

Court of Appeal of The Hague
Date of hearing: 8 December 2022
Case number of the court of appeal: 200.304.295

WRITTEN ARGUMENTS

in the matter of:

1. **[Appellant 1]**,
residing in [city] ("**[Appellant 1]**"),
2. **[Appellant 2]**,
residing in [city] ("**[Appellant 2]**"),
3. The foundation **Stichting RADAR Inc.**,
with its registered office in Rotterdam ("**RADAR**"),

Appellants,
Attorney: A.M. van Aerde

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**"),

Appellants,
Attorneys: J. Klaas and M.B. Hendrickx

Jointly: "**Appellants**"

v.:

the State of the Netherlands (the Ministry of Defence and the Ministry of Justice and Security, and in particular the Royal Netherlands Marechaussee),
domiciled in The Hague,

Respondent,
Attorneys: C.M. Bitter and L. Sieverink

1. Introduction

- 1.1. The question of law at the centre of today's proceedings is as follows: is the RNM permitted to use ethnicity in the performance of MSM, yes or no? Put another way: in the performance of MSM checks, is the RNM permitted to treat people differently depending on their race? In this context, the term 'race' is used exclusively in the legal sense of the word.¹
- 1.2. This question is, on the face of it, crystal-clear. It is established that in the RNM's methods "*ethnicity can play a role in the selection decisions*". The District Court established that this is not in dispute², and the State did not refute this. That ethnicity can play a role in the performance of MSM checks is acknowledged in the Statement of Defence on Appeal,³ is also government policy,⁴ is confirmed by the cases of [appellant 2] and [appellant 1], and is also evident from the examples provided by the State.
- 1.3. So, then, what is in dispute? Essentially, it comes down to the following points:
- a. The State disputes that the use of ethnicity (race) in the selection of persons to be subject to checks constitutes prohibited discrimination.
 - b. The State disputes that race is a component of the risk profiles.⁵
 - c. The State disputes that there are grounds to prohibit such practices.
- 1.4. To begin with the first point: the State takes the position that the use of ethnicity (race) in the selection of persons for checks does not constitute prohibited discrimination, because according to the State prohibited discrimination is only involved when the selection decisions are based "*exclusively or to a decisive extent*" on race.⁶ According to the State, however, selection decisions are made

¹ See Statement of Appeal, paragraph 3.3. A selection based (in whole or in part) on race is one in which the selection is based on an assumption about someone's origin or nationality that is derived from the person's external characteristics; see Statement of Appeal, paragraph 3.9.

² Judgment, paragraph 8.6).

³ Statement of Defence on Appeal, paragraph 4.4.4.

⁴ *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); *Appendix to the Proceedings II*, 2017/18, 2340, p. 3 (Response of Minister Bijleveld-Schouten (Defence) and State Secretary of Justice and Security, 8 June 2018); *Parliamentary Papers, House of Representatives 2021/22*, Appendix, 813, Responses to Parliamentary Questions on news article 'Council of Europe: Dutch court normalises discrimination by RNM', 24 November 2021.

⁵ Amnesty et al. has defined a risk profile as a collection of one or more criteria, also referred to as 'indicators', on the basis of which an assessment is made of a risk of a violation of rules and standards, including illegal residence; see Statement of Appeal, paragraph 3.10.

⁶ Statement of Defence on Appeal, paragraph 4.4.4, 1st paragraph, last sentence.

based on information about migration flows and other phenomena, and ethnicity (race) is only one of the factors on the basis of which a selection decision is made. The State presents examples such as: if the RNM has information that Nigerian money smugglers are attempting to enter the country, then the selection criteria will be "*non-Dutch appearance, walking quickly and smartly dressed*".⁷ Or, if information indicates that Vietnamese people are attempting to illegally travel through the Netherlands to the United Kingdom, and it is known that they are stowing away in freight lorries by night, then the criteria will apparently be defined as: night, rest stop along a motorway, and "*Asian appearance*".⁸

- 1.5. If the decision made would be different for a person with certain racial personal characteristics than for a person with other racial personal characteristics (all other circumstances being equal), then in the selection decision a *difference in treatment* is being applied that is based exclusively or to a decisive extent on race. This has also been referred to as the '*but for*' test: would the subject have received more favourable treatment if he had not had a certain personal characteristic?⁹
- a. The impeccably dressed, fast-walking *white* man does not look like a Nigerian smuggler, while the equally impeccably dressed and fast-walking Appellant 1, with his dark skin colour, apparently does.
 - b. The white men who are wandering around at a roadside rest stop along the motorway at 3 AM do not, in the eyes of the RNM, look like 'Vietnamese stowaways', but in the exact same circumstances men with an 'Asian appearance' do.
 - c. Or as RNM officer [redacted] phrased it: "*If we know that Nigerians are taking a certain route to the Netherlands, then it's very hard to explain why you are pulling a Chinese person out of the line.*"¹⁰ In this 'description of the phenomenon', persons with a 'Chinese appearance' (whatever that may mean) are not pulled aside, while persons with a 'Nigerian appearance' (whatever that may mean) are. The difference in treatment is, therefore, exclusively or to a decisive extent based on race in these similar cases.

⁷ Initiatory summons, paragraphs 95, 114-117; Amnesty exhibit 52: statement 3d of the officers involved, p. 1.

⁸ Statement of Defence on Appeal, paragraph 6.2.3.

⁹ See Statement of Appeal, paragraph 10.6.8, and Amnesty exhibit 96: J.H. Gerards, Sdu Commentary on European Convention on Human Rights, Article 14, paragraph 2.2.

