



**Observations of the Government of the
Kingdom of the Netherlands**

on the admissibility and merits

of communication no. 3236/2018

Hansen

v.

The Kingdom of the Netherlands

Introduction

1. On 6 February 2018, Mr Sherrel Eldgel HANSEN ('the author') submitted a communication to the Human Rights Committee ('the Committee') for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights ('the Covenant').
2. The author primarily claims that the decision to exclude him from Bonaire and his subsequent expulsion to Curaçao constitute a violation of article 12 of the Covenant taken alone, or in conjunction with article 2, paragraph 1, and article 26 of the Covenant. Alternatively, he claims to be a victim of a violation of article 2, paragraph 1, and article 26 of the Covenant only. The author also questions the validity of the reservation made by the Kingdom of the Netherlands in respect of article 12 of the Covenant. He asserts that the reservation has arbitrarily taken away his rights under article 12 in the islands of the Kingdom of the Netherlands situated in the Caribbean, in violation of article 2, paragraph 1, and article 26 of the Covenant. Finally, the author asserts that treating him as a foreign national and expelling him twice to Curaçao constituted degrading treatment as referred to in article 7 of the Covenant.
3. On 8 October 2018, the Committee requested the Government of the Kingdom of the Netherlands ('the Government'), pursuant to rule 97, paragraph 2 of its Rules of Procedure, to submit information and observations to the Committee concerning both the admissibility and the merits of the communication.
4. Before addressing the admissibility and the merits of the communication, the Government wishes to discuss the facts of the case, the constitutional structure of the Kingdom of the Netherlands, including the regulations concerning admission to and expulsion from the territories composing the Kingdom, other applicable domestic law and policy, the reservation made by the Kingdom of the Netherlands with regard to article 12 of the Covenant and applicable international law.

The facts

5. The author is a Dutch national by birth. He was born of Curaçaoan parents in the European part of the Netherlands on 18 June 1984. The author stated that he has lived on Bonaire since 2010. While he was living there he did not have the required permit for long-term residence. Since 2003, Curaçao has been the author's place of habitual residence. When the exclusion order (*ongewenstverklaring*, which in Dutch literally means an order declaring him 'undesirable') was made he was registered with the Civil Registry Office of Curaçao.

6. Between 12 October 2011 and 8 July 2015 the author was convicted of multiple criminal offences on Bonaire, including violation of the Opium Act 1960 BES (Bonaire, St Eustatius and Saba), multiple assaults, criminal damage and violation of the Bonaire Road Traffic Ordinance.
7. On 2 November 2015, the author was informed that the Minister for Migration intended to impose an exclusion order on him. The Minister for Migration based his intention on the fact that the author had multiple convictions for the above-mentioned offences and the fact that the author was not eligible for automatic admission (also referred to as admittance by law) to Bonaire and did not have a residence permit allowing him to live there. The author was given an opportunity to inform the Immigration and Naturalisation Service ('the IND') of his response to the letter giving notice of the Minister's intention within two weeks of the date of the letter.
8. The author's response was received on 10 November 2015. The author's authorised representative also made his views known in an email sent on 10 November 2015. In their responses, the author and his authorised representative stated their objection to the intention to issue an exclusion order.
9. By decision of 20 November 2015 an exclusion order was imposed on the author pursuant to section 16d, subsection 1, opening words and (c), in conjunction with section 1a, subsection 1 (a) of the Admission and Expulsion (BES) Act (*Wet toelating en uitzetting-BES*, WTU-BES). Stated briefly, the decision was based on the fact that the author had been convicted of multiple offences on Bonaire between 12 October 2011 and 8 July 2015 and had been living on Bonaire for a considerable amount of time without ever having had any right to reside there. Furthermore, there was no evidence of any exceptional facts or circumstances which, in the light of all the interests at stake, would give reason to refrain from imposing an exclusion order. The decision of 20 November 2015 stated the legal consequences of the decision and the legal remedies available to challenge it.
10. By letter of 26 November 2015, the author lodged an objection to the decision of 20 November 2015 imposing an exclusion order.
11. In addition, on 27 November 2015 the author submitted an application for interim relief to the Court of First Instance of Bonaire, St Eustatius and Saba ('Court of First Instance') in connection with the decision to impose an exclusion order, which was considered on 12 January 2016. The author and his authorised representative were present at the hearing. By judgment of 3 February 2016 the Court of First Instance granted the application for interim relief and suspended the exclusion order.

