ECLI:NL:GHDHA:2023:173

Ruling

Court of Appeal of The Hague

Civil-law division

Case number of the court of appeal: 200.304.295/01

Case number of the court: C/09/589067/HA ZA 20-235
Publication number of the court decision: ECLI:NL:RBDHA:2021:10283

judgment of 14 February 2023

in the matter of:

1 [Appellant 1],

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

2 [Appellant 2],

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

3 The foundation **Stichting RADAR Inc.**,

with its registered office in Rotterdam
("**RADAR**")

attorney: A.M. van Aerde, Amsterdam,

4 Nederlands Juristen Comité voor de Mensenrechten (NJCM)
[Dutch Section of the International Commission of Jurists],

with its registered office and principal place of business in Leiden
("**NJCM**")

5 Amnesty International Dutch Section,

with its registered office and principal place of business in Amsterdam
("**Amnesty International**"),

attorney: J. Klaas, Amsterdam

appellants (jointly "**Amnesty et al.**")

appellants 3, 4 and 5 (jointly "**the Interest Groups**"),

v.:

the State of the Netherlands (the Ministry of Defence and the Ministry of Justice and Security),
domiciled in The Hague,
defendant on appeal ("**the State**"),
attorney: C.M. Bitter, The Hague

1 The case in brief

1.1 The Royal Netherlands Marechaussee (hereinafter: "**RNM**") is charged with the Mobile Security Monitoring ("**MSM**") procedure. MSM is intended to combat illegal immigration following a border crossing. In the course of the procedure, the RNM is permitted to stop persons who have just crossed the Dutch border for the purposes of ascertaining their identity, nationality and immigration status. The RNM selects the persons who it will subject to these checks based on a number of indicators, which may differ from case to case. In some cases, these indicators may include personal characteristics based on race or ethnicity (such as skin colour). The RNM always uses these in combination with other indicators and only where necessary. The RNM's position is that physical characteristics derived from race or ethnicity do not necessarily – but could potentially – say something about the nationality or origin of the person checked. Consequently, for effective performance of MSM, it is necessary for the RNM to be able to use such characteristics.

1.2 Amnesty et al. take the position that by acting in this way, the RNM is engaging in illegal ethnic profiling and racial discrimination. [Appellant 1] and [appellant 2] believe that they have been made the victims of ethnic profiling by being "pulled from the line" for a check at the airport. Amnesty et al. believe that the actions of the RNM are unlawful because they are in violation of multiple human rights conventions. In these proceedings, they are seeking from the court an injunction on the State, of which the RNM is an agency, on continuing to use characteristics derived from race in the selection of persons for the purposes of MSM checks.

1.3 The district court rejected the claims of Amnesty et al., but on appeal the Court of Appeal rules in favour of Amnesty et al. The Court of Appeal finds that the RNM does make distinctions on the basis of race or ethnicity. In view of the severe consequences of distinction on the basis of race or ethnicity, such a distinction can only be made where there are extremely serious reasons for doing so. The State has not demonstrated any such serious reasons. This means that the RNM is engaging in discrimination on the basis of race, which is prohibited. Accordingly, the Court of Appeal prohibits the State from making selection decisions based (in whole or in part) on race in the performance of MSM checks.

2 The proceedings

2.1 The course of the proceedings is evidenced from the following documents:

- the District Court's interlocutory judgment of 19 May 2021;

- the District Court of The Hague's judgment of 22 September 2021, hereinafter: the "judgment" or "disputed judgment", with the documents from the first instance;

- the summons of 20 December 2021 by which Amnesty et al. appealed against the disputed judgment;

- the letters from the parties to the Court of Appeal of 1 March 2022, in which at the request of the Court of Appeal the parties comment on the applicability on appeal of a number of subjects regulated in Articles 1018b et seq., Dutch Code of Civil Procedure, and in which they also respond to their respective counterparty's draft response (sent to them in advance);

- the interlocutory judgment of 5 April 2022

- Amnesty et al.'s statement of appeal, with exhibits 88 through 111;

- the State's statement of defence on appeal, with exhibits 11 through 13;

- The written arguments of A.M. van Aerde, M.B Hendrickx and J. Klaas on behalf of Amnesty et al., and of C.M. Bitter and L. Sieverink on behalf of the State, all of whom spoke during the oral argument session of 8 December 2022;

- the official report of that oral argument session.

3 Parties to the proceedings

3.1 The RNM is an agency of the State and is charged, in part, with MSM for the purposes of combating illegal residence after crossing a border. To that end, the RNM is permitted to stop persons who have just crossed the Dutch border for the purposes of ascertaining their identity, nationality and immigration status. Hereinafter (under 4.1 et seq.) the Court of Appeal will examine in further detail the statutory powers that the RNM has to do this.

3.2 [Appellant 1] lives in [city] . He crosses the border frequently. In April 2018, [appellant 1] was stopped and pulled from the line for an MSM check at Eindhoven Airport. He submitted a complaint about this to the RNM on the basis of his belief that he had been singled out for this check based on ethnic profiling. [Appellant 1] is not (or is not fully) in agreement with the outcome of the assessment of this complaint by the RNM (and/or the RNM's complaints committee).

3.3 [Appellant 2] lives in [country] and works in the Netherlands as a pilot and therefore regularly

travels between these two countries. Between March 2015 and June 2015, [appellant 2] flew into Rotterdam The Hague Airport four or five times and was stopped for an MSM check three times. On behalf of [appellant 2], RADAR submitted a complaint to the RNM based on unequal treatment in these checks, because [appellant 2] stated that these checks were based on ethnic profiling. This complaint was declared unfounded, after which RADAR brought the matter to the National Ombudsman on behalf of [appellant 2]. In a report on 29 March 2017, the National Ombudsman found this complaint to be justified, and issued a number of recommendations to the State with respect to the MSM checks.