¹⁰ Amnesty exhibit 93: newspaper article (NRC, 24 November 2021).

- 1.6. That is entirely understandable, because the RNM continues to describe the phenomenon to which they are responding – travel movements – as originating in certain countries: ‘Nigerian money smugglers’, ‘Vietnamese stowaways’. The reflexive response is then, apparently, for the RNM officers to pay extra attention to people who, in their eyes, look like people from those countries. This is in itself a direct confirmation of the risk inherent in ethnic profiling.
- 1.7. Additionally, the assertion that MSM could only involve prohibited discrimination if the difference in treatment was based "*exclusively or to a decisive extent*" on race is incorrect from a legal standpoint. A difference in treatment that is based exclusively or to a decisive extent on race can never be justified *under any circumstances*, and as such is *by definition* prohibited. However, it cannot conversely be concluded that any difference in treatment that is not based exclusively or to a decisive extent on race is, by definition, permissible.
- 1.8. So, then, how must one look at this? According to the check applied by the European Court of Human Rights, the review consists of the following:
- a. Is the situation one of unequal treatment of equal cases?
 - b. Is there an *objective and reasonable justification* for that unequal treatment, i.e. does the difference constitute appropriate, *necessary and proportionate* means?
- 1.9. The difference in treatment has been established. This leaves the question of whether there is an objective and reasonable justification, which there is not. It is clear that the State has not demonstrated that the performance of MSM checks makes it *necessary* to apply distinction based on race. The State has not shown that the RNM could not conduct MSM checks without making a distinction based on race. In fact, quite the contrary: the fact that the RNM has taken the position that it "*does not wish to make use of ethnicity as an indicator within profiles or selection decisions*"¹¹ only reiterates that it is apparently *not* ‘necessary’ to make a distinction based on race in the performance of MSM.
- 1.10. Likewise, making a distinction based on race is not an *appropriate* means of performing MSM better. Even with all the ‘practical experience’ in the world, a person’s physical appearance simply does not reveal whether that person does or does not have legal residence status after crossing a border, or whether that person is engaged in any cross-border crime. This is made clear from the cases of [appellant 1] and [appellant 2]: in neither case did their appearance reveal to

¹¹ Amnesty exhibit 92: RNM Discussion Memorandum.

the RNM that they were both Dutch citizens and residing here legally. Similarly, the example of RNM officer [redacted], who would not want to pull aside Chinese people if the illegality on the route concerned Nigerians, shows that even in this aspect making a distinction based on race is problematic. This is because [redacted] will, apparently, wrongly not check Nigerians who do not have legal residence but who 'look Chinese', while he seemingly will also wrongly pull Dutch citizens or Nigerians out of the line, even if they do have legal status to reside in the Netherlands, because according to officer [redacted] they 'look Nigerian'. Race, or presumed nationality, is therefore both an over-inclusive and an under-inclusive criterion. Continue selecting on this basis long enough and on a wide enough scale, and the entire body of statistics becomes skewed. The person on this route with light skin or a 'Chinese appearance' but without residence status will not be reflected in the statistics, because [redacted] doesn't think that such persons will be Nigerians. This is not a hypothetical example: it is estimated that the community of persons of Chinese background in Nigeria numbers as many as 40,000-50,000 people.¹² At the same time, persons with dark skin who are not Nigerian, including dark-skinned Dutch persons, will then automatically be subjected to checks disproportionately often.

- 1.11. Finally, making distinctions based on race is not a *proportionate* means of performing MSM better. It lacks all proportionality. *On the one hand*, it causes harm to the individual and society: it is with good reason that the European Court of Human Rights identifies discrimination on the basis of race as a particularly invidious form of discrimination that constitutes an assault on human dignity.¹³ Unmistakably, its underlying message is: anyone who looks like a Nigerian, or a Vietnamese person, is potentially not a real Dutch person, and may not belong here. This is all the more alienating because that message is brought into the public space. The European Court of Human Rights expresses this as follows: "*the public nature of the search may, in certain cases, compound the seriousness*

¹² See: "Chinese people in Nigeria", https://en.wikipedia.org/wiki/Chinese_people_in_Nigeria:
 "There is a large population of Chinese people in Nigeria which can include Chinese expatriates and descendants born in Nigeria with Hakka ancestry." Source: estimate by Zhou Pingjian, Chinese ambassador to Nigeria, 12 February 2017, reported in newspaper The Sun on 20 February 2017:
"What is the current Chinese population in Nigeria?"
 We don't have the registration system. According to our assessment, I think there are 40,000; some say there are 50,000 Chinese compatriots here."
 See: <https://www.sunnewsonline.com/china-nigerias-trade-volume-declining-very-fast-chinese-ambassador/>.

¹³ European Court of Human Rights 13 December 2005, ECLI:CE:ECHR:2005:1213JUD005576200 (*Timishev v. Russia*), paragraph 56.

of the interference because of an element of humiliation and embarrassment".¹⁴ Additionally, on a broader scale, it presents the risk that entire groups of Dutch citizens will be denigrated as second-class citizens. Even though the Netherlands has since 2013 explicitly expressed the desire to be a 'participation society', the risk is that these marginalized groups of Dutch citizens will withdraw from society – a risk that, it must be noted, the State acknowledges.¹⁵ In the words of the European Court of Human Rights: "*racial profiling, in particular, results in the stigmatisation and alienation of the persons concerned by it*".¹⁶ Thus, on the one hand there is risk of significant harm to the individual and society, and *on the other* there is no 'effectiveness gain' obtained in return. The State has in no way demonstrated that the RNM is better able to fulfil its tasks by making distinctions based on race.¹⁷ No substantiation of this assumption has been provided. With these as the circumstances, it is impossible that making a distinction based on race can be considered a *proportionate* means of performing MSM better.

