

The District Court of The Hague
Date of hearing: 15 June 2021
Case number: C/09/589067 / HA ZA 2020-35

WRITTEN ARGUMENTS

in the matter of:

1. [Claimant 1],
residing in [city] (“**Claimant 1**”),
2. [Claimant 2],
residing in [city] [country] (“**Claimant 2**”),
3. **the foundation Stichting RADAR Inc.**
with its registered office and principal place of business in Rotterdam (“**RADAR**”),

Claimants,

Attorneys: A.M. van Aerde, LL M, E.S. Oudshoorn, LL M

4. **Nederlands Juristen Comité voor de Mensenrechten (NJCM)** [Dutch Section of the International Commission of Jurists],
an association with full legal capacity with its registered office and principal place of business in Leiden (“**NJCM**”),
5. **Amnesty International Dutch Section**,
an association with full legal capacity with its registered office and principal place of business in Amsterdam (“**Amnesty Netherlands**”),
6. **Controle Alt Delete**,
a national platform without legal capacity with its principal place of business in Amsterdam,

Claimants,

Attorneys: J. Klaas, LL M, M. Hendrickx, LL M

Jointly: “**Claimants**”

v.:

the State of the Netherlands (the Ministry of Defence and the Ministry of Justice and Security, and specifically the Royal Netherlands Marechaussee)

a legal entity under public law with seat in The Hague ("**the State**"),
Defendant,
Attorney: C.M. Bitter, LL M

1. Introduction

- 1.1. The matter at hand may be a unique and historic issue of principle, but from a legal standpoint it is a simple question that can be answered with a yes or no.
- 1.2. Firstly, I will be addressing the definition of ethnic profiling, why the Royal Netherlands Marechaussee (“**RNM**”) is clearly engaging in ethnic profiling, and the question of why that is discriminatory.
- 1.3. Mr Van Aerde will then address the question of why ethnic profiling is in violation of the law and a violation of human rights. He will also address the question of whether ethnic profiling takes place frequently or not (and whether that matters). In addition, he will explain the claims in more detail.
- 1.4. I will close with the argument that ethnicity cannot be permitted to continue to be an element of risk profiling and selection decisions by the State.

2. What is this case about?

- 2.1. What this case is *not* about is the authority of the RNM to perform border security operations and the practice known as Mobile Security Monitoring checks (“**MSM checks**”).
- 2.2. Our clients, the claimants in this case, do not dispute that the RNM can pull individuals from the line, nor that the RNM has a discretionary authority to do so on the basis of current laws and regulations.
- 2.3. The claimants also do not dispute that ethnicity may be used in perpetrator profiling: identifying characteristics of a suspect in a specific crime. If, for example, the perpetrator of a crime has been identified as a heavyset, older man wearing a suit, who has orange-tinted skin and pale-yellow hair that looks like a toupee, all men matching that description may, of course, be pulled from the line.
- 2.4. This case is only about whether ethnicity (appearance, skin colour or presumed ethnicity) may be used as a permissible element in drafting risk profiles and making selection decisions in the performance of MSM checks. Ethnicity comprises physical characteristics that a person cannot do anything about, such as physiological features and skin colour.
- 2.5. The State believes that this type of profiling should be allowed, but the claimants do not. This is the dispute that we are asking this court to resolve.

3. Definitions of ethnic profiling

3.1. The State acknowledges that personal characteristics such as skin colour or ethnicity (or assumed ethnicity) are used in selection decisions by the RNM. However, the State asserts that this does not constitute ethnic profiling. Only if these personal characteristics constituted a decisive part of the selection could the decision be characterised as ethnic profiling, according to the State.

3.2. The claimants use the following definition of ethnic profiling:

“...the use by the RNM, with no objective and reasonable justification, of criteria such as race, colour, language, religion, nationality or national or ethnic origin when performing MSM checks.”

