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international immigration, refugee
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1. The fundamental right to respect for family life under Union law

1.1 *The fundamental right to respect for family life in the EU*

The fundamental right to respect for family life is integrated in Union law. A distinction must be made between primary and secondary Union law:

- Primary Union law comprises the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the EU (Charter). This law can be amended only by an Intergovernmental Conference of the Member States.
- Secondary Union law – in so far as it is relevant here – consists of directives and regulations. In the vast majority of cases, this law is created and amended according to the ordinary legislative procedure laid down in Article 294 of the TFEU. The right of initiative to create or amend directives and regulations lies with the European Commission. After that, the Council and Parliament decide jointly (co-decision procedure) on the Commission proposals. The basic principle of this procedure is decision-making by simple majority of votes.

Primary law

The EU Treaties recognise the freedoms and principles set out in the Charter and the fundamental rights as guaranteed by the European Convention for the Protection of Human Rights (ECHR) and as derive from the constitutional traditions of the Member States. They are based on fair treatment of third-country nationals residing legally in the territory of the Union and provide for rules to be adopted on family reunification (Article 79 of the TFEU). The Charter recognises the right to respect for private and family life, the right to marry and to found a family, the rights of the child and the right of the family to legal, economic and social protection. As far as the rights of the child are concerned, the Charter is far more specific than the ECHR.

Secondary law

The fundamental right to respect for family life is integrated in secondary legislation too. The Annex to this Memorandum summarises the preambles and articles of fifteen directives and regulations in which the basic principle of the family unit is expressed.

In the interpretation and application of all these directives and regulations, the Court of Justice ensures respect of this right as a principle of Union law which is recognised *inter alia* in Articles 7, 9, 24 and 33 of the Charter.

1.2 *Union citizens and third-country nationals*

For citizens of the Union, the right to family unity is inextricably bound up with the right of these citizens to move and reside freely within the territory of the Member States (Article 21 of the TFEU) and, according to the Court of Justice, with the free market.¹ Family members, irrespective of their nationality (i.e. including family members from third countries) have the same rights as the

¹ ECJ, 25 July 2008, C-127/08 (*Metock*), paragraph 68.

Union citizen to whose family they belong (Article 7(1)(d) and (2) of Directive 2004/58/EC). The Netherlands has opted to grant Dutch nationals residing in the Netherlands fewer rights to family life with third-country nationals than those which these Dutch nationals enjoy on the basis of Union law if they migrate to or return from other Member States. So far, the view of the Court of Justice is that this situation is a purely internal matter for the Netherlands which comes under the national jurisdiction of the Member State. This does not alter the fact that this "reverse discrimination" has to be justified under Articles 8 and 14 of the ECHR.² However, if the Court were to follow the opinion of Advocate-General Sharpston in the Ruiz Zambrano case (C-34/09), the scope for the Netherlands to limit the right to a family life of its own citizens with third-country nationals will be reduced considerably.

For third-country nationals, the right to a family life does not derive from the Treaty, but from the Family Reunification Directive (2003/86/EC).

1.3 Right to family reunification

Union law on family reunification extends beyond the ECHR. Unlike the ECHR, as interpreted by the Court in Strasbourg, Union law starts from a *right* to family reunification for both citizens of the Union (see Directive 2004/58/EC) and third-country nationals to whom the Family Reunification Directive is applicable. The right to live with one's close family results in obligations for the Member States which may be negative, when a Member State may not deport a person, or positive, when it is required to let a person enter and reside in its territory.³

The scope of the relevant human rights conventions is defined by the Court of Justice as follows: the provisions of the ECHR, the UN Convention on the Rights of the Child and Article 24 of the Charter stress the importance to a child of family life and recommend that States have regard to the child's interests but they do not create for the members of a family an individual right to be allowed to enter the territory of a State and cannot be interpreted as denying States a certain margin of appreciation when they examine applications for family reunification.⁴

Union law goes beyond the ECHR. In addition to the provisions of the texts in which the fundamental right to respect for family life is laid down, the Family Reunification Directive (Article 4(1)) imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.⁵ Since family reunification is the general rule, the faculty to lay down conditions must be interpreted strictly.⁶ The Family Reunification Directive therefore creates more rights for third-country nationals than Article 8 of the ECHR. It is precisely these more far-reaching claims which make less favourable treatment of Dutch nationals residing in the Netherlands with regard to family reunification extra problematic.

1.4 Conclusions

- a. As long as the secondary Union law remains unchanged, the national measures which fall within the scope of Union law must comply with the basic principle of a right to family reunification and reticence with regard to those restrictive conditions which it is authorised to impose. Restrictive conditions other than those provided for by EU law may not be introduced or maintained.
- b. Amendment of the secondary Union law with a view to restricting the legal position of citizens of the Union and their family members (irrespective of nationality) will not be possible or barely possible so long as the fundamental rights of establishment of citizens of the Union (Articles 20 and 21), workers (Articles 45-48) and self-employed persons (Articles 49-55) or to

² ECJ, 25 July 2008, C-127/08 (*Metock*), paragraph 79.

³ ECJ, 27 June 2006, C-540/03 *Parliament v Council*, JV 2006/313, paragraph 52.

⁴ ECJ, 27 June 2006, C-540/03 *Parliament v Council*, paragraph 59.

⁵ ECJ, 27 June 2006, C-540/03 *Parliament v Council*, paragraph 60, and ECJ, 4 March 2010, C-578/08 *Chakroun*, paragraph 41.

⁶ ECJ, 4 March 2010, C-578/08 *Chakroun*, JV 2010/177 with note opinion of Advocate-General, paragraph 43.

provide or receive services (Articles 56-62), laid down in the Treaty on the Functioning of the EU, continue to exist.

- c. Amendment of the secondary Union law (fifteen relevant directives and regulations are mentioned in the Annex) with a view to restricting rights of third-country nationals and their family members will be null and void if it causes an infringement of the fundamental right to respect for family life and the rights of the child.

2. The limits of the right to family life of Article 8 of the ECHR and cumulative effects

2.1. The right to family life

In the Coalition Agreement, proposals are made at various points in the section on Immigration which relate to the right to family life under Article 8 of the ECHR. The Government states in the Agreement that the possibilities for a restrictive and selective migration policy are used to the full within the existing legal frameworks, including the ECHR. Within these frameworks, it is proposed tightening up the requirements for family reunification and making substantial adaptations to the Family Reunification Directive (2003/86/EC) for this purpose.