12. In response to the author's objection of 26 November 2015, the IND National Office for the Caribbean Netherlands (*IND Rijksdienst Caribisch Nederland*), on behalf of the Minister for Migration, provided further information on 13 January 2016 regarding the admission criteria prescribed in the Admission and Expulsion (BES) Act and their applicability to Dutch nationals.
13. On 22 January 2016 a hearing was held to consider the notice of objection. A written report was made of the hearing. During the hearing, the author and his authorised representative were given the opportunity to explain the objection. The author availed himself of that opportunity and provided further information about his personal situation and the reasons why he should not be subjected to an exclusion order barring him from Bonaire.
14. In his decision of 18 February 2016 on the objection, the Minister for Migration declared the author's objection unfounded and improved the grounds justifying the exclusion order. The decision sets out in detail the assessment that took place of the interests involved.¹
15. On 23 February 2016 the author submitted to the Court of First Instance an application for review of the Minister for Migration's decision of 18 February 2016 declaring the objection unfounded and upholding the exclusion order of 20 November 2015. The author also submitted an application for interim relief to the Court of First Instance. The hearing took place via a video link set up between Curaçao and Bonaire on 4 March 2016. The author and his authorised representative participated in the hearing by video link.
16. By judgment of 11 March 2016 the Court of First Instance declared the application for review lodged by the author against the aforementioned decision unfounded. The application for interim relief was denied.
17. The author lodged an appeal with the Joint Court of Justice of Aruba, Curaçao, St Maarten and of Bonaire, St Eustatius and Saba ('Joint Court of Justice'). The Joint Court of Justice heard the case on 30 March 2017. The author and his authorised representative attended the hearing.
18. On 1 September 2017 the Joint Court of Justice upheld the contested decision.

¹ See Annexe I.

The Kingdom of the Netherlands: structure and legal order

19. Before outlining the applicable legislative provisions, the Government wishes to provide an overview of the constitutional structure of the Kingdom of the Netherlands and the arrangements concerning admission to and expulsion from the separate territories of the Kingdom.

Constitutional structure

20. The Kingdom of the Netherlands is a constitutional entity which, as of 10 October 2010, consists of four autonomous countries: Aruba, Curaçao, St Maarten and the Netherlands. Aruba, Curaçao and St Maarten are situated in the Caribbean part of the Kingdom. The country of the Netherlands consists of a territory in Europe and the islands of Bonaire, St Eustatius and Saba (BES) situated in the Caribbean Sea. Before 10 October 2010 the Kingdom consisted of three autonomous countries: the Netherlands Antilles (comprising Curacao, St Maarten, Bonaire, St Eustatius and Saba), Aruba and the Netherlands.
21. It is not easy to put a constitutional label on the Kingdom of the Netherlands. Often it is described as a *sui generis* legal order, as it comprises both confederal, federal and unitary elements. The main features of this legal order are laid down in the Charter for the Kingdom of the Netherlands ('the Charter'). The countries of the Kingdom accepted the Charter of their own free will and it can be considered an expression of their right to self-determination. The Charter governs the legal order at Kingdom level, the relationship between the countries that make up the Kingdom and the relationship between these countries and the Kingdom.
22. The Charter bestows far-reaching autonomy on the countries, each of which has its own constitution and political system.
23. All areas are considered to be internal competences of each of the autonomous countries unless the Charter explicitly states otherwise or if it follows from a provision of the Charter that a matter is a Kingdom affair.
24. Within the Kingdom there is a single indivisible and uniform nationality: the Dutch nationality. In article 3, paragraph 1 (c) of the Charter, nationality is designated exclusively as a Kingdom affair. Nationality is regulated in the Netherlands Nationality Act (*Rijkswet op het Nederlanderschap*).
25. When the Charter was drafted, the decision was made not to give Dutch nationals the right to take up residence freely anywhere in the Kingdom. The Charter allows restrictions to be placed on the movement of Dutch nationals within the Kingdom. Regulating these restrictions is an internal competence of each of the autonomous countries of the Kingdom. Under article 3, paragraph 1 (f) of the Charter only the *supervision* of the general rules governing the

admission and expulsion of Dutch nationals is a Kingdom affair. All rules governing the admission and expulsion of Dutch nationals within the Kingdom thus have the status of national law of one of the Kingdom's constituent countries.

26. The countries of Aruba, Curaçao and St Maarten have each established their own system for the admission and expulsion of Dutch nationals. The Netherlands opted to place restrictions on the admission and expulsion of Dutch nationals only in relation to the Caribbean part of the Netherlands (i.e. Bonaire, St Eustatius and Saba). The rules are explained below. For the European part of the Netherlands, there are no special restrictions with respect to the admission and expulsion of Dutch nationals from the other parts of the Kingdom. In that sense there is no reciprocity with respect to the movement of persons within the Kingdom.
27. With the constitutional reforms of 10 October 2010, article 1, paragraph 2 of the Charter stated that for Bonaire, St Eustatius and Saba rules could be laid down and other specific measures introduced on the basis of factors that distinguish them fundamentally from the Netherlands in Europe, such as: their economic and social circumstances, their substantial distance from the European part of the Netherlands, their insular character, small size and population, their geographic location and their climate. This was explicitly intended as a non-exhaustive list of factors.
28. On 17 November 2017 the Dutch Constitution was amended. The islands of Bonaire, St Eustatius and Saba (the BES islands) were given the status of Caribbean public bodies and were provided with their own constitutional basis. The insertion of article 132a into the Constitution created a constitutional basis for statutory arrangements that take into account the special position of the territorial public bodies in the Caribbean part of the Netherlands. When the aforementioned constitutional amendment entered into effect, article 1, paragraph 2 of the Charter was repealed.
29. Article 132a, paragraph 2 of the Dutch Constitution states that for these public bodies, rules may be laid down and other specific measures may be taken in view of special circumstances that fundamentally distinguish these public bodies from the European part of the Netherlands. This created a constitutional basis for statutory arrangements that take into account the special position of the territorial public bodies in the Caribbean part of the Netherlands.
30. It is clear from the above that the legislature, previously on the basis of the Charter and now, since 17 November 2017, on the basis of the Constitution, has the power to introduce rules and take other specific measures with respect to Bonaire, St Eustatius and Saba where there are special circumstances that fundamentally distinguish the islands from the European part of the Netherlands. In practice this means that for every arrangement that is specifically intended for the public bodies Bonaire, St Eustatius and Saba, the reasons for choosing this different arrangement must be given.

