job, you learn by experience whether someone is a foreigner or a refugee. That’s experience you build up over the years. We do select based on physical characteristics, but that’s one component of the whole picture. Excluding physical appearance from an MSM check is impossible,*” the RNM officer said.<sup>42</sup>

97. The foregoing leads to the following conclusion. Academic research, an MSM evaluation by the government, and statements by RNM officers themselves all confirm that officers have broad discretionary power in selecting individuals for MSM checks. Within this freedom, there are few or no guidelines for that selection. Although the discretionary power should be limited by the prohibition on discrimination and the principle of equality, it appears undeniable that ethnicity, skin colour and physical appearance are in fact important indicators used by RNM officers when deciding on selection. This not only has a negative effect on the individual, but also sets the stage for ethnic profiling, which can lead to systemic negative stereotyping of certain nationalities and groups.

#### **4.2. The experiences of [claimant 2] at [location of airport]**

98. [Claimant 2] lives in [country] and works in the Netherlands. This means that he must regularly travel between the Netherlands and [country]. The Netherlands and [country] are both Schengen countries, which means there are no regular border controls between the two. However, random MSM checks are carried out on preselected flights.
99. Between March and June 2015, [claimant 2] flew between [place of residence] and [location of airport] four times.

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<sup>42</sup> 0: Report of hearing of [claimant 1], p. 5.

- (i) [Claimant 2] was singled out for checking for the first time on 7 March 2015. According to his account, he was the only passenger who was checked. He was given no reason for the check.
  - (ii) On 23 March 2015, he was not checked.
  - (iii) On 15 March 2015, he was checked for the second time. The reason given for the check this time was that the RNM is required to check 10% of the passengers. According to [claimant 2], this is not true. The plane was full of 'white' Dutch people, and yet he was still the only one taken out of line for screening.
  - (iv) On 3 June 2015, he was checked for the third time. This time, the reason that the RNM gave was because he was the last one getting off the plane.
100. This has every appearance of being an arbitrary, contrived reason. In any case, in none of the three instances that [claimant 2] was checked did the officers of the RNM look at his passport, which was placed in a blue sleeve so was not recognisable from a distance as a Dutch passport.<sup>43</sup> All three times, according to his account, he was the only person checked, and the 'white' passengers were all allowed to proceed. [Claimant 2] can only conclude that he was stopped due to the colour of his skin. Based on these experiences, on 18 June 2015, [claimant 2] contacted RADAR because he felt discriminated against by the RNM.

#### **4.2.1. RNM complaint procedure**

101. On 26 June 2015, RADAR filed a complaint of unequal treatment with the RNM on [claimant 2]'s behalf (0). On 8 August 2015, the complaints officer of the RNM responded that based on interviews with the officers involved, there was no evidence that skin colour and/or race were the specific basis of the check (0). On 4 September 2015, a complaint on behalf of [claimant 2] was submitted to the RNM complaints committee, because [claimant 2] was unsatisfied with the complaints officer's explanation (0). This led to a hearing before the RNM's complaints committee, which was held on [date]. Subsequently, on [date], the Commander of the RNM ruled in accordance with the recommendations of the complaints

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<sup>43</sup> 0: Investigation by National Ombudsman, p. 5.

committee that the complaint was unfounded because discrimination had not been plausibly demonstrated (0).

#### **4.2.2. Complaint procedure before National Ombudsman**

102. Following this, on 4 March 2016, RADAR filed a complaint on [claimant 2]'s behalf with the National Ombudsman (0). In its report of [date], the Ombudsman's office established that [claimant 2] had provided a very detailed account of his experiences and noted that, apart from the colour of his skin, there was no reason for him to have been pulled from the line for screening. The Ombudsman also found that in each case, the RNM had given an insufficient explanation of the reason for the selection of [claimant 2]. The investigation also demonstrated that RNM officers select passengers on the basis of their skin colour if that, in combination with something else, constitutes cause for an MSM selection (see paragraph 92 above).
103. In a response to the National Ombudsman, the Ministry of Defence adopted the ruling of the RNM complaints committee and declared the complaint unfounded. The National Ombudsman was surprised by this, because the complaints committee had in fact concluded that the facts were not concrete enough to determine that discrimination was a factor. Consequently, the complaints committee should actually have been expected to conclude on that basis that the facts had not been established, and that therefore it could not make a determination.<sup>44</sup>
104. The National Ombudsman considers it reasonable that [claimant 2] feels that he is the victim of discrimination. The RNM has proven unable to answer the question of why [claimant 2] was selected three separate times. This creates the appearance of discrimination on the part of the RNM.<sup>45</sup> For this reason, it is up to the RNM to prove that there was no discrimination by demonstrating that [claimant 2] was selected on the basis of objective criteria and not on the basis of skin colour.<sup>46</sup> Because the RNM cannot do this, the National Ombudsman considers

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<sup>44</sup> 0: Investigation by National Ombudsman, p. 7.

<sup>45</sup> 0: Investigation by National Ombudsman, p. 7.

<sup>46</sup> 0: Investigation by National Ombudsman, p. 8.

[claimant 2]'s complaint about the conduct of the RNM well-founded on the basis of the failure to sufficiently ensure compliance with the prohibition on discrimination.<sup>47</sup>

105. The National Ombudsman takes the position that the way in which the RNM has set up the MSM screening procedure at [location of airport] is prone to creating the appearance of discrimination. What the National Ombudsman envisions is a different setup of the screening process, in which passengers selected for screening are given more explanation of the reasons for the check, and that more elements of the text of the Aliens Act Implementation Guidelines are adopted in carrying out the checks, by which either all passengers are checked or the passengers who are checked are selected on a random basis. The National Ombudsman asked the Ministers of Defence and of Security and Justice to consider structuring the MSM checks to ensure that they are done on the basis of objective criteria, to avoid the appearance of discrimination (particularly on the basis of skin colour).<sup>48</sup> In light of the apparent policy that ethnicity can still play a role in selection decisions for MSM checks, it is clear that these recommendations have not been implemented or have not been implemented correctly.

#### **4.3. The experiences of [claimant 1] at [location of airport]**

106. On 30 April 2018, [claimant 1] flew from Italy to [location of airport]. He was wearing a pair of slacks and a blazer. Upon arriving at [location of airport], as he walked into the airport, [claimant 1] was pulled aside by an officer of the RNM and taken down a different track from the rest of the approximately 150 passengers. All of the other disembarking passengers walking by could see that [claimant 1] had been taken out of the line and placed in a corner of the main airport area, where he was met by another RNM officer. [Claimant 1] was then able to see that only people with 'non-white' skin colour were being selected and checked, and that all of these other checks likewise were not being carried out in an enclosed room, but in the public area for all to see. The stream of passengers who were not being

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<sup>47</sup> O: Investigation by National Ombudsman, p. 8.

<sup>48</sup> O: Investigation by National Ombudsman, p. 9.

checked and allowed to continue on were, as far as [claimant 1] could see, all 'white'.

107. While his passport was being checked, [claimant 1] pointed out to the officer that the only people being checked were 'non-white' people. The officer responded that the RNM must be alert for potential criminals, terrorists and refugees. When [claimant 1] responded: "*And they're all black, no doubt,*" he was not contradicted.<sup>49</sup>
108. [Claimant 1] also took issue with the officer about the method used by the RNM and the impact of his actions, namely ethnic profiling, on both [claimant 1] himself and society in general, emphasising that the RNM, as representative of our democratic state at the border, should bear a special responsibility of guaranteeing security and freedom for all, in accordance with Article 1 of the Constitution and fundamental values of our legal system.
109. Immediately after the check, [claimant 1] posted on social media that he had been ethnically profiled by the RNM (0). In the days that followed, he was interviewed in various media about the incident (0),<sup>50</sup> and on 4 May 2018, this led to a member of Parliament, Salima Belhaj, asking parliamentary questions to the Minister of Defence about ethnic profiling by the RNM at [location of airport].<sup>51</sup>
110. [Claimant 1] is of the opinion that he was ethnically profiled (and thus discriminated against) by officers. On that basis, [claimant 1] therefore decided to engage with the PILP-NJCM and file a complaint about the RNM's actions. This complaint was filed on 11 June 2018.<sup>52</sup>

#### **4.3.1. RNM complaint procedure**

111. [Claimant 1]'s complaint concerns, in part:
- (i) the selection of only people of 'non-white' skin colour;

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<sup>49</sup> 0: Complaint submitted by [claimant 1] and PILP-NJCM to the RNMC, 11 June 2018, p. 2.

<sup>50</sup> See also: 0.

<sup>51</sup> *Parliamentary Documents II*, 2017/18, no. 2018Z08367 (Parliamentary Questions of 4 May 2018).

<sup>52</sup> 0: Complaint of [claimant 1].

- (ii) that the screening of people of 'non-white' skin colour took place in front of other (white) passengers, which is stigmatising and engenders a negative image of 'non-white' people;
  - (iii) the suggestion that all potential criminals, terrorists and refugees are 'non-white';
  - (iv) the fact that ethnicity or skin colour was evidently a component of the RNM's profiling on 30 April 2018, and that this represents a prohibited form of discrimination.
112. The complaint argues that on 30 April 2018, the profile used by the RNM to carry MSM checks created the foundation for systematic ethnic profiling. Whether ethnicity itself is explicitly a component of that profile is not relevant (see paragraphs 90 and 95 above). The complaint is also directed more generally against the methods of the RNM, because the RNM admits that ethnicity can be relevant to its decisions. This makes the methods of the RNM inherently discriminatory and can prompt officers to engage in ethnic profiling and discrimination.
113. Prior to the submission of the complaint, [claimant 1] and the PILP-NJCM had two meetings with the RNM to discuss the situation. The first of these was on 14 May 2018, after which (on 11 June 2018) the PILP-NJCM filed a complaint with the RNM on [claimant 1]'s behalf regarding the actions of the RNM. The second meeting took place on 17 July 2018 in Leiden. On 24 September 2018, the brigade commander sent the response to the complaint to [claimant 1] (0). [Claimant 1] and the PILP-NJCM did not agree with the perspective outlined in the response, and so, on 12 October 2018, submitted the complaint to the RNM's complaints commission (0). The hearing before the complaints commission was held on 23 November 2018.<sup>53</sup>
114. From what was discussed in the hearing and from the statements of the officers who were on duty at [location of airport] on 30 April 2018, it became clear that this was indeed a situation of ethnic profiling. The officers in question made the following statements:

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<sup>53</sup> 0: Report of hearing of [claimant 1].

*“The reason for me to select [claimant 1] M. was to have my colleague check his nationality, identity and immigration status.”<sup>54</sup>*

*“Selection criteria on this flight from Italy were, for me: walking quickly, smartly dressed, person of non-Dutch background, travelling alone or with family. [...] In that instance, [claimant 1] met the criteria, because he was walking quickly, was well-dressed, was travelling alone and, in addition, had the appearance of a non-Dutch person, potentially a foreign national. In our official capacity we are aware that there is significant traffic of Nigerians travelling from Italy with large amounts of cash in hand, which is something that makes screening worthwhile for us.”<sup>55</sup>*

*“I explained to [claimant 1] M. that we were in the process of performing an MSM check under the applicable legislation regarding foreign nationals, by which we would be checking identity, immigration status and nationality. I am aware that there are large numbers of refugees coming to the Netherlands from a number of places, including Italy.”<sup>56</sup>*

*“The chairperson notes that, according to the complaint file, the selection criteria were: non-Dutch appearance, walking quickly and smartly dressed. [...] these selection criteria were drafted on the basis of the police information with respect to Nigerian money smugglers. The chairperson asks what the difference is between Dutch and non-Dutch appearance. She gives the example of a Polish person, and asks whether a Polish person has a non-Dutch appearance. [...] The Italian and Polish passengers were checked on the grounds of the general screening. The chairperson asks whether the police information was therefore the reason for selecting people with dark skin. [...] asks [Officer Y] whether he thought that the complainant may have been a Nigerian man as described in the police information. [Officer Y] responds yes.”<sup>57</sup>*

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<sup>54</sup> 0: Statement 3a of the officers involved, p. 1.

<sup>55</sup> 0: Statement 3d of the officers involved, p. 1.

<sup>56</sup> 0: Statement 3b of the officers involved, p. 1.

<sup>57</sup> 0: Report of hearing of [claimant 1], p. 3.

*“The complainant asks what non-Dutch appearance means. The chairman notes that one could say that the complainant has a non-Dutch appearance.”*<sup>58</sup>

115. The officers stated that in addition to a Polish person and an Italian person, they also checked a number of other individuals with ‘non-white’ skin colour while [claimant 1] had been pulled aside. These were, according to the officers, an ‘African group’ of two women with children who the officers had approached with a question. They were also checked, to be on the safe side, because they fit “*the profile of asylum-seekers*”.<sup>59</sup>
116. In the recommendations on [claimant 1]’s complaint, the complaints commission established that [claimant 1] was stopped for a check because he met the selection criteria: non-Dutch appearance, walking quickly and smartly dressed.<sup>60</sup> The complaints commission considers this in itself to be objectively justified (even if it should have been better explained to [claimant 1]):

*“[...] that the MSM is based on the law and serves a legitimate purpose. The selection criteria applied, derived from the profiles, are therefore not in accordance with the law, however. They must be justifiable in themselves on an objective basis. If, as in this case, selections are made in part on the basis of ‘non-Dutch appearance’, the use of that criterion must be justifiable on an objective basis, because it can lead to selection on the basis of ethnicity or, for example, skin colour. What is then relevant is what the background is for selecting such a criterion, what the other selection criteria and the grounds for those criteria are, and in what context and circumstances the screening takes place. Taken together, this can constitute an objective justification to, in fact, select certain persons with a ‘non-Dutch appearance’. This can also avoid the appearance of ethnic profiling. With regard to the applied selection criteria of ‘walking quickly’ and ‘smartly dressed’, the Complaints Commission determines that these are insufficiently distinctive to remove the*

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<sup>58</sup> 0: Report of hearing of [claimant 1], p. 6.

<sup>59</sup> 0: Statement 3d, p. 1; 0: Recommendations of complaints commission on the complaint of [claimant 1], 8 January 2019, p. 4.

<sup>60</sup> 0: Recommendations of complaints commission, p. 4.