3.3. This definition is derived from the definition used by the European Commission against Racism and Intolerance (ECRI), which is also used by the Dutch police,¹ and by the College for Human Rights.²

3.4. The most recent recommendations of the UN Committee on the Elimination of Racial Discrimination (CERD), from November 2020, include the following, even stricter, definition of ethnic profiling:

“the practice of police and other law enforcement officials relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity.”³

3.5. Because the MSM checks are also an act of law enforcement, there is no difference between the police and the RNM in terms of the definition to be applied and fundamental rights.

3.6. The CERD goes on to explicitly declare that this definition also applies to border controls and decisions on security and immigration.⁴

¹ <https://www.politie.nl/binaries/content/assets/politie/nieuws/2017/00-km/handelingskader-proactief-controleren-versie-1.9.1-dd-27-oktober2017.pdf>

² Exhibit 87: Position paper, p. 2 (<https://mensenrechten.nl/nl/publicatie/60c0653c1e0fec037359cd1a>).

³ Exhibit 84, par. 18

(https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/1_Global/CERD_C_GC_36_9291_E.pdf).

⁴ Ibid, par. 19: “*Racial profiling by law enforcement officials may also include, inter alia raids, border and custom checks, home searches, targeting for surveillance, operations to maintain or re-establish law and order or immigration decisions. These actions may variously take place in the context of street-policing and anti-terrorism operations.*”

- 3.7. Thus, if we accept the definitions used by the ECRI, the CERD and the police, we must conclude that ethnic profiling is used in border control activities. QED.
- 3.8. The key question, of course, is not only whether ethnic profiling is being used, but whether it is permissible.

4. Ethnic profiling is not permissible

- 4.1. As explained in detail in the summons, ethnic profiling is not permissible. This is because ethnic profiling is impermissible discrimination that not only harms the victims, but society as a whole. Additionally, ethnic profiling is wrong and it is hurtful.
- 4.2. The State argues the opposite, that the use of ethnicity is permissible, so long as it is not a *decisive* or *determining* element of the selection. This, according to the State, also follows from the Supreme Court's judgment in the Dynamic Traffic Control case. In that ruling, the Supreme Court determined that controls are by definition not permissible if they:

"...are based solely or predominantly on ethnic or religious characteristics."⁵

- 4.3. The Supreme Court states that such cases do *in any case* involve prohibited distinctions.⁶ However, that does not mean that the Supreme Court has also ruled that it would not constitute a prohibited distinction if ethnic or religious characteristics are selection criteria, but not the sole selection criteria. That amounts to a *contrario* reasoning. In short, the Supreme Court has mainly ruled on what is not permissible, but has not ruled on what is. The College for Human Rights also interprets the Dynamic Traffic Control judgment in this way:

"In the opinion of this body, the Supreme Court decision and the referenced international judgments were not the final destination, but at most the starting point for the legal debate regarding ethnic profiling. This debate still demands further clarification. It would be a misconception to think that the use of these criteria within a risk profile does not pose any prob-

⁵ Supreme Court 4 November 2016, ECLI:NL:HR:2016:2454 (Dynamic traffic control), paragraph 3.7.

⁶ Supreme Court 4 November 2016, ECLI:NL:HR:2016:2454 (Dynamic traffic control), paragraph 3.7: *"In the case of traffic controls such as those at issue in this case, such a finding may come into play in particular if the selection of the vehicle to be subjected to a traffic control is based exclusively or predominantly on ethnic or religious characteristics of the driver or other occupants of that vehicle."* (Underlined by attorney).

lems, as long as ethnic or national origin is not the sole selection or risk criterion for the application of enforcement or control powers.”⁷

