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Equality and human rights: nothing but trouble?



Liber amicorum Titia Loenen

SIM special 38

Edited by
Marjolein van den Brink
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Utrecht, 2015

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Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt (eds.)

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Born here¹

Revocation and the automatic loss of Dutch nationality in case of terrorist activities

Betty de Hart and Ashley Terlouw

1. Introduction

On August 30, 2013, the Dutch State Secretary for Security and Justice, Fred Teeven (representing the conservative-liberal VVD (the People's Party for Freedom and Democracy)), submitted a Bill to amend the Dutch Nationality Act (DNA).² The aim of this Bill is to allow the withdrawal and automatic loss of Dutch nationality for people who participate in a terrorist organisation or who undertake activities to prepare a terrorist crime. The loss of Dutch nationality is only possible if it does not result in statelessness: thus, the Bill only affects those who possess dual or multiple nationality.³ In this contribution, we first take a closer look at the content of the Bill. Secondly, we will put it in a historical perspective. The government has argued that the loss of nationality in cases of foreign military service has always been central in Dutch nationality law. However, our historical overview reflects a more complicated and nuanced picture. Thirdly, we will address some issues related to equal treatment. In the past, the loss of Dutch

1 The title of this contribution refers to the 'born-here selfies with a Dutch passport' posted by the actor Nasrdin Dchar and the comedian/performer Najib Amhali, as a reaction to the provocative speech that the politician Geert Wilders delivered on the evening of the election in 2014 in which he led a crowd of PVV (Party for Freedom) voters in chanting 'fewer, fewer, fewer' (Moroccans). The selfies were quickly followed by many other born-here selfies by Moroccan Dutch people holding their Dutch passports. On 18 December 2014 the Public Prosecution Service announced that it intends to instigate proceedings against Wilders for inciting racial hatred.

2 The text of the Bill and the Explanatory Memorandum is available at: www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2013/08/30/wijziging-rijkswet-op-het-nederlandschap.html. It cannot be found at the Official Documents site for legislation and parliamentary documents: overheid.nl.

3 In this contribution we will use the term dual nationality also for situations of multiple nationality.

nationality due to, for example, foreign military service often resulted in statelessness, as those in question had no other nationality. At the time, there was not, as yet, any international convention obliging states to prevent statelessness.⁴ Consequently, the loss or withdrawal of nationality now only applies to those who have dual nationality. As we will argue, the Bill would create some new problems and it raises new questions such as: does the Bill violate the prohibition of discrimination? Those with dual nationality – one of which is Dutch nationality – and those with only Dutch nationality are treated differently. Finally, we will discuss three other legal issues: the loss of Dutch nationality by minors, proof of a second nationality and the residence status of those who have lost their Dutch nationality.

2. The 2013 bill on the automatic loss of Dutch nationality for jihadists

The Bill was an extremely quick response to a parliamentary motion by the conservative-liberal (VVD) MP Klaas Dijkhoff which was a reaction to Dutch jihadists fighting ‘against freedom and democracy’ contrary to Dutch values, as the motion puts it.⁵

Contrary to the 2010 Act (see below, section 3), in the 2013 Bill the loss of Dutch nationality is automatic. According to the explanatory memorandum accompanying the Bill, there has to be an irrevocable conviction for participation in a terrorist organization or aiding in (the preparation of) a terrorist crime (Articles 140a and 134a Criminal Code). The rather short, three-page clarification for the bill very briefly sets out the reasons for the amendment, explaining that there are reasons to reconsider the views on the loss of Dutch nationality in cases of involvement in paramilitary or terrorist organizations, because of ‘changing social opinions’. It is not explained what these social opinions are and how they have changed. In fact, the reference to changing ‘social opinions’ about terrorism is the only justification provided for the proposed amendment. The explanatory memorandum also stresses the need for strict requirements of proof of participation in a terrorist organization, because of the far-reaching consequences of a loss of Dutch

4 The United Nations Convention on the Prevention of Statelessness was drafted in 1961 (*Tractatenblad* 1957,124) and ratified by the Netherlands in 1984 (*Staatsblad* 19 December 1984, 627).

5 *Second Chamber*, 2012-2013, 29 754, no. 224.

nationality. That is why an irrevocable conviction is required. As far as enforcement is concerned, the government is optimistic that, although it will be difficult to collect the required evidence, the Public Prosecutor, the police and the AIVD (the General Intelligence and Security Service) will do everything within their power to collect the necessary proof.⁶

The Bill allows for an automatic loss of Dutch nationality in the case of terrorist acts not only committed after the entry into force of the Bill, but also when there has been an irrevocable conviction for crimes committed *before* its entry into force (article II). After its publication on the internet on August 30, 2013, nothing more was heard concerning this Bill. On July 11, 2014, the Dutch Government (*Rijksministerraad*) agreed to send the Bill to the Council of State (*Raad van State*) for advice, after which it will be sent to Parliament. MPs have already inquired about the Bill on several occasions after new incidents of Dutch jihadists travelling to Iraq with the intention of fighting for ISIS.⁷

3. Historical overview

As stated above, in the explanatory memorandum accompanying the Bill, the government argued that the loss of Dutch nationality in the case of foreign military service has always been part of Dutch nationality law. We submit that this is only partly correct.