*aspect of discrimination, or the appearance of discrimination, on the basis of ethnicity or skin colour. They are formulated extremely broadly.*<sup>61</sup>

117. During the hearing, it was stated on the RNM's part that [claimant 1] was selected based on police information. The complaints committee concluded that this does not justify the selection in hindsight, but because the reason that he was stopped was not communicated to [claimant 1], the appearance of ethnic profiling was not prevented.<sup>62</sup> According to the complaints committee, there were no indications that the officers involved had the *intention* to engage in ethnic profiling. Nonetheless, their actions did have the effect of ethnic profiling.<sup>63</sup> To this extent, the complaints commission considers [claimant 1]'s complaint well-founded. These recommendations were followed in the decision on the complaint by the Commander of the RNM dated 5 February 2019 (0).
118. [Claimant 1] et al. cannot accept the complaints committee's ruling. On the basis of the risk profile that was used on 30 April 2018, [claimant 1] will always be pulled from the line because of his skin colour and ethnicity. Despite the fact that there have been 'non-white' Dutch people for well over 400 years, he is still seen as a 'non-Dutch' person. The skin colour and assumed background/nationality of [claimant 1] is undeniably one of the reasons why he was pulled from the line. He was ethnically profiled, and as such, discriminated against. The complaints committee's ruling that "the appearance of ethnic profiling was not prevented" because the selection decision was not explained well to [claimant 1] is not sufficient.
119. [Claimant 1] et al. can accept the consideration that the 'non-Dutch appearance' selection criterion can become the basis for selection on grounds of ethnicity or skin colour. To this, the complaints commission attaches the consequence that this criterion must therefore only be used if the other selection criteria in themselves can be *objectively justified*. The committee additionally found that 'walking quickly' and 'smartly dressed' are insufficiently distinguishing, because these criteria are

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<sup>61</sup> 0: Recommendations of complaints commission, p. 4.

<sup>62</sup> 0: Recommendations of complaints committee, p. 5.

<sup>63</sup> 0: Recommendations of complaints committee, p. 5.

too broadly formulated.<sup>64</sup> [Claimant 1] et al. note in supplement that ‘walking quickly’ and ‘smartly dressed’ are difficult to establish objectively, and also do not give any indication of illegal residence and/or criminal activity – neither in themselves, nor in combination with ‘non-white’ skin colour. Furthermore, unlike a specific suspect profile, general police information about risk groups (‘Nigerian money smugglers’) offers no objective or reasonable justification to distinguish by appearance.

120. The complaints committee refers to the fact that the officers who selected [claimant 1] did not have the *intention* to ethnically profile. However, intention is not relevant to the establishment of whether ethnic profiling, and thus discrimination, has happened. The only thing necessary to demonstrate discrimination is that an unjustified difference in treatment has occurred.<sup>65</sup>
121. Contrary to what the complaints committee may believe<sup>66</sup>, the fact that an Italian passenger and a Polish passenger were also checked is irrelevant to the assessment of the question of whether [claimant 1] was ethnically profiled. The Italian and the Polish passengers were selected at random, while [claimant 1] was selected on the basis of a risk profile.<sup>67</sup> In other words, the Italian and Polish passengers were not selected for reasons of their (in the eyes of the officers) ‘non-Dutch’ appearance, fast walk and smart clothing’. Furthermore, it is clear that the RNM has not adopted the suggestion of the National Ombudsman in the matter of [claimant 2] (either check all passengers, or check a random selection of passengers), or at least not consistently, given that [claimant 1]’s selection was not at all random.

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<sup>64</sup> 0: Recommendations of complaints committee, p. 4.

<sup>65</sup> Error! Reference source not found. @@@ European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law*, Council of Europe, 2010, p. 135; see also: Court of Justice of the European Union, 10 July 2008, ECLI:EU:C:2008:397, C-54/07 (*Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*).

<sup>66</sup> 0: Recommendations of complaints committee, p. 4.

<sup>67</sup> 0: Recommendations of complaints committee, p. 4.

122. This is why [claimant 1] filed his complaint with the National Ombudsman. [Claimant 1] expects that the processing of the complaint will be suspended pending the court's ruling in these proceedings on the merits.

#### **4.4. Complaint procedures do not offer a remedy for ethnic profiling**

123. The RNM's complaint procedure does not offer a permanent solution for the issue of ethnic profiling. This is inherent to the goal and function of the procedure. By definition, the complaint can only pertain to the 'proportionality' and 'reasonableness' of the specific conduct of a specific RNM officer. As long as the Minister of Defence, the Minister of Security and Justice and the RNM believe that it is acceptable to make selections (either fully or partially) on the basis of skin colour, ethnic profiling will not be considered 'disproportionate' and 'improper conduct', and thus will remain standard practice at the RNM.
124. Furthermore, the complaints committee is not external or independent, and has no binding authority over the RNM. The complaints committee *advises* the Commander of the RNM, but there is no independent judicial review. Neither does the complaints committee make its decision on the complaint public. The RNM's complaint procedure therefore does not offer adequate protection against ethnic profiling and discrimination.

#### *Handling of [claimant 2]'s complaint*

125. The handling of [claimant 2]'s complaint further illustrates that the RNM's complaint procedure fails as a remedy against ethnic profiling. The conclusion of the complaints committee was that there was no discrimination 'because this could not be proven'. However, the officers in question were not questioned as part of the complaint procedure because the RNM was unable to determine who those officers were. This lack of investigative effort is appalling, certainly when it comes to an issue as serious as discrimination.<sup>68</sup>

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<sup>68</sup> 0: Investigation by National Ombudsman, p. 6.: "Complaints about discrimination must be taken very seriously. When there are serious indications, these must be thoroughly investigated. It is precisely in the face of an accusation such as this, in relation to the MSM system, that it is also in the interest of the administrative body to investigate this complaint and determine exactly what happened. This is what will show that the complaint has been taken seriously and that the accusation was incorrect or not provable."

126. But in addition to this, based on the information that was presented, the complaints committee drew the wrong conclusion. As the National Ombudsman rightly held, the appearance of discrimination was created, so it was the obligation of the RNM to demonstrate that discrimination had not occurred. In any case, the complaints committee was unable to determine that [claimant 2]'s complaint was *unfounded*.

*Handling of [claimant 1]'s complaint*

127. In the handling of [claimant 1]'s complaint, the complaints committee did conduct an investigation and questioned all of the officers involved. The committee came to the conclusion that ethnic profiling had occurred. The complaint was declared well-founded because the appearance of ethnic profiling was not prevented, as the officers involved did not adequately inform [claimant 1].
128. [Claimant 1] et al. dispute that only 'the appearance of ethnic profiling' was not prevented: [claimant 1] was, in fact, ethnically profiled. No explanation can change this fact; it is, of course, a fact that [claimant 1] was selected due to his ethnicity and the colour of his skin.
129. None of the individuals involved made any apology to [claimant 1] for the fact that he was ethnically profiled, and thus discriminated against, nor has there been any commitment that the RNM will stop ethnic profiling. Quite the contrary, at the meeting in Leiden on 17 July 2018, it was even stated on behalf of the RNM that it is likely that [claimant 1] will again be pulled from the line next time, as well. The RNM only made a recommendation to translate the strategic framework of 'Use of ethnicity in profiling' into operational and practically workable instructions to avoid the appearance of ethnic profiling during MSM checks.<sup>69</sup> Moreover, this strategic framework in fact simply confirms that ethnicity may continue to be one of the factors in the selection for MSM checks.<sup>70</sup>

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<sup>69</sup> 0: RNMC report, *Achtergrond en analyse bij het Strategisch kader – 'Gebruik etniciteit bij profileren'* [Background and analysis of strategic framework: Use of ethnicity in profiling], 28 June 2017.

<sup>70</sup> 0: recommendation of RNMC, p. 4: *Ethnicity can be a relevant component of the indicators for selecting and checking someone. This indicator may be used by the RNMC, but always in combination with other indicators that justify a check. In addition, a check must be explainable and correct treatment of persons must be the highest priority. If this is not the case, then the check constitutes ethnic profiling and is therefore a form of discrimination, which must be avoided.*

130. All in all, there is therefore no reason to expect that the RNM will sufficiently change its conduct on the basis of any number of complaints submitted.

#### **4.5. RNM methods offer insufficient guarantees against ethnic profiling**

131. In answer to the parliamentary questions about discrimination and ethnic profiling by the RNM at the airports in [location of airports], the responsible public officials assert that “*non-discriminatory conduct is the assumption for all enforcement activities by the RNM.*”<sup>71</sup> They also describe the measures that the RNM should have taken to ensure non-discriminatory conduct or to prevent discrimination or ethnic profiling in the course of the MSM check. The following measures are mentioned:

- (i) In courses, training and daily briefings, attention must be paid to the assumption of non-discriminatory conduct. In addition, information and e-learning modules must be available in the digital workplace (including mobile devices).
- (ii) Officers are trained to hold each other accountable for improper conduct.
- (iii) Persons to be checked are selected on the basis of:
  - general profiles based on experience and figures, information, assessments and risk indicators;
  - technical tools that help determine who is checked;
  - deviations from the norm (for example: ‘walking quickly, being nervous or avoiding eye contact’);
  - identification of individuals.
- (iv) In the foregoing, the appearance (including ethnicity of the person) is considered relevant, but always also on the basis of other objective indicators or information;<sup>72</sup>
- (v) Explanation of screening to, and correct treatment of, persons selected for checks;

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<sup>71</sup> See footnote 4/22 and 23.

<sup>72</sup> See, once again, footnotes 4 / 22 and 23 (“The physical appearance (including ethnicity) can be relevant, but always in combination with other objective indicators or information”).

(vi) Use of the Behaviour Detection method taken from Predictive Profiling.<sup>73</sup>

132. Because the policy with regard to MSM checks allows for selection based in part on external characteristics, the possibility of ethnic profiling is de facto policy. The stated assumption of 'non-discriminatory conduct' is incompatible with this, and thus an illusion. In this situation, whether and the extent to which the measures outlined above produce any desired effect is not particularly relevant. Additionally, the information that would be required to make any meaningful statement about this is lacking, because proactive MSM checks are not systematically recorded. Despite this, in the following, [claimant 1] et al. will present a point-by-point commentary on the measures in question intended to implement the prohibition on discrimination and fight ethnic profiling.

1. Training on non-discrimination (paragraph 131, under i). The material used in training sessions and briefings to inform the RNM officers of the non-discrimination principle is not public. This makes it difficult to assess whether this training is effective. Additionally, there is currently very little evidence that the training of police officers leads to changes in the way that police officers observe, think and act, even though training is a very common component of change programmes intended to combat ethnic profiling.<sup>74</sup> It is also well known that training about an individual's own prejudices and stereotypes has no effect on people who do not have a problem with discrimination.<sup>75</sup>
2. Holding each other accountable for improper conduct (paragraph 131, under ii). Holding co-workers accountable for improper behaviour is difficult in any work environment, and particularly when the co-worker in question has a higher rank or position. Moreover, doing this also requires clarity on what is

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<sup>73</sup> Method intended to provide tools for self-reflection, objective action and verbalisation of unusual behaviour. See *Appendix to the Proceedings II*, 2017/18, 2340, p. 3 (Response from Minister Bijleveld-Schouten (Defence) and the State Secretary of Justice and Security, 8 June 2018); and **O**: Defensie magazine, article: *RNM-brede aanpak predictive profiling* [RNMC-wide approach to predictive profiling], 31 January 2019.

<sup>74</sup> **O**: W. Landman & H. Sollie, *Tegengaan van etnisch profileren. Een internationale literatuurstudie naar effecten van interventies* [Fighting ethnic profiling. An international literature survey of effects of interventions] (study commissioned by the Police & Sciences Programme), 2018, p. 85.

<sup>75</sup> **O**: H. Felten & I. Taouanza, *Wat werkt bij het verminderen van discriminatie* [What works in the reduction of discrimination] (study by the Integration & Society Knowledge Platform), 2018, p. 27.

and is not proper conduct. This, coupled with the fact that the broad discretionary monitoring powers for MSM checks are not clearly defined with specific and concrete instructions, would seem to make this no easy task. The RNM officers would only be able to hold each other accountable if there was an understanding at the organisational level that ethnic profiling is not tolerated and is not effective. That, however, is not the case; see paragraph 132 above. Much to the contrary, among the officers of the RNM, certain nationalities (which are assumed from physical characteristics) are associated with certain types of criminal activity (paragraphs 87-88 above).

3. Selection on the basis of profiles (paragraph 131 (iii), first bullet point). Selection based on general risk profiles offers no guarantee against discrimination or ethnic profiling. On the contrary, such risk profiles are in fact one of the major causes of discrimination and ethnic profiling. The example of the 'Nigerian money smuggler' risk profile demonstrates this clearly. Based on this profile, [claimant 1] was selected because of his dark skin.
4. Selection on the basis of unusual behaviour (paragraph 131 (iii), second bullet point). 'Walking quickly', 'looking nervous' or 'avoiding eye contact' are difficult things to establish objectively. Moreover, it is questionable whether, or in fact there is no evidence that, these things can be seriously considered indications of potential criminal conduct. Of course, many people walk 'quickly' when disembarking from an airplane; they may be rushing to catch a connecting flight, or have an appointment, or need to relieve themselves, etc. If the combination of such indicators and ethnicity were permitted, then ethnicity (and the prejudices and stereotypes that this entails) would most likely be the decisive factor in a selection. This should make clear why it is extremely problematic to establish a link between ethnicity and these subjective indicators.
5. Selection with the assistance of tech-based tools (paragraph 131 (iii) third bullet point). Without clarity regarding what technical tools this refers to, there is nothing to be said here.

6. Selection on the basis of identifying characteristics (paragraph 131 (iii), fourth bullet point). Selection of persons based on specific identifying characteristics of a suspect and/or a concrete suspicion is permissible.
  7. Explanation of screening to, and correct treatment of, persons selected for checks (paragraph 131 (v)). The idea is (presumably) that a neutral, respectful interaction will lead to more satisfaction about the contact with, and increase confidence in, the RNM. It is true that research has shown this to have a positive effect.<sup>76</sup> However, it must be kept in mind that while an appropriate interaction can reduce the negative impacts of ethnic profiling, it does not and cannot eliminate the ethnic profiling itself.<sup>77</sup> Appropriate conduct by police officers does not change the fact that proactive searches (especially if performed frequently) can implicitly convey a message about the status of an individual in society, and may consequently give rise to a sense of exclusion.<sup>78</sup>
  8. Method of selection for aberrant behaviour (paragraph 131 (vi)). Such methods are also referred to as the ‘Search Detect React’ method or the ‘Spotter approach’. For the most part, these methods have not been properly researched. Researchers have significant concerns about the assumptions underlying these methods.<sup>79</sup> In the only (known) robust study of SDR training, the researchers found: “[...] *essentially no effects on the actual policing conduct of officers: the hit ratio remained the same, and there was no observable change in the degree to which the proactive conduct could be objectively justified...*”<sup>80</sup>
133. The foregoing leads to the conclusion that the RNM's methods offer insufficient guarantees against ethnic profiling.

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<sup>76</sup> O: Landman & Sollie (2018), p. 62-66.

<sup>77</sup> O: Landman & Sollie (2018), p. 66.

<sup>78</sup> O: W. Landman & L. Kleijer-Kool, *Boeven vangen. Een onderzoek naar proactief politieoptreden* [Catching bad guys: A study of proactive police action] . Apeldoorn/Amsterdam: Police & Science, Reed Business: 2016, p. 191.

<sup>79</sup> O: *Observant Online*, article *Politie gebruikt “kwakzalvers”-methoden* [Police using snake oil-methods], 10 January 2013.

<sup>80</sup> O: Landman & Sollie (2018), p. 70.