The right to family life is also laid down in Article 7 of the Charter of Fundamental Rights of the EU, which has had direct effect since the entry into force of the Lisbon Treaty on 12 December 2009. Fundamental rights such as those guaranteed by the ECHR were already observed by the EU and considered as general principles of Union law (Article 6(2) of the TEU). The aim of the Charter is to bring these fundamental rights together in a document which is valid for all institutions, bodies and organisations of the EU. The Member States are also bound by the Charter, when they are implementing Union law (Article 51 of the Charter). The level of protection of the Charter may not adversely affect the protection as laid down in the ECHR and in other instruments (Article 53 of the Charter).

Measures which restrict the right to family life under Article 8 of the ECHR must:

- (a) serve a legitimate purpose;
- (b) be effective to achieve this purpose; and
- (c) be necessary, which means comply with the requirements of proportionality and subsidiarity.

It is stated in the Coalition Agreement that 'the Government wants an end to the Europe route'. This refers to family migrants who, according to the Government, use EU law on freedom of movement solely to circumvent the Dutch immigration requirements. On behalf of the WODC (Research and Documentation Centre), research has been carried out into the scale of this use of Community law. From this, it appears that the use of this route by Dutch experts occurs on only a limited scale.⁷ Moreover, it is not immediately clear when in fact it is a matter of abuse. These research results indicate that closing the Europe route is disproportionate in relation to the infringement of Article 8 of the ECHR.

2.2 Article 8 of the ECHR

The above-mentioned restrictions on family migration concern a considerable number of proposals in the Coalition Agreement. The question of how this relates to Union law is dealt with above (section 1). Assuming that an amendment to the Family Reunification Directive comes about, with cooperation from other Member States, in order, for example, to introduce the requirement of a specific level of training of the partners ("basic qualifications"), this requirement will also have to withstand Article 8 of the ECHR. In this respect, the measure must meet the requirements of proportionality and subsidiarity. It will not be possible simply to meet these requirements if a new requirement in fact excludes large groups of migrants for a prolonged period or permanently from family reunification. When taking decisions on admission, Article 8 of the ECHR requires an individual examination covering all aspects of the case. The European Court of Human Rights attaches considerable importance to the interests of the child when

⁷ A. Schreijenbergh *et al.*, *Gemeenschapsrecht en gezinsmigratie: Het gebruik van het gemeenschapsrecht door gezinsmigranten uit derde landen*, Amsterdam: Regioplan Beleidsonderzoek, 2009.

weighing up the interests of the parties concerned, as appeared in the Rodrigues da Silva case.⁸ Each measure must therefore not only comply with Union law, but also with the ECHR.

2.3 Cumulative effects

Another aspect is the cumulative effect of the measures proposed by the Government. Even though each measure may be legally permissible in itself, there is still a risk of a cumulative effect which exceeds the limits of Article 8 of the ECHR. Restrictions on this right must serve a legitimate purpose and be necessary in a democratic society. This entails that the measure must be proportional and that the same purpose cannot be achieved by less drastic measures. Although the ECHR leaves the signatory States a certain margin of appreciation in laying down conditions for family migration, the conditions may not result in family migration being made permanently impossible. Moreover, the Family Reunification Directive leaves Member States no margin of appreciation with regard to the right to family reunification of the nuclear family. The Government proposals to prohibit marriages between cousins, the imposition of training requirements, exclusion of the possibility to admit family members of persons who have been convicted of specific violent crimes and the non-authorisation of family reunification of citizens of the Union with unmarried or unregistered partners with whom a durable relationship is maintained come into conflict with this on account of the absolute nature of the measures.

2.4 Conclusions

- a. WODC research indicates that closing the Europe route is disproportionate in relation to the infringement of Article 8 of the ECHR.
- b. Measures in the context of family reunification must comply with the criteria of Article 8 of the ECHR as well as Union law. In this respect, the measure must meet the requirements of proportionality and subsidiarity. On taking decisions on admission, Article 8 of the ECHR requires an individual examination, with the ECHR attaching considerable importance to the interests of the child.
- c. Although each measure in itself may be legally permissible, there is still a risk of a cumulative effect which goes beyond the limits of Article 8 of the ECHR. The conditions imposed for family migration may not result in family migration being made permanently impossible.

3. Marriage and European migration law

3.1 Non-recognition of polygamous marriages

In relation to the proposal not to recognise polygamous marriages, a distinction must be drawn between the recognition of a polygamous marriage concluded abroad as such and the consequences of non-recognition for the right of residence. The Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages (Hague Marriage Convention) names polygamy as a possible ground for refusing to recognise a marriage. The Marriage (Conflict of Laws) Act (*Wet Conflictenrecht Huwelijk*) does not contain this provision, but it applies as a general public policy clause which offers scope for a more tailor-made recognition policy. Under the present policy, polygamous marriages are not recognised if the Dutch legal order was involved in their conclusion, for example because one of the spouses was of Dutch nationality or was residing in the Netherlands. Legally, it must be considered feasible to include a general rule in Dutch legislation for the purpose of non-recognition of polygamous marriages. A study of December 2009, carried out at the request of the State Secretary for Justice by the Molengraaff Instituut voor Privaatrecht, on the legal status of polygamous marriages, concludes, however, that a legal bar on recognition would overshoot the mark, given the limited scale of the problem (only 1374 persons legally residing in the Netherlands are registered as having contracted a

⁸ European Court of Human Rights, 31 January 2006 (*Rodrigues da Silva and Hoogkamer v Netherlands*), Application No 50435/99, JV 2006/90 with note by Boeles, RV 2006, 21 with note by Van Walsum, NJCM-Bulletin 2006, No 6, pp. 849-851 with note by Woltjer and NAV 2006, No 2, pp. 102-104 with note by Bombeke. Also see European Court of Human Rights, 1 December 2005 (*Tuquabo-Tekle*), Application No 60665/00 and European Court of Human Rights, 21 December 2001 (*Sen*), Application No 31465/96.

polygamous marriage), the often temporary nature of polygamous marriages and the negative consequences which non-recognition may have for the protection of the rights of women.⁹

The consequences with regard to the right of residence of the introduction of a general ban on recognition of polygamous marriages will be limited. The present Dutch law already contains the rule that in the case of a polygamous marriage, family reunification can be granted to only one spouse or partner, as well as to the minor children born from that marriage or partnership (Article 3.16 of the Aliens Decree (Vb)). This rule is in keeping with the Family Reunification Directive (2003/86/EC), according to which further spouses than the spouse who is already residing with the sponsor in a Member State are excluded from the right to family reunification (Article 4(4)). This provision also authorises Member States to limit the family reunification of minor children of further spouses. Under the Directive on the right of citizens of the Union to move freely (2004/58/EC), the basic principle applies that marriages validly contracted anywhere in the world must in principle be recognised for the purpose of the application of the right of residence of family members under the Directive (Article 2(2)(a)). This provision must presumably be interpreted to mean that Member States are not obliged to recognise polygamous marriages, contracted lawfully in a third country, which may be in conflict with their own legal order.¹⁰