- 1.12. It is for these reasons that the use of ethnicity in the performance of the MSM constitutes prohibited discrimination. Other scholars of human rights, such as Professor Terlouw and Professor Rodrigues, reach the same conclusion.¹⁸ The claims are directed towards *recognition* of that fact and a *prohibition* of the practice. The State suggests that the appellants are 'over-asking', in that they are seeking "*a general prohibition*". But the only thing that the appellants want is for the State to comply with what is set out in its own Constitution (and elsewhere), and therefore not discriminate. That is not over-asking, but in fact is an entirely modest claim.
- 1.13. With the foregoing I have presented a summary of the most important points of the case. Where necessary, we will expand further on these and other points in the following. We will consider, in the following order:
- the nature and structure of MSM (section 2)
 - the risk profiles and use of nationality as indicator (section 3)
 - the use of race as one of multiple selection criteria or indicators (section 4)

¹⁴ European Court of Human Rights 12 January 2010, ECLI:CE:ECHR:2010:0112JUD000415805 (*Gillan and Quinton v. the United Kingdom*), paragraph 63; European Court of Human Rights 18 October 2022, ECLI:CE:ECHR:2022:1018JUD000021519 (*Basu/Germany*), paragraph 22.

¹⁵ Statement of Defence on Appeal, paragraph 3.3.1.

¹⁶ European Court of Human Rights 18 October 2022, ECLI:CE:ECHR:2022:1018JUD000021519 (*Basu/Germany*), paragraph 34; ECRI Recommendation 11, Explanatory Memorandum, par. 34 sub iii.

¹⁷ Also according to Professor Terlouw, Amnesty exhibit 98.

¹⁸ Amnesty exhibit 98: Terlouw Discussion Memorandum, p. 2.

- no justification for the use of race as indicator (section 5)
- race is not an objective indication of origin or nationality (section 6)
- the proportionality consideration (section 7)
- the other grounds (section 8)
- evidentiary aspects in this case (section 9)
- the claims (section 10)

2. The nature of MSM: also investigating and prosecuting criminal offences

- 2.1. The RNM uses MSM checks, a form of monitoring of foreign nationals, for the purposes of fighting illegal residence after crossing a border.¹⁹ The object of MSM is therefore also fighting forms of cross-border crime.²⁰
- 2.2. During such an MSM check action, selections for an MSM check are made based on risk indicators. MSM checks and MSM selections are proactive. There need not be indications of illegal residence being signalled by the person, nor need there be a reasonable suspicion of guilt of a criminal offence.²¹ According to the State and the RNM, race can and may play a role in the selection decision. This is another reason that it is problematic, because MSM is not only used against illegal residence, but also against cross-border crime in general.
- 2.3. The State disputes that MSM has the object of investigating and prosecuting criminal offences²² and that this would be unlawful.²³ According to the State, the RNM is allowed to independently address human trafficking and identity fraud if these are discovered in the course of MSM checks.²⁴ The State asserts that the RNM may only use its investigative powers for other cross-border crime (such as money laundering, human trafficking and drug-related crime) if indications of a criminal offence are found in the course of an MSM check.²⁵ According to the State, the examples that the appellants presented in the Statement of Appeal therefore only pertain to MSM checks during which a criminal offence is

¹⁹ Judgment, paragraph 3.5, 3.6. This is regulated in Article 50 of the Aliens Act 2000 in conjunction with Article 4.17a of the Aliens Decree 2000.

²⁰ *Parliamentary Papers of the House of Representatives* 2011/12, 19637, 1393; *Parliamentary Papers of the House of Representatives* 2011/12, 19637, 1485; *Parliamentary Papers of the House of Representatives* 2010/11, 32317, 68; Amnesty exhibit 92: RNM Discussion Memorandum; Statement of Appeal paragraphs 11.3-11.4.

²¹ Judgment, paragraph 3.6; Statement of Appeal, paragraphs 11.6-11.7.

²² Statement of Defence on Appeal, paragraph 6.5.6.

²³ Statement of Defence on Appeal, paragraph 6.5.4.

²⁴ Statement of Defence on Appeal, paragraph 3.2.4.

²⁵ Statement of Defence on Appeal, paragraph 3.2.4.

discovered in the course of the check, and not to cases in which a person is selected for a check for that reason.²⁶

- 2.4. However, the appellants repeatedly gave examples (as did the State, it should be noted) in which people were selected for an MSM check *prompted by* indicators relating to or indicating cross-border crime, such as human trafficking and identity theft. Examples include the RNM's associations between criminal offences and nationality in the investigation by Van der Woude,²⁷ [appellant 1] being selected because of police information concerning Nigerian money smugglers,²⁸ the NRC newspaper article of a year ago relating the account of vehicles being selected by RNM officers on the basis of information about human trafficking,²⁹ and two examples given by the State in which MSM checks were used in relation to identity fraud and human trafficking.³⁰
- 2.5. Consequently, the State's assertion that the RNM only 'stumbles across' human trafficking and identity fraud (or other forms of cross-border crime) in the course of conducting an MSM check, and does not profile and select for these in the selections for MSM checks, cannot be true. The RNM does indeed do so, and in that selection race can play a role as indicator. In the case of [appellant 1], race obviously played a role in a risk profile that pertained to Nigerian money smugglers, and thus to criminal offences.