- 4.4. Today, the claimants ask you to eliminate that misconception regarding the Dynamic Traffic Control decision and, in their interest and in the interest of society, to resolve that debate and to establish: ethnicity may not be part of risk profiles or selection decisions by the RNM, including but not limited to in the process of MSM checks.
- 4.5. However, aside from this determination, the way the RNM is currently uses ethnicity does not in any case meet the standard set in the Supreme Court's Dynamic Traffic Control decision. In fact, in the RNM's policy the selection decision is based exclusively or predominantly on external characteristics. I will explain this on the basis of three examples: two that the State itself presents in its Statement of Defence, and the third being [Claimant 1]'s own case.
- 4.6. We will start with [Claimant 1]'s example. It is established that he was pulled from the line.
- 4.7. At the time, the RNM personnel involved declared:
- “[...] The reason for me selecting [Claimant 1] was to have his Nationality, Identity and residency status checked by my colleague. [...]”⁸*
- “[...] Selection criteria on this flight from Italy were, for me: walking fast, smartly dressed, person of non-Dutch origin, travelling alone or with family. In that instance [Claimant 1] met the criteria, because he was walking fast, was well-dressed, was travelling alone and, in addition, had the appearance of a non-Dutch person being, potentially, a foreign national. In our official capacity we are aware that there is significant traffic of Nigerians travelling from Italy with large amounts of cash in hand, which is something that for us makes screening worthwhile. [...]”⁹*
- 4.8. [Claimant 1] was therefore pulled from the line, in any case *partly*, because he has a non-Dutch appearance; that much has been established. But in the selection process, this element was also *decisive* for him being pulled from the line. For is it not true that walking quickly and being well-dressed are elements

⁷ Exhibit 87: Position paper, p. 3. See also Position paper, p. 7. *“However, it can be deduced from the case law described above, that the mere argument that ethnicity is only one of the factors within the risk profile used is insufficient to withstand assessment based on the ban on discrimination.”*

⁸ Exhibit 51, p. 1.

⁹ Exhibit 52, p. 1.

that apply to practically all business travellers on such a flight? And yet, they were not all pulled from the line.

- 4.9. In fact, the only passengers pulled from the line were those with a ‘non-Dutch appearance’. According to the chairman of the complaints committee, [Claimant 1] – these were his literal words – does not look Dutch. What this refers to is his black skin. Having black skin was the deciding element for selection. This difference in treatment is purely and solely based on ethnicity, and consequently the selection is “*solely or predominantly*” based on ethnicity.
- 4.10. His black skin colour makes [Claimant 1] a target for being pulled out of the line. Although the Netherlands has had citizens with black skin for over three hundred years, [Claimant 1] continues to be seen as having a non-Dutch appearance. Regardless of how well he dresses, regardless of his career, regardless of how he behaves: he will be pulled from the line. This is hurtful, it is stigmatising, it is unnecessary, and it is unlawful.
- 4.11. I will now address the examples cited by the State in the Statement of Defence.
- 4.12. First, the risk profile of the victim of forced prostitution from Nigeria. This profile looks for women with Nigerian nationality in the age bracket of 15-35.
- 4.13. According to the State, in these cases the following elements are looked for:
- “Itinerary, airline, gender, age bracket and nationality.”*
- 4.14. In practice, here ‘nationality’ generally means ‘*presumed nationality*’, as this check takes place before passport control. Passports are checked and nationality actually established only after people are pulled from the line and checked.
- 4.15. Given that it is not possible for the RNM employee to know the person’s nationality, the person pulled from the line will therefore conform to the RNM employee’s preconception of what a young Nigerian woman looks like.
- 4.16. In a meeting at the Ministry in preparation for this case, an RNM employee asked to come up with an example also came up with this exact profile. I asked that employee: “*How can you tell which women might be Nigerian citizens just by looking at them?*”
- 4.17. The RNM employee answered: “*Well, these are people from Western Africa*”, and went on to identify a few physiological features (such as a broad skull and a particular jawline) that, the employee claimed, helped to make this selection.