3.4 RADAR promotes equal treatment, and its activities are focused on preventing and combating discrimination in police units. It does this, in part, by means of handling complaints, consultation, information campaigns, policy and public advocacy and legal action. Since 2012, it has been active and visible on the theme of "ethnic profiling" by the police.

3.5 NJCM is an association active in the protection and reinforcement of human rights and fundamental freedoms.

3.6 Amnesty International is an association that is active worldwide working to ensure that governments respect human rights.

3.7 In its interlocutory judgment of 19 May 2011 [1], the District Court determined that Amnesty et al.'s claims were admissible and designated Amnesty International as exclusive interest representative within the definition of Article 1018(e)(1), Dutch Code of Civil Procedure.

3.8 In its interlocutory judgment of 5 April 2022, the Court of Appeal likewise declared Amnesty et al.'s claims admissible and designated Amnesty International as exclusive interest representative within the definition of Article 1018(e)(1), Dutch Code of Civil Procedure.

4 The MSM checks; legal background

4.1 Under Article 4(1) of the Dutch Police Act 2012 (*Politiewet*), the tasks charged to the RNM include the following:

c. the performance of the policing task at Schiphol Airport and the other airport sites designated by Our Minister and the Minister of Defence, as well as the security of civilian aviation;

d. the granting of assistance and cooperation with the police pursuant to this act, including assisting the police in combating cross-border criminality (…);

f. the performance of the tasks under or pursuant to the Aliens Act 2000, including the operation of the border posts designated by Our Minister for Immigration and Asylum and, insofar as necessary in this connection, the performance of the policing task on and in the vicinity of these border posts, as well as the granting of cooperation in the arrest and arraignment of a suspect or convicted person;

g. the combating of human trafficking and of fraud involving travel and identity documents.

4.2 Article 50(1) of the Aliens Act 2000 determines as follows, insofar as relevant here:

The officials charged with border control (…) are authorised to 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. (…)

4.3 The power granted by Article 50(1) of the Aliens Act 2000 is further defined in Article 4.17a of the Aliens Decree 2000. Article 4.17a of the Aliens Decree reads as follows:

1. The authority referred to in Article 50(1) of the Act [the Aliens Act 2000 -- Court of Appeal] to, for the purposes of fighting illegal residence after crossing a border, stop persons in order to establish their identity, nationality and immigration status, is exclusively exercised in the context of monitoring of foreign nationals:

a. at airports when flights arrive from within the Schengen area;

b. in trains for a maximum of thirty minutes after crossing the national border shared with Belgium or Germany or, if within this period the second station after the crossing the border has not yet been reached, until no later than the second station after crossing the border;

c. on roads and waterways in an area up to 20 kilometres from the national border shared with Belgium or Germany.

2. The monitoring referred to in the first paragraph is performed on the basis of information or historical data on illegal residence after crossing a border. Monitoring may additionally be conducted to a limited extent for the purposes of obtaining information about such illegal residence.

3. The monitoring 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, up to a maximum of one-third of the total number of planned flights per month on that flight route. In the context of this monitoring, only a portion of the passengers on a flight will be stopped.

4. The monitoring referred to in the first paragraph, part b, will be performed in a maximum of three trains per trajectory and a maximum of 20 trains in total per day, with the further proviso that the monitoring may only be performed in one section of the train and on each train in a maximum of four train cars.

5. The monitoring referred to in paragraph 1(c) shall be carried out on the same road or waterway for no more than ninety hours per month and no more than six hours per day. In the context of this monitoring, only a portion of the passing vehicles will be stopped.

4.4 The restrictions set on border controls under Article 4.17a of the Aliens Decree 2000 are related to the fact that the Netherlands is a part of the Schengen Area, within which border controls are not permitted. In its decision of 19 July 2012 [2], the CJEU determined that the control powers outlined in Article 4.17a, Aliens Decree 2000, do not essentially entail border controls (unlawful or otherwise).

4.5 This case concerns the authority of the RNM to, for the purposes of MSM, combat illegal residence after crossing a border by stopping persons in order to establish their identity, nationality and residence status. This authority may, as is also entailed by Article 50(1) Aliens Act 2000, be exercised without the requirement of facts and circumstances that, according to objective standards, would present a reasonable suspicion of illegal residence. This authority/these control powers must be distinguished from the authority of the RNM to combat human trafficking and fraud with travel and identity documents (see Article 4(1)(g), Police Act).

5 The MSM checks; RNM policy and implementation

5.1 The RNM maintains the premise that ethnic characteristics are not used in the context of MSM. This does not alter the fact that ethnicity can in fact play a role in selection decisions under certain circumstances, but only in combination with other information and only when necessary. As explanatory remarks with regard to the policy and implementation of MSM checks, the Court of Appeal notes the following. Here the Court bases itself on the explanation that the State provided in the documents, which was not refuted by Amnesty et al. (or not with sufficient substantiation).

5.2 In the performance of its monitoring task within the context of MSM, the RNM operates in an information-driven manner. This means that, on the basis of information originating from various sources (including but not limited to the police and customs authorities), profiles are drafted that pertain to a specific development or trend in migration flows. These profiles are drafted by the RNM's National Tactical Command (NTC), Intelligence Division. In these profiles, objective indicators are used (such as the route travelled or the composition of the party travelling), on the basis of which, combined in part with other factors such as behaviour, the decision of whether to subject a person to a check is made on a case-by-case basis by the inspecting officer.