The previous Government indicated that a rule of non-recognition of polygamous marriages makes the right of residence structure possible that only the spouse with whom a marriage recognised by the Netherlands is concluded is eligible to reside in the Netherlands (Lower House 32175, No 1). This will usually refer to the spouse from the first marriage and the minor children from this marriage. Because this rule is different in content than that included at present in the Family Reunification Directive, it requires adaptation of the Directive. Such a change does not alter the fact that freedom of action in relation to the reunification of family members from a polygamous marriage is limited by the right to a family life (Article 8 of the ECHR) and the basic principle in force under the Family Reunification Directive that exceptions to the right to family reunification must be interpreted strictly.¹¹ Polygamous family relations are in principle protected by Article 8 of the ECHR.¹² Although public policy interests may justify the non-admission of polygamous partners and the children born from this relationship, it is still incumbent upon the Member States to take due account of the interests of family members and in particular those of children from such marriages, such as for example in the case of death of the (unrecognised) spouse.

3.2. Prohibition in principle of marriages between cousins

Also in relation to the proposal to prohibit in principle marriages between cousins, a distinction must be made between the introduction of a prohibition on marriages between cousins in Dutch family law and no longer accepting marriages between cousins as a basis for admission in the context of family reunification. The previous Government already made proposals to prohibit marriages between cousins under Dutch civil law, as well as to no longer accept marriages between cousins and equivalent relationships as a ground for admission (Lower House 32175, No 1).

The prohibition of marriages between cousins to be introduced in the Civil Code must be considered in the light of the internationally recognised right to marry, provided for *inter alia* in Article 12 of the ECHR and Article 9 of the Charter. This right may be subject to national conditions. However, there must be an objective justification for such restrictions.¹³ Unlike in the case of polygamy,¹⁴ public policy interests will not necessarily be in conflict with marriages

⁹ K. Boele-Woelki, I. Curry-Sumner, W. Schrama, B. Braat, C. Budzikiewicz & C. Jeppesen-de Boer, *De juridische status van polygame huwelijken in rechtsvergelijkend perspectief*, Utrecht Centre for European Research into Family Law (UCERF), WODC, December 2009.

¹⁰ Also see the guidance for the application of this Directive, drawn up by the European Commission, COM(2009) 313 final, section 2.1.1.

¹¹ ECJ, 4 March 2010, C-578/08 *Chakroun*, JV 2010/177 with note opinion of Advocate-General.

¹² European Court of Human Rights, 6 January 1992 (*E.A. and A.A. v Netherlands*), Application No 14501/89.

¹³ European Court of Human Rights, 13 September 2005 (*B. and L. v United Kingdom*), Application No 36536/02.

¹⁴ European Court of Human Rights, 18 December 1986 (*Johnston v Ireland*), Application No 9697/82, paragraph 52.

between cousins. Other European countries do not prohibit marriages between cousins.¹⁵ In various non-Western cultures, marriages between cousins are a common occurrence. In the Netherlands, the ban on marriages between relations and blood relations in the third degree (uncle-niece and aunt-nephew) was repealed with the introduction of the New Civil Code in 1970. The question is whether the arguments previously adduced in favour of the undesirability of marriages between cousins (preventing forced marriages, limiting health risks and preventing marriages of convenience) justify a general ban. Marriages between cousins may very well be *bona fide* and the risk of fraud, compulsion or abuse can also be combated with less radical measures. The former Minister for Health, Welfare and Sport (VWS) considered possible health risks of marriages between cousins not to be a sufficient reason to introduce a ban and termed such a measure as disproportionate.¹⁶ Because marriages between cousins are concluded mainly in non-Western circles, the proportionality of such a measure will also have to be assessed in the light of the prohibition of (disguised) discrimination on grounds of race or nationality (see section 5 of this Memorandum).

Under European and international law, there are no particular provisions in relation to the recognition of marriages between cousins or in relation to marriages between cousins as a ground for exclusion for admission. The Netherlands is required, on the basis of the Hague Marriage Convention, to recognise marriages which are validly entered into under the law of the State of celebration, i.e. including marriages between cousins, unless such marriages can be considered to come under the general public policy clause, for example on the grounds of being marriages of convenience or in other ways fraudulent or forced marriages (Articles 9, 10 and 14). This general principle also applies for the granting of rights of residence to family members under the relevant Directives 2004/58/EC and 2003/86/EC. The concept laid down in these Directives of 'spouse' is defined under Union law and does not lend itself to national definition. The exclusion of marriages between cousins from the right to family reunification therefore requires adaptation of both Directives. The Directives do allow measures to be taken to counter forced marriages or marriages of convenience. The inclusion of marriages between cousins as a ground for exception for family reunification in both Directives, as in the case of polygamous marriages as explained above, does not alter the obligation to pay attention to the international law on family life and the principle under Union law that exceptions to the right to family reunification may not take away the effective exercise of that right. This requires a concrete assessment of the situation of each applicant.

3.3 Restriction on family formation and family reunification to partners who are married or with whom a registered partnership has been entered into and minor children

When the Family Reunification Directive was drawn up, the Netherlands argued in favour of opening up the right to family reunification to unmarried partners with whom a durable relationship is maintained, including in the light of promoting the rights of same-sex partners. However, this is an optional provision of the Directive. Although Directive 2004/58/EC equally does not require the admission of partners of citizens of the Union in a durable relationship, this Directive does contain an obligation (to make an effort) to 'facilitate' entry and residence for such partners (Article 3(2)(b)). Abolishing this possibility in Dutch law makes residence more difficult and therefore is contrary to the Directive.

3.4 Conclusions

- a. The introduction of a rule with regard to polygamy according to which only the spouse with whom a marriage recognised by the Netherlands has been concluded and the children from

¹⁵ Marriages between cousins are prohibited in various States in the US. See, for a comparative overview: M. Ottenheimer, *Forbidden relatives: the American myth of cousin marriage*, University of Illinois Press 1996.

