Distr.: General
31 October 2023

English

Advance unedited version

Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3236/2018*,**

Communication submitted by:	S.E.H. (represented by counsel, Mr. Michiel Bijkerk)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	11 February 2018 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 8 October 2018 (not issued in document form)
Date of adoption of decision:	31 October 2023
Subject matter:	Freedom of movement and residence in one's country, in the context of expulsion
Procedural issue:	Admissibility – lack of sufficient substantiation; non-exhaustion of domestic remedies
Substantive issues:	Freedom of movement; degrading treatment; non-discrimination
Articles of the Covenant:	2 (1), 7, 12 and 26
Articles of the Optional Protocol:	2 and 5 (2) (b)

1. The author of the communication, submitted on 11 February 2018, is Mr. S. E.H., a Dutch national, born in the Netherlands (Holland) on 18 July 1984. The author claims a violation by the Netherlands of his rights under article 2 (1), in conjunction with article 26, and articles 7 and 12 (1) and (4) of the International Covenant on Civil and Political Rights ("the Covenant"). The Optional Protocol entered into force for the Netherlands on 11 March 1978. The author is represented by counsel.

Facts as submitted by the author.

* Adopted by the Committee at its 139th session (9 October – 3 November 2023)

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 of the Committee's rules of procedure, Yvonne Donders did not participate in the examination of the communication.

2.1 The author is a Dutch national born in Holland. He came to Bonair in 2010, in the former Netherlands Antilles, and stayed there without officially registering for stay until 2016. In this period, he committed several criminal offences and was declared *persona-non-grata* by an administrative decree of 20 November 2015, ordering his removal.

2.2 On 26 November 2015, the author filed a formal written objection with the Dutch Secretary of State for Security & Justice, requesting to revoke the deportation decree. On 27 November 2015, he filed summary administrative proceedings, requesting the Bonaire Court of First Instance to suspend the deportation decree. On 3 February 2016, the Bonaire Court of First Instance suspended the decree as requested. By decree of 18 February 2016, the Secretary of State for Security & Justice rejected aforesaid formal written objection.

2.3 On 23 February 2016, the author filed again summary administrative proceedings, requesting the same Court of First Instance to suspend aforesaid decree of 18 February 2016. The Bonaire Court of First Instance decided to treat both petitions simultaneously and passed a judgment on 11 March 2016, rejecting both applications.

2.4 Despite the author's request to be deported to Holland (mainland Netherlands) where he was born and had ties, he was instead deported to Curaçao,[1] where he had lived most of his life and held residence right by descent.

2.5 In April 2016, the author lodged an appeal to the Joint Court of Justice of Aruba, Curaçao, St. Maarten and of Bonaire, St. Eustatius and Saba (JCJ). In its judgment of 1 September 2017, the JCJ upheld the decision of the Bonaire Court of First Instance of 11 March 2016.

2.6 The author submits that in administrative cases, there is no recourse to the Supreme Court in The Hague, nor to any other (Administrative) Court in the Netherlands for an appeal in cassation, nor to any other Court on any of the Dutch Caribbean islands within the Kingdom of the Netherlands. He claims to have exhausted all available domestic remedies.

2.7 The matter has not been submitted to any other international mechanism of international investigation or settlement.

Complaint

3.1 The author primarily claims that the decision to exclude him - by being declared a *persona non-grata* in Bonaire, and his subsequent deportation to Curaçao, constitute a violation of his rights under article 12 of the Covenant, read alone or in conjunction with articles 2 (1) and 26 of the Covenant. Alternatively, he claims to be a victim of a violation of articles 2 (1) and 26 of the Covenant only.

3.2 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 his rights under article 12 of the Covenant were arbitrarily taken away from him, in violation of article 2 (1) and article 26 of the Covenant, in all the 6 Dutch Caribbean islands.[2] In other words, the author requests the Committee to subsidiarily find that the reservation and declaration in relation to article 12 made by the Kingdom are incompatible with the object and purpose of the Covenant in so far as they deny the rights under article 12 of the Covenant conferred to Dutch Caribbean nationals in all the Dutch Caribbean islands.

3.3 In addition, the author claims 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.

3.4 Finally, the author requests compensation for expenses he endured due to his return from Curacao to Holland, which he could have avoided, had not he been deported 'arbitrarily' to Curacao.