#### 4.6. Ethnic profiling is not effective

134. In sections 5 and 6 below, we will discuss why ethnic profiling is a violation of human rights and is unlawful. Independently of that, ethnic profiling is not even effective. The Dutch police have already echoed this:

*“But pulling someone aside purely on the basis of their appearance is wrong, unprofessional, ineffective, and undermines the public’s trust in the police.”<sup>81</sup>*

135. Researchers have studied from a theoretical perspective<sup>82</sup> why ethnic profiling is not effective. The assumption is that the vast majority of people of any ethnic group reject criminality, and this is the reason why, in the context of fighting criminality, ethnicity is both an over-inclusive and under-inclusive criterion. If people are selected fully or partially on the basis of their ethnicity, many people of that ethnicity who have done nothing criminal will still be stopped and searched. Meanwhile, people of other ethnicities who have engaged in criminal activity will not be selected. This can be illustrated by way of example. Say that the police have decided to stop twice as many ‘non-white’ drivers as ‘white’ drivers for proactive roadside checks, perhaps because police figures have shown that ‘non-white’ drivers are much more frequently found to be driving under the influence. This will lead to a dramatic increase in the number of people from a given minority group who are wrongly stopped by the police – but it will not lead to a more successful police operation, because ‘white’ drivers who are driving under the influence will then go unchecked, and this will skew the statistics.
136. The few studies that have been done in the Netherlands into the benefits of proactive checks make clear that these benefits, expressed in numbers of fines or

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<sup>81</sup> 0: Police press release, *Rapporten onderbouwen aanpak etnisch profileren* [Reports substantiate approach to ethnic profiling], 3 October 2016.

<sup>82</sup> To this day, there have been no empirical studies into the effectiveness of ethnic profiling as a selection method.

arrests after an identity check or traffic stop,<sup>83</sup> stop-and-frisk action<sup>84</sup> or MSM check are not just low, but exceedingly low.<sup>85</sup>

#### 4.7. Ethnic profiling is harmful

137. Not only does proactive police action have only a modest benefit (effectiveness), but one must also consider the costs, including the costs to society. Research into proactive police action in the Netherlands has concluded that “*the overestimation of the benefits by police officers is paired with an underestimation of the costs*”.<sup>86</sup> The costs (or: damages) manifest themselves in a number of ways.
138. Firstly, ethnic profiling damages social cohesion. Ethnic profiling sends the signal that certain groups in Dutch society are second-class citizens. Even appropriate conduct by police officers does not change the fact that proactive searches (especially if performed frequently) can implicitly convey a message about the status of an individual in society, and may consequently create a sense of exclusion.<sup>87</sup> This can cause these people to reject society.<sup>88</sup> Quantitative research by the European Union Agency for Fundamental Rights (FRA) into the experiences and perceptions of discrimination by Muslims in twelve European countries, including the Netherlands, shows that people who experience discrimination, intimidation or violence as a result of their background or place of origin feel less connection with the country in which they live (Exhibit 64, p. 59).
139. Secondly, ethnic profiling increases mistrust in law enforcement. Minority groups that have the impression that they are subject to ‘stop and search’ because of their ethnic background or because they are immigrants have less confidence in law enforcement than minorities who are of the opinion that such ‘stop and search’

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<sup>83</sup> 0: Landman & Kleijer-Kool (2016), p. 180.

<sup>84</sup> 0: Amnesty Report 2013, p. 66 - 67; See also: 0: Article in national newspaper *De Telegraaf*, *De kwestie preventief fouilleren: Niet effectief en grote negatieve gevolgen* [The question of preventive frisking: not effective, and high negative impact], 14 September 2019.

<sup>85</sup> Van der Woude et al., (2016).

<sup>86</sup> 0: Landman & Kleijer-Kool (2016), p. 191.

<sup>87</sup> 0: Landman & Kleijer-Kool (2016), p. 191.

<sup>88</sup> 0: Amnesty report (2013), p. 5, 14-17.

checks are not related to their ethnicity.<sup>89</sup> People who have less faith in the authorities are also less willing to share information with them; this, too, diminishes the effectiveness of investigative work.

140. Thirdly, ethnic profiling is harmful to human well-being. Health studies have shown that people who experience discrimination are in poorer physical health, and in particular are prone to more psychological issues. The reason for this, the studies show, is that these experiences produce tension and stress; they are generally described as terrorising, humiliating and even traumatic.<sup>90</sup> And such effects can even occur in people who have not experienced discrimination themselves (or not yet), but see that people who look like them do.<sup>91</sup>
141. In conclusion, in Section 4.6 above, we have already looked at why ethnic profiling is not effective. But even if (in theory) it could lead to slightly higher arrest rates in the fight against certain forms of criminality, this modest 'extra' benefit would be outweighed by the high costs: the social cost and the negative impact of ethnic profiling on 'non-white' persons are exceedingly high.

#### **4.8. Combating ethnic profiling: the example of the police**

##### **4.8.1. Measures against ethnic profiling by the police**

142. Amnesty Netherlands, Controle Alt Delete, RADAR and the NJCM/PILP have long been active in addressing the problem of ethnic profiling. In the first instance, this was primarily ethnic profiling by the police, which has received a great deal of

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<sup>89</sup> **0**: Article in *Secondant*, 'Vertrouwen in de politie blijft bij sommige burgers achter' [Trust in the police remains low among some sectors of the public], 30 July 2018.

<sup>90</sup> **0**: Report of the European Union Agency for Fundamental Rights (FRA), *Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, 2010, p. 42.

<sup>91</sup> **0**: Article in *One World*, 'Discriminatie maakt letterlijk ziek' [Discrimination makes you literally sick], 26 September 2018; **0**: U. Ikram, *Social Determinants of Ethnic Minority Health in Europe*, University of Amsterdam, 2016, p. 157 et seq.

attention in recent years thanks in part to the Amnesty report in 2013,<sup>92</sup> the arrest of rapper Typhoon<sup>93</sup> and the recent documentary *Verdacht* [Suspect].<sup>94</sup>

143. The problem of ethnic profiling by the police has not yet been eliminated, as the documentary *Verdacht* illustrated. That said, there have been some real, positive changes since Amnesty first released a report in 2013. The police have taken real steps in attempting to eliminate ethnic profiling.<sup>95</sup>

144. In 2014, the Minister of Security and Justice underscored the interest in preventing ethnic profiling within the National Police Corps:

*“The prevention of ethnic profiling is of essential importance for the effectiveness and legitimacy of all people’s trust in and cooperation with the National Police Corps.”*

145. The Minister also committed to a number of measures, in response to recommendations by civic organisations, including Amnesty International, Controle Alt Delete, RADAR and the NJCM specifically.<sup>96</sup> As part of those measures, ethnic profiling was addressed in briefings in the Multicultural Professionalism training module and in subject-oriented meetings, and the approaches to be further embedded in education and training, complaint handling, police public relations, and diversity in the workplace in the coming year.<sup>97</sup>

146. And in recent years, the Minister and the police have indeed taken steps; a policy change has been drafted and (partly) implemented by the police, the intake of new officers from multicultural backgrounds has increased, all complaints on ethnic profiling are now being recorded at the national level, and obtaining information

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<sup>92</sup> O: Amnesty report (2013).

<sup>93</sup> O: Article in national newspaper *NRC*, ‘Etnisch profileren gebeurt, ook als je Typhoon heet’ [Ethnic profiling happens, even if your name is Typhoon], 30 May 2016.

<sup>94</sup> O: Documentary, *Verdacht* (2018).

<sup>95</sup> O: Police response to the documentary *Verdacht*, 10 December 2018.

<sup>96</sup> *Parliamentary Documents II* 2013/14, 29628 no. 463 (Letter from the Minister of Justice and Security, 8 July 2014).

<sup>97</sup> *Parliamentary Documents II* 2013/14, 29628 no. 463 (Letter from the Minister of Justice and Security, 8 July 2014).

about submitting a complaint or report, as well as the submission itself, has been simplified.<sup>98</sup>

147. The police also took an additional, and significant, step forward in October 2018. Where in previous police policy documents, ethnic profiling was defined as when a person was “*purely and solely*” checked on the basis of his skin colour (as is the current policy of the RNM), the use of ethnicity as a component of risk profiles and proactive checks by the police was banned in October 2018. A selection for a proactive check can now only be conducted on objective grounds. In the new professional guidance published on 27 October 2018, the police state that (0):

*“Making a distinction on the basis of physical characteristics, such as skin colour, background or religion is only permitted where there is an objective justification for doing so. This could be, for example, where there is a description of the suspect.*

*[...]*

*This means, for example, that you cannot check someone because he (by appearance) belongs to a group that is overrepresented in crime statistics, or because he simply ‘does not belong’ in that neighbourhood purely based on his appearance.”*

#### **4.8.2. Ethnic profiling in the news**

148. The steps described above to fight ethnic profiling are laudable. However, even these have not been able to fully eliminate ethnic profiling – as evidenced by the extent to which ethnic profiling has for years been (and continues to be) reported in the news media as a major societal problem. For illustrative purposes, the claimants submit a number of news reports from the summer of 2019 to the proceedings (0).

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<sup>98</sup> *Parliamentary Documents II* 2016/17, 30 950, no. 105 (Letter from the Minister of Justice and Security, 4 October 2016).

#### 4.8.3. RNM continues to lag behind the police

149. The policy of the RNM should at a minimum be in line with police policy nationwide. Obviously, where there is a suspect profile<sup>99</sup> or identification of a suspect (for example, a report from a plane that a black man wearing red pants has been aggressive), the RNM should be allowed to use ethnicity in its response, and upon arrival of that flight, stop and hold all black men wearing red pants. In that case, there is a specific description based on a specific incident that has already occurred. In such cases, the use of ethnicity is objective and can be reasonably justified.
150. The problem emerges when checks are carried out without a suspect profile, as is the case with MSM checks and risk profiles. When you are looking for 'foreign nationals', or screening for a general risk profile with ethnically charged components like 'Nigerian money smugglers', this is ethnic profiling and will inevitably lead to discrimination and stigmatisation. People with light skin can also be foreigners, of course, and one cannot tell who does and does not look like 'a Nigerian' at a glance.
151. Experience shows that generally, the effect of such components is that ethnicity becomes the decisive element in the screening, and people like [claimant 1] and [claimant 2] (and others who, based on prejudices, fit the image of a foreigner or 'non-Dutch' person) will be pulled from the line much more often than people of a different (white) ethnicity.
152. Even if ethnicity (including ethnically charged terms like 'foreigner', 'non-Dutch' or 'Nigerian') do not explicitly appear in the RNM policy, the risk profiles or the selection decisions of individual officers, research has nonetheless shown that ethnicity still consciously or unconsciously plays a major role in selection

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<sup>99</sup> With respect to the drafting of suspect profiles, the UN's Special Rapporteur for the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted that drafting a profile description of terrorist profiles based on race is incompatible with the principles of human rights and that such profiling practices are unsuitable and ineffective methods for identifying potential terrorists (0: UN Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/4/26, 29 January 2007, p. 83.)

decisions, due to the broad discretionary authority the officers have in practice.<sup>100</sup> Ethnic profiling is often based on unconscious assumptions and conventional imaginary stereotypes about certain ethnic minorities, both at the organisational and operational levels.<sup>101</sup> This, too, is discriminatory and stigmatising, and there is no objective and reasonable justification for it.

#### **4.9. Conclusions**

153. In the preceding paragraphs, [claimant 1] et al. have argued that ethnic profiling takes place as part of MSM checks. This is confirmed in three ways.
154. Firstly, the experiences of [claimant 2] and [claimant 1] at [locations of airports] demonstrate that both men were pulled from the line due to their skin colour (sections 4.2-4.3). Although the officers have also put forward other reasons for the selection, the conclusion must be that in both cases, the ethnicity of [claimant 2] and [claimant 1] was the decisive reason for pulling them from the line. The RNM is unable to demonstrate that the contrary is true.
155. Secondly, the Minister's position is that ethnicity can and should be an element of the risk profiles that the RNM uses. Because the policy with regard to MSM checks allows selection based in part on physical characteristics, the possibility of ethnic profiling is de facto policy (sections 4.1.1-4.1.2). This is incompatible with the alleged assumption of 'non-discriminatory conduct' (section 4.5).
156. Thirdly, research into MSM checks has shown that ethnic profiling does occur in practice (section 4.1.3). The RNM's argument that its actions are not in violation of the law if there are other 'objective reasons' to stop someone is not sufficient. The number of 'objective characteristics' is not relevant; as long as ethnicity is

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<sup>100</sup> O: Van der Woude et al., (2016), pp. 135, 137.

<sup>101</sup> O: Amnesty Report (2013), p. 9: "Ethnic profiling explicitly arises when police officers make statements in stereotypes or negative terms about migrants or certain ethnic minorities. Or when police officers openly use characteristics linked to a person's skin colour or ethnic background as a reason for stopping or screening. Ethnic profiling is, however, often based on unconscious assumptions and conventional imaginary stereotypes about certain ethnic minorities, at both the organisational and operational levels. If there is no objective justification for unequal treatment, then such treatment must be considered discrimination – regardless of the intent, and regardless of whether those involved were aware of the potentially discriminatory effect."

allowed to be a risk indicator, it will be decisive in some, if not most, cases. This is clearly in violation of the ban on discrimination.

157. Moreover, this ethnic profiling is not effective (section 4.6) and is harmful (section 4.7).
158. Amnesty, Controle Alt Delete, RADAR and the PILP-NJCM have all made efforts in recent years to fight ethnic profiling. These efforts, which have been primarily directed towards the police, show that achieving the desired result is possible (section 4.8). But with the RNM, the problem of ethnic profiling continues to exist (paragraphs 153-156). It has been demonstrated that pursuing the complaint procedure with the RNM complaints committee or approaching the national ombudsman does not produce results (section 4.4). If the current situation does not change, Dutch citizens like [claimant 2] and [claimant 1] – along with all other ‘non-white’ travellers – will always have a greater chance of being pulled from the line than ‘white’ travellers. This is unacceptable.

## **5. The legal framework on discrimination and ethnic profiling**

159. In the following sections, [claimant 1] et al. will outline the legal framework on discrimination and ethnic profiling, looking at all international conventions applicable to ethnic profiling as well as Dutch law on the subject. [Claimant 1] et al. will also review the Netherlands' statutory obligations to monitor and investigate.

### **5.1. International conventions: ICERD, ICCPR and ECHR**

160. The provisions relevant to ethnic profiling are primarily found in international conventions like the International Convention on the Elimination of All Forms of Racial Discrimination (“**ICERD**”)<sup>102</sup>, the International Covenant on Civil and Political Rights (“**ICCPR**”), and the EU’s Race Equality Directive (Directive 2000/43).

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<sup>102</sup> The Netherlands ratified the ICERD in 1971 and made no reservations in doing so. For the Netherlands, the ICERD went into effect on 9 January 1972.