3.1. *The loss of Dutch nationality in the case of military service*

The first DNA of 1892 indeed laid down an automatic loss of nationality if someone had served in a foreign army without permission from the Dutch authorities.⁸ Even before 1892, an automatic loss occurred in the case of foreign military service. This resulted in a mass loss of Dutch nationality in times of war, but sometimes also in individual cases when men, who wanted

6 *Second Chamber*, 2012-2013, 29 754, no. 224.

7 *Second Chamber*, 2013-2014, 33 852 (R2023), no. 5, at p. 3.

8 Art. 7 section 4 DNA 1892; military service and public service.

to serve in a foreign army, did not ask permission beforehand.⁹ Men with dual nationality had the possibility, due to international conventions, to choose in which of their countries of nationality they wanted to carry out their military service.¹⁰ In this contribution, we will only look at the mass loss of Dutch nationality.

An interesting case in the context of this contribution is that of the approximately 3,000 Dutchmen who fought for the Pope (the Zouaaf soldiers) in 1860, after being recruited by Catholic priests. Upon their return to the Netherlands, they were declared to be stateless persons, as were their children born after 1892.¹¹ It took until 1947 before the Minister of Justice determined that those who had served before they had reached the age of majority had not lost their Dutch nationality. This applied to most of the men involved, but by 1947 all of the Zouaaf soldiers had already died.¹²

A loss of nationality did not occur when a Dutch national was obliged to serve in a foreign army, as this was not on a voluntary basis. This concerned, for example, Dutchmen in the United States during the First World War. Article 7 section 4 DNA 1892 resulted in the automatic loss of nationality for several hundred men who had fought in the Spanish Civil War (1936-1939) against Franco's nationalist army. The Dutch government tried to prevent recruitment for this war, for example by stamping Dutch passports with 'not valid for Spain'. Around 600 Dutchmen fighting against Franco became stateless. As a result of the gender inequality that was central to Dutch

9 Occasionally, the Dutch government gave permission in individual cases. During the nineteenth and early twentieth century especially the sons of the nobility served with permission in foreign armies, e.g. the Hon. J.M. Teixiera de Mattos, who served in a Prussian regiment from 1913 to 1918. Regularly, the Dutch government gave permission in individual cases. KRAMERS 1996.

10 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, Strasbourg, 6.V.1963, arts 5 and 6. European Convention on Nationality, Article 21.

11 Until 1892, the Netherlands recognised *ius soli*, meaning that children born of foreign parents automatically became Dutch nationals upon their birth on Dutch territory. Hence, before 1892, a loss of nationality by the father did not affect the child. After 1892, *ius sanguinis a patre* was introduced, making the nationality of a child dependent on the father.

12 KRAMERS 1996.

nationality law, the loss of nationality for men also affected their wives and children, who automatically also lost their Dutch nationality.¹³

During the Second World War several thousand men who served in the German army, but also those who fought with the Allied Forces (British, Canadian, American) against the Nazis, should have lost their Dutch nationality according to the DNA 1892. However, in 1944 the Dutch government in exile in London decided that all Dutchmen who had served with the Allies after 9 May 1940 retained their Dutch nationality.¹⁴

After the Second World War, the question was what to do with those who had not served with the Allies after 9 May 1940, but with the Axis Forces. In 1951, a government Bill aimed to automatically reinstate Dutch nationality, and without individual scrutiny, on those who had served in the German army as well as those who had fought against Franco in the Spanish Civil War. This Bill met with opposition from both the Second Chamber and society at large, as the wounds of the War were still too fresh. An amendment aimed at making individual naturalisation requests compulsory was adopted. This Act of April 1, 1953, reinstated Dutch nationality on 11,000 persons upon individual naturalisation requests, until this was withdrawn in 1977. Only a small number of requests were rejected.¹⁵

As for the former Spanish combatants (*oud-Spanjestrijders*), mainly communists, some of them had also fought against the Nazis in the Second World War and they consequently regained their Dutch nationality. But most of them were still stateless at the end of the Second World War. Because of the communists' contribution to resistance against the German occupation, the Social Democrats in the government wanted to reinstate their Dutch nationality unconditionally and automatically, but the Catholic Party (KVP) preferred individual naturalisation. As the discussion dragged on and the international political situation changed (the communist takeover in Czechoslovakia in 1948 and the Dutch Communist Party that

13 This was the case until 1936, when women whose husband became stateless during the marriage no longer lost their Dutch nationality with him. However, if a woman married a man who was already stateless, she also became stateless. DE HART 2006.

14 Decree of 4 October 1944, *Staatsblad* 1944, no. E 127.

15 See further HEIJS 1995, at p. 114.

remained loyal to Moscow), their naturalisation requests stood no chance of success, and they were excluded from the 1953 Act. It took until 1964 before the former Spanish combatants could apply for Dutch nationality. Their political conviction was no longer held against them. Thus, although it took several decades, most of those who had lost their Dutch nationality because of foreign military service, whether with enemy forces or not, regained their original nationality. The government thereby confirmed that they were part of Dutch society and belonged here.