¹⁶ *Annex Proceedings II* 2007/08, No 2368. As regards health risks, the RIVM concluded that children from consanguine relationships have an extra probability of 1-2% of a congenital disorder and that consanguinity must be treated as one of the risk factors, like for example maternity of older mothers, diabetes or epilepsy in the mother or inherited or congenital disorders in the family, which increase the probability of a congenital or inherited disorder: RIVM, *Kinderwens van consanguine ouders: risico's en erfelijkheidsvoorlichting*, RIVM Rapport 270032003/2007.

this marriage are eligible for family reunification requires an adaptation to the Family Reunification Directive (2003/86/EC). Such an amendment does not alter the obligation to take due account of the interests of the family members, and especially of children of such marriages, when processing the application.

- b. The introduction of a ban on marriages between cousins under Dutch law requires a further study of compatibility with the internationally recognised right to marry and the ban on (indirect) discrimination. No longer accepting marriages between cousins as a ground for admission in the context of family reunification calls for adaptation of Directives 2004/58/EC and 2003/86/EC. Such an amendment does not alter the obligation to continue to examine in individual cases whether a refusal purely on the basis of the consanguinity of the marriage is proportional.
- c. No longer granting family reunification of citizens of the Union with unmarried and unregistered partners with whom a durable relationship is maintained calls for adaptation of the Directive on the free movement of citizens of the Union (2004/58/EC).

4. The EEC-Turkey Association Agreement

4.1 Standstill clauses

In relation to Turkish citizens who engage in an economic activity or intend to engage in an economic activity in the Netherlands, any tightening-up of the immigration policy which will limit them in this is prohibited. This follows from two standstill clauses laid down in Article 13 of Decision No 1/80 of the Association Council and Article 41 of the Additional Protocol of 1970, as recently interpreted by the Court of Justice in its judgment in Case C-92/07 *Commission v Netherlands*.

The first provision precludes (paragraph 49 of the judgment):

"the introduction of any new restrictions on the exercise of the free movement of workers, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to exercise that freedom."

The other provision prohibits (paragraph 47 of the judgment):

"the introduction of any new restrictions on the exercise of freedom of establishment or freedom to provide services, including those relating to the substantive and/or procedural conditions governing the first admission to the territory of that Member State of Turkish nationals intending to make use of those economic freedoms".

The nature of the forbidden restrictions is not confined by the Court to the examples on which a ruling has already been handed down, such as visas,¹⁷ charges¹⁸ or the introduction of a requirement to have a work permit.¹⁹ It may also be a matter of impediments in the field of family reunification, restrictions in the possibility of rehabilitation after initially unauthorised residence, restrictions in the field of labour migration or tightening up an authorisation for temporary stay requirement, where these restrictions do not also apply for EU citizens.²⁰

4.2 Conclusion

- a. In relation to Turkish citizens, both those who are already residing lawfully here and newcomers, the rule of thumb must be that new restrictions are prohibited unless there can be no doubt that this restriction has no impact on the free movement of Turkish workers and self-employed persons or on the position of those intending to make use of this freedom.

¹⁷ ECJ, 19 February 2009, C-228/06 (*Soysal*).

¹⁸ ECJ, 29 April 2010, C-92/07 (*Commission v Netherlands*).

¹⁹ ECJ, 21 October 2003, C-317/01 (*Abatay and Sahin*).

²⁰ Article 59 of the Additional Protocol.

5. The ban on discrimination on grounds of race in aliens and nationality law

5.1 Distinction according to origin or race in Coalition Agreement

Should they be implemented, various proposals in the Coalition Agreement would have the consequence that in Dutch legislation or in the implementation thereof by the public authorities, a distinction is made directly or indirectly on grounds of ethnic origin or race. Examples are (a) an Act which allows the deportation of Netherlands Antilles nationals from the Netherlands to the Antilles, (b) a difference in treatment between persons of Dutch nationality by birth and those who are naturalised as regards the loss of Dutch nationality after conviction for a crime, (c) the creation of a category of "conditional Dutch nationals", and (d) making the civic integration test more difficult abroad. The effect of the difference between Western and non-Western family migrants in the present Civil Integration Act (WIB), which according to the Monitoring Committee (CERD) is contrary to the UN Convention on the Elimination of Racial Discrimination,²¹ is of course reinforced by this.

In the discussion on the Coalition Agreement, still further examples of difference in treatment of Dutch nationals or of non-Dutch immigrants on grounds of origin were raised. During the presentation of the agreements, the joint-signatory of the tolerance agreement stated in the presence of the proposed Prime Minister that the section on immigration aims to limit non-Western family migrants by 50%. According to the Prime Minister, the Swedish passport of a State Secretary is not problematic, but a Moroccan or Turkish passport is. In this view, the actual or assumed action by the government of the country of origin and not the conduct of the individual concerned is the decisive factor.

5.2 Relevant provisions in the Human Rights Conventions and other conventions

(a) Aliens law

The UN Convention on the Elimination of Racial Discrimination (CERD) is also applicable to legislation and decisions on admission, treatment and deportation of aliens. A distinction on grounds of race or nationality between categories of aliens comes under the prohibition in this Convention. Article 1(2) reads: "*This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.*" This exception to the scope of the Convention relates solely to differences between citizens and aliens made by the public authorities. In the ruling of the House of Lords in the case of the British immigration officials who had the task of preventing Czech citizens of Roma origin in Prague boarding flights to the UK, it is explicitly considered: "*Article 1(2) ... Certainly does not mean that State Parties can discriminate between non-citizens on racial grounds.*"²²

The Committee monitoring compliance with this Convention (CERD) in 2004 in a General Recommendation on discrimination against non-citizens advised the State Parties to ensure "*that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin.*"²³

(b) Nationality law

Article 5(1) of the European Convention on Nationality explicitly states that the rules of a State Party on nationality "*shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.*" These binding provisions are followed by the second paragraph of this Article in which each State Party confirms less imperatively that it shall be guided by "*the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.*" A distinction between citizens by birth and naturalised citizens will nearly always give rise to a direct or indirect distinction according to ethnic origin.

Article 1(3) of the CERD provides: "*Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalisation, provided that such provisions do not discriminate against any particular nationality.*" Each State

²¹ CERD/C/NLD/CO/17-18, p. 2.

²² House of Lords, 9 December 2004, *R v Immigration Office at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)* [2004] UKHL 55, paragraph 101.

²³ General Recommendation No 30, Discrimination against non-citizens, CERD/C/64/Misc.11/rev. 3, paragraph 9, www2.ohchr.org.

Party is therefore free to adopt nationality legislation, provided that this is not discriminatory against persons of specific ethnic origin. The fact that ban on discrimination on grounds of race also applies to the nationality legislation also derives from Article 5(d)(iii) of the CERD, according to which States Parties undertake *"to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (iii) The right to nationality"*.