## 5.2. ICERD

161. The ICERD prohibits every form of discrimination on the basis of race. It also gives contracting states the positive obligation to prevent every form of racial discrimination. The following provisions of the ICERD are relevant to this case:

### **“Article 2**

*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...*
- 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;*
- d. Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation...*

### **Article 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...*
- d. Other civil rights, in particular:*

*i. The right to freedom of movement and residence within the border of the State;” [...]*

162. The Committee on the Elimination of Racial Discrimination (“**CERD**”) has stated (General recommendation no. 31, paragraph 20) that ethnic profiling must be qualified as racial discrimination (**0**):

*“States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely on the physical appearance of a person, that person's colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”*

163. Additionally, the “Guidelines for the CERD-specific document to be submitted by States Parties under Article 9 (1) of the Convention” make clear that under Article 9 of the ICERD, state parties are obliged to report on the measures they have taken to implement the provisions of the ICERD (**0**). In the discussion of the above-referenced Article 5, the Guidelines ask (under I, “*Information grouped under particular rights*”) for further information concerning “*A. The right to equal treatment before the tribunals and all other organs administering justice*”. State parties must, in particular, provide information concerning the measures implemented to ensure “*that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin, and that individuals are not subjected to racial or ethnic profiling or stereotyping*”.
164. The provisions of the ICERD outlined above are relevant because the State is obliged to take proactive measures in order to eliminate all forms of racial discrimination. Such a proactive approach would at a minimum include a policy change as has been implemented by the Dutch police. The RNM should therefore have to change its policy with respect to MSM checks to eliminate ethnicity as a component of risk profiles, and considerations (assumptions and stereotypes) relating to ethnicity, background or religion should no longer play any role in selection decisions in the context of the MSM system. Moreover, the RNM/the Ministry of Defence must ensure that racial discrimination is not only prohibited in

theory, i.e. under the letter of the law, but is actually prevented and eliminated in practice through the exercise of powers like stopping, frisking and checking the identity of persons.

165. Thus far, case law indicates that Articles 2 and of the ICERD do not have direct effect in Dutch law. However, that case law dates from prior to the ‘smoking ban’ decision<sup>103</sup>, in which the Supreme Court formulated a new standard for the question of when an international rule has direct effect. Prior to that case, what was decisive for this question was primarily whether the legislature or the government had *discretionary power* on the issue. In the ‘No Smoking’ decision, however, the Supreme Court ruled:

*“3.5.2. If neither the text nor the drafting history indicates that no direct effect of the treaty clause in question is intended, then the content of that clause is decisive. What is relevant is whether the clause is unconditional and sufficiently precise to be applied, as-is, in the national legal system as objective law. (cf. Supreme Court, 1 April 2011, ECLI:NL:HR:1985:AC0983, NJ 2011/354)*

*3.5.3. If the result to be achieved in the national legal system on the basis of the treaty clause is unconditional and described with sufficient precision, the simple fact that the legislature or the government is entitled to choice or discretionary power with regard to the measures to be implemented to achieve that result does not bar the provision from having direct effect. Whether that is the situation depends on the answer to the question of whether the clause can function as objective law in the context in which it is invoked. Consequently, contrary to what the State argues, the simple existence of choice or policy discretion does not mean that the clause cannot have direct effect.”*

166. The simple fact of the existence of choice or discretionary power in the application and implementation of a clause of an international treaty in the national legal system is therefore not decisive. More significant is the content of the treaty clause and the question of whether the result to be achieved is *unconditional* and

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<sup>103</sup> Supreme Court, 10 October 2014, ECLI:NL:HR:2014:2928 (*Smoking Ban*).

*described sufficiently precisely* in the treaty clause, and can therefore function as objective law. According to the Supreme Court, this was the case for the standard of Article 8 (2) of the WHO Framework Convention on Tobacco Control: this standard is unconditional and described sufficiently precisely (being an obligation to provide effective protection against exposure to tobacco smoke), even considered from the objective of the Framework Convention, namely the prevention of death and damage to health as the result of exposure to tobacco smoke.

167. The objective of the ICERD is eliminating racial discrimination. The obligation to ensure that all government bodies and public institutions do not apply racial discrimination, neither in general nor on an incidental basis, is described clearly and unconditionally in Article 2 (1) (a). Likewise unconditionally determined in Article 2 (1) (c) and (d) is the fact that every government policy and all laws and regulations that could lead to racial discrimination can be declared null and void, and an end must be brought to every form of racial discrimination, if necessary by means of legislation. Thus, the result to be achieved and the obligation that the state parties undertake are unconditional and described sufficiently precisely. The same can be said for Article 5. The obligation to forbid and eliminate racial discrimination in all its forms and to ensure the right to equality of all persons must be implemented in the same way as the obligations described under Article 2.<sup>104</sup> In view of the fact that Article 2 is unconditional and described sufficiently precisely, the same applies for Article 5. In view of the Supreme Court's determinations in the 'No Smoking' decision, the provisions of Articles 2 and 5 of the ICERD have direct effect.
168. As long as the policy of the RNM/the Minister remains unchanged, and race, skin colour and other physical characteristics continue to be a component of conscious/unconscious selection decisions as part of the MSM checks and in risk profiles drafted for the MSM system, the State is failing to comply with its obligations under the ICERD. The RNM's current practice is in violation of the

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<sup>104</sup> Article 5, ICERD: "*In compliance with the fundamental obligations laid down in article 2...*"

provisions of Articles 2 and 5 of the ICERD, and unlawful towards [claimant 1] et al.

169. If, despite this, the District Court should nonetheless determine that the provisions of the ICERD do not have direct effect, these provisions are still relevant to this case, and specifically for the interpretation of the prohibition on discrimination in Article 1 of the Constitution and Section 6:162 DCC. The obligations that the ICERD imposes on the state parties are relevant to the interpretation of these standards in this case.
170. Further, in the interpretation of the relevant standards under the European Convention on Human Rights (“**ECHR**”; for the relevant provisions of this convention, see section 5.4 below), the obligations under the ICERD must also be considered. The European Court of Human Rights commonly uses provisions from international treaties as a source in the interpretation of the provisions of the ECHR.<sup>105</sup>
171. This court is therefore also asked to consider what has been argued with respect to the ICERD in your evaluation of this matter.

### **5.3. ICCPR**

172. The International Covenant on Civil and Political Rights also prohibits discrimination, specifically under Article 26:

*"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."*

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<sup>105</sup> European Court of Human Rights, 22 December 2019, applications nos. 27996/06 and 34836/06 (*Sejdić and Finci v. Bosnia and Herzegovina*).

173. Article 26 of the ICCPR is a provision which is binding on all persons. It has direct effect in our legal system on the basis of Articles 93-94 of the Constitution.<sup>106</sup>
174. Furthermore, Article 2 of the ICCPR prohibits discrimination with regard to the other rights identified in the ICCPR. This is an accessory right, namely a prohibition that applies to the enjoyment of the rights and freedoms protected by the ICCPR.
175. The case law of the UN Human Rights Committee with regard to Article 26 of the ICCPR is, in terms of content, virtually identical to the European Court of Human Rights' case law in relation to Article 14 of the ECHR.
176. One illustrative example is *Williams Lecraft v. Spain*,<sup>107</sup> which has significant similarities to this case. That case pertains to a woman who, while standing on a platform at the train station, was stopped by a police officer and asked for her identity documents. Other persons present on the platform when this happened, including her white spouse and her son, were not checked. When asked for the reason for the check, the police officer told her that he had to check "*people like them*" because "*a lot of them are illegal migrants*", and that the Spanish police had been given an order by the Ministry of Internal Affairs to check "*coloured people*". The UN Human Rights Committee ruled that this was a violation of Article 26 of the ICCPR:

*"In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question **solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct...** in the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met."* (emphasis added by attorney)

177. By the same token, in the present case, Article 26 of the ICCPR was violated with respect to [claimant 2] and [claimant 1]. And the RNM/the Minister will continue to

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<sup>106</sup> See, for example: Central Appeals Tribunal 23 June 1992, ECLI:NL:CRVB:1992:AN2627 and 15 June 1994, ECLI:CRVB:1994:ZB3011; Supreme Court, 8 October 2004, NJ 2005/117.

<sup>107</sup> UN Human Rights Committee, 27 July 2009, CCPR/C/96/D/1493/2006, no. 1493/2006 (*Williams Lecraft v. Spain*), p. 296 et seq.

violate Article 26 as long as ethnicity, skin colour and other physical characteristics that appear ‘non-Dutch’ are used as components of the MSM checks and risk profiles. The selection of persons for a stop and check on the basis of such characteristics is, in effect, making a prohibited distinction for which there is no objective or reasonable justification.

#### **5.4. ECHR**

178. The ECHR, which contains provisions with direct effect in the Dutch legal system, prohibits (in Article 14 of the ECHR, and Article 1 of Protocol no. 12 to the ECHR) discrimination “*on any grounds*” and in any event explicitly including sex, race, colour, national or social origin and association with a national minority. Article 14 represents an accessory right: it enshrines in law the enjoyment of the (other) rights and freedoms set out in the convention, without distinction. This means that Article 14 can only be invoked when another material right is being invoked.<sup>108</sup> By contrast, Article 1 to Protocol no. 12 to the ECHR contains an independent prohibition on discrimination.

179. [Claimant 1] et al. are invoking Article 14 of the ECHR, in connection with Article 8 (the right to respect for private and family life) and Article 2 of Protocol no. 4 to the ECHR (right to freedom of movement). Additionally, they are also invoking Article 1 of Protocol no. 12 to the ECHR. [Claimant 1] et al. will elaborate on this below.

##### **5.4.1. Scope of Article 8 of the ECHR**

180. “*Private and family life*”, within the definition of Article 8, is, according to the case law of the European Court of Human Rights, a broad term which includes the physical and psychological integrity of a person.<sup>109</sup> The European Court of Human Rights has on multiple occasions determined that the application of compulsory measures and monitoring powers by government officials, such as stopping and

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<sup>108</sup> The material right to which the Article 14 complaint is linked need not be violated for the invocation of Article 14 to be allowed by the European Court of Human Rights European Court of Human Rights, 8 July 2003, no. 31871/96 (*Sommerfeld v. Germany*). Further, the European Court of Human Rights applies a broader scope of application of the material right linked to a complaint under Article 14: it is sufficient if the facts of the case are broadly related to issues that are protected by that material right. See, for example, European Court of Human Rights, 17 January 2017, no. 6033/13, par. 380f (*A.H. and others v. Russia*).

<sup>109</sup> European Court of Human Rights 26 March 1985, series A no. 91 (*X and Y v. the Netherlands*), p. 11, par. 22.

searching people, falls under the scope of Article 8. One illustrative example is found in *Gillan and Quinton*,<sup>110</sup> which pertains to stops and preventive searches of persons on public roads without a reasonable suspicion of any unlawful action, for the purposes of fighting terrorism, and applied to persons who were found in a particular risk area. The European Court of Human Rights ruled that even in a public context, there is a personal zone of interaction with others that falls within the scope of private life within the definition of Article 8.<sup>111</sup> The public nature of a search (compulsorily having to share personal information or show what the individual is carrying) can only contribute to the intensity of the interference because of the element of humiliation involved.<sup>112</sup>

181. MSM checks by the RNM therefore constitute *interference* with the right to respect of personal life. This should be clear, as individuals are selected, taken aside and subjected to stop and check. The fact that this happens at an airport or other public place does not detract from this, but rather aggravates it; the fact that this is visible to everyone reinforces the stigmatising nature of the stop and check.

#### **5.4.2. Scope of Article 2 of Protocol no. 4 to the ECHR**

182. This question also falls within the scope of Article 2 of Protocol no. 4, which determines that any person within the territory of the country has the right to freedom of movement.<sup>113</sup> The MSM checks, and specifically the aspect of separating persons found at the airport, requiring them to proceed to a certain place and stopping them for a check, constitutes a restriction of this right to freedom of movement.

#### **5.4.3. Article 14 of the ECHR**

183. With regard to Article 14, the established case law of the European Court of Human Rights is that the difference in treatment of persons in similar situations constitutes

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<sup>110</sup> European Court of Human Rights 12 January 2010, no. 415/05 (*Gillan and Quinton v. the United Kingdom*).

<sup>111</sup> European Court of Human Rights 12 January 2010, no. 415/05 (*Gillan and Quinton v. the United Kingdom*), par. 61-62; see also European Court of Human Rights 15 May 2012, no. 49458/06 (*Colon v. the Netherlands*).

<sup>112</sup> European Court of Human Rights 12 January 2010, no. 415/05 (*Gillan and Quinton v. the United Kingdom*), par. 63.

<sup>113</sup> European Court of Human Rights 13 December 2005, no. 55762/00 and 55974/00 (*Timishev v. Russia*).

a violation where there is no *objective and reasonable justification* for discriminatory treatment. The court has defined this as “*a difference in treatment of persons in analogous, or relevantly similar, situations*” that “*is based on an identifiable characteristic*”.<sup>114</sup>

184. Additionally, in various cases, the European Court of Human Rights has ruled that the burden of proof must be reversed when the complainant plausibly demonstrates that there is a difference in treatment in similar situations; it is then up to the accused State to prove that there is an objective and reasonable grounds to justify the discriminatory treatment.<sup>115</sup>
185. Both direct and indirect discrimination fall under the scope of Article 14.<sup>116</sup> Direct discrimination is when a person is treated less favourably than another person in a similar situation on grounds of ‘race’ or ethnic background. Indirect discrimination means that in a seemingly neutral provision, standard, or method persons of a certain ‘race’ or ethnicity are particularly disadvantaged in comparison with others of a different ethnicity. This case concerns a situation of *direct* discrimination, because ethnicity, skin colour and other physical features that come across as ‘non-Dutch’ are involved in selection decisions as part of MSM checks and are incorporated into risk profiles. During MSM checks and with the use of risk profiles, individuals are treated less favourably than others on the basis of their ethnicity, skin colour and other physical features (“*identifiable characteristics*”) that come across as ‘non-Dutch’, so they are selected from a group of persons due to their physical characteristics and then subjected to stop and check (which the rest of the group is not subjected to). Others who do not have these physical characteristics but are found in the same space and have entered the country in the same manner are not subject to the same screening (*similar or in this case the*

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<sup>114</sup> European Court of Human Rights 16 March 2010, no. 42184/05 (*Carson and others v. the United Kingdom*), par. 61; European Court of Human Rights 29 April 2008, no. 13378/05 (*Burden v. the United Kingdom*), par. 60.

<sup>115</sup> European Court of Human Rights 24 May 2016, no. 57325/00, 2007 (*D.H. and others v. the Czech Republic*), par. 177; European Court of Human Rights 24 May 2016, no. 38590/10 (*Biao v. Denmark*), par. 92.

<sup>116</sup> One example of indirect discrimination can be found in European Court of Human Rights 24 May 2016, no. 57325/00, 2007 (*D.H. and others v. the Czech Republic*).

*same situation*). This entails discrimination for which there is no reasonable justification.