5.3 The performance of an MSM check is preceded by a briefing, which includes an explanation of the profile underlying the decision to conduct this particular MSM check and the illegal migration phenomenon that may be involved here.

5.4 When selecting individual persons for an MSM check, the RNM uses a method known as "Behaviour Detection Method: Predictive Profiling" (PP). This method is designed to identify conspicuous or aberrant behaviour and signal certain modus operandi (which are to be stated in the briefing) that are indicative of an illegal migration phenomenon or other illegality. Selections on the basis of the PP are only made on the basis of a combination of multiple indicators. This is intended to prevent selection from being made on the basis of 'gut feelings' of the officer in question and to increase the 'explainability' of the selection decision.

5.5 Ethnic characteristics can be an element of the selection decision as part of MSM, but only (i) if such a characteristic can be linked to objective information about a specific migration phenomenon, and (ii) in combination with other indicators that fit within the profile. This means, according to the State, that the decision to select an individual for screening may not be based exclusively or predominantly on ethnic characteristics.

5.6 If a person is selected for a check as part of MSM, this person is stopped in order to establish their identity, nationality and residence status.

5.7 After the individual MSM check is completed, a debriefing is given.

5.8 The practice described above primarily applies to checking airline passengers. When checking train passengers, four cars per train are selected to be checked, and then all passengers in those cars are checked. If a coach is selected, then likewise all passengers in that coach are checked. The same applies for checking passengers of a selected car or water vessel: again, all passengers of the selected vehicle are checked. As the Court of Appeal understands it, these cases therefore do not involve any individual selection of persons to be checked.

5.9 Because border controls upon arrival from non-Schengen countries are permitted, this case is in essence about the selection for checks of persons originating from other Schengen countries.[3]

6 The essence of the dispute and what the District Court ruled

6.1 Amnesty et al. take the position, in essence, that in the performance of MSM checks the RNM makes selection decisions (meaning: decides which persons will be subjected to checks to establish their identity, nationality and residence status) that are based in part on race (in the first instance referred to as: "ethnicity"). Amnesty et al. argue that this violates the ban on discrimination. They are seeking in these proceedings (with respect to the Interest Groups: on the basis of Article 3:305a, Dutch Civil Code) declaratory judgments to this effect as well as an order that the State terminate this practice.

6.2 The State disputes the perspective of Amnesty et al., and takes the position first and foremost that the RNM does not engage in ethnic profiling. The RNM's position is that ethnicity is not used in MSM selection decisions, except where it is necessary and its use can be linked to objective information on specific migration phenomena, and only in combination with other indicators. Selection is never made purely on the basis of skin colour and/or race, nor is someone selected *because* they have certain ethnic characteristics and *therefore* would presumably be of a different nationality. Because a selection decision must always be based on multiple objective factors, that decision is also never predominantly based on any one of those indicators, such as skin colour or race. The other indicators weigh just as heavily. This is in line with international human rights conventions and other international agreements, as well as the case law of various national and international courts.

6.3 The District Court rejected Amnesty et al.'s claims. The District Court's ruling can be summarised as follows.

(i) "Ethnicity" is understood by the District Court to mean unchangeable external or physical characteristics that could signal a certain origin or background, specifically skin colour and/or race (paragraph 6.3).

(ii) The question at issue is what persons will be subjected to an MSM check. These selection decisions are made on the basis of indicators that are derived from a certain profile. It is not in dispute that ethnicity can play a role in these selection decisions, and that this can lead to a difference in treatment between persons, which is based in part on ethnic physical characteristics. To make this distinction, there must be an objective and reasonable justification (paragraph 8.6).

(iii) It is not in dispute that MSM serves a legitimate purpose (paragraph 8.7).

(iv) The making of a distinction on the basis of ethnicity must be a proportionate means, in other words, it must be a suitable means for the purpose and it cannot go further than necessary to achieve the purpose (paragraph 8.8).

(v) The ability to establish the nationality or geographic origin of a person is of compelling importance for the effectiveness of MSM, because these can be determining factors in a person's immigration status. Ethnic physical characteristics are not necessarily always, but could in some cases be an objective indication of someone's origin or nationality (paragraph 8.9).

(vi) If a person's ethnicity plays a role in a selection decision, this is an element in a formula composed of related indicators. It is conceivable that ethnicity might be decisive in the sum total

of indicators, but it is not disproportionate. The fact that a selection indicator, such as skin colour or age, might at any time be decisive in the decision whether or not to select a person for a check does not make that indicator the only or most decisive one (paragraph 8.10).

(vii) The checking of all passengers on a given flight is not an alternative, because that would essentially entail a border check (which is not permitted). As the State asserted without dispute, random checks would significantly diminish the effectiveness of the checks. A reasonable alternative for selection decisions based in part on ethnicity has not been demonstrated (paragraph 8.12).

(viii) The use of ethnicity in making selection decisions in the context of MSM in general is therefore not in violation of the ban on discrimination as set out in Article 1 of Protocol 12 to the ECHR (paragraph 8.14).

(ix) It may in practice happen in individual cases that skin colour or other ethnic characteristics are the only or decisive reason for a selection decision. The simple possibility of such a discriminatory and therefore unlawful action in individual cases does not justify the general ban that has been claimed. That would only be justified if unlawful use of these characteristics were happening in MSM checks on a more or less structural basis (paragraph 8.15).