[1] After the deportation, the author came back to Bonaire and was deported again. However, the author does not provide dates and necessary details on his second deportation.

[2] The reservation and declaration in respect of article 12 were entered by the Kingdom of the Netherlands in 1978 and 2010 respectively.

State party's observations on admissibility and the merits

4.1 On 5 April 2019, the State party submitted observations on admissibility and the merits. It recalls the facts of the case, the constitutional structure of the Kingdom, 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 with regard to article 12 of the Covenant and applicable international law.

4.2 As to the facts, the author is a Dutch national by birth. He was born of Curaçao parents in the European part of the Netherlands on 18 June 1984. The author has lived on Bonaire since 2010. While 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, declaring him 'undesirable', was issued, he was registered with the Civil Registry Office of Curaçao.

4.3 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 (Bonaire, Sint Eustatius and Saba), multiple assaults, criminal damage and violation of the Bonaire Road Traffic Ordinance. On 2 November 2015, the author was informed that the Minister for Migration intended to impose an exclusion order against him. The Minister based his intention on the fact that the author was not eligible for automatic admission 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 of his response to the letter giving notice of the Minister's intention, within two weeks of the date of the letter. In their response of 10 November 2015, the author and his authorized representative stated their objection to the intention to issue an exclusion order.

4.4 On 20 November 2015, an exclusion order was imposed against the author, pursuant to section 16d of the Admission and Expulsion (BES) Act.[3] The decision was based on the fact that the author has 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. There were no exceptional facts or circumstances which would give reason to refrain from imposing an exclusion order.

4.5 On 26 November 2015, the author lodged an objection to the decision of 20 November 2015, which imposed an exclusion order. On 27 November 2015, the author also applied for interim relief to the Court of First Instance of Bonaire, Sint Eustatius and Saba in regard to the exclusion order, which was considered on 12 January 2016. The author and his 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. In response to the author's objection of 26 November 2015, the Minister for Migration, in his decision of 18 February 2016, declared the author's objection unfounded and improved the grounds justifying the exclusion order, following the assessments of the interests involved. 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, which upheld the exclusion order of 20 November 2015. The author also applied for interim relief to the Court of First Instance and participated, along with his representative, in the video hearing held on 4 March 2016. By judgment of 11 March 2016, the Court of First Instance declared the application for review lodged by the author unfounded. The application for interim relief was denied. Subsequently, 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

[3] Section 16d, subsection 1, opening words and (c), in conjunction with section 1a, subsection 1 (a) of the Admission and Expulsion (BES) Act sets out: An exclusion order may be imposed on an alien by the 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, Sint 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.

Joint Court of Justice heard the case on 30 March 2017, and the author and his representative attended the hearing. On 1 September 2017, the Joint Court of Justice upheld the contested decision.

4.6 The State party further submitted information on the structure and legal order of the Kingdom. Among others, the State party asserts that the Kingdom Charter was accepted by the Antillean and Surinamese federal sub-states in 1954 of their own free will. 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, Sint Eustatius and Saba. 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, and they are permitted to stay on the BES islands as tourists for six months, without further conditions. The Dutch nationals who wish to stay longer or in a different capacity than as tourists may do so if they are eligible for automatic admission (if they have a certificate of good conduct, a place to live and sufficient means of support) or have been granted a residence permit. Dutch nationals who are not eligible for automatic admission require a residence permit. The conditions for automatic admission have been broad enough and most of the Dutch nationals will 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.

4.7 The reservation of the Kingdom to article 12 of the Covenant was entered upon ratification of the Covenant in 1978.[4] In regard to article 12 (1), (2) and (4), the following explanation was provided. The Kingdom of the Netherlands, a party to the Covenant, consists constitutionally of the separate territories (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.

4.8 On 10 October 2010, the Netherlands Antilles ceased to exist as an autonomous country. Subsequently, on 11 October 2010, the following declaration was made. "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 (1), and as separate countries for the purpose of article 12 (2) and (4) of the Covenant." In accordance with article 19 of the Vienna Convention on the Law of Treaties, codifying customary international law, the primary source of reference, regarding the question of reservations, 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.[5]

4.9 As regards admissibility, the State party recalls the author's 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 State party holds that this claim is inadmissible for several reasons. 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, establishing beyond doubt that article 12 does not imply that legal residence in one of the

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

[5] Guideline 3.1.5 (A/66/10/Add.1).

territories confers a right of entry to the other.[6] 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, Sint Eustatius and Saba), Aruba, Curaçao and St. Maarten.