186. Alongside direct discrimination, the current practice also represents *indirect* discrimination, in that it has the effect that persons with 'non-white' skin colour have a greater chance of being selected by the RNM for screening than other people. The stigmatising effect of this is that the group of 'non-white' people are selected for screening in the presence of 'white' people. The public nature of the MSM checks makes this process stigmatising.

#### **5.4.4. No objective and reasonable justification**

187. For there to be an objective and reasonable justification for the discriminatory treatment described under Article 14, (1) the system or procedure must be intended to serve a *legitimate goal*, and (2) the selected means that lead to the discriminatory treatment must be *proportional and necessary* for achieving that goal.<sup>117</sup> The test of proportionality must assess whether there are any other means to achieve the goal that would be less in conflict with the prohibition on discrimination. Additionally, the objective to be achieved must be compelling enough to justify the violation of individual rights.
188. It is up to the RNM/the Ministry of Defence to demonstrate with sufficient and convincing evidence that there is an objective and reasonable justification for the discriminatory treatment.
189. There is simply no such justification. Specifically, the fact that a given general risk profile applies to an individual is not sufficient justification for discriminatory treatment of that person.
190. [Claimant 1] et al. do not dispute that the MSM checks serve a legitimate goal: the regulation of immigration and fighting criminality. They do dispute that the selected means in question are necessary and proportionate. The approach used by the RNM is not necessary, because the current application of risk profiles that use race, skin colour and other 'non-Dutch' external characteristics as selection criteria

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<sup>117</sup> European Court of Human Rights 29 April 2008, no. 13378/05 (*Burden v. the United Kingdom*), par. 60; European Court of Human Rights 22 March 2016, no. 23682/13 (*Guberina v. Croatia*), par. 69.

has not been proven to be effective (see section 4.6 above). Moreover, the selected means also do not meet the proportionality requirement, because there are other conceivable solutions: e.g. random selection of persons for MSM checking. To be truly random, such selection would have to be applied in a genuinely 'blind' manner. An alternative is that the RNM could check everyone on the flight in question instead of only persons who look 'suspicious' based on non-objective grounds. And indeed, both of these alternatives have already been suggested by the National Ombudsman (see paragraph 105 above). These alternatives would not require much from the RNM and would cause far less damage than what is being caused by the RNM's current approach and policy.

191. The foregoing leads to the conclusion that the RNM/the Minister are violating the prohibition on the discrimination defined in Article 14 of the ECHR, with regard to [claimant 2] and [claimant 1] in the exercise of their rights under Article 8 of the ECHR and Article 2 of Protocol no. 2 to the ECHR, and continue to violate this prohibition in carrying out MSM checks and using risk profiles.

#### **5.4.5. Article 1 of Protocol no. 12 to the ECHR**

192. Article 1 of Protocol no. 12 of the ECHR offers a broader protection against discrimination than Article 14 of the ECHR, in the sense that it prohibits discrimination in the enjoyment of every right set out in the law, including the rights and freedoms enshrined in national law. Unlike Article 14, a complaint invoking this provision need not be linked to another material right under the ECHR.
193. The scope of application of Article 1 is set out in the Explanatory Report to Protocol no. 12; it includes discrimination “*by **any other act or omission by public authority (for example, the behaviour of law enforcement officers when controlling a riot).***” (0, p. 5, paragraph 22 (iv)). This includes selective enforcement of laws by agents of the government such as the officers of the RNM.
194. The case law of the European Court of Human Rights with respect to Article 14 of the ECHR therefore also applies to Article 1 of Protocol no. 12 to the ECHR.<sup>118</sup>

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<sup>118</sup> European Court of Human Rights 22 December 2019, application nos. 27996/06 and 34836/06 (*Sejdić and Finci v. Bosnia and Herzegovina*), par. 55.

What is described above with respect to the definition of discrimination under Article 14 therefore also applies here.

195. The conclusion is that the RNM/the Minister/the State violated the general prohibition on discrimination in Article 1 of Protocol no. 12 to the ECHR against [claimant 2] and [claimant 1], and continue to do so in carrying out MSM checks and using risk profiles.

#### **5.5. Union law TEU and TFEU<sup>119</sup>**

196. According to [claimant 1] et al., the MSM checks by the RNM fall under the scope of Union law for the following reasons.

197. Firstly, during MSM checks, EU citizens are checked as they are exercising their right to move and reside freely. When these EU citizens exercise the rights under Articles 20 and 21 of the TFEU to move and reside freely within the Union, they fall under the material scope of Union law, and restrictions on that right must be in compliance with the requirements that the TFEU sets on such restrictions. This means that such persons can invoke a number of legal remedies, including the prohibition on discrimination on the basis of nationality as set out in Article 18 of the TFEU.<sup>120</sup>

198. Secondly, the Union is an area of freedom, security and law with no internal borders; this is one of the core values of the European Union. With regard to the external borders of the Union, there is a common European policy, as set out in Articles 67 and 77 of the TFEU. Likewise, with respect to the internal borders, there is a common European policy or a shared policy between the Union and the member states. This is seen in Article 4 (2) (j), Article 67 (2) and Article 77 of the TFEU. Government action that constitutes interference within the purview of the TFEU must meet the requirements that the TFEU sets on such interference.

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<sup>119</sup> Treaty on the European Union and the Treaty on the Functioning of the European Union (OJEU 2012,C 326/01) (consolidated version) (hereinafter TEU and TFEU).

<sup>120</sup> Court of Justice of the EU 20 September 2001, C-184/99, Jur.2001, p. I-6193, (*R. Grzelczyk/openbaar centrum voor maatschappelijk welzijn te Ottignies-Louvain-la-Neuve*), paragraph 33; Court of Justice of the EU 13 April 2010, C-73/08, Jur. 2010, p. I-2735, (*N. Bressol et al./Government of the French Community*), paragraph 31.

199. The MSM checks that involve selection on the basis of nationality violate the prohibition on discrimination in Article 18 of the TFEU, and the right to move and reside freely as set out in Article 20 (2) (a) and Article 21 of the TFEU. The MSM checks involving selection on the basis of ethnicity are also in violation of the fundamental Union values of equality and prohibition on discrimination based on ethnicity, as dictated in Articles 2 and 3 of the TEU, and Article 10 of the TFEU. The prohibition on discrimination in these Articles is elaborated in the Charter of Fundamental Rights of the European Union (“**Charter**”) on the basis of Article 6 of the TEU and the Race Equality Directive on the basis of Article 19 of the TFEU.
200. The system of potential justification of discrimination under Union law differs from the system under the ECHR. Under the ECHR, direct and indirect discrimination is permissible if there is an objective and reasonable justification for it (which must be interpreted as strictly as possible); this is, in legal terms, an ‘open system’, in contrast to the ‘closed system’ under Union law, which provides a closed system of justifications for direct discrimination. Under the antidiscrimination directives, discrimination can only be justified by the limited exceptions specifically enumerated in the Directive.<sup>121</sup>

#### 5.5.1. Schengen Borders Code

201. The MSM checks are further subject to 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**”). Persons who cross an internal or external border of the Union fall within the scope of the Schengen Border Code (see Article 3) and are therefore governed by Union law. Border guards must perform their tasks with complete respect for human dignity and without discrimination of persons on the basis of grounds such as race or ethnic origin (Article 7). In the application of the Schengen Borders Code, the Charter must also be observed (Article 4).
202. The MSM checks in the Netherlands have already been the subject of an investigation by the Court of Justice of the European Union (CJEU). In *Atiqullah*

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<sup>121</sup> **0**: European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European non-discrimination law*, Luxembourg: OJEU 2018, p. 91-92.

*Adil*<sup>122</sup> the CJEU ruled that MSM checks do not constitute (prohibited) border checks, and that they do fall under the permitted “checks within the territory” as defined in Article 23 of the Schengen Borders Code. That case did not concern questions of discrimination, and the judgment in it does not detract from the applicability of the Schengen Borders Code (and Union law) to the MSM checks.<sup>123</sup> MSM checks are covered by Article 23 of the Schengen Borders Code, which means that the prohibition on discrimination in Article 7 of that Regulation also applies. The same applies for the prohibition on discrimination set out in the Charter in conjunction with Article 4 of the Schengen Borders Code. Whether qualified as border controls under Article 22 of the Schengen Borders Code, or “checks within the territory” as defined in Article 23 of the Schengen Borders Code, or the “temporary reintroduction of border control at internal borders” of Article 25 of the Schengen Borders Code, in all cases, the prohibition on discrimination under Article 7 of the Schengen Borders Code and the Charter must be observed.

203. Incoming or outgoing flights within or outside Europe’s borders incontrovertibly qualify as border crossings, and the border guards of the RNM conduct checks immediately after the border.<sup>124</sup> This means that MSM checks fall within the scope of the Schengen Borders Code. It would not make sense if the border guard posted at the border had to be in compliance with the prohibition on discrimination of Article 7 of the Schengen Borders Code, while the border guard a few steps further did not have to be. But even if that were the case, the discrimination prohibition of the Charter would still apply. MSM checks, and the profiling involved in them using risk profiles that include ethnicity, are in violation of the discrimination prohibition

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<sup>122</sup> CJEU 19 July 2012, ECLI:EU:C:2012:508, C-278/12 PPU (*Atiqullah Adil v. Minister for Immigration, Integration and Asylum*).

<sup>123</sup> See also: O: P. Rodrigues & M. Van der Woude, *Proactieve politiecontrole en onderscheid naar etniciteit of nationaliteit* [Proactive police control and distinction by ethnicity or nationality], *Netherlands Law Journal* 2016/1650.

<sup>124</sup> O: Background and analysis of strategic framework (2017), p. 23: “The Border Guard Brigade/Dedicated Gate Control Division (DGC) carries out the MSM/air passenger checks at Schiphol Airport. [...] These ‘gate checks’ are conducted by experienced **border guards** and frequently produce identifications and valuable knowledge...” [Emphasis added by attorney]

on the basis of race and ethnicity (or religion) in Article 7 of the Schengen Borders Code, and Articles 20-21 of the Charter (which we will address here in more detail).

### **5.5.2. Charter of the Fundamental Rights of the European Union**

204. The charter applies to MSM checks and the profiling associated with them; this profiling is based on risk profiles that include ethnicity as a factor.

***“Article 20 Equality before the law***

*Everyone is equal before the law.*

***Article 21 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 Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*

***Article 51 Scope***

*1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the subsidiarity principle and to the Member States only when they are implementing Union law. They shall therefore respect to the rights, observe the principles and promote the application thereof in accordance with their respective powers.*

*2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.”*

205. Articles 20, 21 (1) and 51 (1) of the Charter show that where a member state is implementing Union law, all forms of discrimination, and specifically on the basis of race, colour, ethnic or social background, religion and nationality, are prohibited.
206. The CJEU interprets the term ‘implementing’ broadly. Whenever there is a certain relationship between a national action and EU law, this requirement is already

met.<sup>125</sup> In any event, there is such a relationship whenever EU law is carried out or implemented.<sup>126</sup> According to the CJEU, fundamental rights in the Charter “must therefore be complied with where national legislation falls within the scope of European Union law... The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.”<sup>127</sup> ‘Implementing’ also applies where Union law is violated and, as a result, an appeal is made to a fundamental right.<sup>128</sup>

207. The Charter governs MSM checks. Firstly, the MSM checks are an implementation of Union law – they are, of course, oriented towards persons who are crossing the borders of the Union. The free movement of persons and the crossing of European internal and external borders fall within the material scope of Union law. Secondly, MSM checks involve actions in violation of the fundamental values of Union law, namely the principle of equality and the prohibition on discrimination (Article 18 of the TFEU), the right to move and reside freely (Articles 20 (2) (a) and 21 of the TFEU) and the prohibition on discrimination by border guards set out in the Schengen Borders Code. [Claimant 1] et al. therefore appeal to the fundamental right in Articles 20 and 21 of the Charter.
208. Furthermore, the member states must also respect Union law in the exercise of their national powers.<sup>129</sup> Because, according to Article 6 of the TEU, the Charter has the same legal value as the TEU and TFEU, the Charter must be respected in the exercise of national powers, including MSM checks.

*MSM checks in violation of Charter’s prohibition on discrimination*

209. The principle of equal treatment is a general principle of law of the Union that is set out in Articles 20 and 21 of the Charter. The principle of equal treatment requires that comparable situations are not handled differently and different

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<sup>125</sup> O: M. Bulterman, ‘Ontwikkelingen in de Luxemburgse rechtspraak’ [Developments in the case law of Luxembourg], in: J.H. Gerards, H. de Waele & K. Zwaan (eds.), *Vijf jaar bindend EU-Handvest van de Grondrechten* [Five years of binding EU Charter of Fundamental Rights], Deventer: Kluwer 2015.

<sup>126</sup> CJEU 7 May 2013, C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*).

<sup>127</sup> CJEU 7 May 2013, C-617/10, ECLI:EU:C:2013:105 (*Åkerberg Fransson*), paragraph 21.

<sup>128</sup> CJEU 30 April 2014, C-390/12, ECLI:EU:C:2014:281 (*Pfleger*).

<sup>129</sup> CJEU, 26 October 2006, C-192/05, Jur.2006, p. I-10451, pars. 21-22.

situations are not handled equally unless such different handling is objectively justified.<sup>130</sup> According to the Explanatory Report to the Charter, Article 21 has the same content and scope as the corresponding Article (Article 14) of the ECHR.<sup>131</sup> Therefore, here we can suffice with a reference to the discussion of Article 14 of the ECHR, in section 5.4.3 above. The conclusion is that selection decisions for MSM checks and the corresponding profiling based on risk profiles that include ethnicity are in violation of the principle of equality set out in Article 20 of the Charter and the prohibition on discrimination on the basis of ‘race’, colour, ethnic or social background, genetic characteristics, religion or persuasion, membership in a national minority, or nationality as set out in Article 21 of the Charter.

### 5.5.3. Race Equality Directive (Directive 2000/43/EC)

210. The MSM checks further fall within the scope of Article 3 (1) (f) or (h) of Directive 2000/43/EC of the Council of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter: the “**Race Equality Directive**”). This Directive is intended to prohibit any direct or indirect discrimination on the basis of race or ethnic origin in the territories covered by the Directive (preamble, point 13 and Articles 1 and 2 of the Directive). The scope of the Directive is defined in Article 3, which states that the Directive applies “*to all persons, as regards both the public and private sectors, including public bodies*” in relation to, principally, social domains such as (a) access to occupation, (b) vocational guidance, (c) employment, (d) membership in an organisation of workers or employers, (e) social protection, (f) social advantages, (g) education and (h) access to and supply of goods and services available to the public.
211. The selection decision for an MSM check (that is, not being selected for one) must be seen as a “*social advantage*” as referred to in Article 3 (1) (f) of the Race Equality Directive. The *travaux préparatoires* indicates that the term ‘social advantage’ must be interpreted in the same way as Article 7 (2) of Regulation

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<sup>130</sup> CJEU 13 December 1994, C-306/93, (*SMW Winzersekt GmbH v. Land Rheinland-Pfalz*), paragraph 30.