- 4.18. As the court may be aware, Nigeria has over 250 different ethnic groups, from the Hausa in the north to the Yoruba in the south to the white descendants of British colonists.
- 4.19. There is no one typical Nigerian. When it comes down to it, skin colour will ultimately be the deciding factor. Moreover, black women who are not from Nigeria will also be selected.
- 4.20. On the basis of this profile, the RNM employee would not only pick out Chimamanda Ngozi Adiche (one of the most important African writers of the past 15 years), but also, for example, an African-American or Dutch-Surinamese student who has been doing research in Nigeria for her anthropology degree.
- 4.21. They are being singled out this time – and every time – not because they are Nigerian nationals or because they are young, but because they are young women with black skin.
- 4.22. Consequently, the State's example here will lead to direct discrimination and ethnic profiling in many cases.
- 4.23. Finally, let us take the State's example of the blue Ford Escorts, which highlights exactly the point we want to make here.
- 4.24. The State says: suppose that the police have information that shows that we need to be specially on the lookout for cars that are blue in colour, make and model is Ford Escort, manufactured in 2005-2015.
- 4.25. In this case, only these cars will be stopped. Any car that is not a Ford, or not an Escort, or not made in those years, will be allowed to drive on. In other words: according to the State, blue is not the decisive element.
- 4.26. But here is the point: under these selection criteria, all yellow, white and red Ford Escorts from 2005-2015 are allowed to drive on. Only the blue ones will be stopped. Within the set of all Ford Escorts from those years, of all colours, the blue ones are always the target.
- 4.27. For these cars, their colour, as opposed to all other Ford Escorts from this period, is the decisive element. Here again, the selection is predominantly made based on colour. Just like [Claimant 1]'s supposed non-Dutchness, or the supposed Nigerian nationality of the young women.
- 4.28. To use ethnicity or perceived nationality as an element in a risk profile therefore means, by definition, that ethnicity **is** used as a *decisive* element.

4.29. The use of ethnicity as part of a risk profile or selection decision by the RNM is therefore unlawful, even according to the State's own definition. In order to remove any ambiguity about the use of ethnicity, the claimants seek an explicit determination that ethnicity may not be part of a risk profile or selection decision by the RNM for an MSM check. This is, of course, while the State still asserts that it is entitled to use ethnicity as an element.

5. Ethnic profiling is in violation of the law and human rights

5.1. In the summons, we explained in detail on behalf of the claimants that the use of ethnicity violates multiple international conventions and directives, as well as EU law and the Dutch Constitution.¹⁰

5.2. The State's defences here all boil down to essentially the same thing: no international conventions, directives, EU law or Dutch law has been violated, because these pertain to a distinction that is *solely or predominantly* based on, for example, ethnicity or skin colour without there being any objective and reasonable justification to do so. However, the State continues, MSM checks do not purely or predominantly discriminate on the basis of factors such as ethnicity.

5.3. In response to this position adopted by the State, I can be brief: the three examples given above illustrate the opposite, that the MSM checks do involve a distinction that is predominantly based on skin colour or ethnicity. Would the same decision as made in [Claimant 1]'s case have been made for a person of a different ethnicity? The answer is no: a white, well-dressed, fast-walking man, would be allowed to continue, while [Claimant 1], who is also walking quickly and dressed smartly, will be taken out of the queue because he could possibly be a Nigerian money smuggler. This difference in treatment is based purely on ethnicity, and in such a case, selection is therefore based "*solely or predominantly*" on ethnicity.

5.4. Nor is there an objective and reasonable justification for this distinction, which requires consideration of whether there is a legitimate aim and whether the means are proportionate. Although the MSM checks in their current presentation have been construed to serve a legitimate goal, the means of achieving this goal are not proportionate. This is because the use of ethnicity as an element of the selection decision is not necessary. Other solutions are conceivable, such as the use of neutral criteria that have been empirically tested, or

¹⁰ Summons, section 5.

simple random checks. Additionally, the use of ethnicity has not been proven to be effective.¹¹

- 5.5. The State also attempts to justify its manner of exercising MSM checks by arguing that the regulations on MSM, by their very nature, make distinctions based on nationality, and for this reason alone cannot constitute a violation of e.g. ICERD or EU law. What matters, however, is the way in which the border authorities check whether a person is of a given nationality. If distinguishing by nationality in practice entails that the nationality is determined by the RNM on the basis of ethnicity, then this is simply distinguishing by ethnicity. The example of the young Nigerian women demonstrates this. Although Nigeria has more than 250 different ethnic groups, only those women with certain physiological characteristics, including non-white skin colour, will be selected. This method of selection also means that not only persons of Nigerian nationality will be selected, but also persons of other nationalities, including Dutch, who look like Nigerians in the eyes of the RNM.
- 5.6. In short, the RNM does in fact make prohibited distinctions in its selection decisions. In doing so, the State is acting in violation of multiple international treaties and directives, as well as EU law and Dutch law. The claimants have explained this extensively in their summons.
- 5.7. These international conventions, directives and laws are applicable in the Netherlands. Insofar as this is disputed by the State, I will explain this in reference to a number of specific conventions and directives, as well as the Dutch Constitution, in the following. For an explanation of the other conventions, directives and laws, I refer to the summons.¹²