However, the automatic loss of Dutch nationality in case of foreign service remained on the books until it was repealed by the entry into force of the Act of 1984 on January 1, 1985. The government argued that the Dutch authorities often had no information as to foreign military service. This meant that the Dutch Nationality Act resulted in the automatic loss of Dutch nationality sometimes being established years after the relevant facts had occurred.¹⁶ The alternative of replacing an automatic loss of nationality with the withdrawal of nationality in individual cases was considered to place too much of a burden on the administration. The government also pointed at the history of the loss of nationality when serving with enemy forces – the German army during the Second World War – that had been rectified by reinstating Dutch nationality on large groups of people by the 1953 law mentioned earlier.¹⁷

Soon after 1985, a discussion ensued about the consequences of abolishing this law, when it turned out that about one third of the South African army consisted of European nationals who had fought for the *Apartheid* regime, including Dutch nationals who possessed South African nationality. After pleas to make the loss of Dutch nationality once again possible in the case of foreign military service in certain countries with undesirable regimes, the government eventually decided against this. It argued that the acquisition of South African nationality and subsequent military service was not voluntary, and feared unequal treatment for those who had to serve and those who did

16 DE GROOT 2008.

17 Rijkswet op het Nederlanderschap, explanatory memorandum, *Second Chamber* 1981, 16947 (R 1181), nos. 3-4, p. 4.

not (depending on their gender or age), as well as unequal treatment for dual nationals.¹⁸

The discussion emerged again during the war in the former Yugoslavia, when it turned out that several Dutchmen had fought in this war as mercenaries in the Croatian army. This time, however, it led to an amendment to the law, after a motion by certain Members of Parliament (from D66 (the Democrats 66 party) and the VVD) was accepted.¹⁹ It was argued that these combatants did not 'feel' Dutch, rather than that they did not fulfil their obligations as a Dutch citizen or constituted a danger to Dutch society.²⁰ An explicit choice was made, however, not to include participation in paramilitary or guerrilla groups.²¹ According to Article 15 section 1 sub. e DNA 2000, still in force today, an automatic loss of Dutch nationality may only occur if the person voluntarily serving in a foreign army is involved in combat operations against the Netherlands or allies of the Netherlands, and only if it does not result in statelessness.

3.2. *Withdrawal of Dutch nationality in the case of terrorism*

Since 2010, an irrevocable conviction for certain terrorist acts is a ground for withdrawing someone's nationality according to the Dutch Nationality Act. An analysis of the arguments and discussions on this Bill may be of assistance in better understanding the arguments and issues at stake in the recently proposed Bill.

The intention to allow for the withdrawal of nationality in cases of terrorism was announced for the first time in the Memorandum *Multiple Nationality and Integration* by Minister Rita Verdonk (VVD) in August 2004, but it gained new momentum after the murder of the Dutch filmmaker Theo van Gogh in November of the same year. A Bill of 21 June 2005 allowed

18 See further DE HART 2012, at pp. 135-138.

19 *Second Chamber* 1999-2000, 25 891, 17 February 2000, pp. 50-3692. The Dutch newspaper *Algemeen Dagblad*, 19 May 2001, 'Opgejaagd op de Balkan', mentioned 15 Dutchmen who had joined the Croatian army as mercenaries at the beginning of the 1990s.

20 In the words of the progressive liberal D66 party: When such a person is willing to fight against the Netherlands, he does not feel Dutch in the sense that he is not unwilling to fight against the Netherlands. *Second Chamber* 1999-2000, 25 891, 17 February 2000, pp. 50-3692.

21 DE GROOT 2003.

for the withdrawal of Dutch nationality when a person had damaged 'vital interests of the Dutch state' including cases of terrorism. Such a withdrawal would only be possible if the person involved had a second nationality in order to prevent statelessness. According to the government this stipulation was allowed by Article 7 section 1 sub. d of the European Convention on Nationality (ECN) of 1997, and the UN Convention on the Prevention of Statelessness of 1961 (Article 8 par. 3 a ii). The withdrawal of nationality would be allowed both in the case of the enactment and the preparation of these acts.²²

The Second Chamber resisted the inclusion of criminal acts that could be a reason to withdraw nationality by means of an Order in Council (*algemene maatregel van bestuur*, AMvB) and not by means of a formal act, fearing that the number of criminal acts that could potentially result in a withdrawal could be too easily extended and this would therefore violate the principle of legal certainty.

After a change of government in 2007, this part of the Bill was amended and a limited number of criminal acts was included in the Dutch Nationality Act. The list of criminal acts included not only terrorist acts, but also other criminal acts that violate state interests. In all cases, there had to be an irrevocable conviction and a threat to public order. The criminal acts in question were those mentioned in Title I to IV Second Book of the Dutch Criminal Code, (Articles 92-130a), that include acts against the safety of the state, against the King, against the heads of befriended states, terrorist acts and recruitment for foreign armies; all the acts mentioned are acts of violence. In response to objections by the Second Chamber, the government limited the list of criminal acts to those where a prison could be sentenced to eight years imprisonment or more.

