Common

Court of Justice

EXHIBIT 7

HLAR 78727/16
Date decision: 1 September 2017

COMMON COURT OF JUSTICE OF ARUBA, CURAÇAO, SINT MAARTEN AND OF BONAIRE, ST. EUSTATIUS AND SABA

Decision on the appeal of:

S.E. Hansen, residing in Curaçao,
appellant,

against the decision of the Court in First Instance of Bonaire, St. Eustatius and Saba, sitting in Bonaire, of date 11 March 2016 in case no. War BES 2016/7 and 8 in the case between:

the appellant

and

the Secretary State for Security and Justice.

The course of the proceedings

By administrative decree of date 20 November 2015 the Secretary of State declared the appellant a 'persona non grata' pursuant to article 16d, section 1, opening lines and under (c) of the Act on Admission and Expulsion BES (hereinafter: the Wtu BES).

By decision of date 18 February 2016 the Secretary of State declared the administrative objection filed by the appellant against aforementioned [contested] decree unfounded and upheld it, basing his decision on supplemental arguments.

By judgment of date 11 March 2016 the Court [in First Instance] declared the appeal lodged by the appellant against the aforementioned decision, unfounded.

Against the latter judgment the appellant filed a [second/higher] appeal [with the Common Court of Justice].

The Secretary of State submitted a defense.

The Common Court of Justice heard the case on 30 March 2017, during which the appellant was represented by Mr. M. Bijkerk LL.M, attorney, and the Secretary of State was represented by Mr. P.J. de Graaf LL.M., an official working for the Immigration and Naturalization Office.

Considerations

1. For the text of the applicable legal provisions one is referred to the appendix to this judgment.

2. The appellant was born on 8 July 1984 in the European Netherlands to parents from Curaçao. As appears from the minutes of the hearing of date 22 January 2016, held to consider the administrative objection, the appellant declared that he had lived on Bonaire ever since 2010. The legal basis for declaring the appellant a 'persona non grata' by the Secretary of State, is, that between October 2011 and July 2015 the appellant was convicted on Bonaire for various offences, among which a violation of the Illegal Drugs Act 1960 BES, maltreatments, vandalism and breach of the Road Traffic Ordinance Bonaire. The appellant also lived for a long time on Bonaire without a valid residence permit.

3. The appellant argues that the Court [in First Instance] has wrongly ruled that article 16d, section 1, opening lines and under (c) of the Wtu BES, considered in conjunction with article 1a, section 1, opening lines and under (a) of this Act, applies accordingly to Dutch nationals born outside of Bonaire, St. Eustatius and Saba. In this context he argues that the legislator cannot have intended that a foreign national as defined in article 1, opening lines and under (j) Wtu BES should be construed to also mean a Dutch national born outside of Bonaire, St. Eustatius and Saba.

3.1. In accordance with article 1a, section 1, opening lines and under (a) of the Wtu BES, this law, with the exception of chapter 2, applies accordingly to Dutch nationals born outside of Bonaire, St. Eustatius and Saba. From the parliamentary history of this provision (Parliamentary documents II 2009/10, 32 282, no. 5, p 7-10) it appears that it was the intention after the dismantlement and administrative reorganization of the Netherlands Antilles, to regulate the movement of persons within the Kingdom in a Kingdom Act on the Movement of Persons, which was supposed to bring about a uniform, unambiguous and reciprocal arrangement for the right of entry and admission of all Dutch nationals to all parts of the Kingdom.

It also appears from this history that it was deemed appropriate that, for as long as the Kingdom Act on the Movement of Persons had not yet entered into force, to temporarily regulate the regime for the right of entry and admission of Dutch nationals in the Wtu BES – by way of a transitional arrangement. According to the Parliamentary history, it was deemed inappropriate to unilaterally and for a restricted area of the Kingdom, namely the BES-islands, introduce in this transitional arrangement the same regime that the Kingdom Act on the Movement of Persons would be introducing for the right of entry and admission of all Dutch nationals. In other words, it was deemed inappropriate to grant all Dutch nationals the basically unrestricted right of entry and admission to the BES-islands in anticipation of said Kingdom Act. The right of entry and admission of Dutch nationals to the public entities of Bonaire, St. Eustatius and Saba would therefore, for the time being, be regulated in the Wtu BES, which is the same as the arrangement that Aruba and the new 'countries'[1] of Curaçao and St Maarten would be applying with respect to admission and expulsion of both foreign nationals and certain categories of Dutch nationals in their Federal Ordinances on Admission and Expulsion, which ordinances would also remain in force until the arrangement to be introduced in the Kingdom Act would enter into force.