4.10 The author also questions the validity of the reservation and declaration made by the Kingdom in respect of article 12 of the Covenant. The State party is convinced that its reservation to article 12 of the Covenant is compatible with the object and purpose of the treaty since it does not impair the core obligation or the *raison d'être* of the Covenant. The core obligation of article 12 – which is to guarantee the right to liberty of movement and freedom to choose one's residence within the State, 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. The reservation applies without distinction to any Dutch national present in any autonomous country of the Kingdom. Moreover, the reservation made by the Kingdom with respect to specific provisions of article 12 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. In view of the above, the author cannot claim to be a victim of a violation of article 12. This part of his communication should therefore be declared inadmissible.

4.11 As regards the author's claim under article 2 (1) of the Covenant, which prohibits discrimination, made in relation to article 12 of the Covenant, the State party reiterates that the reservation made by the Kingdom applies without distinction to any Dutch national present in any autonomous country of the Kingdom. Since the reservation has been generally accepted under international law, there is no issue under article 2 (1) either. The author's complaint under article 2 (1) should be declared inadmissible.

4.12 As to claims under article 7 of the Covenant, the author has argued in his communication 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. The State party submits that, from the national proceedings it does not appear that the author exhausted all available remedies with respect to his claim under article 7 of the Covenant. Furthermore, the author has not substantiated his claim of degrading treatment. The State party adds that the author has not sufficiently substantiated that he was actually individually affected by the contested decision, not establishing a victim status.[7] Nor has the author provided any credible evidence that the actions of the Minister for Migration caused him harm of the kind against which article 7 of the Covenant offers protection. In any case, the author has not provided any information demonstrating that his situation reaches the threshold of 'degrading treatment' prohibited by article 7. Therefore, this part of the author's claim should be considered inadmissible.

4.13 Since in the context of admissibility the State party demonstrated that there has been no violation of article 12 of the Covenant, alone or in conjunction with article (2) (1) or of article 7 of the Covenant, its observations on the merits are limited to the author's claim under article 26 of the Covenant. Since 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. Article 26 of the Covenant prohibits discrimination on any ground and this right is self-standing, without a relation to other rights from the Covenant. The Committee has 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.[8] The 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. As the author was born in the

[6] This situation remained materially unchanged after the constitutional restructuring of the Kingdom, as of 10 October 2010. The reservation was adapted by the subsequent declaration.

[7] *Mauritian Women's Case* (35/78), para. 9.2.

[8] *Goncalves et al. v. Portugal* (CCPR/C/98/D/1565/2007), para. 7.4, or *Jongenburger-Veerman v. the Netherlands* (CCPR/C/85/D/1238/2004), para. 7.2.

European part of the Netherlands, he is subject to the rules that apply to Dutch nationals born outside Bonaire, Sint Eustatius and Saba, as laid down in the Admission and Expulsion (BES) Act. This Act has no discriminatory intent.[9]

4.14 The distinction between the aforementioned groups has been laid down in law since 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 conditions, 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, Sint Eustatius and Saba.[10] Moreover, the distinction drawn in the Admission and Expulsion (BES) Act is based on the objective criterion of place of birth.

4.15 The distinction serves a legitimate purpose, namely the protection of the interests of the small islands of Bonaire, Sint 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. 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, Sint 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.

4.16 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 letter c)) of the Admission and Expulsion (BES) Act because he had no right to reside on Bonaire and posed a risk to public order. 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. Criminal acts not only infringe on the lives and safety of those directly affected but can also engender feelings of unsafety among public. On a small island like Bonaire, which is 40 kilometres long and 12 kilometres wide, with a population of less than 22,000, 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.

4.17 The personal interests of the author were taken into account in the decision-making process at the national level. However, these interests were ultimately 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. The State party has stressed that the distinction made between citizens of the various constituent parts of the Kingdom 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.

4.18 The State party believes that the differential treatment has a legitimate aim and is based on reasonable and objective criteria. It follows 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, Sint Eustatius and Saba in relation to admission to and residence in the constituent parts of the Kingdom. Finally, the State party addresses the author's

[9] *Simunek et al. v. Czech Republic* (CCPR/C/54/D/516/1992), para. 11.7, and *Wackenheim v. France* (CCPR/C/75/D/854/1999), para. 7.4.