Both the Second Chamber and the Dutch Senate doubted its effectiveness, thereby questioning whether the person who had lost his or her Dutch nationality could actually be expelled, as they considered it unlikely that the country of the other nationality would welcome the terrorist with open

22 *Second Chamber* 2004-2005, 30 166, no. 3, pp. 7-8.

arms. However, the issue of the residence status in immigration law of those who saw their nationality revoked was not raised.

One of the major issues in the political debates was that of equal treatment. A withdrawal of nationality would be made possible both for naturalized Dutch nationals and for persons born with Dutch nationality. The Social Democrats questioned the withdrawal of nationality from those Dutch nationals born with Dutch nationality. In their view, this concerned persons who are on all accounts effectively Dutch, with hardly any links to the country of their other nationality. The government however argued that the withdrawal of Dutch nationality from both groups of Dutch nationals is an expression of equal treatment. Whether someone possesses another nationality voluntarily – by choice – or not was not considered relevant because: ‘In cases where the government decides to withdraw nationality, the irrevocably convicted person has demonstrated that he has renounced his bond with the Kingdom and has taken the risk of losing his Dutch nationality into account.’²³

In response to questions about the differential treatment of single and dual nationals, the government argued that the difference was justified by the interests of the prevention of statelessness, as required by the European Convention on Nationality (Art. 7 section 3) and the UN Convention for the Reduction of Statelessness (Article 8 par. 3 a ii). The question is whether this is a sufficient justification for the difference in treatment, as this argument makes clear why persons with only Dutch nationality cannot lose Dutch nationality, but not why persons with dual nationality should. Especially in cases where people cannot give up their second nationality, it is not their behaviour, but the arbitrariness of foreign nationality law that determines whether or not someone loses Dutch nationality. We will return to this issue below.

To our knowledge, the introduction of the possibility to withdraw Dutch nationality allowed in the DNA in 2010 has so far not been used. In the one case where it might have been used – in the case of the murderer of Theo van Gogh – this did not happen, because a withdrawal is not allowed for terrorist acts committed before the coming into force of the Act of 2010,

23 *Second Chamber* 2008-2009, 31 813, no. 6, p. 26.

and Mohammed Bouyeri (the person responsible for van Gogh's murder) had committed his crime several years before.

There are several lessons to be learned from this historical overview. First, it turned out that the automatic loss of Dutch nationality for large numbers of people was subsequently overturned, because the Dutch authorities had to accept that the people concerned were part of Dutch society, regardless of what they had done. Second, it has become clear that concerns about Dutch nationals fighting in foreign countries were always very specific to the historical context. Opinions about what they had done and how to respond (exclusion from or inclusion in society) changed over time, even in the case of Dutch nationals who fought for the Nazis. This was a second reason why Dutch nationality was restored, although the government decision to restore Dutch nationality was sometimes made years or even decades later.

Third, even if the loss of nationality does not result in statelessness, this does not mean that the consequences of the loss of nationality are not questionable, as the debates on the amendment of 2010 concerning discrimination and equal treatment make clear. It is to the issue of equal treatment that we now turn.

4. Equal treatment

If the new Bill would be enacted, the following situation could occur. Two friends decide to become jihadists and travel to Syria. Both of them were born in the Netherlands. One of them has a Moroccan grandfather and thus both Dutch and Moroccan nationality, without the possibility to renounce the latter.²⁴ The other one has single Dutch nationality as his parents and grandparents only have Dutch nationality. According to the Bill the first one would face the loss of his Dutch nationality, while his friend with whom he

24 A child acquires Moroccan nationality at birth if one of the parents is Moroccan (Art. 6 Moroccan Nationality Law), also if the child is born abroad. There is no limitation to passing on Moroccan nationality to following generations. The same holds true for Dutch nationality, which can be passed on to children born abroad without restriction. The difference is that Moroccan nationality cannot be renounced, while Dutch nationality can.

left would not be affected and would retain his Dutch nationality.²⁵ This raises the question whether the Bill violates the principle of non-discrimination. To answer this question, we will address four sub-questions:

- Are people with single and with dual or multiple nationalities equal cases?
- What is the ground of discrimination?
- What is the legal basis for the prohibition of this discrimination?
- Is there a justification for the differential treatment of participants in terrorist organisations with single and dual or multiple nationalities?