ICERD¹³

- 5.8. According to the State, it is not in dispute that discrimination is prohibited. The question is, then, what does and does not constitute discrimination. According to the State, discrimination is *not*: “*the use – under certain circumstances and within frameworks – of ethnic characteristics in the selection within the context of the MSM*”. The State also asserts that Articles 2 and 5 ICERD do not create any other obligation; if they do, then these articles are not formulated sufficiently precisely and unconditionally.

¹¹ Summons, section 4.6.

¹² Summons, section 5.

¹⁰¹³ International Convention on the Elimination of All Forms of Racial Discrimination.

- 5.9. Articles 2 and 5 ICERD are formulated sufficiently precisely and unconditionally such that they can have direct effect.¹⁴ Briefly stated, these articles prohibit all forms of racial discrimination. What is meant by racial discrimination is also described with sufficient precision, namely including the following:

“any form of discrimination... on grounds of race, colour ...or ethnic origin which has the effect... of [nullifying or impairing] the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social or cultural fields or in other fields of public life.”

- 5.10. This means that any distinction based on ethnic origin must therefore fall under the definition of “racial discrimination”, and that this follows not only from Article 1 of the ICERD but also from the position taken by the CERD.¹⁵ The provisions are therefore sufficiently precise and unconditional. These provisions oblige the State to pursue a policy of eliminating all forms of racial discrimination by all appropriate means. This may also include amending provisions that may lead to racial discrimination,¹⁶ such as, in this case, the removal of ethnicity as part of risk profiles and selection decisions of the RNM.

ECHR

- 5.11. The claimants agree with the State that MSM checks in themselves do not inherently violate Article 8 ECHR: the right to respect for private life. Rather, the claimants only argue that the manner in which the MSM checks are currently carried out, namely in a discriminatory manner within the definition of Article 8 in conjunction with Article 14 of the ECHR¹⁷, do infringe on the right to respect for private life, and more specifically, the psychological integrity of persons. Being taken out of the queue on the basis of ethnicity, again and again, because they are, for instance, mistaken for a possible Nigerian money smuggler, is humiliating and hurtful.

¹⁴ Articles 93 and 94, Constitution. On the direct effect of provisions of conventions, see also Supreme Court 10 October 2014 ECLI:NL:HR:2014:2928 (‘No Smoking’ decision), paragraphs 3.5.1-3.5.3.

¹⁵ This Convention defines “racial discrimination” as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

¹⁶ Article 2(1)(c), ICERD.

¹⁷ Artikel 14 ECHR: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”

- 5.12. The same applies to the claimants' appeal to Article 2, Fourth Protocol, ECHR: freedom of movement. MSM checks do not inherently violate this freedom, but the way in which the MSM checks are currently being conducted does violate Article 2, Fourth Protocol, ECHR.

Schengen Borders Code

- 5.13. The Schengen Borders Code also contains a ban on discrimination, specifically the ban on discrimination in Article 7 of the Schengen Borders Code.¹⁸ Given that the application of the Schengen Borders Code concerns powers under EU law, the ban on discrimination laid down in Article 21 of the Charter applies by virtue of Article 4 of the Schengen Borders Code.¹⁹

Race Equality Directive (Directive 2000/43/EC)