3.2. From article 1a, section 1, opening lines and under (a) of the Wtu BES and the parliamentary history of this provision, it follows unequivocally that the legislator has intended that the Wtu BES should apply accordingly to Dutch nationals, who, like the appellant, were born in the European Netherlands. Furthermore, the Common Court takes into account that from the minutes of the hearing on the administrative objection it appears that the appellant had been living on Bonaire ever since 2010 and that he - immediately prior to 10 October 2010 - had not resided in Bonaire for an uninterrupted period of at least one year, so that the exception of article 1a, section 3, opening lines and under (a) of the Wtu BES, stipulating that this law does not apply, does not occur in the case of the appellant.

This argumentation fails.

4. The appellant furthermore argues that the Court has failed to appreciate that [the appellant] having been declared a 'persona non grata' pursuant to article 16d, section 1, opening lines and under (c) of the Wtu BES constitutes a violation of article 2, section 1 and article 3, section 2 of the Fourth Protocol to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) as well as a violation of article 12, section 1 and 4, of the Convention on Civil and Political Rights (hereinafter: ICCPR), since his rights as a Dutch national laid down in these provisions are being restricted. According to the appellant, the reservations made by the Netherlands to these Treaty-provisions are null and void, as they are incompatible with the object, purpose and purport of these provisions.

4.1 On 27 September 2010 the Kingdom officially declared on the basis of article 5 of the Fourth Protocol to the ECHR, that with respect to the 'territorial declaration' to said Protocol of date 23 June 1982, it considers the European part of the Netherlands, the Caribbean part of the Netherlands [the BES-islands], Aruba, Curaçao and St. Maarten as of 10 October 2010 to be 'separate territories' for the application of articles 2 and 3 of said Protocol. On 11 October 2010 the Kingdom likewise adapted the reservation it made to article 12 ICCPR at the ratification of the ICCPR on 11 December 1978 (hereinafter together referred to as: the reservations).

[1] A more logical translation would be 'federal states'.

4.2 The Common Court is of the opinion that the adapted reservations are legally valid. They are no more than an adaptation of the internally altered relations within the Kingdom: the Netherlands Antilles had been dismantled and was replaced by the BES-islands as public entities[2] and Curaçao and St. Maarten as separate 'countries'. The altered reservations refer to the same territory of the Kingdom as the original reservations, albeit that certain parts thereof have now been given a different autonomous status vis-à-vis each other. The adaptation [of the reservations] was meant to reflect this change. Without this adaptation the original reservations – which presume that the Netherlands Antilles still exist – would no longer be applicable. The objective of the adapted reservations remained the same as of the original reservations, namely the protection of small, socio-economically vulnerable communities against an uncontrolled influx of Dutch and foreign nationals who do not originate from the BES-islands.

4.3 The legal validity of the adapted reservations does not mean that it would preclude the possibility that in exceptional cases the consequences of their application would be so disproportionate, that this would violate the treaty provisions to which the reservations refer. However, the present case is not such an exceptional case.

4.4 The gist of article 3 of the Fourth Protocol to the ECHR and article 12, section 4, of the ICCPR is that the appellant has the right of return to, entry into and legal residence in his own country and that he cannot be expelled from his own country. Because the appellant was born in the European Netherlands[3], that is his own 'country'. Having been declared a 'persona non grata' means that he has no right of residence on the BES-islands. His [right of] entry into and residence in his own country, i.e. the European Netherlands (Holland), is not restricted by the adapted reservations.

4.5 Furthermore, the adapted reservations only have limited consequences for the appellant's right of free movement and free residence, as referred to in article 2, section 1, of the Fourth Protocol to the ECHR and in article 12, section 1 of the ICCPR. The appellant having been declared a 'persona non grata' applies only to the BES-islands and not to the European Netherlands, Aruba, Curaçao and St. Maarten[4]. Under these circumstances there is no ground to conclude that the adapted reservations have disproportionate consequences for the appellant's rights of free movement and residence.

4.6 In this connection, the Common Court also observes that pursuant to article 12, section 3, of the ICCPR and article 2, section 3 of the Fourth Protocol to the ECHR, the rights of free movement and residence may be restricted to, *inter alia*, maintain public order, national security and to prevent criminal offences. The reasons for declaring the appellant a 'persona non

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[2] The 'public entities' are comparable to Dutch municipalities. They form an integral part of the 'country' known as Holland. Even Holland should be considered to be a 'federal state' (not a 'country') within the federation known as the Kingdom of the Netherlands, which since 1 October 2010 consists of four federal states, i.e. Holland, Curaçao, Aruba and St. Maarten. To call these federal states 'countries' is incorrect and a persistent cause of confusion. Internationally there is only ***one*** country, i.e. the Kingdom of the Netherlands. Its constituent parts are federal states, except for the so-called 'BES-islands' which in 2010 have been incorporated as an integral part into the federal state known as Holland.

