

Court in First Instance of Bonaire, Sint Eustatius and Saba  
Sitting in Bonaire

Judgment

on the petition for a provisional Court order submitted by:

**Sherrel Eldgel Hansen,**  
applicant,  
held in detention at JICN<sup>1</sup> in Bonaire,  
hereinafter referred to as: 'Hansen '  
Attorney: Mr. M. Bijkerk LL. M.,

regarding a dispute between the applicant and:

**the Secretary of State for Security and Justice,**  
defendant,  
hereinafter referred to as: 'the Secretary of State'  
Attorney: Mr. P.J. de Graaf LL.M

The contested decree in question

1. The administrative decree issued by the defendant (IND<sup>2</sup>) of date 20 November 2015, in which Hansen was declared a 'persona non grata' pursuant to article 16d, section 1, opening lines and under (c), of the Act on Admission and Expulsion BES<sup>3</sup>.

The course of the proceedings

2. Against aforementioned administrative decree the applicant submitted a petition to the Court on 27 November 2015 requesting a provisional Court order. On 26 November 2014<sup>4</sup> the applicant's attorney filed a written objection with the defendant against the contested decree.

3. The case was heard by the Court on 12 January 2016 at 14.00 hours. At the hearing appeared Attorney Bijkerk together with his client who had been brought from JICN, as well

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<sup>1</sup> JICN is the Bonaire Prison Facility

<sup>2</sup> IND is the Immigration & Naturalization Office

<sup>3</sup> BES is short for the 'BES-islands', i.e. Bonaire, St. Eustatius and Saba.

<sup>4</sup> The year was 2015 (not 2014)

as on behalf of the defendant, Mr. P.J. de Graaf. The parties verbally argued their respective cases, both attorneys making use of a written memorandum which were submitted to the Court.

4. After the hearing the Court determined that judgment would be pronounced in four weeks' time, or earlier if the judgment should be ready earlier. The parties gave permission for this – in so far as far as such permission is required.

#### Hansen's point of view

5. Hansen requests the Court to suspend the contested decree, because – succinctly put – for various reasons it is legally not correct. In so far as required, Hansen's point of view will be considered in more detail herein below.

#### The defendant's point of view

6. As the defendant sees it, the petition for a provisional Court order should be rejected. The contested decree is correct and was issued in a correct manner. The WTU<sup>5</sup> gives the defendant the legal authority to issue such a decree. The defendant intends to deport the applicant to Curaçao (where he is registered as a citizen), because – aside from him having been declared a 'persona non grata' – his stay on Bonaire is illegal. The contested decree authorizes the KMAR<sup>6</sup> to deny the applicant entry, in case he should return to the BES-islands. The defendant intends to rule on the applicant's administrative appeal before he will be released from prison.

7. In so far as required, the defendant's point of view will also be considered in more detail herein below.

#### What can be presumed to be correct

8. Hansen was born on 18 June 1984 in Holland. Later he went to Curaçao and up to now he is registered there in the Civil Registry. Hansen has lived in Curaçao during the greater part of his life<sup>7</sup>. At a certain moment Hansen moved to Bonaire, where he could not be registered in the Civil Registry, because – succinctly put – he could not submit a VOG<sup>8</sup> and could therefore not legally stay on Bonaire. Following a previous detention period on Bonaire, Hansen was deported from Bonaire to Curaçao. Shortly thereafter he returned to Bonaire. He was sentenced to imprisonment here on Bonaire and he is currently serving time in prison on Bonaire. Hansen is due for release on 8 March 2016

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<sup>5</sup> WTU is the Act on Admission and Expulsion for the BES-islands, usually abbreviated as the 'WTU BES', but the Court refers to it here as just the 'WTU'.

<sup>6</sup> KMAR is a special police force, in charge of *inter alia* border control.

<sup>7</sup> This statement is factually incorrect. For the greater part of his life, Hansen lived in Holland (M. Bijkerk).

<sup>8</sup> VOG is a Certificate of Good Conduct.