- 5.14. The State has argued that the Race Equality Directive only covers discrimination based on race or ethnic origin, not nationality. However, this argument fails, because the claimants are not accusing the State of making a distinction based on nationality, but rather one on ethnicity. As should be clear, the selection decisions are not made on the basis of nationality, but on the basis of factors such as the person's physical appearance.
- 5.15. The State further argues that the Directive has no direct effect, because it was implemented into 'equal treatment legislation'. This argument cannot help the State's case. Directives have a 'vertical effect', meaning that private individuals, such as the claimants, may appeal to such a directive with respect to the State if the State has not implemented the Directive into national law appropriately.²⁰
- 5.16. The question that remains is, what exactly does the Directive entail? The claimants and the State agree that the Directive pertains to the social domain, but they disagree on how broadly that should be interpreted. On this point, the claimants refer to paragraphs 210-218 of the summons.

The Dutch Constitution

¹⁸ Article 7(2) of the Schengen Borders Code reads: "While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

¹⁹ Article 21(1) of the Charter reads: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

²⁰ See, for example, CJEU 26 February 1986, ECLI:EU:C:1986:84 (*Marshall*).

5.17. Finally, by using ethnicity in risk profiles and selection decisions in MSM checks, the State is violating the ban on discrimination laid down in Article 1 of the Dutch Constitution.

5.18. On this point the National Ombudsman has recently noted that:

“Ethnic profiling is a form of discrimination, and therefore in violation of Article 1 of the Constitution. The government treats someone differently from others just because of who he is. If the government acts in this way, it violates the fundamental rights of that citizen.”²¹

5.19. Reduced to its essence, this is what discrimination is. When a border police officer uses ethnicity in his selection decision, the State is discriminating against people on the basis of their appearance. This is, fundamentally, the very definition of discrimination.

6. Does it occur only rarely? Does that matter?

6.1. Finally, in its Statement of Defence, the State argues that the claimants have not asserted sufficiently, and not sufficiently specifically, that the State engages in the practice of discrimination. According to the State, this entire case is based *“on only two incidents in the air travel sector”*.²² This defence is, however, untenable.

6.2. First, the State has consistently taken the position, including in these proceedings, that it *is permitted to* use ethnicity in selection decisions.²³ It should then come as no surprise that in practice, what the State finds permissible actually happens, specifically: distinctions being made based on ethnicity.

6.3. Second, the claimants have appealed to a significant body of academic research on the MSM checks in actual practice. In the study conducted by Van der Woude et al., officers of the RNM were observed by three researchers over a period of sixteen months, for a total of 800 man-hours, and interviews were conducted with both officers and selectees.²⁴ This study confirmed that selection by ethnicity is happening, which is not at all surprising given the position of the State.

²¹ Exhibit 85, p. 12 (https://www.nationaleombudsman.nl/system/files/bijlage/Verkleurde%20Beelden-%20klachtbehandeling%20etnisch%20profileren%20DEF_1.pdf)

²² Statement of Defence, sections 9.2, 9.5.

²³ Summons, sections 81-84 and Statement of Defence, section 1.5.

²⁴ Exhibit 86, p. 27-48.

- 6.4. Third, Amnesty International, RADAR and Controle Alt Delete spoke to dozens of citizens who indicated that they have been discriminated against by ethnic profiling at the border.
- 6.5. Fourth, it is likely that ethnic profiling happens in the course of the MSM checks, because this also happens at other governmental institutions, such as the police and the tax authorities. On 30 March 2021, the National Ombudsman published a report on ethnic profiling.²⁵ The report states that figures are incomplete, but:
- “What is clear is that ethnic profiling does take place in the Netherlands. We know this from European figures, but also from research in the Netherlands and because the police themselves admit it (and condemn it). In addition, many people share their experiences: on social media, in documentaries such as ‘Verdacht’, and in the form of complaints. Discrimination and ethnic profiling are important themes in society. [...] In the past year, we have seen that this theme is also alive and well in the Netherlands. The Tax Administration’s benefits scandal, football players who explicitly spoke out against racism, and the Black Lives Matter movement are examples of this.”²⁶*
- 6.6. Fifth, the claimants have appealed to the experiences (and complaints, which were declared well-founded) of [Claimant 1] and [Claimant 2]. Their experiences illustrate that ethnic profiling is happening, the impact it had on them, and that these are in no way isolated incidents.
- 6.7. Against this the State argued that the RNM receives “hardly any” complaints concerning discrimination due to skin colour, as compared to the hundreds of thousands of arrests, and presented figures to substantiate this.²⁷ These figures represent the degree to which complaints concerning discrimination are brought to the RNM, but do not represent the degree to which discrimination occurs. There is a vast difference between the two, because the majority of persons confronted with ethnic profiling never submit a complaint at all, as the National Ombudsman reports:

²⁵ Exhibit 85.