3. The risk profiles; and nationality as indicator

- 3.1. A risk profile is a collection of one or more criteria, also referred to as 'indicators', on the basis of which an assessment is made of a risk that rules and standards will be violated, and on the basis of which a selection decision is then made.³¹ These predictive criteria together make up a risk profile. At issue in these proceedings are the risk profiles that are proactively used by the RNM, with varying degrees of automation (not automated, semi-automated or fully automated), and so without a specific, individualised suspicion of violation of the law.³² The risk

²⁶ Statement of Defence on Appeal, paragraph 3.2.4.

²⁷ Statement of Appeal, paragraph 11.10.

²⁸ Statement of Appeal, paragraph 11.11; Amnesty exhibit 52: Statement 3d by the RNM officers involved, p. 1.

²⁹ Statement of Appeal, paragraph 11.14.

³⁰ Statement of Defence, paragraph 5.4.3; Statement of Defence on Appeal, paragraphs 4.3.1 and 6.11.1.

³¹ Statement of Appeal, paragraph 3.10.

³² Descriptions of suspects are not included among these, because in such cases there is a concrete suspicion and a search underway for a specific suspect. The use of race or nationality in suspect identification is permitted, so long as it stays within the boundaries of the specific rules governing it. Consequently, the claims of the appellants do not pertain to suspect identification.

profile is used to select persons for an MSM check where the profile indicates that there is a greater risk of violation of a rule or standard (whether that is stowing away in a freight lorry, residing illegally in the Netherlands, or smuggling money).

- 3.2. When race or nationality is an indicator in risk profiles, different values are assigned to different groups of people based on their background (or presumed background). A person's presumed nationality and background, or their 'race', contributes to the assessment of how likely it is that that person will violate the rules and standards and whether that person should be checked (or otherwise treated differently). This is in violation of the prohibition on discrimination, because this creates a difference in treatment for which there is no conceivable objective, reasonable justification. The State effectively acknowledges this, saying that "race is not an objective indicator of guilt of any criminal offence, and must never be used as such".³³
- 3.3. The State asserts that race is not an element of the risk profiles used to plan a specific MSM check and that the indicators and the risk profiles are in all cases neutral and objectively justifiable.³⁴ The State also asserts, in essence, that ethnicity can be used as an indicator in the selection decision, but that does not make it an element of a risk profile.³⁵ These assertions on the part of the State are not correct, and additionally are not substantiated with evidence.
- 3.4. According to the State, the profiles that the RNM draft in order to plan a specific MSM check are composed of indicators that together may signal a migration phenomenon and related trends and developments.³⁶ I can clarify this using the State's example of 'Vietnamese stowaways'. The State might, for example, have information that there are currently large numbers of Vietnamese people entering the country with the intention of illegally travelling on to the United Kingdom. It is known that people 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', these persons may be checked to ascertain their identity, nationality and residence status, the State asserts.³⁷ In this 'Vietnamese stowaways' example

³³ Statement of Defence on Appeal, paragraph 6.5.5.

³⁴ Statement of Defence on Appeal, paragraphs 4.3.4 – 4.3.6.

³⁵ Statement of Defence on Appeal, paragraphs 4.3, 5.5.5 and 6.6.

³⁶ Statement of Defence on Appeal, paragraphs 4.3.2 – 4.3.4, 4.37.

³⁷ Statement of Defence on Appeal, paragraph 6.2.3.

presented by the State, nationality is clearly an element of the migration phenomenon. It is consequently very difficult for the State to claim that nationality is not an indicator in the risk profile for planning a specific MSM check action.

- 3.5. Then, prior to the MSM check, there is a *briefing* in which the team leader explains the reason for the check; this includes explaining to the officers which migration phenomenon is currently applicable and what the process of the check will be.³⁸ In the ‘Vietnamese stowaways’ example, this means that the team leader will explain: we are seeing large numbers of Vietnamese people attempting to travel on to the United Kingdom, and in many cases this is happening by stowing away in freight lorries.
- 3.6. The officers of the RNM who go out on duty after this briefing must interpret this and put it into practice. However, they cannot see from a person’s appearance whether they come from Vietnam, or have Vietnamese citizenship. They can, on the other hand, observe external personal characteristics and on the basis of those make selection decisions. Persons with an ‘Asian appearance’ who are walking around a roadside rest stop along the motorway meet the characteristics of the risk profile or migration phenomenon; meanwhile, a person with a ‘non-Asian appearance’ evidently does not. Thus, ‘*check of nationality*’ in practice translates into *selection based (in part) on race*. Note that the State does not deny that ethnicity can play a role in the selection decision:³⁹

"[The] use of [ethnic] characteristics is nonetheless possible if that use can be linked to objective information about certain migration phenomena, and exclusively in combination with other indicators fitting within the profile that signal deviations from the norm and (...) illegal migration and/or associated crime."

- 3.7. This shows that a selection decision by the RNM officer is in fact evidently based on a risk profile. Nationality and race can be indicators in such a profile. In the first instance and in this appeal, the appellants have presented multiple examples demonstrating this⁴⁰, and the example of the ‘Vietnamese stowaways’ is one such example that illustrates this point.

³⁸ Statement of Defence on Appeal, paragraph 4.4.1.

