



to House of Representatives of the Netherlands
Postbus 20018
2500 EA Den Haag

date 28 March 2014

reference CM1403

subject **A Bill tabled by André Bosman (VVD) to regulate the right of Dutch nationals from Aruba, Curaçao and Sint Maarten to settle in the Netherlands (Tweede Kamer 33325)**

Meijers Committee
Standing committee of experts
on international immigration,
refugee and criminal law

Mailing address
Postbus 201
3500 AE Utrecht

Visitor address
Kanaalweg 86
3533 HG Utrecht

Ph 030 297 4328
F 030 296 0050

W www.commissie-meijers.nl

E l.middelkoop@commissie-meijers.nl

Dear members of the House of Representatives,

The Meijers Committee is deeply concerned about a Bill tabled by Mr André Bosman (VVD) to regulate the right of Dutch nationals from Aruba, Curaçao and Sint Maarten to settle in the Netherlands (TK 33325).

The Meijers Committee is aware that a relatively small portion of Dutch citizens of Antillean origin cause serious problems and have difficulty in integrating in Dutch society. However, the Committee considers that a bill which draws a direct distinction between Dutch nationals on the basis of their decent and which deprives Antillean Dutch of certain rights which European Dutch do enjoy, is incompatible with the international obligations of the Netherlands, does not contribute to a solution for the problems experienced and may in itself cause new problems with the integration of Dutch nationals of immigrant origin.

It is the opinion of the Meijers Committee that this bill is in violation of Dutch international obligations under five treaties and two EU-Directives: The UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), the European Convention on Human Rights, the International Covenant on Civil and Political Rights, The Treaty on the Functioning of the European Union, The Treaty on the European Union and the EU Racial Equality Directive (2000/43/EC) and the EU Data Protection Directive (95/46/EC).

In the enclosed note the Meijers Committee discusses the following four aspects of the bill:

- (1) The distinction between Antillean and European Dutch is a distinction on the ground of race.

- (2) The proposed rules on settlement and deportation are contrary to international law and primary EU law
- (3) If this bill would be enacted into law, the Netherlands would take up an exceptional position in the EU and in the world
- (4) The proposed exclusion of Antillean Dutch nationals from social assistance, social housing and many other benefits is contrary to international law and secondary EU law.

Lastly, the Meijers Committee concludes from the Parliamentary Papers that no due consideration was given to the negative impact on Dutch nationals from other immigrant groups of the abolition of an undivided Dutch nationality and the proposed division of Dutch nationals with more and less rights in the Netherlands.

We are available to answer further questions.

Sincerely,



Prof. Kees Groenendijk
Chairman

Enclosed: *Memorandum about the Bill tabled by André Bosman (VVD) to regulate the right of Dutch nationals from Aruba, Curaçao and Sint Maarten to settle in the Netherlands (Tweede Kamer 33325)*

Memorandum about the Bill tabled by André Bosman (VVD) to regulate the right of Dutch nationals from Aruba, Curaçao and Sint Maarten to settle in the Netherlands (Tweede Kamer 33325)

General principle

1. International law allows states considerable freedom in regulating the entry and expulsion of non-nationals. This is also the principle applied by the European Court of Human Rights when interpreting the ECHR. International law does, however, impose limits on the regulation of migration of non-nationals. Thus, for example, discrimination on grounds of race when admitting or expelling non-nationals is covered by the prohibition on racial discrimination in Article 1 of the UN Convention on the Elimination of All Forms of Racial Discrimination. Although Article 1(2) of that Convention states that it does not apply to distinctions made between citizens and non-citizens, the Convention does apply to distinctions between foreign nationals when regulating migration and to distinctions between a country's own nationals ('citizens') on the grounds of race.

Drawing a distinction between Antillean and European Dutch nationals is a racial distinction

2. Article 2 of Bill 33325 unmistakably draws a direct distinction between Dutch nationals on the grounds of their origin or descent. Article 2(1) refers to Dutch nationals who obtained Dutch nationality in Aruba, Curaçao or Sint Maarten through 'descent', the option procedure, or naturalisation. Article 2(2) adds a further category of children whose mother, at the time of their birth, had her principal residence in one of these three countries. Birth, descent and principal residence in these countries are therefore the main criteria for defining this group of Dutch nationals and distinguishing them from European Dutch nationals. Furthermore, Article 2(3) excludes from the scope of the act European Dutch nationals (children of Dutch nationals who acquired Dutch nationality in the European part of the Netherlands through descent, the option procedure, or naturalisation). The proposal thus makes a direct distinction by race or ethnic origin in the legal sense of these terms.