[Applicable] laws and regulations

9. Pursuant to article 85, section 1 of the Act on Administrative Law for the BES-islands<sup>9</sup> (hereinafter referred to as: WAR BES) the Court may, briefly summarized, issue a provisional injunction at the request of the person who has filed a written objection or an appeal with the Court against an administrative decree, on the ground that immediate execution of that decree would cause disproportionate harm to the person concerned in proportion to the purpose served by that decree. The judgment of the Court in such summary proceedings has a provisional character and is not binding in the main proceedings.

10. The relevant provisions of the Act on Admission and Expulsion<sup>10</sup> read as follows:

**"Article 1**

***In this act and any regulations based thereon the following definitions apply:***

***(.....)***

***'j. foreign national: anyone who does not have the Dutch nationality'.***

**"Article 16d**

***Section 1***

***A foreign national may be declared a 'persona non grata' by Our Minister:***

- a. if he has not been granted admission by operation of law or pursuant to a permit and has repeatedly committed offenses punishable under this Act;***
- b. if he has been finally and conclusively sentenced by a Court for an offense punishable by three years imprisonment or more, or if the measure referred to in article 39, section three of the Penal Code for the BES-islands was imposed upon him;***
- c. 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;***
- d. pursuant to a treaty; or***
- e. in the interest of international relations.***

***(...)***

**"Article 1a**

***Section 1***

***"This Act, with the exception of chapter 2, applies accordingly to :***

- a. Dutch nationals, born outside of Bonaire, Sint Eustatius and Saba;***
- b. Dutch nationals who obtained the Dutch nationality outside of Bonaire, Sint Eustatius and Saba".***

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<sup>9</sup> Hereinafter referred to as 'WarBES' (the abbreviation used in Dutch).

<sup>10</sup> Hereinafter referred to as 'WTU BES' (the abbreviation used in Dutch).

## Adjudication of the case

11. Hansen requests the Court to suspend the contested decree, because it will be “an obstacle for him”, because it will entail that immediately upon his release he will again be deported by the defendant to Curaçao – which is what he believes will happen. Thus he runs the risk, *inter alia* due to the effect of the contested decree, that he will not be able to be present [in Court] in case the written objection should turn out to be negative for him and he has to take the case to the administrative Court. The contested decree will also make it factually impossible for him to appeal against a possible decision to expel him.

12. Thus the applicant has, in the opinion of the Court, sufficiently shown that his interest in the requested interim injunction is urgent. The defendant's position that this is not the case, is therefore rejected.

13. The dispute between the parties concerns, *inter alia*, the question whether the contested decree falls within the scope of the defendant's authority. Hansen's opinion is that it does not.

14. The Court notes that in the contested decree Hansen – who only has the Dutch nationality – was declared a ‘persona non grata’ by the defendant based on article 16d, section 1, opening lines and under (c) of the Act on Admission and Expulsion BES.

15. During the hearing it was explained on behalf of the defendant that pursuant to the decree Hansen was declared a ‘persona non grata’ only for the BES-islands and that he still had free entry to Curaçao and Holland<sup>11</sup>. It is the defendant's intention to deport Hansen to Curaçao immediately after his release from his current detention, but that this had not been decided yet.

16. On behalf of the defendant it was further clarified that this was the first time that it was decided to partially<sup>12</sup> declare a person with the Dutch Nationality a ‘persona non grata’, for he would only be ‘non grata’ in the BES-islands, not in the European Netherlands<sup>13</sup>. The defendant said that he did not know of any case law on this issue, neither from the period before 10 October 2010. The defendant argued that the provisions laid down in article 1a WTU BES makes it possible to make such a decision also with respect to persons having the Dutch nationality residing on the BES-islands. Article 1a WTU BES must be understood and applied in such a way, that a ‘foreign national’ within the meaning of article 16d opening lines and under (c) WTU BES should be understood to include persons having the Dutch nationality, but born outside of Bonaire, Sint Eustatius and Saba. The contested decree was formulated in accordance with this: the person concerned can therefore “be declared a ‘persona non grata’, despite him having the Dutch nationality”.

17. The Court is of the opinion, however, that the defendant's legal position [on this issue] is not correct. This judgment requires the following explanation.