(x) Even if it were to be assumed that the checks of [appellant 1] in 2018 and of [appellant 2] in 2015 were discriminatory and therefore unlawful, this does not demonstrate an existing unlawful implementation practice on the part of the RNM, not least in consideration of the improvements that the RNM has since implemented, in part based on the recommendations of the Ombudsman (paragraph 8.17).

6.4 On appeal, Amnesty et al. changed their claim to replace the term "ethnicity" with "race". Amnesty et al. is currently seeking from the Court of Appeal:

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

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

2.a. that the State be prohibited from compiling and using risk profiles for MSM checks in which race is an element (at least in part);

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

3. that the State be ordered to ensure that no (direct or indirect) discrimination take place in the performance of the MSM checks;

that the State be ordered to pay the costs of the proceedings.

7 Assessment on appeal; introductory considerations

7.1 *RNM's process*

7.1.1 In the statement of appeal, Amnesty et al. argued that the RNM had supposedly changed its process after the judgment of the District Court. From the State's position on appeal, it is clear that there has been no change or only very limited change to the process. Regardless, the Court of Appeal will assume that the process of the RNM is as the State has described it on appeal and as has been outlined in the foregoing. The court notes that Amnesty et al. also assumes that the 'new' position of the RNM is based on maintaining the old position.[4]

7.1.2 Amnesty et al. further argued (ground for appeal 4) that the District Court failed to recognise that in practice MSM checks are also being used to fight cross-border crime. According to Amnesty et al., this interweaving of tasks related to immigration law and criminal law is problematic because the RNM uses it to bypass the threshold of reasonable suspicion of guilt of a criminal offence. The Court of Appeal does not see what this has to do with Amnesty et al.'s claims, which are not directed towards stopping any possible interweaving of tasks related to immigration law and criminal law, but rather towards stopping selection decisions based on race. Accordingly, the Court of Appeal further disregards this argument presented by Amnesty et al. Additionally, Amnesty et al. have no interest in this argument, because their claim is awardable even without it.

7.2 *Change of claim*

7.2 On appeal, Amnesty et al. changed their claim to replace the term 'ethnicity' with 'race'. As reason for this change, Amnesty et al. refer to the term 'racial profiling' (which, according to Amnesty et al., is translated into Dutch as '*etnisch profileren*') and argue that this change improves the readability of the statement of appeal. Amnesty et al. define 'race', in part, as skin colour, origin or national or ethnic background.[5] Amnesty et al. define 'origin' as characteristics relating to national or ethnic background, for example a birthplace outside of the Netherlands or a country of origin other than the Netherlands. Amnesty et al. define 'national background' as a person's connection with a nation-state, for example by virtue of that person or that person's parents or ancestors having been born and raised in that nation-state. Amnesty et al. use 'ethnic background' and 'ethnicity' as a reference to membership in a social or societal group that is characterised by a common nationality, tribe, religion, language or culture and traditional origin or background.

7.3 In terms of the terminology to be used, the Court of Appeal concurs with the European Court of Human Rights, which has considered as follows[6]:

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

Where the court uses the terms 'race' and 'ethnicity' below, it does so in these (overlapping) meanings. They include, in any event, personal characteristics such as skin colour and facial characteristics. The court understands that Amnesty et al. does not mean anything fundamentally different by using the term 'race'.

8 Assessment on appeal; discussion of the grounds for appeal

8.1 Amnesty et al. argued fifteen grounds for appeal against the District Court's judgment. In essence,

these grounds for appeal boil down to the argument that on a number of points, the District Court failed to understand what review in the context of the ECHR must be applied, and as a result reached an incorrect determination on the question of whether the RNM is acting in violation of Article 1 of Protocol 12 to the ECHR. Amnesty et al. further argue that the court wrongly failed to address other grounds for appeal that they had raised.

8.2 The Court of Appeal will first address Amnesty et al.'s argument with regard to Article 1 of Protocol 12 to the European Convention on Human Rights (ECHR), given that the most extensive body of available case law of the European Court of Human Rights pertains to the ECHR. Article 1 of Protocol 12 to the ECHR determines that no one may be discriminated against by any public authority on, in particular, the following grounds: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

8.3 The history of the creation of Article 1 Protocol 12 shows that it was intended that the concept of discrimination in that provision should have the same meaning as in Article 14 ECHR.[7] The Court of Appeal will therefore seek alignment with the case law of the European Court of Human Rights concerning Article 14 ECHR, because there is more extensive case law available concerning Article 14 ECHR than there is concerning Article 1 of Protocol 12 to the ECHR. The only difference between Article 14 ECHR and Article 1 of Protocol 12 to the ECHR (the more limited scope of application of Article 14) has no relevance in this case.

8.4 In order to assess whether Article 14 ECHR is being violated, the following review must be undertaken:

1. is the situation one of unequal treatment of equal cases; if so,

2. is there an objective and reasonable justification for the unequal treatment, that is:

- does the distinction serve a justified purpose; and

- is there a reasonable degree of proportionality between the means used (the unequal treatment) and the purpose sought.[8]

The requirement of proportionality inherently entails that the measure must be appropriate and, certainly where it comes to a distinction that is to be considered "suspect", must be necessary in order to achieve the (legitimate) goal sought.[9] Distinction on the basis of race must in any event be considered such a 'suspect' distinction.[10]