[10] *Van Oord v. the Netherlands* (CCPR/C/60/D/658/1995), para. 8.5; *Smidek v. the Czech Republic* (CCPR/C/87/D/1062/2002).

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. It recalls that all the interests concerned were given careful consideration at the 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 so to the IND. Consequently, in accordance with the applicable legislation, the author was expelled to his most recent country of residence.

4.19 The State party concludes, pursuant to articles 1 and 2 of the Optional Protocol, that the communication is inadmissible. Alternatively, the State party considers that there has been no violation of article 12, read alone or in conjunction with articles 2 (1), 7 or 26 of the Covenant, and that the communication as a whole is unfounded.

Comments by the author on the State party's observations

5.1 On 19 July 2019, the author submitted comments on the State party's observations on admissibility and the merits. He considers the observations of the State party to be based on various mistaken premises with respect to the law and contain several mistranslations.

5.2 First, the Admission and Expulsion Ordinance is not an act of the Kingdom, but a law adopted by the Parliament of one of the three Caribbean islands of Curaçao, Aruba and St. Maarten (three individual constituent parts of the Kingdom) and is applicable exclusively on the island that has adopted such a law. The author develops his arguments that the three constituent parts of the Kingdom mentioned should be considered federal sub-states within the Federation (the Kingdom), and not *sui generis* constituent entities as those cannot be considered as 'autonomous countries'. They are not independent, nor have they separate nationality. It means that article 12 of the Covenant has to be interpreted and applied in accordance with article 50 of the Covenant. The author agrees with the State party's assessment that the Kingdom's constitutional order comprises a number of unitary elements, in accordance with a doctrine that federation is a sovereign state that includes a union of partially self-governing states. Of this federation, the three islands of Curaçao, Aruba and St. Maarten form a constituent part, with a generous scope of autonomy. Accordingly, these islands are not internationally recognized as independent or sovereign states, and the Committee should confirm such interpretation. In addition, the part of the Kingdom known as 'the Netherlands' or 'Holland' is also a federal sub-state within the Kingdom. The Netherlands consists of a territory in Europe – Holland, and of the territories of the islands of Bonaire, St. Eustatius and Saba (the BES islands), without identifying the Kingdom with Holland. Each island has its constitution.

5.3 *De iure*, the Kingdom comprises four countries (art. 1 of the Kingdom Charter). In that context, the author elaborates on the Kingdom Charter and its 'concordance-principle'. All responsibilities and tasks are vested in the federal sub-states, unless explicitly assigned to the Kingdom. Within the Kingdom, there is one single Dutch nationality, which is regulated in the Kingdom Act, which applies in all 4 sub-federal states of the Kingdom. This is one of the reasons why internal migration restrictions for Dutch nationals within the Kingdom cause numerous violations of articles 12 and 26 of the Covenant. All four federal sub-states have the power to regulate such restrictions, according to domestic law within the Kingdom, and article 3 (section 1f) of the Kingdom Charter assigns the power of supervision to the Kingdom. General rules concerning admission and expulsion of Dutch nationals, laid down in Federal Ordinances of Curaçao, Aruba and St. Maarten, require the approval of the Kingdom government before they can enter into force. The federal sub-state Holland has introduced internal migration restrictions for Dutch nationals only for the BES-islands. Holland has not yet legislated any such restrictions for itself. Dutch nationals from all 6 islands therefore enjoy free right under article 12 of the Covenant, if they wish to settle in Holland. Dutch nationals from Holland, however, do not enjoy the same rights under article 12 of the Covenant, if they wish to settle on these 6 islands. All such restrictions violate articles 12 and 26 of the Covenant.