3. After all, the term 'race' as defined in Article 1 of the UN Convention against Racial Discrimination also includes 'descent'. The Dutch Council of State also refers explicitly to the Convention in its advisory opinion on this Bill (TK 33325, No. 4, p. 8). Article 14 ECHR and Article 26 ICCPR explicit mention 'birth' as a prohibited criterion. The fact that the proposal makes a distinction by race is underlined by the use in the Explanatory Memorandum and Memorandum of Reply of terms such as 'Antillean Dutch nationals', 'European Dutch nationals' and '*landskinderen*' (literally 'children of the country', a term from the colonial period applied to adults and referring exclusively to 'locals' or 'natives' rather than European Dutch nationals).

4. The Bill's sponsor 'strongly refutes' this interpretation (see TK 33325, No. 8, p. 3), but his arguments (that a difference in treatment according to origin does not amount to a difference on the grounds of ethnicity, and the countries in the Antilles do it too) do not hold water. The term '*nationale herkomst*' ('national origin'), used by the sponsor, means exactly the same as '*nationale afstamming*' ('national origin') as used in Article 1 of the UN Convention against Racial Discrimination. Both translations of the term 'national origin', as used in the original English version of the Convention, are used interchangeably in the literature. A distinction by national origin is covered by the prohibition of racial discrimination in the legal sense. For an interpretation of the concept of race, see the judgment of the Dutch Supreme Court (Hoge Raad) of 15 June 1976 (NJ 1976, 551 relating to 'Surinamers'). This judgment also equated race with national origin. The Bill's

sponsor wrongly concludes from the Judgment of the Dutch Supreme Court of 24 November 2000 (NJ 2001, 376) that discrimination on the grounds of national origin does not constitute racial discrimination in the legal sense. In this judgment the Supreme Court merely rejected the ground for appeal in cassation to the effect that the distinction made between Dutch nationals in the National Ordinance on Admission and Expulsion of the Dutch Antilles would never be justified. The fact that a provision features in another country's legislation does not prove that the introduction of such a provision by the Netherlands would be lawful.

Regulation of settlement and expulsion

5. The Bill provides for Dutch nationals from the Antilles to be treated less favourably than European Dutch nationals. They would be required to apply to the Immigration and Naturalisation Service (IND) for 'admission for the purpose of settlement' and could be detained with a view to being forcibly expelled.

The Bill refers euphemistically to their being 'returned'. The Bill's sponsor, however, does use the terms 'expulsion' and 'expelled' in this context (TK 33325, No. 8, p. 7 and 8). In addition, Antillean Dutch nationals would be excluded from social assistance, social housing and almost every other public benefit because for their first six months in the Netherlands, and even after that, they would not be allowed to register in the Municipal Personal Records Database (previously known as the GBA) unless they had been granted 'admission for the purpose of settlement'.

The Bill infringes the ECHR and the UN Convention against Racial Discrimination (CERD)

6. The Bill infringes the prohibition on degrading treatment in Article 3 ECHR. The former European Commission on Human Rights ruled on 14 December 1973 in the case of *East African Asians v the United Kingdom* that the Commonwealth Immigration Act 1968 infringed the prohibition on degrading treatment in Article 3 ECHR. This Act deprived British citizens of Asian origin, who were living in Kenya and elsewhere in Africa, of the right to settle in the UK. The Commission held that:

'When it was introduced into Parliament as a Bill, it was clear that it was directed against the Asian citizens of the United Kingdom and Colonies in East Africa and especially those in Kenya' (par. 199). It found: 'that the 1968 Act, by subjecting to immigration control citizens of the United Kingdom and Colonies in East Africa who were of Asian origin, discriminated against this group of people on grounds of their colour or race' (par. 201). It also noted: 'that the persons concerned were not aliens but were and remained citizens of the United Kingdom and Colonies. As such they had the same rights as other citizens. They were thus, as submitted by the applicants, reduced to the status of second-class citizens' (par. 205).

The European Commission on Human Rights concluded:

'that the racial discrimination to which the applicants have been publicly subjected by the above immigration legislation constitutes an interference with their human dignity, which in the special circumstances described above, amounted to "degrading treatment" in the sense of Article 3 of the Convention' (par. 208).

The parallels between the Commonwealth Immigration Act 1968 and the present Bill are unmistakable. In both cases a group of citizens is deprived of the right to settle in the country of their nationality on grounds of their origin. The UK Act of 1968 affected British citizens of Asian

origin. The present Bill concerns Dutch nationals of Antillean origin. This Bill also reduces these Antillean Dutch nationals to the status of second-class citizens.