4.1. *Equal cases?*

Equal treatment is only required in equal cases. Therefore, it is important to answer the question whether people with single and dual nationality have to be regarded as equal cases in the context of the loss of nationality. If two people have Dutch nationality one must, in our view, in principle speak of equal cases, whether they became Dutch nationals through naturalization or by birth, even if one of them has one or more other nationalities next to Dutch nationality.²⁶ Only if this extra nationality is relevant (that is, if it somehow affects the situation at issue) could it be argued that unequal cases exist. The essence of equal treatment legislation is that differential treatment is only permitted in so far as this is necessary due to a relevant difference. Applied to the Bill that distinguishes between single Dutch nationals and Dutch nationals with multiple nationalities, it seems difficult to argue that the difference is relevant in the case of terrorist acts. The aim of the deprivation of nationality is to prevent people who are a threat to Dutch

25 Raad voor de Rechtspraak (Council for the Judiciary) delivered its advice on the bill on 30 October 2013: 'This advice points at the possible disproportional and/or unfair consequences of the Bill due to unequal treatment in punishment: an insignificant participation in a terrorist organization, for example fund-raising, may lead to much more severe punishment than a terrorist attack if the first act is committed by someone with dual nationality while the other act is committed by someone with only Dutch nationality', available at: www.rechtspraak.nl/Organisatie/Raad-Voor-De-Rechtspraak/Wetgevingsadviesing/Pages/Wetgevingsadvies-2013.aspx.

26 This could be derived by analogy from Art. 5(2) and Art. 17 ECN as both articles state that no distinction should be made between nationality by birth or subsequently acquired. Compare VAN DEN BRINK and TERLOUW 2007. These authors conclude that people who have Dutch nationality are equal cases under Art. 1 of the Dutch Constitution regardless of whether they also have other nationalities. Also compare HOLTMAAT 2007.

security from returning to or remaining part of Dutch society. This aim does not require a differentiation between jihadists with single and those with dual nationality. Possibly a relevant difference could be that a 'jihadist' with single Dutch nationality is more likely to return to the Netherlands than a 'jihadist' who has dual nationality and therefore also another country to go to. However, such a claim must be substantiated, which the drafters of the Bill did not do, or even argued.

The British scholar Prabhat, writing on the deprivation of nationality in the case of terrorism in the British context, raised the question whether dual nationals have proven to be a greater threat to national security than single nationality holders.²⁷ She suggests that as no difference in the threat to national security has so far been established, dual nationals are targeted merely because they *can* be targeted without violating international obligations to prevent statelessness.

The burden of proof that – in this specific context and in these specific cases – the extra nationality is of such relevance that the cases cannot be regarded as equal rests on the party that contends that there is a relevant difference, in this case: the State. The only difference mentioned in the explanatory memorandum accompanying the Bill is that Article 7 of the European Convention on Nationality and Article 8 of the UN Convention for the Reduction of Statelessness prohibit the deprivation of nationality if this results in statelessness. However, the mere fact that the consequences for single and dual nationals will not be the same does not make them unequal cases. Compare, for example, the situation of a dismissal from employment due to an internal reorganisation. Employers are legally prevented from dismissing only those employees who have a partner who can provide for them. The conclusion is that as long as the Dutch Minister of Security and Justice offers no more convincing arguments as to why dual and single nationals are different and why this difference is relevant with regard to the aim of the Bill, one must assume that the cases are equal. And equal cases must be treated equally.

27 PRABHAT 2014, at pp. 18-19.

4.2. *What is the ground of discrimination?*

The unequal treatment of cases that are considered to be equal can be more or less 'suspicious'. Human rights treaties list identity markers, such as race, sex, religion, and often also nationality, which can only be used as a ground for distinctive treatment if there is an objective and reasonable justification for doing so. Identity markers not included in those lists, although they are not necessarily unprotected, since most lists are not exhaustive and include 'other status' (see also below). It depends on the identity marker how strictly a justification for a distinctive treatment is tested.

In this case no difference is made between nationals and non-nationals, but between Dutch nationals, depending on their single or dual nationalities.

It may be argued that although no difference is made between people with different nationalities (in all cases they have Dutch nationality), *nationality* is nevertheless the ground of discrimination which is at stake. After all, having a second nationality apparently makes the difference. There is another reason to state that nationality is central, namely that in fact a distinction is made between 'us', the original Dutch people, and 'them', who are Dutch on paper although they are not really regarded as Dutch but rather as (second or third generation) (Muslim) immigrants. In the discussion about jihadism, terrorism has become linked to Islam and a (second or third generation) immigration background, although not all those going to Syria to fight in fact have such a background. Rephrased in more legal terms, one could claim that discrimination on the ground of single or dual nationality is in fact indirect discrimination²⁸ on the ground of race, as it primarily and mostly affects people who have acquired dual nationality due to migration by themselves, their parents or grandparents. It is settled case law by the Netherlands Institute for Human Rights (NIHR and of its predecessor, the Dutch Equal Treatment Committee, ECT) that discrimination on the ground of nationality may constitute indirect discrimination on the ground

28 Whether direct or indirect discrimination is at stake is important for the justification test required, at least according to the CJEU and the NIHR (we deal with this justification test under the fourth question).

of race.²⁹ The Court of Justice of the European Union (CJEU) has determined in the case of *Vasiliki Nikoloudi* that if a provision (for part-time workers) exclusively affects a protected group (in that case women, because all part-time workers were women) this constituted direct discrimination.³⁰ This means that it can be argued that as the Bill exclusively affects Dutch people who also have another, non-Dutch nationality, this constitutes direct discrimination on the ground of race.