5.4 The author agrees with the State party that the facts are accurate, with some additional precisions. The author is a Dutch national, born in Holland on 18 July 1984. His parents are from Curaçao. From his birth until 2003, the author lived in Holland. He registered in Curaçao in 2003. Curaçao was not his habitual place of residence as of 2003, as the State

party asserts. Instead, the State party agreed elsewhere that his habitual place of residence was Bonaire at least of 2010, but probably earlier. One exclusion order was issued against the author in 2015. He was expelled to Curaçao twice. As to the author's convictions for multiple offences between 2011 and 2015, the author holds that the State party has exaggerated the seriousness of the offences since the author may have spent approximately 12 to 15 months in jail for these offences. Regarding the State party's assertion that, at the moment of issuing the exclusion order, the author was not eligible for 'automatic admission' to Bonaire and that he did not have a residence permit, the author objects that the term 'automatic admission' is another mistranslation as a Dutch national can obtain admission 'by operation of law', after having met three legal preconditions. Furthermore, the parties agree that article 1, section 2 of the Kingdom Charter and article 132a of the Constitution of the European and Caribbean Netherlands (CECN) as of 17 November 2017 allow for differential regulations and measures - so called differentiation clause, for the BES-islands - in relation to Holland. Differentiation is acceptable as long as there is a clear distinction between differentiation and discrimination. The concerned clause cannot become a discrimination clause, as has been the author's case. He is complaining about violations of articles 12 and 26 of the Covenant. If he is right, no rule in the domestic Constitution (such as the Kingdom Charter and/or the CECN) can justify that.

5.5 The parties agree that the Parliament of Holland passed the Admission and Expulsion (BES) Act exclusively for the BES islands, in effect as of 10 October 2010. This Act was based on the differentiation clause set out in article 1, section 2 of the Kingdom Charter at the time. This fact does not mean that its provisions are in accord with the Covenant. The parties agree that the Admission and Expulsion (BES) Act is similar to the Federal Ordinances on Admission and Expulsion of the federal sub-states of Curaçao, Aruba and St. Maarten. This Act applies *mutatis mutandis* to Dutch nationals not born or naturalized in the BES-islands. The parties agree that Dutch nationals born in Holland, Curaçao, Aruba and St. Maarten are free to enter the BES-islands as tourists, for no longer than six months. Dutch nationals not-born in the BES-islands have no free admission in these islands. They need either a residence permit on the same conditions as an alien, or they may be admitted 'by operation of law'. The three requirements for admission have been drafted to keep the Dutch nationals not born in the BES-islands out of these islands. The State party's observations about the largely free access to these islands are entirely false. Without a place to live, without work or wealth, and if they have a criminal record, they are not welcome in the BIS-islands. The justification for this given by the State party is to prevent an unregulated mass influx of the Dutch nationals (born in Holland, Curaçao, Aruba and St. Maarten). In the author's case, the question is whether this justification can pass muster in light of articles 12 and/or 26 of the Covenant. That can be debated, but a system of permits based on three restrictive requirements is not 'largely free access', nor is it 'automatic admission'. The author reiterates that the Dutch nationals only have free access as tourists, up to 6 months, which is a restriction as well.

5.6 As regards the State party's argument that the distinctive categories of Dutch nationals in article 1 of the Admission and Expulsion (BES) Act are justified, since article 132a of the Constitution of the European and the Caribbean Netherlands (CECN) allows for differential laws in Holland and the BES-islands, the author reiterates that there is a distinction between differentiation and discrimination. The differentiation clause of article 132a of the CECN does not justify any discrimination. In addition, the distinctive categories between the Dutch nationals within the Kingdom involve not only Holland and the BES-islands. The other three islands - Curaçao, Aruba and St. Maarten are also involved. A similar differentiation clause as in article 132 of the CECN is not included for the other three islands in the Kingdom Charter, nor in the Constitutions of the 4 federal sub-states within the Kingdom.

5.7 Furthermore, the author asserts that some of the Dutch politicians have repeatedly attempted to introduce in Holland the restrictions to free admission and residence similar to article 1, section 5, of the Admission and Expulsion (BES) Act (and similar restrictions in the Federal Ordinances on Admission and Expulsion of the federal sub-states of Curaçao, Aruba and St. Maarten) in order to keep out Holland the Dutch nationals born on these islands who wish to settle in Holland. So far, those attempts have failed. However, if these discriminatory distinctions persist against the Dutch nationals from Holland, to protect the islands against immigration from Holland, one day the above referred politicians will succeed

as introducing the same restrictions in Holland would only be reciprocal. However, this should be prevented. If the Committee ruled that these distinctions are unjustifiably discriminatory and that the reservations are therefore incompatible with the object and purpose of the Covenant, this would be prevented. This would introduce a new cooperation within the Kingdom and would affect other Covenant rights as well. If the Committee would rule that the Kingdom is indeed a federation, consisting of the four federal sub-states of Holland, Curaçao, Aruba and St. Maarten, article 50 of the Covenant would apply fully.