8.5 On the question of whether an instance can be qualified as unequal treatment of equal cases, in cases in which it is asserted that distinction is being made on the basis of a 'suspect' ground, the European Court of Human Rights applies the "*but for*" test. This means that the European Court of Human Rights investigates whether the treatment of the person would have been the same if the person did not have a certain (as stated in Article 14 ECHR) personal characteristic, such as skin colour. If the answer is no, then the instance must be considered unequal treatment on the basis of one of the grounds prohibited by Article 14 ECHR. If multiple factors played a role in the decision-making, the European Court of Human Rights reviews whether the discriminatory element had decisive significance.[11]

8.6 Once it is established that there is a difference in treatment, it is up to the authorities in question to demonstrate that there is a justification for it.[12] In its case law, the European Court of Human

Rights consistently takes the position that distinction on the basis of 'suspect' grounds such as race or ethnicity can only be justified if there are "*very weighty reasons*" for doing so. The European Court of Human Rights also expresses this such that in these cases, the term "*objective and reasonable justification*" must be interpreted "*as strictly as possible*".[13] The '*very weighty reasons*' test means that high standards must be set on the justification of the objective sought, as well as on the appropriateness, necessity and proportionality of the unequal treatment.[14] These high standards are almost never met in actual practice.[15]

8.7 The European Court of Human Rights is further of the opinion that if the distinction is based "*exclusively or to a decisive extent*" on ethnicity, there can be no objective justification for that distinction.[16] Contrary to what the State argues, it is not the case that a distinction on the basis of race or ethnicity is only prohibited if that distinction can be linked "excl*usively or to a decisive extent*" to race or ethnicity. If the distinction is based "*exclusively or to a decisive extent*" on race or ethnicity, then the European Court of Human Rights states that there can be no such justification. If a distinction is made that is not based "*exclusively or to a decisive extent*" on race or ethnicity, but does pass the "*but for*" test, the State must then demonstrate that there are "*very weighty reasons*" for that distinction.[17]

8.8 Amnesty et al. further argued that the 'margin of appreciation' that the European Court of Human Rights extends to the state parties applies only in the relationship between the European Court of Human Rights and the state parties, so not in the relationship between the courts and the government within those states themselves. That in itself is correct, but that does not mean that the civil court should leave the State no discretion at all, although such 'margin of appreciation' in domestic relations may be a different one than what the European Court of Human Rights leaves to the state parties. In the present case, however, the court sees no reason to apply a different margin of appreciation in the relationship between the parties than that expressed in settled case law of the European Court of Human Rights and as summarised above.

8.9 The court will now consider, against the background described above, whether the RNM is violating Article 1 of Protocol 12 to the ECHR in its performance of the MSM checks. It is relevant to note here that Amnesty et al. are seeking a future-oriented ban. Awardability of such a ban requires that there is a real risk that the state will violate a legal obligation; but if this requirement is fulfilled, that is all that is necessary for such a ban to be awarded.[18] This makes the approach that must be applied in these proceedings slightly different than that of the European Court of Human Rights.

8.10 The case law of the European Court of Human Rights was established as the result of and in response to complaints by individual persons. For this reason, it is necessary for the European Court of Human Rights, when a complaint is submitted about discrimination on the basis of race or ethnicity, to first investigate whether the complainant was indeed treated unequally on the basis of his or her race or ethnicity. A recent example is the case of *Muhammad v. Spain*[19], in which the European Court of Human Rights concluded that it had not been established that the decision to subject Muhammad to an identity check was based on racist motives. In that sense, this case is different because it is not about assessing an individual incident completely in the past, but about a future-oriented ban. Moreover, the present case differs from many other cases adjudicated by the European Court of Human Rights in that the State acknowledges that the RNM uses (as the situation requires) race or ethnicity in selection decisions as part of MSM. This is a component of RNM policy. Against this background, an order directed towards the State does not, strictly speaking, require it to first be established – by applying the "*but for*" test – whether there is unequal treatment on the basis of race or ethnicity. This is because it has been established that, in certain cases, the RNM does use race and ethnicity (alongside other factors) in selection decisions in the context of MSM. The court can and must review whether there is an objective and

reasonable justification for this use of race and ethnicity.

8.11 This does not alter the fact that, insofar as the Court of Appeal must still use the "*but for*" test to ascertain whether the RNM will act in a discriminatory manner on the basis of race or ethnicity in otherwise equal cases (or there is a real risk that this will happen), the court must also conduct that review. Indeed, based on what the State has presented about the use of race or ethnicity in the MSM checks, the court can determine that there is and will be unequal treatment in equal cases.

8.12 The State has explained that, in its decisions to subject a person to a check as part of MSM, the RNM uses race or ethnicity as an indicator if there is a reason to do so on the basis of objective information, always in combination with other indicators and only where necessary. As considered above, the issue is to determine whether selection in such cases would have occurred even if the racial or ethnic characteristic in question had been absent (the "*but for*" test).

8.13 The Court of Appeal is of the opinion that the simple fact that other grounds also contribute to the selection decision does not preclude the fact that race or ethnicity are decisive, to the extent that selection would not have happened without the personal characteristic in question (linked to race or ethnicity). Nor does the possibility that one or more of the other grounds are decisive in the same sense prevent race or ethnicity from also being decisive in the sense that, all other circumstances being equal but in the absence of the racial or ethnic characteristic, selection would not have taken place. This is similar to *condicio sine qua non* in establishing causation: there can be (and in practice almost always will be) multiple causes with respect to which *sine qua non* is present.