<sup>131</sup> Explanatory report to the charter of the fundamental rights, OJ 2007, C 303/17; see also M.L.C.C. Lückers, ‘T&C PFR, commentaar op art. 21 Handvest Grondrechten EU’ [Text & Commentary, law of persons and family law, commentary on article 21, Charter of Fundamental Rights of the EU], 1 December 2009.

1612/68 on the freedom of movement for workers within the Union.<sup>132</sup> In *Reed*, the CJEU linked the concept of 'social advantage' with the mobility of worker-subjects within the Union: a migrating worker's ability to bring an unmarried partner to the country of migration contributes to the integration of that employee in the host country, and therefore qualifies as a 'social advantage'.<sup>133</sup> In *Martinez Sala*, the CJEU ruled similarly on the concept of 'social advantage'.<sup>134</sup> Subsequently, in *Commission/Greece* the CJEU ruled that the term 'social advantage' also comprises a "*reduction or waiver of charges*".<sup>135</sup>

212. The case law of the CJEU therefore demonstrates that 'social advantage' is also understood to (a) include mobility and (b) comprises not only a positive right to receive an advantage, but also a negative right to not be burdened. The term further comprises advantages that only the State can extend ("access to government functions"; "permission... to reside").

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<sup>132</sup> COM (1999) 566 final, p. 7, commentary on draft art. 3, point 4. Regulation 1612/68 was revoked and replaced by consolidated Regulation 492/2011, of which article 7(2) corresponded to the revoked article in question. See Regulation (EU) 492/2011 of the European Parliament and the Council of 5 April 2011 (OJ 2011, L 141/1). Article 24 of Directive 2004/38 contains the same provision with a broader material and personal scope ("*all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty*").

<sup>133</sup> CJEU 17 April 1986, C-59/85, ECLI:EU:C:1986:157 (*Reed*), paragraph 28: "In the same way it must be recognised that the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion is not a national of the host member state, can assist his integration in the host state and thus contribute to the achievement of freedom of movement for workers. Consequently, that possibility must also be regarded as falling within the concept of a social advantage for the purposes of Article 7(2) of Regulation no. 1612/68."

<sup>134</sup> CJEU 12 May 1998, C-85/96 (*Martinez Sala*), paragraph 25: "As far as the concept of social advantage, referred to in Article 7(2) of Regulation No 1612/68, is concerned, this term means, according to consistent case-law, all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community."

<sup>135</sup> CJEU 9 October 1998, C-185/96, ECLI:EU:C:1998:516 (*Commission v. Greece*), paragraph 6: "Articles 3 to 12 of [1910/1944] set out the various advantages to which such status affords entitlement. These may consist in the **reduction or waiving of charges**, or the grant of assistance, or **preferential treatment** in such areas as education, health, housing, legal matters, access to employment in the public service, and transport."

*Remaining exempt from being stopped as 'social advantage'*

213. Being stopped as part of an MSM check is, in essence, a repressive power of the RNM and/or the State. Doing so deprives the person who is stopped of the right and social advantage of moving freely within the territory of the State or freely crossing the borders of the Union. Likewise, the free access to the airport and the free passage through it is impeded by the RNM's MSM checks.
214. Furthermore, point 9 of the preamble to the Race Equality Directive emphasises that one of the major reasons for this Directive is that discrimination and racism can undermine the goals of the union, such as "*the attainment of a high level of [...] social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity*" and the development of "*an area of freedom, security and justice*". The provision of equal freedoms and respect for ethnic minorities moving within the State or crossing the national borders of the State by not profiling such persons falls within these objectives and can be considered a 'social advantage' within the definition of Article 3 (1) (f) of the Race Equality Directive.

*Free access to and passage within airport as a 'service'*

215. If the MSM checks do not fall under the scope of Article 3 (1) (f) of the Race Equality Directive, then (alternatively) the free access to and passage within an airport can be considered a service available to the public as referred to in Article 3 (1) (h) of the Directive. Although this is not a service that the RNM offers, the MSM checks by the RNM do constitute an impediment to the free access to that service.
216. The term 'services' is not defined in the Race Equality Directive, and the CJEU has not yet made a ruling on the interpretation of this term in the context of this Directive; nor does the preamble to the Directive explicitly state that the term 'services' must be interpreted in the same way as in the TFEU.<sup>136</sup> (This is, for example, specifically stated in Directive 2004/13 implementing the principle of

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<sup>136</sup> Article 57, TEU and TFEU: "Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons."

equal treatment between men and women in the access to and supply of goods and services.)<sup>137</sup>

217. The CJEU has not yet ruled on the qualification of the choice of whether or not to select a person for an MSM check. It has, however, already considered that the scope of this Directive, in view of the interests to be protected, cannot be interpreted restrictively.<sup>138</sup>
218. In view of the goal of the Directive and the nature of the rights it is intended to protect, the term 'services accessible to the public' (and the access to such services) as referred to in the Directive must be interpreted broadly. This is supported by the legal literature.<sup>139</sup> The free and equal access to an airport like Schiphol or Rotterdam The Hague Airport, and the passage within it for everyone regardless of ethnicity, can easily be interpreted as such a service, and therefore falls within the scope of Article 3 (1) (h) of the Race Equality Directive. The performance of MSM checks has an influence on the access to this service. The fact that this service is offered by another party is not relevant to the applicability of the Directive. The only relevant factor is that a service is offered and that access to this service cannot be discriminatory.

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<sup>137</sup> Directive 2004/13/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373/37).

<sup>138</sup> CJEU 12 May 2011, C-391/09, ECLI:EU:C:2011:291 (*Malgožata Runevič-Vardyn et al./Vilniaus miesto savivaldybės administracija et al.*), paragraph 43: "It should be noted in those circumstances that, in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that Directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of European Union law, as recognised in Article 21 of the Charter of Fundamental Rights of the European Union, the scope of that Directive cannot be defined restrictively."

<sup>139</sup> O: Ringelheim, *The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU Law*, European Anti-Discrimination Law Review, Issue No 10, 2010, p 14-15: "[T]he Belgian federal law transposing Directive 2000/43 covers not only the 'provision of services' but also 'access, participation and any other exercise of an economic, social, cultural or political activity accessible to the public.' [...] the British Race Relations Act 1976, which makes it unlawful 'for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public [...]'."

*Directive indirectly applicable*

219. If the Race Equality Directive is not directly applicable, then it still has indirect effect. This Directive is in fact a concrete implementation, in the material areas covered by the Directive, of the principal set out in Article 21 of the Charter: non-discrimination on the basis of race and ethnic background.<sup>140</sup> Article 21 of the Charter applies to the actions of the RNM, including MSM checks, which fall outside the scope of the Directive but within the scope of the TEU and TFEU. Some of the principles on which the Race Equality Directive is based further define the principle of equality under Articles 20 and 21 of the Charter. The point is not that the Charter expands the scope of the Directive to matters that would normally fall outside the scope of the Directive, but that the principles in the Charter that are also identified in the Directive are in part interpreted through the lens of the Directive. The Directive provides an expression of the principal of equality set out in Articles 20 and 21 of the Charter.<sup>141</sup>
220. More specifically, the right to an effective remedy in the event of discrimination (Article 47, Charter; Article 7 (1) of the Race Equality Directive) and the provisions with regard to burden of proof (Article 8 of the Race Equality Directive) are inherent to the objective of the Race Equality Directive: the prohibition of discrimination on the basis of race or ethnicity. Because Article 21 (1) of the Charter contains a similar prohibition, it also requires that Member States provide for an effective remedy in the event of discrimination and that, if the evidence of the claimant sufficiently justifies the presumption of discrimination, the Member State must prove that there was no discrimination. Whether Dutch law provides such an 'effective legal remedy' is, however, extremely questionable. The complaint

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<sup>140</sup> CJEU 16 July 2015, C-83/14 (*CHEZ Razpredelenie Bulgaria*), paragraph 58; See also: CJEU 12 May 2011, C-391/09, EU:C:2011:291 (*Runevič-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 (*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."

<sup>141</sup> CJEU 12 May 2011, C-391/09, EU:C:2011:291 (*Runevič-Vardyn and Wardyn*), paragraph 43.

procedures provided by the RNM and the National Ombudsman are decidedly not 'effective', given that, in real terms, they offer no remedy at all (see section 4.4 above). Victims of ethnic profiling are left with the avenue of initiating civil proceedings against the State, and whether this is something that can be required of them is extremely debatable. Without the support of claimants 3 through 6 and their counsel, [claimant 2] and [claimant 1] would likely never have initiated these proceedings.

*Directive violated*

221. It has been described above that the MSM system as implemented by the RNM falls within the scope of Article 3 of the Race Equality Directive. This means that the MSM checks are subject to that Directive.
222. According to Article 2 (2) (a) of the Race Equality Directive, "*direct discrimination*" is when "*one person is treated less favourably than another is, has been, or would be treated in a comparable situation on grounds of racial or ethnic origin*". Case law of the CJEU reveals that profiling on the basis of stereotypes and prejudices about certain groups can lead to direct discrimination based on race.<sup>142</sup> Direct discrimination therefore arises when ethnicity is a component of a risk profile or is one of the indicators for making a selection decision for an MSM check. A person who is stopped on the basis of (for example) assumed race or ethnic origin will clearly be treated less favourably than another person not of that same assumed race or ethnic background would be treated. There was also direct discrimination involved in the checks performed on [claimant 2] and [claimant 1].
223. The public statement by the RNM<sup>143</sup> and the Minister of Defence's responses to the parliamentary questions from MP Belhaj (D66),<sup>144</sup> both of which stated that ethnicity can be, and therefore *must be allowed to be*, a component of a risk profile,

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<sup>142</sup> CJEU 16 July 2005, ECLI:EU:C:2015:480, C-83/14 (*CHEZ Razpredelenie Bulgaria AD/Komisija za zashtita ot diskriminatsia*); O: Van der Woude et al. (2016), p. 69.

<sup>143</sup> See footnote 22.

<sup>144</sup> See footnote 23.

are sufficient to assume the existence of direct discrimination within the definition of Article 2 (2) (a) of the Race Equality Directive.<sup>145</sup>

224. The existence of this sufficiently substantiated (dare we say, even proven) suspicion of direct discrimination must also result in a reversal of the burden of proof (Article 8 (1) of the Race Equality Directive).<sup>146</sup> It is therefore up to the RNM/the Minister/the State to demonstrate that discrimination did *not* happen in the cases in which ethnicity may be a component, or has been shown to have been a component, in the selection decisions and risk profiles in the context of MSM checks (including, specifically, in the cases of [claimant 2] and [claimant 1]). The RNM/the Minister/the State must then, according to the case law of the CJEU, demonstrate that the current method of selection and profiling in the context of the MSM system up to this point has in no way been based on the prohibited ground ‘ethnicity’, but only on objective factors that have nothing to do with discrimination on the basis of race or ethnic origin.<sup>147</sup> They will not be able to succeed in demonstrating this, however, given that the RNM and the State have stated so explicitly that they select and profile in part based on ethnicity.
225. Article 2 (4) of the Race Equality Directive also stipulates that an instruction to discriminate on the basis of ethnicity or race is to be considered equivalent to direct discrimination. Given that the RNM instructs its personnel<sup>148</sup> that they can use ethnicity (in part) as an indicator for selection and screening on the basis of ethnicity or race, that instruction within the definition of Article 2 (4) is sufficiently established.
226. There is also unjustified indirect discrimination within the definition of Article 2 (2) (b) of the Race Equality Directive, because it is clearly “*an apparently neutral provision, criterion or practice*” that puts “*persons of a racial or ethnic origin at a*

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<sup>145</sup> Court of Justice of the European Union, 10 July 2008, ECLI:EU:C:2008:397, C-54/07 (*Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*), paragraph 28.

<sup>146</sup> Court of Justice of the European Union, 10 July 2008, ECLI:EU:C:2008:397, C-54/07 (*Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*), paragraph 34.

<sup>147</sup> CJEU 16 July 2005, ECLI:EU:C:2015:480, C-83/14 (*CHEZ Razpredelenie Bulgaria AD/Komisija za zashtita ot diskriminatsia*), paragraph 85.

<sup>148</sup> O: Background and analysis of strategic framework (2017), pp. 17-19.

*particular disadvantage compared with other persons*". The manner in which the RNM selects and profiles for the purposes of MSM checks has the effect that 'non-white' persons who, according to the officers, look like 'foreigners' or 'non-Dutch' persons have a greater chance of being checked than 'white' people. This also applies to the use of nationality as an indicator for the selection decision and profiling, because in these cases, it is essentially still ethnicity or *assumed* nationality that is the basis of the selection – as in the case of [claimant 1].

227. The existence of this sufficiently substantiated suspicion of indirect discrimination must (also) also result in a reversal of the burden of proof (Article 8 (1) of the Race Equality Directive).<sup>149</sup> It is up to the RNM/the Minister/the State to demonstrate that the selection and profiling on the basis of seemingly neutral determinations like 'foreigner', 'non-Dutch' or a particular nationality such as 'Nigerian' for the purposes of the MSM system is *not* to be qualified as discrimination.
228. In any event, there is no objective and reasonable *justification* possible for this form of indirect discrimination by the RNM, because the means used are not necessary and proportionate. As already stated (section 4.6), ethnic profiling has been shown to be not *effective* (and thus not necessary or proportionate). The MSM checks also have a stigmatising effect on 'non-white' persons. As a group they are more often subjected to MSM checks, regardless of whether they themselves have ever been involved in any illegal activity. Furthermore, they are subjected to these checks in the presence of other persons, and 'white' persons in particular who are not subjected to such checks (as happened in [claimant 1]'s case; see paragraph 106). This can contribute to the perception that 'non-white' people potentially commit such illegal activities.<sup>150</sup> This stigmatising effect of MSM checks disadvantages 'non-white' persons in comparison to others.<sup>151</sup> Even if, in the case of the MSM checks, there was a seemingly neutral determination that

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<sup>149</sup> Court of Justice of the European Union, 10 July 2008, ECLI:EU:C:2008:397, C-54/07 (*Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*), paragraph 34.

<sup>150</sup> CJEU 16 July 2005, ECLI:EU:C:2015:480, C-83/14 (*CHEZ Razpredelenie Bulgaria AD/Komisija za zashtita ot diskriminatsia*), paragraph 84.

<sup>151</sup> CJEU 16 July 2005, ECLI:EU:C:2015:480, C-83/14 (*CHEZ Razpredelenie Bulgaria AD/Komisija za zashtita ot diskriminatsia*), paragraphs 87, 108.

served a legitimate purpose, then these checks would still not be permissible in this way due to their stigmatising effect, because the disadvantages caused are disproportionate to the intended objectives, even though there are still other appropriate and less invasive, humiliating or stigmatising means available by which these objectives could be achieved – for example, truly random sampling or a policy of checking all passengers on the flight.<sup>152</sup>

#### 5.5.4. Data Protection Directive (Directive 2016/680/EU)

229. The MSM checks also fall within the scope of Article 2 (1) or (2) of European Directive 2016/680/EU on the protection of data of natural persons for the purposes of investigation and prosecution (hereinafter: the “**Data Protection Directive**”). The goal of this Directive is to offer protection to natural persons in the processing of personal data in connection with the investigation or prosecution of criminal offences or the enforcement of criminal punishment, including the protection against and prevention of threats to public security.