5.8 The author admits that his case is not the most sympathetic one, as he has indeed behaved badly on Bonaire. Nevertheless, this should not affect the principle that nobody's human rights should be violated, and that nobody should be discriminated against, including the ex-convicts.

5.9 Finally, the author provides another example what this kind of discrimination leads to. It concerns a case of a foster mother who was entrusted with care of a Dutch child born in Curaçao from Curaçaoan parents. When the foster child was about 11 years old, the foster mother decided to move to Bonaire, where the mother's father was born, so the mother had free admission and residence rights there. However, her foster daughter did not. The foster child was therefore denied free admission and residence in Bonaire and to the day of submission of comments, she has lived there with her foster mother, without any residence permit. She could not comply with article 3, section 5, Admission and Expulsion (BES) Act requirements. The Immigration offered to give her a residence permit as an alien. The child has basically lived on Bonaire as an undocumented alien, without access to health insurance by the government since she cannot be registered at the Civil Registry.[11] This example clarifies why this discriminatory practice should stop, if not within the whole Kingdom, then at least among the 6 Caribbean islands

State party's additional observations

6.1 On 23 September 2019, the State party submitted that the author's comments of 19 July 2019 do not give any reason to alter the State party's position as expressed in its initial observations of 5 April 2019. The State party nevertheless makes additional observations, on the understanding that it does not agree with the points in the author's comments it does not address.

6.2 In his comments, the author submits that the Kingdom of the Netherlands is a federation with means that article 12 of the Covenant would have to be interpreted and applied in accordance with article 50 of the Covenant. The State party rejects that view. In its initial observations, the State party outlined the constitutional structure of the Kingdom as a *sui generis* legal order that does not justify it to be labelled a federation. The author's statement is also contradicted by the Kingdom's practice at the international level, in particular with regard to the territorial scope of treaties.

6.3 It is consistent practice of the Kingdom to indicate at the time of expressing its consent to be bound by a treaty – any treaty – for which parts of the Kingdom the treaty will be binding, thereby establishing the intention regarding the territorial scope of the treaty for the Kingdom. It has been generally accepted that the Kingdom may confine the territorial scope of treaties to any of the constituent parts of the Kingdom, i.e. Aruba, Curaçao, St. Maarten and the Netherlands (the European and the Caribbean parts of the Netherlands). This practice includes treaties, which – like the Covenant – contain specific provisions on the territorial scope in respect of federal states. In this respect, the Committee recently welcomed in its concluding observations on the fifth period report of the Kingdom of 26 July 2019 the Kingdom's ratification of: a) The Convention on the Rights of Persons with Disabilities in 2016, for the European part of the Netherlands; b) The International Convention for the Protection of all Persons from Enforced Disappearance in 2011, for the Netherlands (i.e. the European and the Caribbean part – Bonaire, Sint Eustatius and Saba – of the Netherlands); and in 2017 for Aruba; c) The Optional Protocol to the Convention against Torture and Other

[11] The case concerns Cicilia/Brunken vs. State Secretary of Justice & Security (annexed). Although the government has verbally promised not to deport her, because that would violate the best interests of the child, the Admission and Expulsion (BES) Act does not give her protection against deportation to Curaçao.

Cruel, Inhuman or Degrading Treatment or Punishment in 2010, for the European part of the Netherlands.

6.4 The Kingdom also ratifies treaties, including the Covenant and its Optional Protocol, for all its constituent parts. Also, in such cases, the Kingdom will always specify the different constituent parts of the Kingdom for which the treaty will be binding. In its instrument of ratification of the Covenant and the Optional Protocol, deposited on 11 December 1978, it explicitly stated that it had ratified both treaties for the Kingdom in Europe and the, then, Netherlands Antilles. The above generally accepted state practice at the international level is a manifestation of the constitutional order within the Kingdom, by which each constituent part may decide autonomously whether or not it wishes to be bound by a treaty. Since only the Kingdom of the Netherlands is a subject of international law, it is for the Kingdom to formalise that choice at the international level. The same is true about reservations that may be made. It is always specified for which constituent part or parts of the Kingdom the reservations are made.