8.14 Contrary to the State's apparent belief, the mere fact that multiple, equally weighty, grounds (including race or ethnicity) led to the selection decision does not make the "*but for*" connection absent, nor does that make it permissible for race or ethnicity to be used for that reason alone. Similarly, the case law of the European Court of Human Rights does not indicate that the presence of other causes besides race or ethnicity by definition mean that the use of a racial or ethnic characteristic for the selection or other treatment of persons is permissible. This goes without saying, since it is difficult to imagine in actual practice that the racial or ethnic characteristic alone led to government action. In practice, other circumstances will almost always play a role, such as the age of the person selected and the time and place of the check.

8.15 The question now is whether, if the RNM uses a characteristic linked to race or ethnicity in a certain instance, it can then automatically be said that the answer to the "*but for*" test is no, or at least there is a realistic risk that the answer is no. The State asserts that race or ethnicity is only used in the selection decisions if this is necessary, which the Court of Appeal understands as: proper performance of the MSM check in question would not otherwise be possible, for example because certain migration phenomena could then not be checked properly. This position necessarily implies that in those cases where race or ethnicity are used, the person being monitored would not have been selected if the racial or ethnic characteristic had been absent. Obviously, the use of such a characteristic cannot simultaneously be 'necessary' while also having no impact on the selection decision. In other words: if race or ethnicity do not actually make a difference for the selection decision, then the use of them cannot be necessary. The conclusion is therefore that whenever the RNM uses race or ethnicity in making a selection decision, the answer to the "*but for*" test is no.

8.16 This is also evident from the examples that the State provided of selection decisions in which race or ethnicity does play a role. The first example involves information that the RNM has concerning unlawful smuggling or travel of young Nigerian women into the Netherlands on the

flight route from Rome to Rotterdam.[20] According to the State, ethnic characteristics do not necessarily say anything about nationality, but they could, and this element is not the only consideration, but one element among more objective elements *that must also be present* [emphasis added by Court of Appeal]. This last phrase shows that even in the State's view, no selection is made in such a case if that ethnic characteristic is not met.

8.17 The second example concerns information that the RNM has about a migration phenomenon by which Vietnamese people are attempting to illegally pass through the Netherlands and travel on to the United Kingdom.[21] It is known that persons who wish to make the illegal crossing to the United Kingdom are climbing into freight lorries by night at rest stops along a certain motorway in the border area. If that is the situation and, at a rest stop in the border area along this motorway, the RNM observes two persons with an Asian appearance walking between the parked freight lorries one night around 3:00 AM, the RNM may check these persons. According to the State, in such a case the Asian appearance *could* say something about the origin of these two persons and in this case could in part – in combination with other factors *that must also be present* [emphasis added by Court of Appeal] – form the basis of the selection decision. Again, the State's assertion in this case shows that selection for the MSM checks would not have occurred if the two individuals did not have an Asian appearance.

8.18 In its pleadings, following on from this second example, the State further argued that this does not mean (in the situation of 'stowaways' as described here) that everyone with an Asian appearance would be checked, and that persons who conform to the other indicators but do not have an Asian appearance could also be checked. The court cannot rule on specific hypothetical and/or future cases. It is certainly conceivable that race or ethnicity might not play a decisive role in a specific check situation. What is at issue here, however, is that the State itself argues that the RNM does use race or ethnicity as a selection criterion when it feels that this is necessary. This in itself sufficiently establishes that there is a realistic risk that such instruments have decisive influence on selection decisions that the RNM makes in the context of MSM, and that the RNM acts in a discriminatory manner in otherwise equal cases.

8.19 The Court of Appeal will now review whether there is an objective and reasonable justification for the distinction made by the RNM on the basis of race or ethnicity. The assumption here is that the combating of illegal residence after crossing a border[22] is a legitimate objective. That is not in dispute.

8.20 The first question that the Court of Appeal must consider is whether, if race or ethnicity are used as one of the grounds, the decision to check a person is "*exclusively*" or "*to a decisive extent*" based on race or ethnicity. If that is the case, then it can be ruled out that there is an objective and reasonable justification for the distinction made.[23] It has been considered in the foregoing that in those cases in which the RNM bases a selection decision on race or ethnicity, the characteristic derived from race or ethnicity is decisive in that the person in question would not have been selected for a check if, in the same circumstances, that characteristic was absent (or there is a realistic risk that they would not have been selected). This inevitably means that the selection decision is based "*to a decisive degree*" on that racial or ethnic characteristic. The fact that other factors may also be decisive does not change this. This establishes, according to the standing case law of the European Court of Human Rights, that there cannot be an objective and reasonable justification for the distinction made. The use of personal characteristics derived from race or ethnicity in selection decisions in the context of MSM is therefore unjustified.

8.21 As an additional (but redundant) consideration, the Court of Appeal will consider what the situation would be if race or ethnicity did play a role in the selection decisions, but these decisions

were not based "*exclusively or to a decisive extent*" on race or ethnicity. In that case, as has been considered in the foregoing, it must be investigated whether there are "*very weighty reasons*" for that distinction, and this is up to the State to demonstrate. However, the State did not demonstrate this. The State only argued that ethnic characteristics do not necessarily say anything about nationality or origin, but that they could.[24] The State did not, however, demonstrate or make plausible that race or ethnicity says (or could say) anything about nationality or origin. In this context, Amnesty et al. rightly argue that nationality is a legal category that cannot, under normal circumstances, be derived from external characteristics based on race or ethnicity. 'Origin' is a term that is overly vague and not defined by the State. Nor has the State explained, and certainly not on the basis of any scientific evidence, why the mere possibility that race or ethnicity could say something about origin or nationality makes such a selection criterion an adequately suitable and proportional means for fighting illegal residence. Nor has the State provided any insight into how the cases in which the State believes racial or ethnic characteristics do say something about nationality or origin compare numerically with those in which they do not.