230. The scope of the Directive is set out in Article 2, which states that the Directive applies to the processing of personal data by competent authorities for the purposes of the objectives as described above. The “competent authority” is defined in Article 3 (7) as “*any public authority competent for the prevention, investigation, detection or prosecution of criminal offences, including the safeguarding against and the prevention of threats to public security*”. The RNM therefore falls under the definition of “competent authority”.

#### *Directive violated*

231. In compiling the risk profiles, the RNM processes personal data on the basis of which the MSM checks are conducted. The Minister confirmed this in answers to questions from Parliament: “*The RNM uses profiles that are based on experience and figures, information, assessments and risk indicators.*”<sup>153</sup> For example, the ‘Nigerian money smuggler’ risk profile was drafted using police information that must, by definition, have required consulting data of all suspects of money

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<sup>152</sup> CJEU 16 July 2005, ECLI:EU:C:2015:480, C-83/14 (*CHEZ Razpredelenie Bulgaria AD/Komisija za zashtita ot diskriminatsia*), paragraph 128.

<sup>153</sup> Appendix to the Proceedings II, 2017/18, no. 2340.

smuggling in a certain period in the recent past. The correspondence among this group and subgroups are then analysed and processed, and this produces physical and behavioural characteristics: a non-Dutch appearance, walking quickly and dressed smartly.

232. According to Article 10 of the Data Protection Directive, processing of personal data that indicates race or ethnic origin is prohibited unless processing is strictly necessary, in which case appropriate safeguards for the rights and freedoms of the data subject must be observed, and only where the processing is permitted by Union or Member State law. That is not the case here. There is nothing indicating that processing of race and ethnicity is strictly necessary. As has already been determined, the MSM checks could also be conducted randomly. Additionally, such processing on the basis of race and ethnicity is not permitted under Union or Member State law, as has been described above in chapter 5 of this summons. In compiling the risk profiles from which race and ethnicity are derived, the RNM is therefore violating this Directive.

#### **5.6. National legislation: the Constitution**

233. As already stated, there is no legal definition of ‘ethnic profiling’ under Dutch law. There is, however, a codified prohibition on discrimination – Article 1 of the Constitution. The prohibition on discrimination of Article 1 of the Constitution imposes the obligation on administrative bodies that they may not make a distinction by religion, persuasion, political orientation, race, sex or any basis whatsoever. Article 1 formulates the principle of equality and the prohibition on discrimination. These entail that public officials may not, in the course of their duties, treat any persons differently than any other persons in a negative sense on the basis of their appearance and/or origin. Likewise, even the appearance of such unequal treatment must be avoided.

*“Constitution, Article 1*

*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.”*

## **5.7. Dutch case law: selection on the basis of ethnicity is unlawful**

234. In this section, the limited body of case law from the Dutch judiciary concerning ethnic profiling is discussed. In this case law, [claimant 1] et al. see a confirmation that ethnicity may not be allowed to play a role in risk profiles or selection decisions for the purposes of MSM checks because this constitutes direct discrimination and is therefore unlawful.

### **5.7.1. Amsterdam Court of Appeals: Hollende Kleurling**

235. As early as 1977, the Amsterdam Court of Appeals ruled on a case involving ethnic profiling, even though that term was not then used.<sup>154</sup> The case was as follows. A man with dark skin by the name of Bergwijn was seen running quickly away from the Caribbean Nights cafe, which was known to the police as a haven for Surinamese narcotics dealers. For the officers involved, this was reason enough to stop and search Bergwijn, upon which they found heroin in his possession.

236. The Amsterdam Court of Appeals ruled that the evidence against Bergwijn was not legitimately obtained: under the circumstances, Bergwijn should not (by objective standards) have been deemed to be a suspect. The fact that Bergwijn had dark skin and was hastening away from the Caribbean Nights café was insufficient to justify this assumption. In essence, the Court of Appeals ruled in this case that ethnic profiling is not lawful.

### **5.7.2. Council of State's Administrative Jurisdiction Division: impermissible inspections under the WAV by the Labour Inspectorate**

237. Today, it is widely understood that ethnic profiling is not permitted. The Council of State's Administrative Jurisdiction Division ("**AJD**") reflected this understanding when it ruled in 2015 that the evidence on the basis of an inspection under the Foreign Nationals (Employment) Act (WAV) had been obtained unlawfully because, during the inspection, the inspector had made a distinction on the basis of physical characteristics. Of all the persons present during the inspection, the inspector had only asked for identity documents from those with dark hair and 'non-

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<sup>154</sup> Amsterdam Court of Appeal, 3 June 1977, *NJ* 1978/601 (*Hollende Kleurling*).

white' skin colour, because based on these external characteristics, he suspected that these persons were foreign nationals. The AJD ruled that:

*“in consideration of the importance of the prohibition on discrimination set out in Article 1 of the Constitution and the severity of the aforementioned violation, this [...] conflicts so much with what should be expectable from a government acting reasonably that the use of these statements must be considered inadmissible as evidence.”*<sup>155</sup>

238. If everyone present had been asked for their identity documents, this would not have been a case of ethnic profiling.<sup>156</sup> By the same token, the identity check for the purposes of the MSM system of only people of a certain appearance ('non-white' skin colour) is discriminatory, stigmatising and unlawful. That would not be the case if everyone on the flight was checked, regardless of appearance.

### **5.7.3. Supreme Court: Dynamic traffic control decision**

239. In the “*Dynamic traffic control*” decision, the Supreme Court also ruled that ethnic profiling is impermissible. According to the Supreme Court, the selection for the check cannot be made “*in a manner that is incompatible with the assumption that persons are not discriminated against due to reasons such as their race or religion or conviction*”; that would make the selection unlawful. According to the Supreme Court, the court can specifically come to the conclusion that a selection is unlawful: “*if the selection of the vehicle to be considered for a traffic stop is based exclusively or predominantly on ethnic or religious characteristics of the driver or other passengers in that vehicle.*”<sup>157</sup>
240. Incidentally: the Supreme Court’s determination leaves room for the court to also come to the conclusion that a non-justified distinction was made in the selection if the selection was not exclusively or predominantly, but only *partially* based on ethnic or religious characteristics. Beyond that, as long as ethnicity is a component of risk profiles and a basis for selection decisions for MSM checks, it will always potentially be one of the decisive factors. Even if ethnicity is not the sole decisive

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<sup>155</sup> AJD 3 June 2015, JV 2015/213, sections 3.2-3.4.

<sup>156</sup> AJD 5 November 2015, JV 2015/352.

<sup>157</sup> Supreme Court, 4 November 2016, ECLI:NL:HR:2016:2454 (*Dynamic traffic control*), section 3.7.

factor, it can still exert a predominant influence on a selection decision. The control question is: all things being equal, would the decision on a person of a different ethnicity have been different? If yes, then the decision is based on prohibited discrimination. The '[claimant 1] example' illustrates this. Based on the risk profile applied in that case, a white, well-dressed, fast-walking man would have been allowed to continue on, while [claimant 1], who also walks quickly and is well dressed, is pulled from the line because he might be a Nigerian money smuggler. This difference in treatment is purely and entirely based on ethnicity, and in such a case the selection is "exclusively or predominantly" based on ethnicity. This is in violation of the prohibition on discrimination.

#### **5.8. Monitoring and investigation obligation of the Netherlands**

241. Bodies of the United Nations and the Council of Europe that monitor compliance with human rights obligations in the Netherlands have for a number of years been expressing concerns about the practice of ethnic profiling in the Netherlands.
242. In a recent example, the Committee against Torture<sup>158</sup> issued a report in December 2018 with recommendations following a visit to the Netherlands. In it, the Committee urges the Dutch government to monitor activities like searches, arrests and frisking based on ethnic profiling. The Committee also recommends research be conducted into the causes of ethnic profiling and the effects of measures to fight it.<sup>159</sup>
243. In 2015, the Committee that monitors compliance with the UN Convention against racial discrimination released a report with recommendations calling upon the

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<sup>158</sup> The Committee against Torture monitors compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, to which the Netherlands is a party (Treaty Series 1989/20). This convention obliges every State Party to prevent torture as well as (article 16): "other acts of cruel, inhuman or degrading treatment".

<sup>159</sup> **O**: Committee against Torture, *Concluding observations on the Netherlands*, CAT/C/NLD/CO/7, Recommendation 45, 18 December 2018, Recommendation 45: "The State party should take measures to monitor and prevent arbitrary stops, searches and arrests based on racial profiling and ensure the correct and effective use of compulsory measures. In that regard, it should conduct a study on that practice with a view to identifying the causes and effective solutions. It should also redouble its efforts to provide the police with adequate training and awareness-raising programmes to counter prejudice and stereotypes, and regularly assess their impact and effectiveness."

government to collect data and information on proactive stop and searches of persons and to include this data in its next report to the Committee. The Committee also urged monitoring of compliance with the measures against ethnic profiling.<sup>160</sup>

244. In January 2019, the government published its report to the committee. In response to the concerns about ethnic profiling and the recommendations, the government will present a description of the ongoing approach to ethnic profiling.<sup>161</sup>
245. The government's report does not provide the requested figures concerning the nature and scope of the problem, nor does the government report on the extent to which it is monitoring whether the steps taken against ethnic profiling are indeed ensuring that discrimination does not happen in practice. Additionally, it is also remarkable that the government notes that research into ethnic profiling has not demonstrated that there is a systemic problem. In recent years, there have been various studies and academic research projects looking at selection decisions by police and the RNM in law enforcement and their powers to stop and search individuals. Most of these studies did not focus on establishing whether discrimination was a systemic problem, so their conclusions do not state in so many words that this is the case.
246. Be that as it may, all of the studies have revealed ethnic profiling taking place, and the majority of them contain strong indications that would justify the assertion that it is a persistent problem that occurs on a considerable scale across the country, and that it is in part caused by the structuring (or more accurately, the lack thereof) of general and routine use of stop and check powers by the police, the RNM and other branches of law enforcement. These are not isolated incidents; ethnic profiling is a systemic problem.

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<sup>160</sup> O: CERD, Report on the Netherlands, CERD/C/NLD/CO/19-21, Recommendation 14.b. and 14.g, 24 September 2015. Recommendation 14.b.: "*Adopt the measures necessary to ensure that stop-and-search powers are not exercised in a discriminatory manner, and monitor compliance with such measures;*" and 14.g. "*Collect data and information about stop-and-search practices by the police and include these findings in its next periodic report.*"

<sup>161</sup> O: CERD, Twenty-second to twenty-fourth periodic reports submitted by the Netherlands under article 9 of the Convention, due in 2019, /C/NLD/22-24, 4 March 2019, p. 14-15.

247. International human rights organisations have not just been making these recommendations in the last few years. The Amnesty report on ethnic profiling discusses comparable recommendations of human rights bodies that were made in the years up to 2013.<sup>162</sup>
248. Finally, we refer to General Recommendation no. 11 from the European Committee against Racism and Intolerance from 2007. It calls upon Member States to conduct research, monitoring and data collection (broken down by grounds such as national origin, nationality, language and religion) with respect to the conduct of the police.<sup>163</sup> With respect to this last point, the Netherlands was also recently, on 7 October 2019, called to account by the United Nations Human Rights Council.<sup>164</sup>

## **6. Analysis: ethnic profiling is unlawful**

249. It has already been discussed above in sections 4.1-4.3 that ethnic profiling takes place as part of MSM checks by the RNM. However, ethnic profiling is not permitted. Making a distinction by ethnicity during MSM checks is a violation of the principles of non-discrimination and equality as set out in both national and international law. This has already been addressed above in section 5, and specifically in paragraph 185. It also qualifies as unjustified *indirect* discrimination (paragraph 186).
250. A difference in treatment of individuals based in whole or in part on ethnicity is not permitted except where there is an objective and reasonable justification for doing so. There is, however, no such justification for making a distinction by ethnicity during MSM checks (see 4.6 and 5.4.4 above). In fact, any such justification would actually be barred (paragraph 200).

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<sup>162</sup> O: Amnesty Report (2013), p. 9-10.

<sup>163</sup> O: ECRI (2007), Recommendations 1.2: "To carry out research on racial profiling and monitor police activities in order to identify racial profiling practices, including by collecting data broken down by grounds such as national or ethnic origin, language, religion and nationality in respect of relevant police activities."

251. Below, the current implementation of MSM checks is reviewed against the criteria of Section 6:162 DCC. The conclusion is that all requirements for an unlawful government act have been met.

### 6.1. Unlawfulness

252. Section 6:162 (2) DCC defines the following as an unlawful act:

1. a violation of a right, and
  2. an act or omission in conflict with a legal obligation, and
  3. an act or omission in conflict with the societal standards inherent to the unwritten rules of society,
- all barring the existence of grounds for justification.

253. Ethnic profiling should be qualified as all three: as a violation of the fundamental right to equal treatment of the person screened, as an action in violation of the legal obligation derived from Article 1 of the Constitution (and elsewhere) to refrain from discriminatory action, and as an act or omission in violation of the societal standards inherent to the unwritten rules of society. It is without question a violation of the standards of due care in society towards the screened person to be selected on the basis of their ethnicity for an MSM check.

254. Insofar as the State should wish to invoke its discretionary power in the exercise of the MSM system (which the state did, for example, in *Urgenda* in regard to the implementation of policy), this appeal fails. The discretionary power or policy freedom that must be granted to the State cannot under any circumstances go so far as to allow the State to discriminate in violation of the Constitution and international treaties. The State also has a duty of care to stamp out discrimination. In *Urgenda*, the State's appeal to discretionary power was similarly unsuccessful:<sup>165</sup>

*“As considered in 6.3 above, in the Dutch constitutional system of decision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the*

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<sup>165</sup> Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda*), sections 8.3.1–8.3.4.

*courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound.*

*[...] The State is obliged to do 'its part' in this context [...] The policy that the State has pursued since 2011 and intends to pursue in the future (see 7.4.2 above), whereby measures are postponed for a prolonged period of time, is clearly not in accordance with this, as the Court of Appeals has established. At least the State has failed to make it clear that its policy is in fact in accordance with the above [...]"*

255. It should also be noted that the selection decisions by the officers of the RNM are *factual actions*, so any defences with regard to discretionary power on policy would have to be considered less relevant.

## **6.2. Attributability, damages and causality**

256. An unlawful act can be attributed to the perpetrator if it is attributable to that party's fault or a cause that pursuant to the law or generally accepted standards would fall under that party's responsibility. The attributability can only be nullified by the presence of a ground for exclusion of fault. The attributability of an unlawful act to the government is virtually automatic: even if no imputation of the government could be made at all (which is not the situation here), it will generally be assumed that the unlawful act must, in principle, fall under the government's responsibility.<sup>166</sup>

257. [Claimant 1], [claimant 2], and all others who have been the victim of ethnic profiling are suffering damages as a result, given that their personal, fundamental rights are being violated.