7. The proposal is also incompatible with the case law of the European Court of Human Rights (ECtHR) since 2005. In several judgments the Court has ruled that it is rarely or never justified in a pluralist, democratic society for a government to treat people differently solely or mainly on the grounds of ethnic origin.

'In any event, the Court considers that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.' (Judgment in *Timishev v Russia*, 13 December 2005, par. 58).

A few years later, the Grand Chamber of the ECtHR ruled on 13 November 2007 in *D.H. and Others v the Czech Republic* (par. 196) that:

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

The latter case involved a form of indirect discrimination. Where direct discrimination is concerned, as in the Bill in question, the scope is even more restricted, if not absent altogether, except in cases of positive discrimination.

This is also apparent from the judgment in the case of *Finci v Bosnia-Herzegovina*, Grand Chamber, 22 December 2009:

'where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (see D.H. and Others, cited above, § 196). The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (ibid., § 176). That being said, Article 14 does not prohibit Contracting Parties from treating groups differently in order to correct "factual inequalities" between them.' (par. 44)

In so far as there is any scope left for an objective justification, the end must be legitimate and the means adopted must be necessary and appropriate. The Meijers Committee takes the view that the end might be legitimate. However, the arguments put forward to demonstrate the need for and proportionate nature of the proposed statutory regulation fall well short of the high standards set by the ECtHR, as the Council of State notes in its advisory opinion on the Bill. If a contracting party makes a distinction on the grounds of a questionable criterion, such as race or nationality, the ECtHR applies a much stricter test than in other cases. Very weighty reasons must be adduced in such cases. The contracting parties rarely, if ever, succeed. Moreover, there are no exemptions to the prohibition of racial discrimination in the UN Convention (CERD) and this prohibition precludes any justification of racial discrimination even if other treaties or conventions were to include grounds for justification.

8. Regulating the admission and expulsion of Dutch nationals as proposed in the Bill is contrary to Article 2(1)(a) and Article 5(d)(i) of the UN Convention against Racial Discrimination. Article 2(1)(a) of the Convention requires the Kingdom of the Netherlands:

'to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation' and under (c) of this provision '[to] take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists'.

In Article 5(d)(1) of the Convention the Kingdom of the Netherlands has pledged

'to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (d) Other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State'. [our underlining]

The Kingdom of the Netherlands has not entered a reservation regarding the territorial application of the UN Convention.

Use of territorial declarations is contrary to international law

9. The territorial declarations entered by the Netherlands in 1982 on ratification of the Fourth Protocol to the ECHR with regard to Articles 2 and 3, and in 1983 on ratification of the International Covenant on Civil and Political Rights (ICCPR) Discrimination with regard to Article 12 were apparently not deemed inadmissible by the other contracting parties. However, under Article 29 of the Vienna Convention on the Law of Treaties, the Netherlands may not use these declarations to act in breach of the 'object and purpose' of the ECHR or the ICCPR, or to infringe other international obligations. As stated earlier, the Netherlands did not enter any corresponding reservation on ratification of the CERD Convention, Article 5(d)1 of which guarantees 'free movement and residence', or ratification of the Twelfth Protocol to the ECHR, Article 1 of which contains a general prohibition on discrimination. The room for manoeuvre which the Netherlands thought it was creating over 30 years ago in other treaties can no longer be used in 2014 to restrict migration by one group of its own citizens on the grounds of their origin, in breach of the CERD Convention, because of previous and subsequent treaty obligations, the development of the ECtHR case law on the prohibition of racial discrimination in Article 14 ECHR, and the development of Union law, as discussed below. Moreover, it is increasingly accepted that the prohibition of racial discrimination is a peremptory norm (*jus cogens*) of international law.¹ Applying territorial declarations that result in racial discrimination is contrary to that prohibition.

The Netherlands is the exception in the EU and the world

10. The Netherlands is the only member state of the Council of Europe to have entered such a reservation to the Fourth Protocol to the ECHR. None of the other EU Member States that had colonies outside Europe has legislation which divides its own citizens on the basis of their origin into two categories, one with the right to reside in the country of nationality and the other without. The Netherlands would be the only EU Member State to make such a distinction in its legislation between first and second-class citizens. The Bill's sponsor implicitly admits as much: the last EU Member State to make such a distinction, the United Kingdom, has now ceased to do so (TK 33325, No. 8, p. 7). In 1992 British citizens in the former British Dependent Territories were

¹ Cf. Marc Bossuyt and Jan Wouters (2005): *Grondlijnen van internationaal recht*, Intersentia, Antwerpen, p. 92.

granted full citizenship, including the right to enter and live in the UK. The old distinction between British citizens who had the right of residence in the UK and those who did not attracted much international criticism.² The Netherlands and the UK were alone among the 167 contracting parties in entering territorial declarations on Article 12 ICCPR. The UK stopped using this reservation more than 10 years ago. The Netherlands would thus be the only contracting party actually using such a reservation.