31. Accordingly, the Admission and Expulsion (BES) Act lays down the special arrangements regarding admission and expulsion with respect to Bonaire, St Eustatius and Saba.

Admission and Expulsion (BES) Act (Wet toelating en uitzetting-BES, WTU-BES)

32. The Admission and Expulsion (BES) Act, which came into force with the restructuring of the Kingdom of the Netherlands on 10 October 2010, lays down rules for the admission and expulsion of aliens and of Dutch nationals who were not born or naturalised on Bonaire, St Eustatius and Saba.
33. Before the constitutional reforms, the immigration law of the Netherlands Antilles was set out in the National Ordinance on Admission and Expulsion (*Landsverordening toelating en uitzetting*) and the accompanying Admissions Decree (*Toelatingsbesluit*). The provisions of this National Ordinance were for the most part incorporated into the Admission and Expulsion (BES) Act.² When the Admission and Expulsion (BES) Act was drafted, a guiding principle for the legislative transition in the area of immigration law was that admission policy in the public bodies should be simple and practical and should remain so in the future. In the light of this principle, the body of immigration legislation that applies in the European part of the Kingdom was considered to be too comprehensive and complex for Bonaire, St Eustatius and Saba given their size.

Admission of Dutch nationals pursuant to the Admission and Expulsion (BES) Act

34. Section 1a of the Admission and Expulsion (BES) Act stipulates that this Act, with the exception of chapter 2, applies *mutatis mutandis* to Dutch nationals who were not born or naturalised on the BES islands.³ The National Ordinance on Admission and Expulsion of the Netherlands Antilles also prescribed rules for the admission of Dutch nationals who were not residents of the Netherlands Antilles or born there and those rules were incorporated into the Admission and Expulsion (BES) Act. After the constitutional restructuring, the countries of Curaçao and St Maarten opted for a national ordinance on admission and expulsion that contains a regime for the admission of Dutch nationals that is similar to National Ordinance on Admission and Expulsion of the Netherlands Antilles.
35. Dutch nationals from the European part of the Netherlands, Aruba, Curaçao and St Maarten are, in principle, allowed to enter Bonaire, St Eustatius and Saba freely. They are permitted to stay on the BES islands as a tourist for six months without any further conditions. Pursuant to the Admission and Expulsion (BES) Act, Dutch nationals who wish to stay longer or stay

² In accordance with the principle that the legislation of the Netherlands Antilles would provisionally remain applicable on the BES islands. Senate 2009-2017, 32017 (R1884), C, p. 36.

³ Section 1a of the Admission and Expulsion (BES) Act and chapter 2, section 2.2 of the Admission and Expulsion (BES) Act Implementation Guidelines (*Circulaire toelating en uitzetting Bonaire, Sint Eustatius en Saba, CTU-BES*).

in a different capacity than as a tourist may do so if they are eligible for automatic admission or have been granted a residence permit. Dutch nationals are eligible for automatic admission if they have:

- a certificate of good conduct;
- a place to live;
- sufficient means of support.⁴

36. Dutch nationals who are not eligible for automatic admission require a residence permit.⁵

37. The conditions for automatic admission have been formulated to ensure broad eligibility for Dutch nationals. Most will therefore not be required to apply for a residence permit. This means that Dutch nationals have largely free access to the islands but subject to criteria aimed at preventing an unregulated mass influx of Dutch nationals.⁶

Applicable Dutch law and policy

38. Below is an overview of the relevant provisions of national law.

Charter for the Kingdom of the Netherlands

Article 1

The Kingdom of the Netherlands comprises four countries: the Netherlands, Aruba, Curaçao and St Maarten.

Article 1, paragraph 2 [repealed on 17 November 2017]

Bonaire, St Eustatius and Saba form part of the constitutional order of the country of the Netherlands. Rules may be laid down and other specific measures may be taken for these islands, in view of their economic and social circumstances, their substantial distance from the European part of the Netherlands, their insular character, small size and population, their geographic location, their climate and other factors that distinguish them fundamentally from the European part of the Netherlands.