³⁹ Among others Statement of Defence on Appeal, paragraphs 6.7.2 and 4.4.4. See also the RNM’s Action Framework for Professional Searches (State’s exhibit 12), which states that risk profiles are a basis for a check by the RNM.

⁴⁰ Among others Amnesty’s written arguments, paragraph 4.5 et seq.; Statement of Appeal, paragraph 17.4; Amnesty exhibit 52: Statement 3d by the RNM officers involved, p. 1:

3.8. This negates the State's defence that the information-driven structure and design of MSM by the RNM allegedly would not allow a person to be selected for an MSM check because he or she (for example) looks 'Romanian' or because of a particular skin colour.⁴¹ In every example presented by the State, that is exactly what happens. The fact that this is done on the basis of information, or that along with it other indicators are also relevant, does not change the fact that the selection is based (at least in part) on race. Consequently, the District Court's determination that ethnicity is not a risk indicator in the profiles that the RNM uses in MSM is incorrect.⁴²

4. Race as one of the indicators

4.1. As has already been addressed: the State asserts that use of race cannot be qualified as discrimination if that use is necessary and if there are also other indicators underlying the selection decision. These other indicators must fit within the profile, indicate deviation from the norm and point to illegal immigration. According to the State, if there are multiple indicators underlying it, a selection decision cannot by definition be based '*exclusively or to a decisive extent*' on any single one of those indicators.⁴³

4.2. However, the prohibition on discrimination does not allow differences in treatment that are based "to some extent" on race. The State's position is reasoning *a contrario* that is not supported by the case law of the European Court of Human Rights.⁴⁴

4.3. In fact, what follows from the case law of the European Court of Human Rights is very much the opposite: what must be considered is whether a person was treated differently or less favourably than someone else due to a certain personal characteristic (the "*but for*" test). That characteristic is then the decisive factor.

"Appellant 1 appeared early at the arrivals hall and was walking at a rapid pace. At that moment, he conformed to the selection profile for an MSM check. (...)

Selection criteria on this flight from Italy were, for me: walking quickly, smartly dressed, person of non-Dutch background, travelling alone or with family? (...)

Appellant 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 makes screening worthwhile for us."

⁴¹ Statement of Defence on Appeal, paragraph 4.4.4.

⁴² Judgment, paragraph 8.5.

⁴³ Statement of Defence on Appeal, paragraph 6.9.3.

⁴⁴ Statement of Appeal, paragraph 20.4.2.

- 4.4. It therefore does not matter whether ‘walking quickly’, ‘well-dressed’ or ‘in a parking area in the middle of the night’ are also indicators that must be present to fit the profile and/or trigger a selection decision. The determination of whether the situation qualifies as discrimination is not made by looking at the weight of the indicator ‘race’ in the profile or in relation to other indicators, but by looking at the *difference in treatment of two otherwise similar cases* that results when race is used as an indicator.
- 4.5. Taking the example of the ‘Vietnamese stowaways’: if a person with an ‘Asian appearance’ who is walking quickly in a parking area along the motorway late at night is checked, while a person with a ‘non-Asian appearance’ in the same circumstances is not, then this check is a difference in treatment based on race. Or, to take the example of [appellant 1]: if [appellant 1], as a well-dressed, fast-walking man with a ‘non-Dutch appearance’ is checked, but a well-dressed, fast-walking white man is not, then this is a difference in treatment based on race. In these cases, the State will argue that the *selection decision* itself is not based ‘exclusively or to a decisive extent’ on race because location and time or clothing and pace of walking are also factors in the selection decision. But that does not change the fact that the *difference in treatment* with respect to persons with other physical personal characteristics, in circumstances that are otherwise the same, is in fact based ‘exclusively or to a decisive extent’ on race.
- 4.6. In the following section, we will now take a closer look at the justification of the difference in treatment.

5. **No justification of the difference in treatment**

- 5.1. If a difference in treatment on the basis of race is established, there must then be an assessment of whether there is an objective and reasonable justification for it. This review is very strict and leaves virtually no room for justifying a difference in treatment on the basis of race. The State bears the burden of proof for this and must argue “very weighty reasons” for this justification that are independent of the race factor. In this case, however, the State has not as yet argued any such objective and reasonable justification for making a distinction based on race.
- 5.2. There could conceivably be such an objective justification in some cases, such as the efforts to track sickle-cell anaemia, a blood disease that predominantly affects dark-skinned people. In this case, race is an objective indicator for potentially being afflicted with sickle-cell anaemia. Making distinctions among patients based on race may be objectively justifiable in that context. In addition to this, it

must also still serve a legitimate purpose and be necessary, suitable and proportionate.

5.3. Race is not, however, an objective indicator for illegal residence after crossing a border, nor for cross-border crime. This in and of itself means that there can be no objective and reasonable justification for the use of race for MSM checks.⁴⁵

5.4. In addition, a *difference in treatment* with respect to persons with other racial personal characteristics in otherwise identical circumstances is, in fact, “exclusively or to a decisive extent” based on race, and this as such can never be justified, as found in the *Timishev* decision and the *Dynamic Traffic Controls* decision. The RNM’s argument that it does not make such a distinction because other indicators are also relevant for the selection decision is not a viable defence.

6. Race is not an objective indication of illegal residence or cross-border crime

6.1. The appellants have significant objections to the District Court’s determination that external ethnic characteristics do not necessarily, but could potentially constitute an objective indication of someone’s origin or nationality. According to the appellant, this consideration is based on an extremely outdated idea that Dutch people are white, and that non-white people might presumably not be entitled to have residence in the Netherlands.