8.22 Similarly, the State has not demonstrated nor made plausible that the use of race or ethnicity in making selection decisions in the context of MSM is necessary for the proper performance of monitoring for illegal residence after crossing a border. The State did argue, on the basis of a pilot study (which, it must be noted, was only referred to for the first time on appeal and the results of which were not submitted to the proceedings), that if information-driven action were to be abandoned, the effectiveness of MSM would drop to zero. The issue, however, is not whether information-driven action is necessary, but (only) whether its inclusion of the possibility of using race or ethnicity as a basis for selection is necessary. This is not something that the State demonstrated by referencing this pilot study, nor did the State demonstrate that it can only act in an information-driven manner if it is allowed to use race or ethnicity. Furthermore, the fact that distinction on the basis of race or ethnicity is not suitable as an indicator of nationality or origin in itself entails that this distinction cannot be necessary for effective monitoring of illegal residence after crossing a border.

8.23 The State also argued that the use of race or ethnicity can help prevent abuses such as human trafficking. The European Court of Human Rights has considered that Article 14 ECHR does not prohibit authorities from treating groups of people differently in order to correct "*factual inequalities*", i.e., in cases of positive discrimination.[25] It can therefore not be summarily ruled out that, if in a specific case the RNM is not actively conducting an MSM check, but rather wishes to provide assistance to persons who are at risk of becoming the victim of crimes such as human trafficking, this could constitute an objective and reasonable justification. However, these proceedings are about the checks carried out in the context of MSM, which are intended to combat illegal residence after crossing the border. The simple fact that there is the possibility that an MSM check could have the 'side effect' of fighting a specific crime is insufficient to lead to the determination that there is an objective and reasonable justification for selection on the basis of race or ethnicity. The State has not provided enough concrete evidence to support that.

8.24 The result of all this is that it must be concluded that there is no objective and reasonable justification for the distinction made by the RNM on the basis of race or ethnicity and selection decisions for the purposes of MSM checks. Making a distinction on the basis of race or ethnicity without an objective and reasonable justification is an extremely severe form of discrimination. On this matter, the European Court of Human Rights has considered as follows[26]:

"56. A differential treatment of persons in relevantly similar situations, without an objective and reasonable justification, constitutes discrimination (see Willis v. the United Kingdom, no. 36042/97, § 48, ECHR 2002-IV). Discrimination on account of one's actual or perceived ethnicity is

a form of racial discrimination (see the definitions adopted by the United Nations and the European Commission against Racism and Intolerance – paragraphs 33 and 34 above). Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment (see Nachova and Others, cited above, § 145)."

In certain cases, the RNM makes a distinction on the basis of race or ethnicity and wishes to continue being able to make this distinction. In such cases, the RNM subjects persons to a check due to characteristics such as their skin colour, while other persons who do not have the same skin colour but do conform to the other indicators are not checked. This constitutes discrimination based on race.[27] Such forms of discrimination lead to stigmatisation and feelings of pain and frustration on the part of the persons selected on this basis, as has been sufficiently demonstrated from the statements of [appellant 1] and [appellant 2] in the session (and not disputed). Moreover, RNM policies and actions have a negative impact on society as a whole. It makes Dutch citizens with a skin colour other than white feel that they are not accepted, that they are considered second-class citizens. The negative consequences of discrimination on the basis of race or ethnicity justify the application of the strict review imposed by the European Court of Human Rights and – in line with that judicial authority – by this Court of Appeal.

9 Awardability of the claims

9.1 Amnesty et al. are seeking, in part, that the State be prohibited from making selection decisions in the performance of MSM checks based (in whole or in part) on race. As considered in the foregoing, a requirement for such an order is that there must be a realistic risk that the State will act wrongfully. In view of the foregoing, that requirement is met. Contrary to what the District Court considered, such a ban does not require it to be established that wrongful use of ethnicity is being made "on a more or less structural basis".[28] The use of race and ethnicity in selection decisions is based on standing policy of the RNM and is not the result of officers who in specific cases depart from the standards applicable within the RNM. Nor has the State argued that the use of race or ethnicity happens so rarely that there is no longer a real risk of it, nor is that plausible given the importance that the RNM evidently attaches to this instrument. The claim seeking that the Court of Appeal prohibit the State from making selection decisions in the performance of MSM checks based (in whole or in part) on race is therefore awardable. Amnesty et al. do not have an independent interest in the claim that the Court of Appeal also issue a declaratory judgment to that effect.

9.2 Amnesty et al. also seek that the Court of Appeal prohibit the State from compiling and using risk profiles for MSM checks in which race is a factor (in whole or in part). According to Amnesty et al., the risk profiles also use racial or ethnic characteristics. The State disputes this. The Court of Appeal can leave the determination on this aside, because Amnesty et al. have no interest in this claim. Since the Court of Appeal is prohibiting the State from using such characteristics in the selection decisions, it cannot be envisioned – nor have Amnesty et al. offered reasons to substantiate this – what interest they would have in the content of the profiles (which, it should be noted, are not public) in addition to the claim already granted. This claim will therefore be rejected, as will the claimed declaratory judgment to the same effect.

9.3 Finally, Amnesty et al. are seeking that the Court of Appeal order the State to ensure that no (direct or indirect) discrimination takes place in the performance of the MSM checks. It is not clear

what this claim adds to the order that the Court of Appeal will issue prohibiting the State from making selection decisions in the performance of MSM checks based (in whole or in part) on race. The RNM is, of course, an agency of the State and as such must already adhere to that order. Therefore, this claim is also not awardable on the basis of lack of interest.