Article 3

1. Without prejudice to provisions elsewhere in the Charter, Kingdom affairs include:

- a. maintenance of the independence and the defence of the Kingdom;
- b. foreign relations;
- c. Dutch nationality;
- d. regulation of the orders of chivalry, the flag and the coat of arms of the Kingdom;

⁴ Section 3, subsections 1 and 5 of the Admission and Expulsion (BES) Act. House of Representatives letter 2011 – 2012, no. 31 568.

⁵ Sections 6, 7, 9 and 14 of the Admission and Expulsion (BES) Act. A residence permit is granted for specific purposes, such as paid employment or residence as a pensioner or person of independent means. This residence permit can be refused or cancelled if the person's presence is not conducive to the general interest or there is a risk to public order. The general interest includes public safety, national security and public health. It can also include a housing requirement.

⁶ Proceedings of the Senate 2010-2011, 32 282.

- e. regulation of the nationality of vessels and the standards required for the safety and navigation of seagoing vessels flying the flag of the Kingdom, with the exception of sailing ships;
 - f. supervision of the general rules governing the admission and expulsion of Dutch nationals;
 - g. setting general conditions for the admission and expulsion of aliens;
 - h. extradition.
2. Other matters may be declared to be Kingdom affairs by agreement. Article 55 applies *mutatis mutandis*.

Constitution

Article 132a [as of 18 November 2017]

1. In the Caribbean part of the Netherlands, territorial public bodies other than provinces and municipalities may be established and dissolved by Act of Parliament.
2. Articles 124, 125 and 127 to 132 apply *mutatis mutandis* to these public bodies.
3. In these public bodies, elections are held for an electoral college for the Upper House. Article 129 applies *mutatis mutandis*.
4. For these public bodies, rules may be laid down and other specific measures may be taken in view of special circumstances that fundamentally distinguish these public bodies from the European part of the Netherlands.

Article 134

1. Public bodies for the professions and trades and other public bodies may be established and dissolved by or pursuant to Act of Parliament.
2. The duties and organisation of these public bodies, the composition and powers of their administrative organs and public access to their meetings are regulated by Act of Parliament. Legislative powers may be granted to their administrative organs by or pursuant to Act of Parliament.
3. Supervision of the administrative organs is regulated by Act of Parliament. Decisions by the administrative organs may be quashed only if they conflict with the law or the public interest.

Admission and Expulsion (BES) Act

Section 1, opening words and (j)

For the purposes of this Act and the provisions based upon it an alien is anyone who does not possess Dutch nationality.

Section 1a.

This Act, with the exception of chapter 2, applies *mutatis mutandis* to:

- a. Dutch nationals born outside Bonaire, St Eustatius and Saba;
- b. Dutch nationals who were naturalised outside Bonaire, St Eustatius and Saba.

2 Notwithstanding subsection 1, this Act does not apply *mutatis mutandis* to Dutch nationals born or naturalised in Aruba, Curaçao, St Maarten or the European part of the Netherlands, if and to the extent that this Act does not apply to the father or mother.

3 Notwithstanding subsection 1, this Act also does not apply *mutatis mutandis* to Dutch nationals who:

- a. for an uninterrupted period of at least one year immediately prior to 10 October 2010 had their domicile (*woonplaats*) as referred to in article 10, paragraph 1 of Book 1 of the Civil Code of the Netherlands Antilles on the islands of Bonaire, St Eustatius or Saba and were born in Aruba, Curaçao, St Maarten or the European part of the Netherlands or were naturalised in Aruba, Curaçao, St Maarten of the European part of the Netherlands;
- b. are children of a Dutch national as referred to in (a) and for an uninterrupted period of at least one year immediately prior to 10 October 2010 had their domicile on the island of Bonaire, St Eustatius or Saba.

Section 3

1. The following persons are eligible for automatic admission to the public bodies:
 - a. aliens who are posted there by their government, for the duration of their government service;
 - b. aliens who were in the service of a public body and in that capacity enjoy a pension or financial assistance by way of pension, as well as unmarried widows/widowers of such aliens;
 - c. professional consuls, professional consular staff and other consular personnel admitted in that capacity to the public bodies;
 - d. service personnel, during the period in which they are stationed in the public body;
 - e. crew of vessels or aircraft belonging to the navy or air force of any power, during the period in which the vessel or aircraft is in the public body with the permission of the competent authority;
 - f. the spouse and minor children of an alien referred to in a, b, c or d, provided the couple are not legally separated;
 - g. aliens born in a public body who have reached the age of 16 and have been legally resident in the public body since their birth without interruption.
2. The category of persons who are eligible for automatic admission to the public bodies, as referred to in subsection 1, may be expanded by order in council.
3. Upon a request to that effect, Our Minister issues to the aliens referred to in subsection 1 a declaration stating that they are eligible for automatic admission to the public bodies.
4. Our Minister may attach conditions regarding the performance of a certain profession or trade to the automatic admission of the spouse of the person who qualifies for automatic admission.
5. Likewise automatic admission applies to Dutch nationals as referred to in section 1a who are adults and have the following:
 - a. a certificate of good conduct pertaining to the past five years and issued by the competent authority within two months prior to their arrival in the public bodies or another written declaration by which this is satisfactorily demonstrated; and
 - b. housing and sufficient means of support, in accordance with rules laid down by or pursuant to order in council.
6. Minor children of Dutch nationals referred to in subsection 5 are also eligible for automatic admission if one of the parents has parental responsibility.