## **6.3. Conclusion: ethnic profiling is unlawful**

258. The conclusion is that ethnic profiling is unlawful towards the party being ethnically profiled.

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<sup>166</sup> See, for example, Supreme Court, 31 May 1991, *NJ 1993/112 (Van Gog/Nederweert)*.

## **7. The claims of [claimant 1] et al. and their substantiation**

259. The claims of [claimant 1] et al. are oriented towards putting an end to ethnic profiling by the RNM. [Claimant 1] et al. therefore ask the court to:

- 1a. issue a declaratory judgment that the compiling and use of risk profiles for the purposes of MSM checks by which ethnicity is used as a risk indicator is in violation of the prohibition on discrimination;
- 1b. issue a declaratory judgment that making selection decisions in the performance of MSM checks that are based in whole or in part on ethnicity violates the prohibition on discrimination;
- 2a. prohibit the State from compiling and using risk profiles for MSM checks in which ethnicity is incorporated as a risk indicator;
- 2b. 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 as part of MSM checks.

260. The basis for these claims has been detailed amply in the foregoing. In paragraphs 121, 190 and 228, [claimant 1] et al. have offered multiple possible solutions as to how the State can comply with [claimant 1] et al.'s claims without any adjustment in existing legislation being required. Nonetheless, [claimant 1] et al. leaves it up to the State to determine what measures it intends to take to comply with the injunctions given under 2a and 2b and the order sought under 3.<sup>167</sup>

## **8. Defences of the State**

261. The position of the State is, in essence, that it is permissible for the RNM to compile risk profiles using ethnicity as a component and to make selection decisions based on ethnicity. The State has indeed expressed this position multiple times.<sup>168</sup> However, it follows from the foregoing that the State's position is not tenable.

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<sup>167</sup> Cf. Supreme Court, 20 December 2019, ECLI:NL:HR:2019:2006 (*Urgenda/State*), sections 8.1-8.2.7.

<sup>168</sup> See footnotes 4 and 22/23.

Compiling risk profiles that include ethnicity making selection decisions on the basis of ethnicity violates a plethora of legal principles and is unlawful.

## **9. Evidence and offer to furnish evidence**

262. To demonstrate the accuracy of the assertions disputed by the RNM/the State, [claimant 1] et al. have access to all of the exhibits that have been submitted. In addition, insofar as the District Court should rule that [claimant 1] et al. bear any burden of proof, they offer to prove their assertions through the hearing of witnesses.
263. This offer to furnish evidence is without prejudice to the fact that it is the responsibility of the State/the Minister/the RNM to demonstrate that there was no discrimination involved in the selection of [claimant 2] and [claimant 1]. [Claimant 1] et al. have explained this allocation of the burden of proof in paragraphs 224 and 227 above. It should also be noted that the European Court of Human Rights has ruled in multiple cases that when the complainant has plausibly demonstrated that there has been a difference in treatment in comparable situations, the burden of proof is reversed. It is then up to the State against which the complaint is directed to prove that there is an objective and reasonable justification for the discriminatory treatment.<sup>169</sup> Under Union law, even such evidence would not be sufficient.

## **10. Claim for relief**

### **CLAIM**

[Claimant 1] et al. ask the court to:

- 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;

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<sup>169</sup> European Court of Human Rights 13 November 2007, no. 57325/00 (*D.H. and others v. the Czech Republic*), paragraph 177; European Court of Human Rights 4 May 2016, no. 38590/10 (*Biao v. Denmark*), paragraph 92.

- 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 take place in the implementation of the MSM checks;
4. to order the State 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,

all with provisional enforceability, insofar as allowed by law.

Costs of writ: EUR

Court Bailiff

**List of exhibits**

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| Exhibit 1 | ECRI, <i>General Policy Recommendation N°11 on combating racism and racial discrimination in policing</i> , 29 June 2007.                                    |
| Exhibit 2 | Amnesty International report, <i>Proactief politieoptreden vormt risico voor mensenrechten</i> [Proactive police action poses threat to human rights], 2013. |
| Exhibit 3 | Terminology 'non-white'/'white' as used in the summons of [claimant 1] et al.  |

- Exhibit 4 M.A.H. van der Woude, J. Brouwers & T.J.M. Dekkers, *Beslissen in grensgebieden* [Decisions in border areas], Boom Criminologie: The Hague 2016, p. 64, 65, 66, 69, 128, 135, 137, 138, 253.
- Exhibit 5 Charter of the NJCM.
- Exhibit 6 Briefing by the NJCM to the European Commission against Racism and Intolerance (ECRI), 15 June 2018.
- Exhibit 7 Statute of Amnesty International.
- Exhibit 8 Actions by Amnesty Netherlands.
- Exhibit 9 Police press release, 'Handelingskader helpt bij proactieve controles' [Action framework helps in proactive checks], 11 December 2017.
- Exhibit 10 Involvement of Amnesty International in legal proceedings.
- Exhibit 11 Demonstrations by Amnesty in the Netherlands.
- Exhibit 12 RADAR Charter.
- Exhibit 13 RADAR project, 'Aanpak etnisch profileren door de politie' [Approach to ethnic profiling by the police], 2013.
- Exhibit 14 RADAR report, *Effecten van ervaren selectiviteit bij politiecontroles; een uiteenzetting aan de hand van interviews en focusgroepgesprekken in Rotterdam en Breda* [Effects of experienced selectivity in police checks; an explanation based on interviews and focus group meetings in Rotterdam and Breda], June 2014.
- Exhibit 15 Blikopeners, Bicycle test in Vondelpark Amsterdam.
- Exhibit 16 2017 Annual Report.
- Exhibit 17 Printout from CAD website about dialogue evenings.
- Exhibit 18 Article in KRO-NCRV, '2Doc: Verdacht', 10 December 2018.
- Exhibit 19 Printouts from websites of NJCM, Amnesty International, RADAR.
- Exhibit 20 Report by Amnesty International Netherlands in cooperation with Open Society Justice Initiative, *Gelijkheid onder druk: De impact van etnisch profileren* [Equality under pressure: The impact of ethnic profiling], 2013.
- Exhibit 21 RADAR news item, 'Marechaussee Rotterdam The Hague Airport Discrimineert' [Dutch Border Police discriminate at Rotterdam The Hague Airport], 7 April 2017.
- Exhibit 22 Controle Alt Delete report, *Kies een kant* [Choose a side], 2017.
- Exhibit 23 Controle Alt Delete blogs and videos, 2013.

- Exhibit 24 Controle Alt Delete article, 'Flying While Black', June 2018.
- Exhibit 25 Controle Alt Delete article, 'De impact van etnisch profileren' [The impact of ethnic profiling], October 2018.
- Exhibit 26 Contact between CAD and the municipal council.
- Exhibit 27 RADAR and CAD complaint procedures.
- Exhibit 28 Flyer with information about rights in the event of police checks.
- Exhibit 29 Printout from Amnesty International website, 'Een kwestie van kleur' [A matter of colour].
- Exhibit 30 Control Alt Delete video about ethnic profiling.
- Exhibit 31 Printout from Police Academy website, 'Etnisch profileren' [Ethnic profiling], 2016.
- Exhibit 32 Letter from [claimant 1] et al. to the Ministry of Defence and the RNM with the request for consultation, 28 November 2019.
- Exhibit 33 Letter from [claimant 1] et al. to the Ministry of Defence, the Ministry of Justice and Security and the RNM, 16 January 2020.
- Exhibit 34 Printouts from websites of NJCM, Amnesty Netherlands, RADAR about annual report.
- Exhibit 35 RNM report, *Achtergrond en analyse bij het Strategisch kader – 'Gebruik etniciteit bij profileren'* [Background and analysis of the Strategic Framework: 'Use of ethnicity in profiling'], 28 June 2017.
- Exhibit 36 Article in regional newspaper *Eindhovens Dagblad*, '[baan] [eiser 1] uit [woonplaats] ontzettend woedend om 'etnisch profileren' op [vestigingsplaats luchthaven]' ['[Job title] [claimant 1] in [city] furious over 'ethnic profiling' at [location of airport]], 30 April 2018.
- Exhibit 37 R. Witte, V. Wijkhuijs, A. Kaouass, M. Scholtes & S. Akkes, *Effectief Mobiel Toezicht Vreemdelingen. Eindrapportage* [Effective Mobile Monitoring of Aliens: Final Report], The Hague: 2001.
- Exhibit 38 J. Brouwer, *Detection, detention, deportation: criminal justice and migration control through the lens of crimmigration* (dissertation, Leiden University), Eleven International Publishing: 2020, p. 69–74, 79.
- Exhibit 39 Investigation by the National Ombudsman, 'Uit de Rij Gehaald ['Pulled out of the queue'], 2017/44, 29 March 2017.

- Exhibit 40 Report of the hearing of the complaints committee with regard to the complaint of [claimant 1] [reference number], [date].
- Exhibit 41 Complaint filed by RADAR with the RNM on behalf of [claimant 2], [date].
- Exhibit 42 Response from RNM complaints officer, [date].
- Exhibit 43 Complaint filed by RADAR with the RNM on behalf of [claimant 2], [date].
- Exhibit 44 Decision of RNM complaints committee, [date].
- Exhibit 45 Complaint filed by RADAR with the National Ombudsman on behalf of [claimant 2], [date].
- Exhibit 46 Complaint submitted by [claimant 1] and PILP-NJCM to the RNM, [date].
- Exhibit 47 Tweet posted by [claimant 1], 30 April 2018.
- Exhibit 48 Selected media interviews with [claimant 1].
- Exhibit 49 Response from brigade commander, [date].
- Exhibit 50 Letter from PILP-NJCM to RNM complaints coordinator, 12 October 2018.
- Exhibit 51 Statement 3a of the officers involved.
- Exhibit 52 Statement 3d of the officers involved.
- Exhibit 53 Statement 3b of the officers involved.
- Exhibit 54 Recommendations on complaint of [claimant 1], [date].
- Exhibit 55 Decision on the complaint by the Commander of the RNM, [date].
- Exhibit 56 European Union Agency for Fundamental Rights, *Handbook on European non-discrimination law*, Council of Europe, 2010, p. 135.
- Exhibit 57 Article in *Defensie* magazine, 'KMar-brede aanpak predictive profiling' [RNM-wide approach to predictive profiling], 31 January 2019.
- Exhibit 58 W. Landman & H. Sollie, *Tegengaan van etnisch profileren. Een internationale literatuurstudie naar effecten van interventies* [Fighting ethnic profiling. An international literature survey of effects of interventions] (study commissioned by the Police & Science Programme), 2018, p. 62-66, 70, 85.
- Exhibit 59 H. Felten & I. Taouanza, *Wat werkt bij het verminderen van discriminatie* [What works in reducing discrimination] (study by the Integration & Society Knowledge Platform), 2018, p. 27.
- Exhibit 60 W. Landman & L. Kleijer-Kool, *Boeven vangen. Een onderzoek naar proactief politieoptreden* [Catching bad guys: A study of proactive police action]. Apeldoorn/Amsterdam: Police & Science, Reed Business: 2016, p. 180, 191.

- Exhibit 61 Article in *Observant Online*, 'Politie gebruikt "kwakzalvers"-methoden' [Police using 'snake oil' methods], 10 January 2013.
- Exhibit 62 Police press release, 'Rapporten onderbouwen aanpak etnisch profileren' [Reports substantiate approach to ethnic profiling], 3 October 2016.
- Exhibit 63 Article in national newspaper *De Telegraaf*, 'De kwestie preventief fouilleren: Niet effectief en grote negatieve gevolgen' [The question of preventive frisking: not effective, and significant negative impact], 14 September 2019.
- Exhibit 64 European Union Agency for Fundamental Rights (FRA), *Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Muslims – Selected findings*, 2017.
- Exhibit 65 Article in *Secondant*, 'Vertrouwen in de politie blijft bij sommige burgers achter' [Trust in the police remains low among some sectors of the public], 30 July 2018.
- Exhibit 66 Report of the European Union Agency for Fundamental Rights (FRA), *Towards More Effective Policing. Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, 2010.
- Exhibit 67 Article in *One World*, 'Discriminatie maakt letterlijk ziek' [Discrimination literally makes you sick], 26 September 2018.
- Exhibit 68 U. Ikram, *Social Determinants of Ethnic Minority Health in Europe*, University of Amsterdam, 2016.
- Exhibit 69 Article in *NRC* national newspaper, 'Etnisch profileren gebeurt, ook als je Typhoon heet' [Ethnic profiling happens, even if your name is Typhoon], 30 May 2016.
- Exhibit 70 Police response to the documentary *Verdacht*, 10 December 2018.
- Exhibit 71 National Police Force, *Handelingskader proactief controleren* [Action framework for proactive searches], 27 October 2018.
- Exhibit 72 Various press releases, summer 2019.
- Exhibit 73 UN Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/4/26, 29 January 2007.
- Exhibit 74 General recommendation no. 31 of the Committee on the Elimination of Racial Discrimination.

- Exhibit 75 Guidelines for the CERD-specific document to be submitted by States Parties under Article 9, paragraph 1 of the Convention, CERD/C/2007/1 dated 13 June 2008.
- Exhibit 76 Council of Europe, *Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Rome, 4.XI.2000, European treaty series no. 177).
- Exhibit 77 European Union Agency for Fundamental Rights (FRA), *Handbook on European non-discrimination law*, Council of Europe, Luxembourg: OJEU 2018, p. 91-92.
- Exhibit 78 P. Rodrigues & M. Van der Woude, 'Proactieve politiecontrole en onderscheid naar etniciteit of nationaliteit' [Proactive police control and distinction by ethnicity or nationality], *Netherlands Law Journal* 2016/1650.
- Exhibit 79 M. Bulterman, 'Ontwikkelingen in de Luxemburgse rechtspraak' [Developments in the case law of Luxembourg], in: J.H. Gerards, H. de Waele & K. Zwaan (eds.), *Vijf jaar bindend EU-Handvest van de Grondrechten* [Five years of binding EU Charter of Fundamental Rights], Deventer: Kluwer 2015.
- Exhibit 80 Ringelheim, 'The Prohibition of Racial and Ethnic Discrimination in Access to Services under EU Law', *European Anti-Discrimination Law Review*, Issue No 10, 2010.
- Exhibit 81 Committee against Torture, Concluding observations on the Netherlands, CAT/C/NLD/CO/7, Recommendation 45, 18 December 2018.
- Exhibit 82 CERD, Concluding observations on the combined 19th to 21st periodic reports of the Netherlands, CERD/C/NLD/CO/19-21, Recommendation 14.b. and 14.g, dated 24 September 2015.
- Exhibit 83 CERD, 22nd to 24th periodic reports submitted by the Netherlands under Article 9 of the Convention, due in 2019, CERD/C/NLD/22-24, 4 March 2019.