Under Article 2(1)(a) of the CERD, the Netherlands is required *"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"*. Under Article 2(1)(c) of that Convention, the Netherlands has undertaken 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"*. Both obligations also apply under aliens law and nationality law.

5.3 Not every distinction on grounds of race is prohibited discrimination

It appears from the recent case-law of the European Court of Human Rights in Strasbourg that the Court leaves little scope for justification of distinction on grounds of 'race' or 'ethnic origin', certainly when that distinction is made by the public authorities. The Court ruled: *"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"* (Timishev v Russia judgment of 13 December 2005, paragraph 58). The Court has reiterated this consideration in various later judgments.

The Council of State pointed out in 2006, in its opinion on the amended Civil Integration Bill (*Wet inburgering*), that a difference between naturalised Dutch nationals and 'indigenous' Dutch nationals *"without justification not only conflicts with general principles regarding equal treatment, but also with more specific international rules which prohibit an unjustified distinction on grounds of origin or ethnicity"*. In this respect, the Council referred to the European Convention on Nationality, the UN Convention on the Elimination of All Forms of Racial Discrimination and the European Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC) (Lower House 30 308, No 106).

The general prohibitions of discrimination in Article 21(1) of the Charter of Fundamental Rights of the EU, in Article 1 of Protocol No 12 to the ECHR and in Article 12 of the International Covenant on Civil and Political Rights (ICCPR) are also applicable under aliens law and nationality law. These fields are not exempted from the scope of these provisions. The UN Human Rights Committee confirms in the General Comment on the position of aliens under the ICCPR: *"Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens"*.²⁴

5.4 Distinction on grounds of nationality sometimes indirect distinction on grounds of race

The CERD makes it clear that a distinction on grounds of nationality or right of residence status may give rise to a prohibited distinction on grounds of race: *"differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim"* (paragraph 4 of the General Recommendation of 2004).

Article 18 of the TFEU prohibits discrimination on grounds of nationality between EU citizens. A distinction between EU citizens and third-country citizens regarding admission and deportation may be justified by rules under the special legal system formed by the EU (according to the European Court of Human Rights in 1991 in the *Moustaquim* judgment).²⁵ Outside of immigration

²⁴ General Comment No 15 on the position of aliens under the International Covenant adopted in 1986, paragraphs 2 and 5, see www2.ohchr.org.

²⁵ European Court of Human Rights, 18 February 1991 (*Moustaquim v Belgium*), Application No 12313/86.

law, differential treatment requires a sound justification. Many EU measures contain a prohibition [to discriminate] between EU citizens and certain categories of third-country nationals in specific fields. The new Article 21(2) of the Charter contains a generally formulated prohibition of distinction on grounds of nationality within the sphere of action of the Union. Whether this prohibition also applies to distinction on grounds of nationality between third-country nationals is still unsure. Given the location of the provision in the Charter and the useful effect of this provision alongside Article 18 of the TFEU, this interpretation is perfectly possible.

5.5 Conclusions

- a. Various proposals in the Coalition Agreement, such as deportation of nationals of the Netherlands Antilles from the Netherlands to the Antilles, a difference in treatment between Dutch nationals by birth and naturalised Dutch nationals as regards the loss of Dutch nationality after conviction for a crime, the creation of "conditional Dutch nationality" and making the civic integration test more difficult abroad would have the consequence, if they are implemented, that in Dutch legislation or in the implementation thereof by the public authorities, a direct or indirect distinction is made on grounds of ethnic origin or race.
- b. The general prohibitions of discrimination in Article 21(1) of the Charter of Fundamental Rights in the EU, in Article 1 of Protocol No 12 to the ECHR and in Article 12 of the ICCPR are also applicable under aliens law and nationality law. From the recent case-law of the European Court of Human Rights in Strasbourg, it appears moreover that the Court leaves little scope for justification in law of a distinction on grounds of 'race' or 'ethnic origin', certainly when that distinction is made by the public authorities.
- c. A distinction on grounds of nationality or right of residence status may, according to the CERD, give rise to a prohibited distinction on grounds of race. In addition, Article 18 of the TFEU prohibits discrimination on grounds of nationality between EU citizens. Moreover, the new Article 21(2) of the Charter contains a generally formulated prohibition of distinction on grounds of nationality within the sphere of action of the Union which possibly is also applicable to third-country nationals.

6. Conditional Dutch nationality

6.1 Proposal for conditional Dutch nationality

It is announced in the Coalition Agreement that the Government will issue a proposal *'for persons who within five years of obtaining Dutch nationality have been or are convicted of a crime punishable by a term of 12 years or more, to be deprived of Dutch nationality. For this purpose, the attempt is made to arrive at a broader interpretation of Article 7(d) of the European Convention on Nationality. If it appears that this broader interpretation will not be possible, discussions will be held with the State Parties with a view to an amendment of the Convention. If it appears by 1 January 2012 that the State Parties are not prepared to undertake such an amendment, the Dutch legislation will be amended so that for the first five years it will be a matter of conditionally obtaining Dutch nationality which, taking into account the stricter surrender requirement, automatically becomes definitive unless the person is convicted of a crime punishable by a term of 12 years or more.'*

It will require the greatest effort in Dutch diplomacy to induce the parties to the European Convention on Nationality, which was concluded within the Council of Europe with its 47 members, to accept a broader interpretation of Article 7(d) (strictly speaking: Article 7(1)(d)), let alone to amend the Convention along the lines desired by the Dutch Government. Certainly there will be no certainty by 1 January 2012 as to the readiness of the State Parties on this subject. The authors of the Convention clearly had the intention of keeping the ground for exception *'conduct seriously prejudicial to the vital interests of the State Party'* very limited, with the German and Russian forced exiles as a deterrent background. Consequently, it is explicitly warned in the official comments that *'criminal offences of a general nature, however serious they might be'* are not included in this ground for exception. The intention of the Government is heading for direct confrontation with this explanation by associating loss of nationality with civil offences.

6.2 Conditional acquisition

After 1 January 2012, the Netherlands intends to have the freedom on its own initiative to achieve the desired result. Not now by deprivation, but by preventing the acquisition of nationality because a condition has not been met: i.e. that the person has not been convicted in the first five years of a crime subject to a term of five years or more.