Section 6

1. Aliens who are residing in the public bodies and are not eligible for automatic admission by or pursuant to section 3 or 5a must have a temporary or permanent residence permit.
2. A temporary residence permit is issued for a maximum of five consecutive years. Rules relating to the period of validity of the temporary residence permit and to renewal of the temporary residence permit are laid down by order in council.

Section 7

1. All temporary and permanent residence permits are issued by Our Minister. Our Minister may issue a document or written declaration demonstrating that admission has been granted to an alien who is eligible for automatic admission or has been granted a residence permit. Our Minister may adopt models for such documents and written declarations.
2. Rules may be laid down by or pursuant to order in council with regard to:
 - a. the manner in which an application is submitted and processed;
 - b. the information which the alien must furnish in person.
3. In the cases specified by Our Minister and in accordance with the rules set by Our Minister, an alien is liable to pay a fee for the disposal of any application to issue, renew or amend a temporary or permanent residence permit. Our Minister may also determine that an alien is liable to pay a fee for the issue of any document demonstrating residence status, including a declaration as referred to in section 3, subsection 3. If payment is not made, the application will not be processed and no document will be issued.
4. The temporary or permanent residence permit is valid as of the day on which the alien demonstrates that he has met all the requirements, but no earlier than the day on which the application is received.
5. The temporary residence permit is renewed as of the day on which the alien demonstrates that he has met all the requirements, but no earlier than the day after the expiry date of the residence permit to which the renewal application relates.
6. If the alien, through no fault of his own, does not submit the renewal application or the information demonstrating that he meets the requirements on time, the temporary residence permit may be renewed as of the day after the expiry date of the residence permit to which the renewal application relates.
7. A temporary residence permit is issued subject to restrictions connected with the purpose for which permission to reside is granted. Conditions may be attached to temporary residence permits. Rules relating to the restrictions and conditions may be laid down by or pursuant to order in council.
8. The restrictions and conditions referred to in subsection 7 may be amended at the alien's request in accordance with the procedure prescribed for issuing a temporary residence permit.
9. Permanent residence permits are not issued subject to restrictions. No conditions are attached to permanent residence permits.

Section 16b

1. Our Minister may expel an alien:
 - a. who is not eligible for automatic admission;
 - b. who does not have a temporary or permanent residence permit;
 - c. who is not permitted to stay in the public bodies while awaiting a decision on an application for the issue, renewal or amendment of a temporary or permanent residence permit;
 - d. who has not voluntarily left the public bodies within the time limit stipulated in this Act.
2. If the operation of the decision rejecting an application or cancelling a temporary or permanent residence permit is suspended, the alien may be required to cooperate in the preparations for the expulsion.
3. An alien will not be expelled as long as his health or that of any of the members of his family would make it inadvisable to travel.

Section 16d

1. An exclusion order may be imposed on an alien by Our Minister:
 - a. if he is not eligible for automatic admission or has not been granted a residence permit, and has repeatedly committed an act that constitutes an offence under this Act;
 - b. if he has been convicted by final and unappealable judgment of a court of a serious offence that carries a term of imprisonment of three or more years or has been given a non-punitive order within the meaning of article 39, paragraph 3 of the Criminal Code of Bonaire, St Eustatius and Saba for such an offence;
 - c. if he is not eligible for automatic admission or has not been granted a residence permit, and poses a risk to public order or national security;
 - d. pursuant to a treaty; or
 - e. in the interests of international relations.
2. If the decision imposing the exclusion order is to be communicated by post, notice of the decision is given in the Government Gazette.
3. An alien who is the subject of an exclusion order is not eligible for automatic admission to and cannot be granted a residence permit for the public bodies. Nor can he be given permission to stay in the public bodies while awaiting a decision regarding a temporary or permanent residence permit.

Admission and Expulsion (BES) Act Implementation Guidelines (CTU-BES)

Chapter 17, section 6.2.

An exclusion order can be imposed on an alien (see section 16d, subsection 1, Admission and Expulsion (BES) Act):

- a. if he is not eligible for automatic admission or has not been granted a residence permit, and has repeatedly committed an act that constitutes an offence under this Act;
- b. if he has been convicted by final and unappealable judgment of a court of a serious offence that carries a term of imprisonment of three or more years or has been given a non-punitive order within the meaning of article 39, paragraph 3 of the Criminal Code of Bonaire, St Eustatius and Saba for such an offence;
- c. if he is not eligible for automatic admission or has not been granted a residence permit, and poses a risk to public order or national security;
- d. on the basis of a treaty; or
- e. in the interests of international relations.

(...)

Re c.

