

Court in First Instance of Bonaire, Sint Eustatius and Saba

Sitting in Bonaire

Judgment

pursuant to article 95, section 1 of the War BES
in the case between:

Sherrel E. HANSEN,
[applicant] held in detention at Penitentiary Institution Caribbean Netherlands, location Bonaire (JICN), attorney: Mr. M. Bijkerk LL. M., lawyer,

and

the Secretary of State for Security & Justice
defendant,
attorneys: Messrs. L.M. Virginia and W.J. de Nijs, lawyers.

Course of the proceedings

As per decree of date 20 November 2015 the defendant declared the applicant a 'persona non grata' pursuant to article 16d, section 1, opening lines and under (c) of the Act on Admission and Expulsion for the BES-islands (the 'WTU BES'¹).

As per the contested decree of date 18 February 2016 the defendant declared the administrative objection against the [primary decree] unfounded.

By letter of date 23 February 2016 the applicant filed an appeal against the contested decree and also petitioned the Court to issue a provisional Court order.

The parties submitted [various] documents to the Court.

The Court treated the case during a hearing on 4 March 2016 via video-link between Curaçao and Bonaire. The applicant attended this hearing, assisted by his attorney. The defendant was represented by Messrs De Nijs and Virginia, accompanied by Mr. P.J. de Graaf LL.M., official working at the Immigration and Naturalization Service (IND²).

¹ The Court prefers the shorter abbreviation 'Wtu', but for clarity's sake we will use the longer abbreviation 'WTU BES' in all translations submitted to the UN Committee in this communication.

² IND is the abbreviation of the Dutch name of this Government Service ('Immigratie- & Naturalisatie Dienst').

Considerations

1. Pursuant to article 85, section 1, of the War BES a decree against which an appeal has been filed with the Court, may, at the request of the petitioner, be partially or wholly suspended by the Court on the ground that the execution of the decree would prejudice him disproportionately as compared to the interest being served by the immediate execution of the decree. It is also possible at his request to issue a provisional Court order so as to avoid such disproportional harm as referred to in the previous sentence.

Pursuant to article 95, section 1, [of the War BES], the Court may pass judgment on the appeal immediately, if a petition pursuant to article 85, section 1, has been submitted and the Court is of the opinion that the facts do not require any further investigation and provided all parties agree hereto in writing.

2. The Court is of the opinion that the facts in this case do not require any further investigation. Seeing that during the hearing the parties agreed hereto, the Court will apply aforementioned article 95, section 1, and pass judgment on the appeal immediately.

3. Pursuant to article 1, opening lines and under (a), respectively under (j), of the WTU BES, by “public entity” in this Act and the provisions based thereon is meant: Bonaire, St. Eustatius or Saba, and by “foreign national” is meant: anyone who does not have the Dutch nationality.

Pursuant to article 1a, section 1, opening lines and under (a), this Act, except for chapter 2 (national visa), applies accordingly to Dutch nationals, born outside of Bonaire, St. Eustatius and Saba.

Pursuant to article 16d, section 1, opening lines and under (c) a foreign national can be declared a ‘persona non grata’, if he has not been granted admission by operation of law or pursuant to a permit and poses a threat to public order or national security. Pursuant to section 3 the foreign national who has been declared a ‘persona non grata’, cannot be granted admission in the public entities³ by operation of law or pursuant to a permit. Nor can he be granted permission to await the decision on his request for a residence permit for a definite or an indefinite period of time in the public entities.

4. The applicant argues in vain that the defendant has failed to recognize in the contested decree that article 1a, section 1, opening lines and under (a) of the WTU BES should not be applied, because this would entail that he is treated as a foreign national on the territory of the State of which he is a national, which would contravene his Treaty-right to free movement and establishment in his own country, as stipulated in article 2, section 1, of the Fourth Protocol to the Convention for the protection of Human Rights and fundamental freedoms (the Fourth Protocol ECHR) and article 12 of the International Convention for Civil and Political Rights (ICCPR).

³ Bonaire, St. Eustatius and Saba. Also shortly referred to as the BES-islands.

4.1 The aforementioned treaty-provisions aim to give everyone who is legally staying in the territory of a State, the right of free movement and free establishment within that territory.

4.2 The Court observes here first and foremost, as the applicant's argument also implies, that article 1a, section 1, opening lines and under (a) WTU BES entails that the provisions with respect to declaring someone a 'persona non grata', as stipulated in Chapter 9, paragraph 3 of the WTU BES, apply accordingly to Dutch nationals, born outside of the public entities and consequently also to the applicant, who undisputedly was born in the European part of the Netherlands. Apart from the fact that the text of the law is clear on this point, the parliamentary documents with respect to the drafting of this law do not offer any indications to reach a different conclusion either, as the defendant has correctly argued.