6.5 In the State party's opinion, the above-described practice refutes the author's assertion that the Kingdom is a federation and that, therefore, article 12 should be interpreted and applied in accordance with article 50 of the Covenant. As regards article 29 of the Vienna Convention on the Law of Treaties, quoted by the author, the state practice by the Kingdom is covered by the exception explicitly mentioned therein.[12]

6.6 With regard to the author's comments concerning the permissibility of the reservation to article 12, the State party reiterates that 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 not affected by the reservation. Anyone lawfully residing in any part of the Kingdom is provided the protection under article 12. The reservation applies without distinction to any Dutch national present in any part of the Kingdom of the Netherlands. It cannot, therefore, be said that the reservation violates any peremptory norm under international law.

6.7 In conclusion, the State party reiterates its position that the present communication should be declared inadmissible pursuant to articles 1 and 2 of the Optional Protocol. Alternatively, the State party submits that there has been no violation of the Covenant and that the communication is unfounded.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

7.2 The issue before the Committee is whether the expulsion order against the author, to leave the island of Bonaire for the island of Curaçao, both within the Kingdom of the Netherlands, violated the author's rights under articles 2, 7, 12 and 26 of the Covenant.

7.3 As required under article 5 (2) (a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.4 The Committee notes the State party's objection to the exhaustion of domestic remedies by the author in the context of article 7 of the Covenant, asserting that the author's claim of degrading treatment, due to his expulsion from Bonaire to Curaçao, has not been raised before national authorities, and hence the domestic remedies have not been effectively exhausted. The State party also argued that the circumstances of the author's expulsion have not reached a threshold of degrading treatment, and that he has not established a victim status in that regard. The Committee observes that the author has not rebutted the State party's objection about lack of exhaustion of domestic remedies, as he does not claim to have

[12] " *Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*".

presented the allegations of degrading treatment in the context of appeals against the expulsion order before the domestic courts. The Committee therefore finds that the consideration of the author's claim under article 7 is precluded by the requirements of article 5 (2) (b) of the Optional Protocol.

7.5 As regards the author's claims under article 2 (1) of the Covenant, the Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[13] The Committee also considers that the provisions of article 2 cannot be invoked as a claim in a communication under the Optional Protocol in conjunction with other provisions of the Covenant, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual claiming to be a victim. The Committee notes, however, that the author has already alleged a violation of his rights under article 12, resulting from the interpretation and application of the existing laws of the State party, and the Committee does not consider that examination of whether the State party also violated its general obligations under article 2 of the Covenant, read in conjunction with article 12, to be distinct from examination of a violation of the author's rights under article 12 of the Covenant. The Committee therefore considers that the author's claims in the context of article 2 (1) of the Covenant are incompatible with article 2 of the Covenant, and inadmissible under article 3 of the Optional Protocol.

7.6 Regarding the author's claim under article 12, the Committee notes that the author objected to the expulsion order against him, as a Dutch national born in the European part of the Netherlands, who was removed for his repeated criminal activity in Bonaire, where he had resided unlawfully since 2010; and his effective expulsion from Bonaire to Curaçao on two occasions in 2015 and 2016. The author held that he had a right to stay in Bonaire, or to be alternatively removed to Holland (European part of the Netherlands), but not to Curaçao (Caribbean Netherlands). The Committee also notes the State party's argument that the Admission and Expulsion (Bonaire, Sint Eustatius and Saba - BES) Act serves to protect the islands of Bonaire, Sint Eustatius and Saba from massive influx of the Dutch nationals, mainly from the European part of the Netherlands, given the limited size and resources of the Caribbean islands; that the immigration rules are within the sovereign discretion of the State party; and that most of the Dutch nationals are entitled to automatic admission to BES islands, having met three legal requirements, or to request a residence permit. The State party further argued that the expulsion order against the author was issued as a consequence of his criminal activity, and as a means of protection of his former partner living in Bonaire legally; that since the author was unlawful resident of Bonaire and his last legal residence was registered in the civil register of Curaçao, he had to be removed to Curaçao as a means of precautionary measure, adopted by the Minister of Immigration; and that the author in fact challenges the applicable immigration rules, extrapolating his arguments. The Committee observes that the author in his comments regretted his deplorable behaviour in Bonaire; and that the State party maintained that its action against the author was necessary, proportionate and lawful; that the author was able to move from Curaçao to the mainland Netherlands (Holland); and that the immigration affairs are at the State party's discretion. In light of the above, the Committee considers that the author failed to adequately substantiate his claim of a violation of the freedom of movement and residence for the purpose of admissibility, since he resided unlawfully in Bonaire and he was expelled for repeated criminal activity, which he unsuccessfully challenged before the domestic courts but has not demonstrated that the assessment of his individual circumstances by the national authorities were arbitrary or disproportionate, and consequently declares it inadmissible, pursuant to article 2 of the Optional Protocol.