It could also be argued that it is not race but national origin which is the discrimination ground at stake. National origin is not the same as nationality; it resembles ethnic origin. Discrimination on the ground of national or ethnic origin occurs, for example, when people who are Dutch but originally had another nationality, or national minorities within a country (such as the Kurds in Turkey), are treated differently because of that different background. The essence of the prohibition of discrimination on the ground of national origin is that somebody's origin (for example, related to his parents or grandparents) cannot be a legitimate reason for differential treatment. It is clear that people with dual nationality are more likely to have a (partly) non-Dutch national origin than people with single Dutch nationality. After all, whether or not people have dual or multiple nationalities often depends on where they are born and who their parents or grandparents are. Besides, it depends on whether the laws of the country of their other nationality make it possible to renounce the other nationality. Statistics show that dual nationality is in most cases acquired automatically at birth.³¹ It concerns mainly children of mixed parentage or of parents who have dual nationality. This means that dual nationality is often not a free choice for the persons concerned. The Bill therefore indirectly discriminates against people due to their national or ethnic origin.

29 Most recently, NIHR, 27 February 2014, 2014-21. See also ECT 2007-152 with annotation by ДАVIDOVIČ 2008, at p. 353. And see ECT 24 February 2011, 2011-27 for an explanation of the concept of national origin.

30 Case C/196-02, *Vasiliki Nikoloudi v. Organismos Tilepikoinonion Ellados AE*, [2005] ECR I-01789.

31 In 2011, there were 1,195,090 dual citizens in the Netherlands. In the period 1996-2010, about one third of these dual nationalities were acquired at birth. Source: CBS statistics, DE HART 2012, at p. 93.

De Groot refers to this situation as holding their genealogy and the nationality laws of the countries of origin of their parents against them.³² De Groot suggests in his comment on the 2010 Act, which introduces the withdrawal of Dutch nationality in the case of terrorism, that the deprivation of nationality should not be allowed in the case of dual nationals who were born and bred in the Netherlands. We disagree with De Groot, as this would create another inequality, in particular between different categories of Dutch citizens. This is prohibited by Article 5(2) ECN, which reads: ‘Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.’ Furthermore, one should not lose sight of the fact that even if people have acquired Dutch nationality by naturalisation, Dutch nationality may very well be their effective nationality.³³

In short, we conclude that it is not so easy to argue that nationality is the ground for discrimination which is at stake, but at least it can be said that the Bill (indirectly) discriminates between Dutch people who do and those who do not have a certain ethnic or migration background.

4.3. The legal basis for the prohibition of (indirect) discrimination based on nationality and national or ethnic origin

Neither the equal treatment principles contained in Article 14 of the European Convention on Human Rights (ECHR) and Article 1 of Protocol XII to the ECHR, nor Article 26 of the International Covenant on Civil and Political Rights (ICCPR), nor Article 1 of the Dutch Constitution explicitly prohibit discrimination on the ground of nationality. Nevertheless, discrimination on the ground of nationality is understood to fall within the scope of these provisions, as the grounds of discrimination are not limited to those mentioned in the provisions. The provisions mention that discrimination based ‘on any other status’ is also prohibited.

32 DE GROOT 2005.

33 Effective nationality is the nationality of the country with which a person with more than one nationality has the strongest social ties.

On the other hand, Article 21 (2) of the Charter of the EU and Article 18 of the Treaty on the Functioning of the EU (TFEU) explicitly prohibit discrimination on the ground of nationality. The latter article states: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.’

Moreover, Article 17 (1) ECN states: ‘Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party’. Apparently the ECN regards nationals of a State Party with dual and single nationality as equal cases.

Article 1(2) of the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD) states: ‘This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.’ However, Recommendation 30 of the CERD, paragraph 4, reads: ‘Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.’ Also, Article 5 (1) of the 1997 ECN prohibits any practice which amounts to discrimination on the grounds of (among others) race, national or ethnic origin.³⁴

4.4. Is this discrimination justifiable?

The two European Courts use different standards to judge whether discrimination can be justified. Different from the CJEU, the ECtHR does not clearly distinguish between the requirements for the justification

³⁴ See, however, the explanatory report to the ECN on Art. 5, which not only explains that the terms national and ethnic origin are based on Art. 1 CERD but also explicitly states that State Parties in some situations can give more favorable treatment to nationals of other States. Available at: <http://eudo-citizenship.eu/InternationalDB/docs/ECN%20Explanatory%20Report.pdf>.

of direct and indirect discrimination.³⁵ Discrimination, according to the ECHR, can in principle be justified both in the case of direct and indirect discrimination and the burden on the discriminating State depends on the ground at stake. In case of discrimination on the ground of nationality it requires very weighty reasons.³⁶

The EU gender equality and non-discrimination legislation makes a difference between direct and indirect discrimination. Direct discrimination can only be justified in specific cases mentioned in the EU legislation, which depend on the ground at stake. Indirect discrimination can be objectively justified if the aim of a measure is legitimate and the means of attaining that aim are effective and necessary.³⁷

The Bill concerns EU citizens, namely Dutch nationals.³⁸ Therefore we take the CJEU test as a starting point. This justification test requires at least a legitimate aim, effectiveness – that is a clear connection between the threat and the objective – and a fair balance between the interests which are served with the discriminatory measure and the interest of the persons who are discriminated against. Let us take a look at these requirements one by one.