6.2. It has already been explained that since its establishment, the Netherlands has had a history of migration, that there have been non-white Dutch people for hundreds of years, that the Netherlands was a colonial empire with non-white subjects, and that in 2021 fully one-fourth of those with Dutch citizenship had a migration background. A person who looks ‘Nigerian’ might just as easily be Dutch, or British. This shows that race is not an objective indicator, and is not and cannot be a justified indicator of nationality or residence status.

6.3. Because what does a ‘Nigerian’ look like? What does a ‘Pakistani’ look like? Or a ‘Dutch person’? A Nigerian, Pakistani or Dutch person are all simply people who are citizens of that country – nothing more and nothing less. But problems

⁴⁵ Cf. also the UN Special Rapporteur (Amnesty exhibit 73, paragraphs 43-44): “*terrorist-profiling practices that involve distinctions according to a person’s presumed “race” cannot be supported by objective and reasonable grounds, because they are based on the wrongful assumption that there are different human races and, therefore, inevitably involve unfounded stereotyping through a crude categorization of assumed races, such as “white”, “black” and “Asian”.*”

arise when stereotypes are attached to these terms. Many Pakistanis have brown skin and are Muslim. If an MSM check were to be conducted on the basis of a profile about Pakistanis, then it would be an obvious choice to focus attention on all people with brown skin and characteristics that might indicate the practice of the Islamic faith. Projection of these ideas into the concept of nationality always unavoidably includes prejudices. This is also a good demonstration of why nationality can be an over-inclusive selection criterion. If most Pakistanis are brown-skinned and Muslim, similar conclusions could be drawn about the appearance of people from Bangladesh, or India, or all Dutch people of Pakistani or Hindu background. By pulling these people from the line as well, because they look Pakistani (in this case: brown and appearing to be practising Muslims), this reconfirms each and every time all over again that these people do not look like Dutch people and might not belong.

- 6.4. It is 2022, and yet if ethnicity is allowed to play a role in MSM checks, then [appellant 1] and [appellant 2] can still be pulled from the line every time to check whether or not they are illegally residing in the Netherlands or engaging in cross-border crime – because, according to the District Court, their physical appearance is not necessarily, but could be, an indication of non-Dutch nationality.
- 6.5. The State endorses the District Court’s consideration that ethnicity can be an indication of nationality⁴⁶, but denies that the RNM associates skin colour with legitimate residence, or certain criminal conduct with a particular ethnic group.⁴⁷ The State substantiates this in essence only by asserting that the RNM works in an information-driven manner, and uses objective indicators and profiles.
- 6.6. Apparently, by this the State means that the RNM does not make selections on the basis of stereotypical (institutional) prejudices. But in reality, that is exactly what happens when one uses general information about an ethnic group to then select persons who resemble that group to perform a check.⁴⁸ The example of the ‘Vietnamese stowaways’ confirms this: there is general information that Vietnamese people are attempting to stow away in lorries at a certain location. The effect is that the RNM will select persons at that location who have an ‘Asian appearance’ for checks. And this is discrimination on the basis of race, even if the State claims that it has general information and data to support this.

⁴⁶ Statement of Defence on Appeal, paragraph 6.8.8.

⁴⁷ Statement of Defence on Appeal, paragraph 6.8.5.

⁴⁸ Amnesty exhibit 84: General Recommendation no. 36, paragraph 20.

6.7. In short, race is not an objective indicator for nationality, and following on from that conclusion, it is similarly not an objective indicator for illegal residence after crossing a border, nor for cross-border crime. And even if it were true that “race could be, but is not necessarily, an indicator of nationality”, then that simple possibility is not sufficient to lead to the conclusion that there are weighty reasons that justify making a distinction on the basis of race.

7. Proportionality, necessity and effectiveness

7.1. Because distinction on the basis of race is a particularly unjust form of discrimination, the State must provide very weighty reasons (not related to race) for making any such distinction.⁴⁹ The proportionality review is therefore very strict, and for this it is relevant whether making the distinction on the basis of race is necessary (in the sense of ‘indispensable’).

7.2. The State must demonstrate first that the distinction is proportionate and necessary for properly performing the statutory task, and then that the use of exclusively neutral criteria is not sufficient. The State did not do this in the first instance. On this appeal, the State does note that race may only play a role in the selection decision when this is necessary.⁵⁰ However, the State offers no substantiation or argumentation of why and how this use might be necessary. The conclusion must be that the State has not plausibly demonstrated that the use of ethnicity is necessary for MSM checks.

7.3. The risk of discrimination could be eliminated by using non-selective random sampling. Against this, the State argues that in that event many people would wrongly be selected for an MSM check; however, once again the State does not offer any evidence to demonstrate this. Moreover, many people are already being wrongly selected for checks right now, as the cases of [appellant 1] and [appellant 2] demonstrate. Non-selective random sampling would at least eliminate the risk of discrimination. Additionally, selection for checks by random sample would be harder to avoid than selections on the basis of profiling, because people can adjust their behaviour to avoid fitting into a profile.

7.4. The State also argues against this that the CJEU’s *Adil* decision shows that checking “everyone” would be in violation of the Schengen Borders Code.⁵¹

⁴⁹ Statement of Appeal, paragraph 20.3.3.

⁵⁰ Statement of Appeal, paragraph 5.7.3 and 6.7.3.

⁵¹ CJEU 19 July 2012, C-278/12 PPU.