7.7 As regards the author's objection to the reservation and the declaration by the Kingdom of the Netherlands under article 12 of the Covenant, the Committee notes the State party's argument that the four constitutive territories of the State are considered as separate autonomous territories, and that the right of residence in one of them does not automatically entitle the beneficiary to a residence in another constitutive territory. The Committee

[13] *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 10.12.

observes that the State party's reservation has not been objected to by other State parties to the Covenant; that the State party argued that the nature of its reservation is in accordance with the Guidelines of the International Law Commission on the issue of reservations; and that the Committee has not expressed concerns over its scope. The Committee also observes that it is a general prerogative of a State party to enter a reservation, pursuant to article 19 of the Vienna Convention on the Law of Treaties, and that a treaty is binding upon each party in respect of its entire territory, in accordance with article 50 of the Covenant. In these circumstances, the Committee considers that the author has not sufficiently substantiated his allegation that the reservation is not compatible with the object and purpose of the Covenant, since the Admission and Expulsion (BES) Act contains the distinct immigration rules for all the Dutch citizens willing to settle in the BES islands, whereas the Covenant remains binding on the Kingdom of the Netherlands as a whole.[14] Accordingly, the Committee concludes that this part of the author's claims under article 12 is also inadmissible, pursuant to article 2 of the Optional Protocol.

7.8 As regards the author's claim under article 26, the Committee notes the State party's argument that the specific circumstances invoked by the author have been properly assessed by the domestic authorities; that the mere fact that the author was subject to an expulsion order does not constitute a violation of the principle of non-discrimination; and that no causal link between the disputed expulsion and the alleged discriminatory consequence has been established. The Committee also notes the State party's argument that the Admission and Expulsion (BES) Act applies to all Dutch nationals; that the Act has no discriminatory intent; that it is based on the objective criterion of place of birth, and the distinction serves a legitimate purpose, namely the protection of the interests of the small islands of Bonaire, Sint Eustatius and Saba, and their residents (paras. 4.13-4.15); and that the distinct immigration rules for BES islands have been prompted by their specific socio-economic circumstances, including limited size and resources. The State party maintains that such distinction is objective and reasonable, and pursues legitimate aim, as set out in the distinction clause of the Kingdom Charter and the Constitution of the European and Caribbean Netherlands.

7.9 The Committee recalls that, for the purposes of article 26 of the Covenant, a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[15] Moreover, the State parties enjoy a margin of appreciation[16] in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The Committee notes that the distinct immigration rules for all the Dutch nationals who wish to reside in the BES islands for longer periods were adopted for merely practical and objective reasons, including a requirement of a request for residence permit for stays (residence) of over 6 months; and that the author's expulsion was prompted by his illegal stay and illegal activity in Bonaire. In addition, the author has not established that the authorities' assessment of his circumstances in the context of his expulsion was clearly arbitrary or amounted to a denial of justice. Therefore, the Committee finds that the author has not substantiated that the authorities' expulsion order against him was discriminatory. Accordingly, the Committee concludes that the author's claims under article 26 of the Covenant are also inadmissible due to a lack of sufficient substantiation, in accordance with article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5 (2) (b) of the Optional Protocol;

(b) That the decision shall be transmitted to the State party and to the author.

---

[14] See the Committee's General comment No. 24 (CCPR/C/21/Rev.1/Add.6), paras. 6 and 18.

[15] General comment No. 18 - Non-discrimination (1989), para. 13.

[16] *Hertzberg et al. v. Finland* (CCPR/C/15/D/61/1979), para. 10.3 and *Raihman v. Latvia* (CCPR/C/100/D/1621/2007), para. 8.3. See also General comment No. 34 on Article 19: Freedoms of opinion and expression (CCPR/C/GC/34), para. 36.