First, the aim of the Bill. As already explained, the official aim of the Bill is to protect the interests of Dutch society against criminal acts by terrorists (jihadists), which might very well be directed at Dutch society.³⁹ At the time

35 The ECHR does use the concept of indirect discrimination but until now it is not very clear what this means for the justifications it requires; it seems that the ECHR mainly uses the concept of indirect discrimination to clarify that even if discrimination is not intended but is the result of a neutral measure, discrimination can be at issue. See TERLOUW 2013, at p. 159.

36 ECtHR, *Gaygusuz v. Austria*, 16 September 1996 (Appl.no. 17371/90): ‘*The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention*’. See also ECtHR, *Genovese v. Malta*, 11 October 2011 (Appl. no. 53124/09), and recently: ECtHR, *Dhabbi v. Italy*, 8 April 2014 (Appl.no. 17120/09). See also MANTU 2014, at pp. 90-92.

37 For an elaborate description of the concepts of direct and indirect discrimination in EU law, see ELLIS and WATSON 2012, at pp. 148-156 and pp. 171-174.

38 This test of EU law only applies if EU citizens are concerned, not if a distinction is made between EU citizens and third country nationals.

39 *Second Chamber*, 2012-2013, 29 754, no. 224.

of writing, some 130 Dutch jihadists have left for Syria.⁴⁰ For some of them, Dutch nationality cannot be revoked as they would then become stateless as a result, while others can be expected never to return to the Netherlands, either because they have been killed in action or for other reasons.⁴¹ Nevertheless, some of them do return; according to the AIVD, up to now some 30 Dutch 'jihadists' have returned.⁴²

However, the exact dangers of returning jihadists for Dutch society are not specified in the explanatory memorandum accompanying the Bill. For example, it is unclear whether and why radical jihadists would be less dangerous if they are deprived of their Dutch nationality. The assumption may be that they are less likely to return to the Netherlands. However, entering the Netherlands with another passport is not very difficult if their second nationality is the nationality of an EU Member State or if they travel from a visa-free country. Besides, it can be questioned whether it is legitimate and in accordance with the mutual trust between states to limit the danger for the Netherlands by burdening other countries with Dutch extremists who have been born and bred in the Netherlands under the responsibility of the Dutch government and who happen to have another nationality but often no factual ties with the country of this other nationality.

With regard to the requirement that the means must be suitable to attain the desired aim, the question arises how effective the Bill is if it can only be applied to part of the target group. Is it known how many of the jihadists have dual nationality and will the deprivation of their nationality really diminish the threat for Dutch society? Or is it, as Jensma has argued, a case of 'panic and nonsense rulemaking, which gives a false feeling of safety'?⁴³ In relation to effectiveness, depriving only dual nationals of their Dutch nationality raises several other questions. We have already touched upon them above: are dual nationals more dangerous than single nationals and

40 Some 130 jihadists have left the Netherlands, of whom some thirty have returned. NATIONAAL COÖRDINATOR TERRORISME BESTRIJDING EN VEILIGHEID 2014.

41 At the time of writing, fourteen Dutch jihadists had died; NATIONAAL COÖRDINATOR TERRORISME BESTRIJDING EN VEILIGHEID 2014.

42 NATIONAAL COÖRDINATOR TERRORISME BESTRIJDING EN VEILIGHEID 2014.

43 JENSMa 2014.

what exactly are the threats that we are talking about? Is the Bill aimed at the threat of terrorist attacks in the Netherlands or the threat of indoctrinating other youngsters with a fascination for extremism? In both cases one does not need to have Dutch or dual nationality to commit terrorist attacks, or to have a deleterious influence on others. And, as Prabhat convincingly argues: ‘Differential deprivation adds to this perception of unequal treatment, lack of belonging and potentially leads to more extremism.’⁴⁴ In judging effectiveness, such possible side-effects should be taken into account.

Finally, the fair balance of interests. This part of the justification test consists of the proportionality requirement, that is whether the means are suitable to attain the aim. Although the Bill lacks a clearly stated aim, we assume that it is to prevent (further) terrorist acts. When weighing the proportionality of a measure, it should be taken into account whether there are alternatives to reach the same aim without discrimination. Such possible alternative measures may include preventive measures or having the persons involved serve their sentence in the Netherlands where they can follow social rehabilitation courses under Dutch responsibility. In this context, it is interesting to point at the practice in Aarhus, Denmark, where returning jihadists are offered medical and psychological aid, as well as support in finding a job or embarking on a study. The aim is to reintegrate them and prevent further terrorist acts.⁴⁵

The proportionality requirement is the most difficult part of the objective justification test as it requires a balancing of unequal interests and because it is difficult to establish which interests have to be proportional with what other interests. The proportionality requirement is, on the one hand, about the interests which are served with the discriminatory measure and, on the other, about the interest of the victims of the discriminatory measure. The aim of the measure is, as said before, national safety: protecting Dutch society, in this case against terrorist attacks and/or the negative influence of radicalisation. It is therefore important to establish in each individual case how dangerous someone is for Dutch society. Although it may be assumed