This is 'with due regard for the stricter surrender requirement'. This means that the person naturalising 'on parole' must already have renounced other nationalities as far as possible during the trial period. If naturalisation does not then go through, this will then usually lead to statelessness. However, this is prohibited in various ways by Article 8 of the 1961 Convention on the Reduction of Statelessness. The European Convention on Nationality also provides for the principle (Article 4(b)) that statelessness shall be avoided, with this principle then developed in Article 7.

It must therefore be assumed that the entry into force of the condition for not (definitively) acquiring Dutch nationality will apply only if this will not lead to statelessness, i.e. only for persons who, alongside the conditional Dutch nationality, still possess another nationality. In practice, it will then be a matter of persons who do not have the possibility to relinquish their other nationality, such as citizens of Argentina and Morocco.

6.3 Discrimination

The proposal is at loggerheads with Article 5(2) of the European Convention on Nationality, which strongly recommends not discriminating between citizens, whether they are citizens by birth or have obtained the nationality later. Dutch nationals by birth who are of dual nationality do not lose their Dutch nationality if they are convicted of a crime subject to a term of twelve years or more. They possess unconditional Dutch nationality. We suspect indirect distinction on grounds of race or ethnicity here. This discrimination is prohibited in various conventions, including Article 5(1) of the European Convention on Nationality which, unlike paragraph 2, is binding, and Article 1(1) in conjunction with paragraph 3 of the 1965 UN Convention on the Elimination of All Forms of Discrimination (see Section 5 above).

6.4 Conditional Dutch nationality and citizenship of the Union

'Every person holding the nationality of a Member State shall be a citizen of the Union', according to Article 20 of the TFEU. With conditional Dutch nationality, is the Netherlands now introducing conditional citizenship of the Union? How is this to be conceived of? During the trial period of 5 years, all kinds of legal consequences under European law associated with citizenship of the Union may have arisen. Must these be considered not to have taken place or to be reversed (such as the right to be followed by family members) if the final acquisition of nationality (by option or naturalisation) does not occur?

In the *Rottmann* case, the European Court of Justice ruled that the withdrawal of naturalisation, lawful as such, on account of deception nevertheless had to observe the principle of proportionality in the light of both European and national law.²⁶ It is to be expected that such examinations will (have to) be applied where it is a matter of not definitively granting Dutch nationality. It is for the Netherlands to establish its nationality law, although having due regard for EU law, according to the settled case-law of the Court of Justice.

The Netherlands can draw up a unilateral declaration for the attention of the other Member States and the EU of whom it wishes to consider as its citizens for the purposes of Union law. In principle, the addressees are bound by this.²⁷ It will still take some doing to define the conditional Dutch nationals in this. 'Conditional Dutch nationals' are citizens of the Union or they are not. There is no conditional citizenship of the Union under Union law. Union law is also relevant as to whether children of conditional Dutch nationals become conditional or fully-fledged Dutch nationals by birth. Moreover, it is in line with settled case-law, culminating with *Rottmann*, that requirements under European law will be laid down concerning such unilateral declarations. States are no longer totally free to determine who will have to be considered as citizens for the purposes of Union law. On account of the nature and the consequences of ultimately not granting

²⁶ ECJ, 2 March 2010, C-135/08 (*Rottmann*), on which, *inter alia*, H.U. Jessurun d'Oliveira, *NJB* 2010, p. 1028 *et seq.*

²⁷ According to ECJ, 20 February 2001, C-192/99 (*Kaur*).

the status of Dutch national and with them those of Article 20 of the TFEU, the situation comes within the scope of European Union law. It is therefore a matter of inferring from Rottmann. The examination under European law is not exhausted by the proportionality requirement. Many other principles and rules of European law can be deployed against conditional Dutch nationality, including, indirectly, the European Convention on Nationality. With this, the Netherlands is back to the beginning.

6.5 Conclusions

- a. The intention of the Government gives rise to direct confrontation with the European Convention on Nationality by also associating loss of nationality with civil offences.
- b. The entry into force of the condition for not (definitively) acquiring Dutch nationality may apply only if this does not lead to statelessness, i.e. only for persons who possess another nationality in addition to the temporary Dutch nationality. It will then in practice concern persons who do not have the possibility to relinquish their other nationality.
- c. This is at loggerheads with Article 5(2) of the European Convention on Nationality because a distinction is made between citizens by birth and those who have obtained the nationality later. Moreover, indirect differentiation on grounds of race or ethnicity is suspected here. This discrimination is prohibited in various conventions, including Article 5(1) of the European Convention on Nationality which, unlike paragraph 2, is binding, and Article 1(1) in conjunction with paragraph 3 of the 1965 UN Convention on the Elimination of All Forms of Discrimination.
- d. On account of the nature and consequences of ultimately not granting the status of Dutch national and with them those of Article 20 of the TFEU, determining who will be considered as citizens comes within the scope of Union law. There is no conditional citizenship of the Union under Union law. In addition, the examination under European law is not exhausted by the proportionality requirement. Many other principles and rules of European law can be deployed against conditional Dutch nationality, including, indirectly the European Convention on Nationality.

7. Legal assistance and effective legal protection in cases of asylum

7.1 Limitation on accumulation of procedures

The Coalition Agreement provides that the processing of applications for asylum must be undertaken as effectively, efficiently and carefully as possible. The Government wishes to achieve this by avoiding the accumulation of procedures, among other measures. For this purpose, a radical cut-back in legal assistance to asylum seekers is carried out in the second and subsequent asylum procedures. In addition, the Government wishes to grant exceptions to the principle of the suspensory effect of an application for an interim order. Finally, the Coalition Agreement contains various proposals to reinforce the burden of proof and to transfer it more to the asylum seekers.

"No cure, no fee"

The Government wishes to remove incentives for new procedures after the first application has been examined by deploying the basic principle of "*no cure, no fee*".²⁸ This presupposes that when a subsequent procedure does not lead to a residence status for the asylum seeker, he may not claim legal assistance for this. In consequence, lawyers will be less ready to assist asylum seekers in their subsequent application. They are of course not assured of remuneration for the hours they work. As a result, the submission and substantiating of a second application are rendered impossible in practice by a roundabout route.²⁹

²⁸ Coalition Agreement VVD-CDA, 30 September 2010, p. 22.