The proposal is contrary to EU law

11. The Antillean Dutch nationals in question are Union citizens. The three countries in the Antilles do not belong to the territory of the Union. 'Returning' Antillean Union citizens means forcibly removing them from EU territory. Article 20(2) TFEU states that:

'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States [...].'

Article 21(1) TFEU states that:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'

Both provisions refer to the right 'to move and reside freely within the territory of the Member States'. This does not exclude the territory of the Union citizen's own Member State. Nor is the operation of these provisions limited to cases where the Union citizen has exercised the right to free movement of persons within the Union. Nor does such a condition apply to the three other rights attributed to Union citizens in Article 20(2): the right to vote and to stand as a candidate in elections to the European Parliament, the right to diplomatic and consular protection, and the right to petition. According to established case law of the Court of Justice, Union citizens may also invoke Articles 20 and 21 TFEU against their own Member State. It follows from recent judgments in *Zambrano*, *McCarthy*, *Dereci*, *Ymeraga* and *Alokpa* that Articles 20 and 21 TFEU do not allow Member States to exert pressure on third-country citizens to leave the territory of the EU if this has the effect of forcing their family members, who are Union citizens, to leave EU territory. This would, after all, deprive the Union citizenship of the family member concerned of its effectiveness. This not only applies to Union citizens who are minors, but can also arise in relation to adult Union citizens, (see point 46 of the view of Advocate General Mengozzi in the *Dereci* case). Why would this be any different if the Member State exerted the pressure to leave the Union on the Union citizen himself rather than via the third-country national's family members? According to the Court of Justice the issue concerns

'situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole' (judgment in Case C-256/11 *Dereci* [2011] ECR I-11315, paragraph 66).

The same situation arises in the case of expulsion to Aruba, Curaçao or Sint Maarten: the Dutch nationals concerned are forced to leave the territory of the Union as a whole. Moreover, it is

² British Overseas Territories Act 2002 and <http://www.parliament.uk/briefing-papers/RP01-90/british-overseas-territories-bill-hl-bill-40-of-200102>

difficult to maintain that the Bill concerns a 'purely domestic' situation. Other Member States will also feel the effects of the proposed restrictions on a group of Dutch Union citizens. If Antillean Dutch nationals are refused the right to settle in the Netherlands or threatened with being 'returned' to the Antilles, these Union citizens will be inclined to exercise their right of free movement within the EU and travel to other Member States and live there (see also point 13 below). The proposed migration rules fall within the scope of Union law. The proposal must therefore be compatible with the EU Charter of Fundamental Rights and the general principles of Union law (see judgment in Case C-135/08 *Rottman* [2010] ECR I-01449). Reducing Antillean Union citizens to the status of second-class Union citizens breaches Article 1 of the Charter, which states that: 'Human dignity is inviolable. It must be respected and protected.'

12. Since 1974 the Court of Justice has repeatedly held that:

'a principle of international law, reaffirmed in Article 3 of Protocol No 4 to the [ECHR], that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason (see Case 41/74 van Duyn [1974] ECR 1337, paragraph 22, and Case C-257/99 Barkoci and Malik [2001] ECR I-6557, paragraph 81); that principle also precludes that Member State from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional (see Cases C-370/90 Singh [1992] ECR I-4265, paragraph 22 and C-291/05 Eind [2007] ECR I-10719, paragraph 31).' (Judgment in Case C-434/09 *McCarthy* [2011] ECR I-03375.)

It is precisely the intention of this Bill, in breach of the established principle of international law confirmed in these judgments, to make it possible to deprive Dutch nationals of the right to reside in Dutch territory and to make this right conditional.