18. The definition in article 1 under j WTU BES of a ‘foreign national’ is very clear: it means anyone who does not have the Dutch nationality. That is also the concept referred to in

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<sup>11</sup> Literally ‘the European Netherlands’.

<sup>12</sup> Hansen was ‘partially’ declared a ‘persona non grata’ in the sense that he is only ‘non grata’ in the BES-islands.

<sup>13</sup> European Netherlands is ‘Holland’.

article 16d, opening lines and under (c) WTU BES. There is no indication that the legislator has intended to give this definition a broader meaning via the provisions of article 1a [WTU BES]. In Article 1a [WTU BES] there is no indication that this article entails a major expansion of the meaning of the term 'foreign national', as this term is defined in the article just before it. If the legislator had wanted to qualify the concept of 'foreign national', this should have been done in article 1, which is the definitions article. That is where all concepts/definitions are formulated which must be observed when applying this law, unless somewhere else in this law an exception/deviation is made. Nor has article 16d, section 1, opening lines and under (c) of the Act on admission and expulsion for the BES-islands [WTU BES] been explicitly changed by the legislator to make it possible to (aside from foreign nationals) declare Dutch nationals born outside of Bonaire, Sint Eustatius and Saba 'personae non grata', and then only for the BES-Islands. It is just not there. Nor has it been stated elsewhere that the legislator has wanted to create this possibility in article 1a [WTU BES].

19. During the hearing the parties were asked if there were any relevant references to this in the relevant parliamentary history [pertaining to the WTU BES]. The defendant answered that he did not know. The Court also has not been able to find any support in the parliamentary history that would make it legally possible to issue the contested decree, which, as the defendant's attorney remarked during the hearing, was in fact a kind of a try-out.

20. Within the context of these summary proceedings for a provisional Court order, it is, of course, not possible to conduct an exhaustive judicial review.

21. The final conclusion must therefore be that the contested decree was issued in violation of the provisions of the WTU BES: for Hansen is not a foreign national within the meaning of the WTU BES and he can therefore not be declared a 'persona non grata' for the BES-Islands.

22. As a side-note, it is observed that this is a legal matter which was supposed to have been regulated in the once envisaged "Kingdom Act on Movement of Persons"; which Kingdom Act – the Court wishes to observe with sadness – is direly missed in the legal practice.

23. In the unlikely case that the Court's aforementioned judgment should prove to be incorrect and that the contested decree has in the meantime become part of the defendant's legal tool-kit, the Court wishes to observe that the contested decree also does not meet the requirements for yet another reason. After all, a weighty decision such as declaring somebody a 'persona non grata' requires that the justification therefore must be very well reasoned, requiring that interests and proportionality be thoroughly weighed. In the justification for the contested decree such weighing has apparently not taken place. For on page 3, in the last considerations under point 3, there are only a few repetitious general statements that no extraordinary facts or circumstances have been shown to exist which should lead to the conclusion that [Mr. Hansen] should not be declared a 'persona non grata'. There is no mention at all of the applicant's interests, which have subsequently

been weighed. Therefore it is not possible to check what interests were included in the defendant's decision-making process, nor whether the relevant interests were in fact weighed. Therefore, the justification for the contested decree has not been properly and convincingly reasoned.

24. The petition to issue a provisional Court order to suspend the contested decree, will therefore be granted.

25. There is good reason to award costs against the defendant in accordance with the provisions of the 'Decree for award of costs in administrative lawsuits for the BES-islands' to the amount of US\$ 866.- by way of compensation for the costs of this lawsuit (i.e. 2 points for filing the lawsuit and for attending the hearing, at the rate of US\$ 391.- for each point, based on a weighing factor of 1.0 in view of the complexity of the case). Furthermore, the Court orders the defendant to pay to the applicant the court registry fee amounting to US\$ 84 .-.

#### Final Decision

The Court in first instance:

- suspends the contested decree issued by the defendant of date 20 November 2015;
- orders the defendant to pay to the applicant the costs of this lawsuit to the amount of US\$ 886.-;

Thus decided by Mr. M.L.J. Koopmans LL.M. and pronounced in Open Court on 3 February 2016 on Bonaire, in the presence of the Court Registrar L. van Marrewijk .

*(two signatures)*