However, in that decision the CJEU actually considered in regard to checks under Article 23 of the Schengen Borders Code:

“(...) that they are selective and thus not systematic like border checks and, second, that they are police measures applied on the basis of spot-checks, as required by Article 21(a)(iv) of Regulation No 562/2006.” [currently Article 23, Schengen Borders Code] [emphasis and note added by attorney]

- 7.5. As this shows, the CJEU considered ‘spot-checks’ (non-selective random checks) permissible under the Schengen Borders Code, and the National Ombudsman also recommended them.⁵² It must also be noted that the RNM does indeed check everyone in a selected vehicle or vessel, and in a maximum of 4 selected train cars.⁵³ Consequently, the appellants cannot understand why checking everyone in a single aircraft would constitute a de facto border control. Why would this apply to an aeroplane, but not to a tour bus? In any case, in *Adil* the CJEU did not determine that checking everyone on a plane (but not every plane) could be construed as a de facto border control.
- 7.6. It should also be noted that it is not up to the appellants to come up with good alternatives. It is up to the State to demonstrate that making a distinction on the basis of race is necessary and effective in fighting illegal residence after a border crossing and that there are no reasonable alternatives for doing so. The State did not do this.
- 7.7. The State has only asserted that random sampling for checks would severely compromise MSM because it would be unfocused and as a result less effective.⁵⁴ However, the investigation *Beslissen in grensgevallen* (‘Decisions in border cases’) revealed that the people being stopped are primarily Dutch people of colour who are stopped on their way home, while the number of ‘hits’ (police stops that reveal crime) proves to be limited.⁵⁵ That is not surprising. Race is, as already argued, not an objective indicator for illegal residence after crossing a border, nor for cross-border crime. Likewise, race is not effective for selecting people for MSM checks. Because it is not, the use of race to make a distinction in these selections is not proportionate.⁵⁶ Nor has the State demonstrated this

⁵² Amnesty exhibit 39: Investigation by National Ombudsman, p. 9.

⁵³ Statement of Defence on Appeal, paragraph 3.5.2.

⁵⁴ Statement of Defence on Appeal, paragraphs 6.7.3 and 6.10.2.

⁵⁵ Amnesty exhibit 4: Van der Woude et al., p. 107, 127.

⁵⁶ Statement of Appeal, paragraph 19.4.16.

alleged effectiveness in any manner.⁵⁷ And even if the use of race was effective, that is not in itself sufficient reason to justify making such a distinction.

- 7.8. In short, selecting for a proactive check on the basis of race is neither effective nor necessary, and there are reasonable alternative selection methods. This means that the use of race is not proportionate.⁵⁸ The District Court should have reached this conclusion if it had properly conducted the proportionality test and evaluated the ‘gains’ and the harmful impact of MSM.⁵⁹ This harm is real, and the State acknowledges the impact of MSM checks on the individual and society.⁶⁰

8. Bases other than the European Court of Human Rights

- 8.1. According to the District Court, a review against the other conventions raised by the appellants, Union law, and case law and recommendations would not lead to a different outcome than a review against article 1 of Protocol no. 12.⁶¹ Ground for Appeal 3 disputes this. I will briefly review the various bases here.
- 8.2. Articles 2 and 5 ICERD have direct effect.⁶² The State counters that nationality falls outside the ICERD definition of race and that making a distinction between citizens and foreign nationals is theoretically justified. However, the distinction that is being made *in practice* is a distinction based on race.⁶³
- 8.3. The CERD recommendations do not have direct effect but are an authoritative source of interpretation. The recommendations are adopted by consensus by the CERD: a committee of independent experts that monitors compliance with the ICERD.⁶⁴ The CERD recommendations in any event offer interpretation of articles 2 and 5 ICERD⁶⁵, which do have direct effect.

⁵⁷ Statement of Appeal, paragraph 20.

⁵⁸ Statement of Appeal, paragraph 19.4.16.

⁵⁹ Statement of Appeal, paragraph 20.3.4.

⁶⁰ Statement of Appeal, paragraph 20.3.5; Statement of Defence on Appeal, § 3.3.1. For an account of damages, see also Amnesty exhibit 84: General Recommendation no. 36, paragraph 30, and European Court of Human Rights 18 October 2022, ECLI:CE:ECHR:2022:1018JUD000021519 (*Basu/Germany*), paragraph 34.

⁶¹ Judgment, paragraph 7.6.

⁶² Initiatory summons, paragraphs 165-167.

⁶³ See paragraph 3 of these arguments.

⁶⁴ A.B. Terlouw, ‘Discrimination on the basis of nationality. General Recommendation 30 of the Committee on the Elimination of Racial Discrimination and its significance for the Netherlands’, *NJCM-Bulletin* 2005, no. 1, p. 119.

⁶⁵ See Amnesty exhibit 84 (CERD Recommendation 36), chapter V, paragraph 23.