13. Moreover, the threat of expulsion is contrary to the Member States' duty of sincere cooperation under Article 4(3) of the Treaty on European Union. An Antillean Dutch national who is threatened with expulsion in the interests of 'protecting public policy' can simply avoid this by exercising his/her right to free movement within the EU. The criterion for expelling Antillean Dutch nationals in Article 16(2) of the Bill is much wider than the public policy criterion in the rules on the free movement of Union citizens. This means that if an Antillean Dutch national has been threatened by the Netherlands with expulsion 'to protect public policy [in the Netherlands]' (the criterion in Article 16(2) of the Bill) and has then travelled to another Member State, that other EU Member State may only expel him or her to the Netherlands if that person represents 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'. Contrary to what is stated on page 6 of the Explanatory Memorandum, this criterion in EU law is much more restrictive than the broader wording of Article 16(2) of the Bill. It is clear from the article-by-article explanation of the provision on page 12 of the Explanatory Memorandum, too, that the Article 16(2) criterion is much broader. In all cases that lie somewhere between these two criteria the other Member State will not be able to remove the Dutch national concerned to the Netherlands. The proposed rules will encourage the Antillean Dutch nationals concerned to use 'the Belgian route'. This proposal will have the effect of passing the Netherlands' problems with its nationals on to other EU Member States. Other Member States will not be able to recognise the Dutch nationals concerned as 'Antillean Dutch nationals'. Unlike the UK on its accession to the EU, the Netherlands did not issue a declaration to the effect that certain citizens do not have an unrestricted right to live in their own Member State. In light of the judgment in *Kaur* (C-192/99

[2001] ECR I-1237), it is very doubtful whether depriving certain Dutch nationals of that right, retroactively, as the Bill seeks to do, is compatible with EU law.

14. In the case of *Eman* (C-300/04 [2006] ECR I-8055) the Court of Justice ruled that the exclusion of Antillean Dutch nationals from participating in the elections to the European Parliament was incompatible with the non-discrimination principle, which is a general principle of EU law. This judgment prompted an amendment to the Electoral Act. The Court of Justice and other EU bodies are aware that the Netherlands had previously included in its national legislation a provision that was incompatible with EU law and that excluded Antillean Dutch nationals from a right that other Dutch nationals enjoyed.

Exclusion from social assistance, social housing and many other benefits

15. Articles 19 to 21 of the proposal are incompatible with the specific prohibitions in Article 5(e)(iii)-(v) of the UN Convention against Racial Discrimination, with the general prohibition of discrimination in Article 1 of the Twelfth Protocol to the ECHR and with Article 3(1)(e) to (h) of the EU Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Council Directive 2000/43/EC, OJ L 180, 19.7.2000, p. 22). Direct discrimination is described in Article 2(2)(a) of this Directive as occurring: 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin'. The Directive also applies to the actions of the Dutch government. Article 3(1) of the Directive prohibits discrimination in such areas as:

'[...]

- e) social protection, including social security and healthcare;
- f) social advantages;
- g) education;
- h) access to and supply of goods and services which are available to the public, including housing.'

The exclusion of Antillean Dutch nationals from social security benefits, healthcare and education as a result of the non-registration in the Municipal Personal Records Database envisaged by Article 19 of the Bill, is incompatible with points (e) to (g) quoted above. The exclusion from the Housing Act proposed in Article 20 of the Bill and from the Work and Social Assistance Act in Article 21 is incompatible with points (h) and (f) of the Directive. According to Article 3(2), the Directive

'does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned'.

The Bill is not, however, covered by this exception. The proposed rules would apply to Dutch citizens of Antillean origin (not to third-country nationals), and the proposal makes a distinction on grounds of race, not nationality. European Dutch nationals do not need 'admission for the purpose of settlement' in order to qualify for these benefits.

Privacy

16. Article 14 of the Bill allows the Minister to make data available to other administrative bodies. It is not clear from the Explanatory Memorandum whether this refers to ethnic data

(national origin of those concerned) and how this exchange of data would be permitted under the EU Data Protection Directive (Directive 95/46/EC, OJ L 281, 23.11.1995, p. 31).

Stigmatization

17. The Explanatory Memorandum and the Memorandum of Reply do not consider the negative impact of the proposed rules on Dutch nationals from other immigrant groups. The provision on stopping people and checking their identity in Article 13 of the proposal poses a clear risk for all Dutch nationals with darker skin of being challenged by the police. How are the police going to identify the relatively small group of Antillean Dutch nationals who do not have the right to settle when they are out on the street or elsewhere? This threat to hundreds of thousands of Dutch nationals is apparently a price worth paying. White Dutch nationals will never be bothered by it.

18. In the Parliamentary documents relating to this Bill there has been no mention of the negative message which this proposal will send to all Dutch nationals from immigrant groups, by dividing Dutch nationals into two categories and ending the indivisibility of Dutch nationality. What guarantee do Dutch nationals from other immigrant groups have that the legislator will not decide to pass laws depriving Dutch nationals of Moroccan, Turkish, Surinamese, Iraqi, Iranian or Somalian origin, who also have the nationality of another country, of certain substantive rights on the basis of their origin in a similar manner?