[3] The European (part of the) Netherlands is the country (federal state) commonly known as Holland. The Caribbean part of the Netherlands consists of the 3 so-called Bes-islands (since 2010).

[4] This is factually incorrect. The appellant enjoys these rights only in Holland and Curaçao. For Aruba and St. Maarten he must request a residence permit, which will be granted only if he can prove that he has 1) a home or other accommodation, 2) sufficient income and 3) no criminal record during the 5 years prior to his petition for a residence permit. Therefore, in Aruba and St. Maarten he does ***not*** have the right of free movement and residence. He never enjoyed these rights in the BES-islands either, as the Secretary of State himself explicitly confirms in the present case.

grata' offer sufficient grounds to restrict the appellant's right to free movement and residence.
The argumentation fails.

5. The appellant furthermore argues that the Court [in First Instance] failed to appreciate that the decree of 18 February 2016 was flawed in its reasoning, seeing that the Secretary of State did not consider whether the individual behavior of the appellant posed an actual, real and serious threat to a fundamental interest of the community as, according to the appellant, he should have done, because as a Dutch citizen the appellant also is a citizen of the European Union and should enjoy the rights concomitant therewith. According to the appellant, the Court also failed to appreciate that the Secretary of State was wrong in not stating any particular circumstances, on the basis of which he could in all reasonableness decide not to follow the usual policy as set out in the Circular on Admission and Expulsion BES (hereinafter: the Ctu BES).

5.1 In the Wtu BES nor anywhere else is it stipulated that the Secretary of State while executing his right to declare a citizen of the European Union a 'persona non grata', is obligated to consider whether the behavior of the person in question poses an actual, real and sufficiently serious threat to a fundamental interest of the community. In so far as the applicant argues that this obligation of the Secretary of State is consequent on the provisions concerning fundamental freedoms as stipulated in the Treaty on the Functioning of the European Union (hereinafter: the TFEU), this is also in vain. Bonaire has the status of a so-called Overseas Territory and Country (hereinafter: OTC). As the Common Court has considered before (decision of 3 June 2016; ECLI:NL:OGHACMB:2016:35), according to definitive case-law of the European Court of Justice of the European Union, the existence of the OTC-regulation concerning the associative status of OTC's does not result in the general provisions of the TFEU – i.e. those which are not included in part four, laying out the framework of this associative regulation – being applicable without explicit reference thereto in the OTC-regulation.

5.2 Furthermore, it is undisputed that the appellant was not granted admission to the BES-islands by operation of law or pursuant to a residence permit and it is also true that in accordance with the requirements stipulated in paragraph 6.2 Wtu BES, he poses a threat to public order within the meaning of article 16d, section 1, opening lines and under (c) of the Wtu BES. The Court has also correctly ruled that the circumstance that the appellant feels that his freedom is restricted by having been declared a 'persona non grata', is not such an exceptional circumstance which should necessitate a deviation from the regular policy, seeing that this circumstance in itself is not a disproportionate consequence if weighed against the purposes served by this policy, namely the protection of public order and the prevention of crime in the BES-islands.
The argumentation fails.

6. The appellant's argumentation concerning expulsion does not fall within the scope of this court-case, which concerns the contested decree in which he was declared a 'persona non grata' and can therefore not lead to the intended result.

7. In so far as the appellant in this appeal case refers to the grounds he put forward in first instance, he does so in vain. The Court [in First Instance] has treated and judged these. The appellant has not argued that and why the relevant considerations of the Court [in First Instance] are incorrect (cf. *inter alia* the Common Court's decisions of date 9 June 2008; ECLI:NL:OGHNAA:2008:BG2235 and 14 December 2012; ECLI:NL:OGHACMB:2012:BY7682).

8. This appeal is unfounded. The contested decision must be confirmed.

9. There is no reason to award costs.

Decision

The Common Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba:

confirms the contested decision.

Thus decided by Mr. E.J. van der Poel LL.M, president, Mr. J.Th. Drop LL.M and Mr. H.G. Lubberdink LL.M, members, in the presence of Mr. M.J.C. Beerse LL.M, court clerk.

signature *signature*

president court clerk

Pronounced in open court on 1 September 2017

Dispatched: 1 September 2017

Issued for true copy,
the court clerk,
on behalf of the latter,
(signature)