²⁹ In 2009, according to the State Secretary for Justice, just under 8% of asylum applications were subsequent applications. At the moment, Article 3(f) of the Decree on Criteria for Legal Aid and Appointment of a Lawyer (*besluit rechtsbijstand- en toevoegingscriteria*) for that matter already provides that, except in special circumstances, no legal aid is granted for a second or subsequent asylum application when it is beyond all reasonable doubt that the new facts or circumstances could have been adduced before the decision concerning

According to Article 32(4) of the Procedures Directive (2005/85/EC), if following a preliminary examination it appears that there may be new elements or findings which may lead to qualification as a refugee, a second or subsequent application for asylum must be examined in conformity with Chapter II of the Directive. On the basis of Article 15(3)(a), in Chapter II, Member States must provide for free legal assistance for the appeal procedure as referred to in Article 39 of the Procedures Directive. This also applies for appeals in the second and subsequent asylum procedures in which new facts have been adduced. Free legal assistance may be refused at the appeal stage if the appeal has no chance of success. However, if there are new facts and circumstances which require an entirely new examination of the asylum application, the appeal against rejection of this application will not often be without chance of success. Moreover, Article 39 of the Procedures Directive requires a right to an effective remedy in all asylum cases, including second and subsequent applications. This right assumes that the remedy must be accessible to the asylum seeker. The EU right to effective legal protection is laid down in Article 47 of the Charter of Fundamental Rights of the EU and includes, in all cases covered by the scope of EU law (i.e. including alien and asylum cases), the guarantees deriving from Article 6 of the ECHR. The case-law concerning Article 6 of the ECHR shows that the lack of free legal assistance may make a remedy inaccessible.³⁰ The right to legal assistance is consequently expressly laid down in Article 47 of the Charter. This provides that legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. Judicial proceedings under asylum law are so far-reaching and complex that without the assistance of a lawyer the asylum seeker has no effective access to justice. Given the situation in which many asylum seekers find themselves, paying a lawyer's fees is not a real option for them. To give the alien effective access *de facto* to the required remedy, the government will have to provide for free legal assistance in the case of a second or subsequent application for asylum too.

Suspensory effect of interim order

The Government wishes to make exceptions to the principle allowing the ruling on an application for an interim order to be awaited during a repeat application in the Netherlands. This entails the risk that the asylum seeker, pending the ruling on the interim order and therefore also before the ruling in the appeal, is sent back contrary to the prohibition on return.

Article 39(3) of the Procedures Directive allows Member States to provide for rules on the question of whether or not the appeal against a decision refusing asylum or an interim order against the deportation submitted has suspensory effect. According to this provision, these provisions must however comply with the international obligations, such as Article 3 of the ECHR and Article 33 of the Refugee Convention. The European Court of Human Rights ruled in relation to Articles 13 and 3 of the ECHR that in the event of a serious (arguable) claim of breach of Article 3 of the ECHR, a remedy against a deportation decision is effective only if it has automatic suspensory effect.³¹ It must be guaranteed that an asylum seeker is not deported during the appeal stage contrary to the prohibition on return of Article 3 of the ECHR.³² Exceptions to the principle allowing the ruling on an interim order to be awaited in the Netherlands are therefore contrary to the EU right to effective legal protection laid down in Article 47 of the Charter and Article 39 of the Procedures Directive.

7.2 Burden of proof

Various proposals are made in the Coalition Agreement to transfer the burden of proof more to the asylum seekers and to reinforce it. The Government states that optimally reliance will be placed on invoking the lack of identity particulars in the case of undocumented asylum seekers, on transferring the burden of proof to the asylum seeker and reinforcing it within the frameworks

the earlier asylum application. See *Parliamentary Papers II 2009-2010*, 32 359, No 1, Rapport brede heroverwegingen, H14. Asiel, immigratie en integratie, April 2010, p. 37.

³⁰ See European Court of Human Rights, 9 October 1979, *Airey v Ireland*, Application No 6289/73, paragraph 26.

³¹ European Court of Human Rights, 26 April 2007 (*Gebremedhin v France*), Application No 25389/05, *JV* 2007/252, with note TS, *AB* 2007/227 with note HBA, paragraph 66.

³² European Court of Human Rights, 5 February 2002 (*Čonka v Belgium*), Application No 51564/99, paragraphs 75 and 83.

of the case-law of the Council of State and on an amendment to the Qualification Directive (2004/83/EC) to transfer the burden of proof to the applicant in relation to demonstrating (the lack of) alternatives to flight. Such a transfer and reinforcement will make it more difficult for the asylum seeker to prove that his application is founded.

Article 4 of the Qualification Directive gives Member States the possibility to place the burden of proof with the asylum seeker.

Article 4(5) of the Qualification Directive recognises, however, that the asylum seeker cannot be expected to substantiate his entire account in support of his asylum application. This provision states that when the conditions set out there are met, the applicant's statements, despite the lack of evidence, are deemed to be credible and he is given the benefit of the doubt. Article 4 of the Qualification Directive must be read in the light of the case-law of the European Court of Human Rights on the burden and standard of proof in matters of asylum. According to the European Court of Human Rights, an asylum seeker must provide evidence '*capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3*'. It is then for the State to assuage any doubt as to this risk.³³ When assessing the credibility of the account in support of an asylum application, the Court places the emphasis on the core of this account and disregards any vagueness or inconsistencies in less relevant parts of the account.³⁴

Moreover, on the basis of EU law, the burden of proof in an asylum case may not be reinforced to an extent such as to undermine the effectiveness of the EU right to asylum status for persons recognised as refugees or eligible for subsidiary protection and of the EU prohibition on return. The principle of effectiveness assumes that national rules of procedure, such as rules of proof, may not make the exercise of rights granted by the Community legal order nearly impossible or extremely difficult.³⁵ Also any adaptation of the Qualification Directive to transfer the burden of proof with regard to the protection alternative may not come into conflict with the principle of effectiveness. The Court of Justice has already ruled in fields other than asylum law that a heavy burden of proof may undermine the effectiveness of a right granted by the EU.³⁶ It has to be concluded that both Article 3 of the ECHR and the EU law stand in the way of the burden of proof being transferred too far to the asylum seeker and reinforced.

7.3 Conclusions

- a. It appears from Article 32(4) in conjunction with Article 15(3)(a) of the Procedures Directive that when there is a question of new elements or findings which may lead to qualification as a refugee, legal assistance must be granted free of charge in a second or subsequent application for asylum too. Moreover, the right to financial assistance is expressly laid down in Article 47(3) of the Charter, which is also applicable to migration and asylum cases.
- b. The European Court of Human Rights ruled in relation to Articles 13 and 3 of the ECHR that in the event of a serious (arguable) claim of breach of Article 3 of the ECHR, a remedy against a deportation decision is effective only if it has automatic suspensory effect.³⁷ Failure to recognise that an interim order has suspensory effect is therefore contrary to the EU right to effective legal protection, laid down in Article 47 of the Charter and Article 39 of the Procedures Directive.