This provision concerns aliens who are not eligible for automatic admission and have no residence permit. They can have an exclusion order imposed on them because they pose a risk to public order or national security. It is not necessary for an alien to have been convicted of a criminal offence to be considered a risk to national security. There must be specific evidence of a risk to national security, such as reports issued by the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst, AIVD*), the National Crime Squad (*Dienst Nationale Recherche*), national or international ministries or intelligence services.

Aliens pose a risk to public order if they:

a. have been convicted of a serious offence (*misdrijf*) and:

1. incurred a custodial sentence (which could include youth detention); or
2. incurred an alternative sanction; and/or
3. had a detention order imposed on them;
4. whereby the total non-suspended part of the sentence, sanction or order is at least one month; or
5. had a penalty imposed on them by the public prosecutor.

b. have been repeatedly convicted of a serious offence (*misdrijf*) and:

1. incurred a non-suspended (short) custodial sentence (which could include youth detention);
2. incurred an alternative sanction;
3. incurred a non-suspended fine; or, as the case may be,
4. had a detention order imposed on them; or, as the case may be,
5. accepted a settlement penalty; or
6. had a penalty imposed on them by the public prosecutor.

An alternative sanction is:

- a. either a community service order (to perform unpaid work for the public good);
- b. or a training order (to follow a course); or
- c. a combination of the two.

An alternative sanction is imposed in lieu of a custodial sentence. If the alien incurs an alternative sanction, the duration of the detention imposed in lieu by the court is taken as the point of departure. This means that every alternative sanction counts against the person, regardless of the duration. It is not necessary for the judgment to have become final and unappealable.

Reservation of the Kingdom with regard to article 12 of the Covenant

39. Article 12 of the Covenant reads as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

40. Upon ratification of the Covenant in 1978 the Kingdom of the Netherlands made the following reservation with regard to article 12⁷

⁷ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en#EndDec

41.

'Article 12, paragraph 1

The Kingdom of the Netherlands regards the Netherlands and the Netherlands Antilles as separate territories of a State for the purpose of this provision.'

'Article 12, paragraphs 2 and 4

The Kingdom of the Netherlands regards the Netherlands and the Netherlands Antilles as separate countries for the purpose of these provisions.'

42. The following explanation was provided:

'Article 12, paragraphs 1, 2 and 4

The Kingdom of the Netherlands, a party to the Covenant, consists constitutionally of the countries of the Netherlands and the Netherlands Antilles.

Admission and residence are regulated differently in these two countries. The Kingdom of the Netherlands wishes to establish beyond doubt that Article 12 does not imply that legal residence in one of the countries confers a right of entry to the other.'

43. As mentioned above, on 10 October 2010 the Netherlands Antilles ceased to exist as an autonomous country. Subsequently, on 11 October 2010 the following declaration was made⁸:

'... The Kingdom of the Netherlands, consisting, as per 10 October 2010, of the European part of the Netherlands, the Caribbean part of the Netherlands (the islands of Bonaire, Sint Eustatius and Saba), Aruba, Curaçao and Sint Maarten, regards these parts as separate territories for the purpose of Article 12, paragraph 1, and as separate countries for the purpose of Article 12, paragraphs 2 and 4, of the Covenant.'

Applicable international law

44. Article 19 of the Vienna Convention on the Law of Treaties ('Vienna Convention'), codifying customary international law, reads as follows:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) The reservation is prohibited by the treaty;

(b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

⁸ Ibid.

45. Thus, regarding the question of reservations, the primary source of reference is the treaty itself. Where the treaty concerned is silent on the permissibility of reservations, a State may formulate a reservation only if it is not incompatible with the object and purpose of the treaty. Although the Vienna Convention does not define the notion of 'object and purpose', that notion points to something that is the core obligation, the essential provision or the *raison d'être* of a particular treaty. This view is also reflected in the guidelines of the International Law Commission constituting the Guide to Practice on Reservations to Treaties adopted in 2011, according to which a reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general tenor, in such a way that the reservation impairs the *raison d'être* of the treaty.⁹

Admissibility of the communication

Article 12 of the Covenant

46. Article 12 of the Covenant protects the liberty of movement of persons, including the rights to move freely and to reside within the State, and the right to traverse State borders in order to both enter and leave the country.
47. The author claims to be a victim of a violation of article 12 of the Covenant since he was deported from one part of the Kingdom of the Netherlands to another part of the Kingdom, while the Kingdom is one country. The Government is of the opinion that this claim is inadmissible for the following reasons.
48. The Government has explained above the constitutional structure of the Kingdom of the Netherlands and the different regulations that exist concerning admission and residence. In view thereof a reservation to article 12 was made, clarifying that for the application of article 12, the different territories that make up the Kingdom are to be regarded as separate territories, thereby establishing beyond doubt that article 12 does not imply that legal residence in one of the territories confers a right of entry to the other.¹⁰ Since 10 October 2010 there have been five separate territories within the Kingdom: the European part of the Netherlands, the Caribbean part of the Netherlands (Bonaire, St Eustatius and Saba), Aruba, Curaçao and St Maarten.
49. The author also questions the validity of the reservation made by the Kingdom of the Netherlands in respect of article 12 of the Covenant.