9.4 With this being the situation as regards the claims, Amnesty et al. have no interest in the Court of Appeal also addressing the other bases for their claims.

10 Conclusion; litigation costs

10.1 To the extent outlined above, the grounds for appeal succeed. The District Court's judgment cannot be upheld. The Court of Appeal will prohibit the State from making selection decisions in the performance of MSM checks based (in whole or in part) on race. The Court of Appeal will declare the decision immediately enforceable, as Amnesty et al. sought in the summons in appeal proceedings.

10.2 As the party ruled against, the State will be ordered to pay the costs of the proceedings in both instances, including the costs of the procedural matter that led to the decision of 5 April 2022.

Decision

The Court of Appeal:

- sets aside the judgment of the District Court and, adjudicating anew:

- prohibits the State from making selection decisions in the performance of MSM checks based (in whole or in part) on race;

- rejects all other or additional claims;

- orders the State to pay the costs of the proceedings in both instances, assessed up to this point *in the first instance* at €656 in court fees and €1689 in attorney's fees, and *on appeal* at €1566 in court fees and €4140.50 in attorney's fees, and at €173 in subsequent attorney's fees, to be increased by €90 if this judgment is not complied with amicably within fourteen days after notice and this judgment is subsequently served, determining that these amounts must be paid within fourteen days after the date of this judgment or, in respect of the amount of €90, after the date of service, failing which these amounts are to be increased by the statutory interest as referred to in Article 6:119 of the Dutch Civil Code as from the end of said fourteen-day period up until the date of payment;

- declares this judgment provisionally enforceable.

This judgment is rendered by S.A. Boele, E.M. Dousma-Valk and J.J. van der Helm and pronounced in open court in the public session of 14 February 2023, in the presence of the court clerk.

[1] ECLI:NL:RBDHA:2021:10080.

[2] CJEU 19 July 2012, C-278/12, *Adil v. the Netherlands.*

[3] Cf. Amnesty et al. Statement of Appeal No. 1.2.

[4] Statement of Appeal No. 8.5.

[5] Statement of appeal 3.3 and 3.8 (referring to Art. 1.1 ICERD).

[6] European Court of Human Rights, 13 December 2005, *Timishev v. Russia*, nos. 55762/00 and 55974/00, para. 55; European Court of Human Rights, 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 43.

[7] J.H. Gerards, Sdu Commentary ECHR, Art. 1 Protocol 12 (Gerards), para. 2; European Court of Human Rights, 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 55.

[8] J.H. Gerards, Sdu Commentary ECHR, Art. 14 ECHR para. 2.1.

[9] J.H. Gerards, Sdu Commentary ECHR, Art. 14 ECHR para. 2.2.2; European Court of Human Rights, 19 October 2013, no. 19010/07, *Kärner/Austria*.

[10] See below no. 8.6.

[11] J.H. Gerards, Sdu Commentary ECHR, Art. 14 ECHR para. 2.2.2; European Court of Human Rights, 11 October 2011, no. 53124/09,
Genovese v. Malta, para. 39.

[12] European Court of Human Rights, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 57; European Court of Human Rights, 18 October 2022, no. 34085/17, *Muhammad v. Spain*, para. 94.

[13] E.g. European Court of Human Rights, 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 44.

[14] J.H. Gerards, Sdu Commentary ECHR, Art. 14 ECHR para. 3.1.

[15] J.H. Gerards, The margin of appreciation doctrine, the very weighty reasons test and grounds of discrimination p. 9 (exhibit 97 in statement of appeal); European Court of Human Rights, 24 May 2016, no. 38590/10, *Biao v. Denmark*, para. 93; European Court of Human Rights, 13 November 2007, no. 57325/00, *D.H. et al. v. Czech Republic*, para. 196: Similarly European Court of Human Rights, 10 November 2022, Nos. 49636/14 and 65678/14, *Bakirdzi and E.C. v. Hungary*, para. 50.

[16] European Court of Human Rights, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*, para. 58; European Court of Human Rights, 13 November 2007, no. 57325/00, *D.H. et al. v. Czech Republic*, para. 176; European Court of Human Rights, 24 May 2016, no. 38590/10, *Biao v. Denmark*, para. 94.

[17] That these are two different tests is also evident from the Guide on Article 14 of the European Convention on Human Rights (prepared by the ECtHR Registry) and on Article 1 of Protocol No. 12 to the Convention, updated Aug. 31, 2022, para. 107.

[18] Supreme Court, 21 December 2001, NJ 2002, 217.

[19] European Court of Human Rights, 18 October 2022, no. 34085/17, para. 102, *Muhammad v. Spain*.

[20] Appeal to a higher court p. 6.

[21] Statement of defence on appeal 6.2.3; appeal to a higher court p. 6/7.

[22] Cf. Art. 50(1) Aliens Act.

[23] See no. 8.7 above.

[25] European Court of Human Rights, 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 44.

[26] European Court of Human Rights, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia*.

[27] '*Discrimination*' within the meaning of Article 14 ECHR and Article 1 Protocol 12 ECHR is unequal treatment of equal cases without objective and reasonable justification, see European Court of Human Rights, 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 55. '*Racial discrimination*' is unequal treatment based on race or ethnicity, see European Court of Human Rights, 13 December 2005, nos. 55762/00 and 55974/00, *Timishev v. Russia* para. 56; European Court of Human Rights, 22 December 2009, nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, para. 43.

[28] Court order 8.15.