- 8.4. According to the State, CERD Recommendation 36 pertains only to artificial intelligence and algorithms in profiles.⁶⁶ AI and algorithms are a sub-topic of the recommendation, but the recommendation is not limited to them.⁶⁷ And, contrary to what the State asserts⁶⁸, ethnicity is used in MSM, and to a decisive extent.⁶⁹
- 8.5. For ECRI recommendations 7 and 11, it is noted⁷⁰ that these do not have direct effect, but they are an authoritative source of interpretation; these recommendations do serve as inspiration for the European Court of Human Rights.⁷¹ It is notable that ECRI Recommendation 11 mentions the following example of ethnic profiling: checking passengers on a flight from specific countries.⁷²
- 8.6. Finally, two further remarks about Union law: The State argues that the appellants do not dispute that Directive 2000/43/EC pertains to the social domain. However, the parties disagree on how broad the term 'social domain' must be interpreted.⁷³ The State also asserts that the CJEU determined in *Adil* that MSM is not in conflict with Union law: "*if it had seen indications of discrimination in the system, it would certainly have included them in its considerations*", the State says. But *Adil* was not about discrimination, so there is no reason to assume that the CJEU was aware that within MSM, race was being used to treat people differently. If the CJEU had known that, then it would certainly have included this in its considerations.

9. Burden of proof: who must demonstrate what

- 9.1. The appellants have asserted: as soon as a difference in treatment is demonstrated, the burden of proof shifts and it is up to the State to justify this difference in treatment.⁷⁴ According to the State, this is "*far too rigid*".⁷⁵ That is incorrect. In actual fact, it is exactly what the European Court of Human Rights rules in *Timishev* (at paragraph 57): "*Once the applicant has shown that there has been a*

⁶⁶ Statement of Defence on Appeal, paragraph 5.2.2.

⁶⁷ See Amnesty exhibit 84 (CERD Recommendation 36), paragraphs 3, 10-13, 18-20. Introductory chapters I-IV pertain to *racial profiling* in general; chapter VII pertains to *algorithmic profiling* in particular. Of the operative chapter VIII, Recommendations, recommendations A-F pertain to *racial profiling* in general and recommendation G pertains to *artificial intelligence* in particular.

⁶⁸ Statement of Defence on Appeal, paragraph 5.2.3.

⁶⁹ See paragraphs 3 and 4 of these arguments.

⁷⁰ See Statement of Appeal, paragraph 10.5.

⁷¹ See Statement of Appeal, paragraph 10.6.10 and footnote 35 and Statement of Appeal, paragraph 15.6.

⁷² Statement of Appeal, paragraph 10.5.4.

⁷³ Initiatory summons, paragraphs 210-218; arguments in the first instance, paragraph 5.16.

⁷⁴ Statement of Appeal, paragraph 10.6.12.

⁷⁵ Statement of Defence on Appeal, paragraph 5.5.3.

difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified."⁷⁶ The appellants have demonstrated that persons are treated differently in MSM checks depending on their race. Consequently, the burden of proof shifts.

- 9.2. The State then goes on⁷⁷ to defend the position that a difference in treatment that is purely or predominantly based on ethnic characteristics could be justified if there are "very weighty reasons" presented for them. This is entirely incorrect. A difference in treatment that is based exclusively or to a decisive extent on race can *never* be justified under any circumstances.⁷⁸ The "very weighty reasons" standard ("*strict in theory, fatal in fact*") applies to other cases in which a distinction is made on the basis of race.⁷⁹
- 9.3. Insofar as the Court of Appeal were to rule that the difference in treatment for the purposes of MSM could be justified at all (which is incorrect), the State would then have to prove that the use of race in the MSM checks is necessary, appropriate and proportionate. In that event, that evidence must be held to the highest possible standards, and the State is unable to provide that evidence.

10. Claims of appellants

- 10.1. The claims aim to obtain a confirmation from the Court of Appeal that the use of race for the purposes of MSM is impermissible; this confirmation is sought in the form of a declaratory judgment, as well as an injunction and an order.
- 10.2. Claims 2.a and 2.b then indeed involve a "*general prohibition*". At issue here is not a situation of occasional incidents. If it is wrongful to select people for MSM checks in part or in full on the basis of their race, then every time that this happens this is wrongful, and therefore the requested prohibition is awardable for every time that this action may happen. This justifies a general prohibition on the use of race in risk profiles and for selection decisions for MSM checks.

11. Conclusion

- 11.1. The question addressed in this case is: in the performance of MSM checks, is the RNM permitted to treat people differently depending on their race? That

⁷⁶ Statement of Appeal, paragraph 10.6.12.

⁷⁷ Statement of Defence on Appeal, paragraph 5.5.4.

⁷⁸ Statement of Appeal, paragraphs 10.6.12-10.6.13, referencing *Timishev*, paragraph 58; *D.H. et al./Czech Republic*, paragraph 176.

⁷⁹ Statement of Appeal, paragraphs 10.6.14-10.6.15, 10.6.20-10.6.22

question can be broken down into two sub-questions: is it happening, and is it permissible?

- 11.2. That it is happening has today been demonstrated from various examples: [appellant 1], [appellant 2], the ‘Vietnamese stowaways’ and officer [---] of the RNM. All of these cases involve a person who would have been treated differently if he had had different racial characteristics. In all of its arguments, the State does not actually deny this.
- 11.3. Then, to the next question: is it permissible? The answer to this question is: of course not. When these checks happen, there is no individual suspicion towards the person to be checked. The actual result of the MSM checks is that Dutch citizens and other people who are perfectly entitled to be here are targeted by the MSM checks disproportionately often because they, in the eyes of the RNM, look “non-Dutch”, or look like “Nigerian money smugglers”, “Vietnamese stowaways”, etc. Insofar as such a race-based distinction can be justified at all, the State has not produced any “very weighty reasons” that would justify it. Treating people differently in the performance of the MSM checks, based on their race, is therefore a violation of the prohibition on discrimination. The conclusion is therefore that the judgment must be overturned and the claims must be awarded.

* * *