⁹ Guideline 3.1.5, Report of the sixty-third session of the International Law Commission (2011), UN General Assembly official records supplement 10 (A/66/10/Add.1)

¹⁰ This situation remained materially unchanged after the constitutional restructuring of the Kingdom, which entered into effect on 10 October 2010. The reservation was adapted to the new status of Curaçao and St Maarten as autonomous countries within the Kingdom and the special status of the BES islands, which become part of the constitutional order of the country of the Netherlands.

50. Where a treaty is silent on the permissibility of reservations, a State may formulate a reservation only if it is not incompatible with the object and purpose of the treaty. The Government is convinced that its reservation to article 12 of the Covenant fulfils this requirement since it cannot be said that the reservation impairs the core obligation or the *raison d'être* of the Covenant.
51. The core obligation of article 12 – which is to guarantee the right to liberty of movement and freedom to choose one's residence, the right to leave any country, including one's own, and the right not to be arbitrarily deprived of entry to one's own country – is fully respected for anyone lawfully residing in any autonomous country of the Kingdom of the Netherlands. The reservation applies without distinction to any Dutch national present in any autonomous country of the Kingdom of the Netherlands.
52. Moreover, the reservation made by the Kingdom of the Netherlands with respect to specific provisions of article 12 of the Covenant has not been objected to by any other State Party to the Covenant, nor has the Committee itself, in the past, questioned or raised any concerns in respect of this reservation. This implies that the reservation is generally accepted.
53. In view of the above, the Government is of the opinion that the author cannot claim to be a victim of a violation of article 12. This part of his communication should therefore be declared inadmissible.

Article 2, paragraph 1 of the Covenant

54. Article 2, paragraph 1 contains a prohibition against discrimination, the scope of which is limited to the rights recognised in the Covenant. In the present case, the author invokes this provision in relation to article 12.
55. The Government has explained above that the reservation made by the Kingdom of the Netherlands applies without distinction to any Dutch national present in any autonomous country of the Kingdom of the Netherlands. Since the reservation has been generally accepted under international law, there is no issue under article 2, paragraph 1 either.
56. Therefore, the Government is of the opinion that the author's complaint under article 2 should be declared inadmissible.

Article 7 of the Covenant

57. In his communication the author expresses the view that depriving a person of his full nationality rights constitutes degrading treatment prohibited by article 7 of the Covenant. He is of the opinion that treating him as a foreign national and deporting him twice to Curaçao, which is not his island of birth, constituted degrading treatment.
58. The author does not explicitly solicit an opinion from the Committee on this matter but for the sake of completeness the Government will address it too.
59. From the national proceedings it does not appear that the author exhausted all available remedies with respect to his complaint under article 7 of the Covenant. Furthermore, the author has not substantiated his claim of degrading treatment.
60. Pursuant to article 1 of the Optional Protocol, petitions can only be submitted by individuals who believe themselves to be victims of a breach of the Covenant. This means that the individual must actually be affected.¹¹ The Government takes the view that the author has not sufficiently substantiated that he was actually affected by the contested decision. Nor has the author provided any credible evidence that the actions of the Minister for Migration caused him harm of the kind which article 7 of the Covenant offers protection against.
61. In any case, the author has not provided any information demonstrating that his situation reaches the threshold of 'degrading' treatment prohibited under article 7 of the Covenant.
62. The Government is therefore of the opinion that the author's complaint under article 7 is also inadmissible.

Merits

63. In its discussion of the admissibility, the Government has already demonstrated that there has been no violation of article 12 of the Covenant, taken alone or in conjunction with article 2, paragraph 1, or of article 7 of the Covenant. In its observations on the merits, the Government will therefore limit itself to a discussion of the author's complaint under article 26.
64. The Government will argue that, in view of the fact that the author had no right to reside on Bonaire and had been convicted of multiple offences on Bonaire, the action taken was not contrary to the principle of non-discrimination.

¹¹ *Mauritian Women's Case* (35/78), para. 9.2.

Article 26 of the Covenant (non-discrimination)

65. Like article 2, paragraph 1 of the Covenant, article 26 prohibits discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 provides an autonomous right to non-discrimination.
66. The Committee has consistently held that not every differentiation between persons amounts to discrimination, as long as the criteria on which it is based are reasonable and objective and the aim is to achieve a purpose which is legitimate under the Covenant.¹²
67. The Government is of the opinion that its decision to impose an exclusion order and expel the author to Curaçao does not constitute a prohibited distinction between Dutch nationals born in the European part of the Netherlands, such as the author, and Dutch nationals born on Bonaire, St Eustatius and Saba.
68. Because the author was born in the European part of the Netherlands he is subject to the rules that apply to Dutch nationals born outside Bonaire, St Eustatius and Saba, as laid down in the Admission and Expulsion (BES) Act. The Government would emphasise that this Act has no discriminatory intent.¹³
69. The distinction between the aforementioned groups has been laid down in law because the Netherlands in Europe and the overseas territories differ fundamentally in terms of economic and social circumstances. Consequently, rules and specific measures were introduced for Bonaire, St Eustatius and Saba that take into account the factors that fundamentally distinguish these small islands from the European part of the Netherlands. These factors include their economic and social circumstances, their substantial distance from the European part of the Netherlands, their insular character, small size and population, their geographic location and their climate. These fundamental differences justify the establishment of special rules for the islands of Bonaire, St Eustatius and Saba.¹⁴
70. Moreover, the distinction drawn in the Admission and Expulsion (BES) Act is based on the objective criterion of place of birth.