4.3 As the Court has ruled before – whilst referring to the Judgment of the Supreme Court of date 24 November 2000, NJ 2001/376 (Matos) – in its judgment of date 18 February 2015, case no. War BES 2014/4, the discrimination between Dutch nationals born within and without [i.e. outside of] the public entities [i.e. the BES-islands], which is a consequence of article 1a, section 1, opening lines and under (a) WTU BES, does not violate any treaty-provision nor any [general] principle of law. In its judgment the Court explicitly considered the treaty-provisions mentioned by the applicant. The Court here subscribes to what was considered then. The argument that article 12, section 1, ICCPR does not permit the partitioning of a State [...] ⁴ along the borders of its constituent parts ⁵, together forming a federative State, because this would be contrary to the object, purpose and purport of this treaty-provision, does not at this juncture change the Court's view. This argument is not based upon any change of the applicable legislation since the Supreme Court judged on this matter in aforementioned judgment, but on a different understanding thereof. Furthermore, this argument does not change the fact that the Kingdom of the Netherlands has by means of a reservation limited the extent to which [the Kingdom] is bound to article 12 ICCPR, which limits the Court is bound to respect. In this connection the Court also observes that article 5, section 4 of the Fourth Protocol to the ECHR ⁶ entails that for the application of article 2 ⁷, certain circumstances may indeed necessitate that the territory of the State should be partitioned into separate territories.

4.4 Therefore it is the Court's view that there is no forbidden discrimination between Dutch nationals born within and without the public entities, as is the consequence of article 1a, section 1, opening lines and under (a) WTU BES. Consequently, there is no ground to grant the request to refrain from applying this provision in conjunction with article 16d WTU BES. Nor can such ground be inferred from the applicant's argument that the effect of these provisions would in the present case constitute a violation of *inter alia* article 3 ECHR, i.e. forbidden inhuman or degrading treatment. From the judgment that the application of

⁴ For clarity's sake the words 'to which this provision applies' have not been included in the translation, because they are redundant and obscure the meaning of this long sentence.

⁵ The word in the Dutch text here is 'countries', but this would be a misleading translation, as these so-called 'countries' are in fact federal states of the greater Federation called the 'Kingdom of the Netherlands'.

⁶ ECHR = European Convention of Human Rights.

⁷ Article 2 of the Fourth Protocol to the ECHR.

article 16d [WTU BES] to Dutch nationals born outside of the public entities, does not in itself constitute [forbidden] discrimination, it follows that only in the particular circumstances of any given case it could be judged that the application of this measure⁸ would constitute degrading treatment. But in this case there is no indication of this at all.

5. The applicant's argument that in the contested decree the defendant has not convincingly demonstrated that he [i.e. Mr. Hansen] poses a threat to public order, which would justify the measure to declare him a 'persona non grata', also fails.

5.1 Pursuant to the defendant's policy, as stipulated in the Ministerial Circular on admission & expulsion for the Bes-islands, foreign nationals pose a threat to public order, if they have been convicted repeatedly for criminal offences and sentenced to unconditional imprisonment (even if for short prison terms).

5.2 The Court does not consider this policy to be clearly unreasonable nor in any other way unlawful, also in view of the provisions of article 16, section 1, opening lines and under (b) WTU BES, [stipulating] that a person can be declared a 'persona non grata', if the foreign national has been irrevocably sentenced for a criminal offence which is punishable with imprisonment for a term of three years or more. The stricter criterion to declare someone a 'persona non grata' pursuant to European (EU) law, which requires that the person concerned should pose an actual, real and serious threat to a fundamental right of the country concerned, does not apply here, because this [criterion] refers to EU-citizens who go to or are staying in an EU member-state whose nationality they do not have. The applicant's arguments with respect hereto can therefore not succeed.

5.3 It is undisputed that the applicant was irrevocably convicted for criminal offences four times during the period from 2011 to 2016, in three of which he was sentenced to (partially) unconditional imprisonment. Therefore, the decision in the contested decree to declare the applicant a 'persona non grata', is in conformity with the afore-mentioned policy. The defendant also considered whether the applicant had any serious interests which would prohibit the application of this policy. The Court agrees with the defendant that there is no indication that such interests exist. His alleged stay on Bonaire for a period of six years was not legal (no residence permit) and he has no close relatives who live in the public entities. The fact that the applicant feels at home and has friends there and that he feels that his freedom is being curtailed, as he explained during the hearing, does not carry any weight which would obligate the defendant to come to a different conclusion than the one laid down in the contested decree.

6. The final conclusion is that the appeal must be declared to be unfounded and that the contested decree must stand. The request to issue a provisional Court order must be rejected.

⁸ The Court presumably refers to the decision ('measure') to declare the applicant a 'persona non grata'.

7. The Court does not see any reason for award of costs [against the applicant].

Decision

The Court:

- declares the appeal unfounded; and
- rejects the petition to issue a provisional Court order.

Thus decided by Mr. D. Haan LL.M., judge of the Court, on 4 March 2016 and publicly pronounced on 11 March 2016 in the presence of the Court registrar.

(Two signatures)

This judgment is open to appeal within 6 weeks following the dispatch hereof. Cf. chapter 5 War BES.