²⁶ Exhibit 85, p. 13.

²⁷ Statement of Defence, section 1.4 and footnote 4.

“The vast majority of citizens with experiences of ethnic profiling do not file a complaint about it. The main reason for this is that they think complaining is pointless anyway.”²⁸

6.8. But even if discrimination in the course of MSM checks occurs ‘only occasionally’, that is no justification for a policy that permits discrimination. Every instance of discrimination is one too many.

7. Some comments on the claims

7.1. In these proceedings, the claimants are seeking a declaratory judgment that the inclusion of ethnicity in risk profiles and selection decisions when performing MSM checks is in violation of the ban on discrimination. Additionally, the claimants are seeking a prohibition on the State’s inclusion of ethnicity in risk profiles and selection decisions. Finally, the claimants ask this court to order the State to ensure that no discrimination takes place in the performance of MSM checks.

7.2. These claims on the part of the claimants are aimed at putting an end to ethnic profiling by the RNM: not only in the air travel segment, but also in other segments. The fact that the RNM may base its selection decisions for all segments (even in part) on ethnicity makes ethnic profiling by the RNM possible in all segments and promotes ethnic profiling.

7.3. The State has argued that a prohibition as sought would go too far, and in this regard pointed to cases in which selection on the basis of ethnicity does not occur – for example, when all passengers in a certain train car or bus are checked.²⁹ But the claims of the claimants pertain not to any such cases, but only to cases in which ethnicity is used, and do not affect the MSM checks in which ethnicity is not a factor. As such, in the cases in which the State does not use ethnicity in the performance of the MSM, the State will not suffer any impediment from the claims.

7.4. Naturally, the RNM’s statement that it has taken steps in recent years and on an ongoing basis to address the risks of discrimination is viewed as a positive development by the claimants. That does not, however, mean that the claims should not be awarded. The examples show that prohibited discrimination still does occur in practice despite these measures, and that the policy of the State, in which ethnicity is permitted to be an element in the performance of MSM

²⁸ Exhibit 85, p. 32.

²⁹ Statement of Defence, sections 9.3-9.4.

checks, encourages discrimination. The aforementioned claims formulated in general and absolute terms are intended to put an end to this.

8. Conclusion

- 8.1. In this matter, we are talking about a major societal and institutional problem. We are talking about ethnic profiling, discrimination and racism.
- 8.2. The claimants do not assume that the RNM employees doing their jobs every day are racists. Surely these employees are not intending to discriminate.
- 8.3. But it is not about the intention; what matters is the effect. The effect of ethnic profiling is hurtful, discriminatory and harmful to society.
- 8.4. It gives people the feeling that they do not belong; that they cannot be, and will never be, seen as full members of society.
- 8.5. The claimants understand that this lawsuit will not enable them to put an end to institutional racism, or even to ethnic profiling. This is not what they are seeking from the court's decision.
- 8.6. They are seeking a much smaller, but logical step: a determination that ethnicity is no longer a permissible element of risk profiles and selection decisions.
- 8.7. The use of ethnicity is ethnic profiling, and consequently discrimination. As long as the use of ethnicity as an element in risk profiles and selection decisions is still permitted, the door to ethnic profiling and discrimination remains wide open.
- 8.8. It is in the interests of the claimants, of all non-white people crossing the border, of society as a whole, and of the RNM employees that this door be shut.
- 8.9. That is what the claimants are asking this court to do. Close the door, draw a line: determine that ethnicity can no longer be a permissible element of risk profiles and selection decisions.