¹² *Gonçalves et al. v. Portugal* (1565/2007), para. 7.4, *Jongenburger-Veerman v. Netherlands* (1238/2004), para. 7.2, *O'Neill and Quinn v. Ireland* (1314/2004), para. 8.3.

¹³ *Järvinen v. Finland* (295/1988), para. 6.4; *Simunek et al. v. Czech Republic* (516/1992), para. 11.7; *Wackenheim v. France* (854/1999), para. 7.4.

¹⁴ *Van Oord v. the Netherlands* (658/1995), para. 8.5; *Smídek v. the Czech Republic* (1062/2002).

71. Furthermore, the distinction serves a legitimate purpose, namely the protection of the interests of the small islands of Bonaire, St Eustatius and Saba and their residents. Given the diminutive size of the islands and their small populations, and consequently their limited absorption capacity, particularly in an economic sense, an excessive and uncontrolled influx of people could have a serious impact on these islands.
72. As stated above, the rules that apply to Dutch nationals born in the European part of the Netherlands are, in principle, more flexible than those that apply to non-Dutch nationals (aliens). The Admission and Expulsion (BES) Act is structured in such a way that many Dutch nationals are eligible for automatic admission to and residence on Bonaire, St Eustatius and Saba. Dutch nationals have largely free access to the islands. The criteria that apply were set for the sole and legitimate purpose of protecting the interests of Bonaire, St Eustatius and Saba and their residents.
73. The exclusion order against the author, who was born in the European part of the Netherlands, was made pursuant to section 16d, subsection 1, opening words and (c) of the Admission and Expulsion (BES) Act because he had no right to reside on Bonaire and posed a risk to public order. As the facts of the case show, the author committed and was convicted of a considerable number of serious offences on Bonaire in a short period of time. The author finished serving his most recent sentence on 7 March 2016. When the decision was made to impose an exclusion order there were strong indications that he posed a threat to his former partner.
74. Violations of the law can have a disruptive impact on society. Often criminal acts not only infringe on the lives and safety of those directly affected but can also engender feelings of unsafety among a larger group of people. On a small island like Bonaire, which is 40 kilometres long and just 12 kilometres wide at its broadest point and has a population of less than 20,000, any offence – especially violent offences like those the author was convicted of – constitutes a serious threat to public order. It may also prove virtually impossible for a victim to avoid encountering a perpetrator in daily life.
75. The personal interests of the author were taken into account in the decision-making process at national level. Ultimately, these interests were not found to be compelling enough to warrant refraining from making an exclusion order against him. The mere fact that the author has Dutch nationality did not present an obstacle to an exclusion order.¹⁵

¹⁵ For a detailed account of the assessment of the interests reference is made to the exclusion order of 20 November 2015 (see Annexe II), the decision on the notice of objection of 18 February 2016 (see Annexe I) and the judgment on appeal of 1 September 2017 (see Exhibit 7 of the author's communication).

76. In addition, it should be stressed that the distinction made between citizens of the various constituent parts of the Kingdom, as indicated above, is expressly permitted as a result of the reservation with regard to article 12 of the Covenant. The Government is therefore certain that the system provided for by the Admission and Expulsion (BES) Act cannot be considered to discriminate on the basis of origin against citizens of one of the territories of the Kingdom.
77. The Government believes that the differential treatment has a legitimate aim and is based on reasonable and objective criteria. It follows from the above that no prohibited distinction has been made between the author, who was born in the European part of the Netherlands, and Dutch nationals born on Bonaire, St Eustatius and Saba in relation to admission to and residence in the constituent parts of the Kingdom.
78. Finally, the Government wishes to address the author's assertion that he would have preferred to have been deported to the Netherlands in Europe because he had closer ties with this country than with Curaçao. On this matter, the Government recalls that all the interests concerned were given careful consideration at national level. Before taking up residence on Bonaire unlawfully, the author lived in Curaçao. Curaçao was the author's place of habitual residence, a fact confirmed by his registration in the Personal Records Database there. The author also stated as much to the IND. Consequently, in accordance with the applicable legislation, the author was expelled to his most recent country of residence.

Conclusions

79. In view of the above, the Government takes the position that, pursuant to articles 1 and 2 of the Optional Protocol, the communication is inadmissible.
80. If the Committee does not endorse this view, the Government is of the opinion that there has been no violation of article 12, taken alone or in conjunction with article 2, paragraph 1, of article 7 or of article 26 of the Covenant and that the communication as a whole is unfounded.

The Hague, 5 April 2019



Kanta Adhin

Deputy Agent of the Government of the Kingdom of the Netherlands