³³ See, for example, European Court of Human Rights, 17 July 2008 (*NA v UK*), Application No 25904/07, paragraph 111.

³⁴ See, for example, European Court of Human Rights, 9 March 2010 (*R.C. v Sweden*), Application No 41827/07, paragraph 52, European Court of Human Rights, 5 July 2005 (*Said v Netherlands*), Application No 2345/02, paragraph 53.

³⁵ ECJ, 16 December 1976, 33/76 *Ruwe* [1976] ECR 1989.

³⁶ See, for example, ECJ, 17 October 1989, 109/88 *Danfoss*, which involved the right to equal pay for men and women for work. Also see ECJ, 17 February 2009, in Case C-465/07 *Elgafaji*, paragraph 42, in which the Court of Justice rules, in the context of Article 15(c) of the Qualification Directive, that in applying national law, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 of the EC Treaty (now Article 288 of the TFEU).

³⁷ European Court of Human Rights, 26 April 2007 (*Gebremedhin v France*), Application No 25389/05, *JV* 2007/252, with note TS, *AB* 2007/227 with note HBA, paragraph 66.

- c. Article 4(5) of the Qualification Directive provides that if the conditions set out there are met, the applicant's statements, despite the lack of evidence, must be deemed to be credible and he must be given the benefit of the doubt. Moreover, on the basis of EU law, the burden of proof in an asylum case may not be reinforced to an extent such as to undermine the effectiveness of the EU right to asylum status for persons recognised as refugees or eligible for subsidiary protection and of the EU prohibition on return. Extensive transfer of the burden of proof to the asylum seeker and reinforcement of it will be in conflict with Article 3 of the ECHR.

8. The criminalisation of illegality

8.1 Introduction

In the past decade, the possibility of criminalising unauthorised residence has already been the subject of discussion several times. Mention is made of the Kok II Government (1998-2002) and the Balkenende II Government (2003-2006). So far, the criminalisation of unauthorised residence has always been renounced. Various reasons are given for this, which are recalled again here. It is not obvious of course why matters should be different now. In addition, there are more pragmatic reasons to question the desirability of criminalisation of unauthorised residence.

8.2 Relationship with the present body of legislation

A first reason to renounce criminalisation of illegality is directly related to the present body of legislation, which grants the Minister the competence to deport illegal residents and to place them in detention pending expulsion (Article 63 in conjunction with Article 59 of the 2000 Aliens Act (*Vreemdelingenwet*)). Furthermore, the Minister may order the illegal resident to be declared an undesirable alien in cases specified by the Act (Article 67 of the 2000 Aliens Act (*Vreemdelingenwet*)). Declaring a person who is an illegal resident in the Netherlands to be an undesirable alien is a decision under administrative law.

The alien declared undesirable who does not leave the Netherlands of his own accord thereby renders himself guilty of an offence, criminalised in Article 197 of the Penal Code. This crime is punishable by a prison sentence of a maximum of 6 months or a fine.

The present body of legislation is therefore directed at criminal or trouble-making aliens. The situation would be different if, in addition to this body of legislation, unauthorised residence were to be criminalised *in itself*. In that case, persons who at present are preparing to depart would also be negatively affected as well as persons who have only just arrived in the Netherlands and still have to submit an application for asylum.³⁸

In this connection, we also mention another group of persons, i.e. the victims of human trafficking or illegal immigrant smuggling. With regard to persons who have become victims of human trafficking, the Protocol against the Smuggling of Migrants supplementing the UN Convention against Transnational Organised Crime even expressly prohibits the criminalisation of illegality in a number of situations. Article 6 of this Protocol, to which the Netherlands is a party,³⁹ prohibits in particular the criminal prosecution of migrants for the fact of having been the object of: the smuggling of migrants; producing, procuring, providing or possessing travel and identity documents; or enabling a person to remain illegally by illegal means, including those mentioned above.

8.3 Concurrence of administrative penalties and criminal penalty

A second reason to renounce criminalisation of illegality also relates to the present body of legislation and concerns the concurrence of administrative penalties and criminal penalties, in the event that unauthorised residence should be criminalised. If no clear choice is made, an illegal resident may be subject to both administrative and criminal action, with the same objective strived for in both legal fields, i.e. the termination of the unauthorised residence.⁴⁰ Moreover, the

³⁸ Also see *Parliamentary Papers II* 2004-2005, 29 537, No 23, p. 3.

³⁹ *Collection of Treaties and Conventions* 2001, 70.

⁴⁰ Also see *Parliamentary Papers II* 2004-2005, 29 537, No 23, p. 3.

question is whether deportation pending the criminal prosecution is authorised. If not, criminal prosecution would create an impediment to deportation.⁴¹

8.4 Other objections

Furthermore, the question arises of whether the police and judiciary have sufficient capacity to undertake the prosecution of illegal residents. There are serious doubts about this capacity.⁴² Are the costs of detection, prosecution and detention of the aliens concerned really justified by the effects to be reasonably expected from the criminalisation on the conduct of these aliens?

Moreover, can the consequences of a possible conviction apply for a long time for the illegal resident, even after final deportation? What purpose does this serve?

Finally, the question is what the consequences of criminalisation of illegality will be for church or other institutions, as well as citizens who give assistance (in whatever field) to those who are unlawfully resident in the Netherlands. The same question can be asked in relation to medical personnel or those providing pastoral care who (must) provide assistance to this group of people in the pursuit of their profession. Are these persons accomplices in the crime of unauthorised residence?

8.5 Conclusions

- a. The present body of legislation, with the order declaring a person to be an undesirable alien, already focuses on criminal or trouble-making aliens. If, in addition to this body of legislation, unauthorised residence were also to be criminalised separately, persons who at present are preparing to depart and those who have only just arrived in the Netherlands and still have to submit an application for asylum would also be negatively affected.
- b. Finally, other objections, such as doubts whether the police and judiciary have the capacity to prosecute illegal residents, the hampering of deportation as a consequence of criminal prosecution, the long-term negative consequences of any conviction for the illegal resident and the consequences for institutions, citizens and medical and pastoral personnel who provide assistance to illegal residents, argue against the desirability of this measure.

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⁴¹ See, *inter alia*, J. Snoeijer & N.M. van Wersch, "Illegaliteit als strafbaar feit: het rijmt wel, maar het spoort niet", *MR* 2003, No 8, p. 281.

⁴² J. van der Leun, *Crimmigrație*, lecture at University of Leiden, 11 December 2009, Apeldoorn/Antwerp: Maklu-Uitgevers, 2010, p. 22.