44 PRABHAT 2014, at pp. 4-5.

45 VAN LANGENDONCK 2014.

that an individual assessment will already have been carried out during the criminal procedure, another kind of balancing of the individual interests will be necessary in case Dutch nationality is withdrawn.⁴⁶ The consequences for the person in question may be very harsh. The argument is that these consequences will be less harsh for persons who have dual or multiple nationalities because they have their other nationality or nationalities to rely on. If having dual nationality makes one more prone to losing Dutch nationality, then multiple nationality becomes less of an advantage and more of a liability. If the person in question has been born and bred in the Netherlands, the loss of his/her Dutch nationality will often result in the loss of the only effective nationality or even *de facto* statelessness.⁴⁷

5. Other legal issues

The Bill is not only bound to violate the principle of non-discrimination, but entails other legal issues. We discuss two issues of nationality law: the loss of nationality by minors and proof of the second nationality, and then we will turn to the residence status of persons whose nationality has been lost or withdrawn.

An automatic loss of nationality on the grounds discussed, introduced by the amendment to Article 15 DNA, that only applies to persons older than 18, is therefore only possible for persons who have reached the age of majority. Media reports suggest that a significant number of those persons going to Iraq or Syria are minors. For those minors, the automatic loss of nationality will not apply according to Art. 15 DNA.⁴⁸ Dutch nationality can only be lost by a minor in the case of a limited number of grounds under Art. 16 DNA 2000, and Art. 14 section 4 DNA.

Another question is how it has to be determined that a person has another nationality. This is less obvious than it seems. Until January 2014, the

46 Compare the Rottman case in which the CJEU requires a proportionality test in case of the loss of Union citizenship. Case C-135/08, *Janco Rottmann v. Freistaat Bayern*, [2010] ECR I-01449, and about this case MANTU 2014, at p. 126 ff.

47 Compare the *Nottebohm Case (Liechtenstein v. Guatemala)*, second phase, Judgment, 6 April 1955, p. 4 in which it was determined that a national must prove a meaningful connection with the State of his nationality to be entitled to protection by this State.

48 GROEN 2014.

possession of a second nationality was registered in the Dutch civil registry. This basically occurred in two ways: on the basis of a document provided by foreign authorities stating the foreign nationality or, when such a document is lacking, based on the civil registrar's interpretation of foreign nationality law (Art. 43 sections 1 and 2 *Wet Gemeentelijke Basisadministratie Persoonsgegevens* (Municipal Database (Personal Files) Act). However, the registering of a second nationality is not the same as determining or granting a nationality, as this is the exclusive competence of a foreign state.⁴⁹ This registration without foreign documents often occurred in cases where a person possesses a foreign nationality by birth alongside Dutch nationality. For several reasons, the nationality registered in the Dutch civil registry does not always reflect reality. First of all, the Dutch authorities have had to interpret foreign nationality law and this is not always easy and has not always been done correctly. Secondly, the foreign nationality law in the books can sometimes differ from its implementation in practice. Hence, the registered nationality is sometimes more a reflection of a presumption than legal reality.⁵⁰

After protests by individual parents opposing the registration of the dual nationality of their children, and after years of political discussion, the Dutch government decided to abolish the registration of a second nationality completely. Data on second nationality that were registered in the old Municipal Database have not been transferred to the new Municipal Population Register introduced in 2014.⁵¹ This means that the Dutch authorities cannot rely on a registration in the civil registry and have to establish for themselves whether a person has a second nationality or not. Hence, the burden of proof concerning a second nationality should rest with the Dutch authorities and the person involved should be able to present counter-evidence.

A final question concerns the residence status of a person who has lost his/her Dutch nationality. The implicit assumption concerning the Bill is that persons who have had their nationality revoked or automatically lost can

49 KULK forthcoming.

50 KULK and DE HART 2011.

51 KULK forthcoming.

subsequently be expelled to the country of their other nationality. But is this really the case? What is the residence status of the persons involved?

Most of the people targeted by the Bill were born in the Netherlands or came to the Netherlands at a very young age. In the past, immigrants who had been living in the Netherlands for a considerable period of time were entitled to a permanent residence permit, that could not easily be withdrawn, and after twenty years of legal residence expulsion was no longer allowed. However, this protection has recently been lessened.⁵²

Nevertheless, after Dutch nationality has been revoked or lost, the persons concerned may still have, under certain circumstances, an entitlement to a permanent residence permit. In the case of youngsters born in the Netherlands or who came to the Netherlands before the age of four years, a permanent residence permit can only be refused in case of a conviction and a subsequent custodial sentence of more than 60 months for a drug offence or if the person in question is a threat to national security (Art. 21 section 4 Aliens Act). When there has been residence for ten years or more – residence as a Dutch national counts as residence – the withdrawal or refusal of a permanent residence permit is only possible when a crime has been committed for which a custodial sentence of six years or more can be imposed (Art. 3.86 section 10 *Vreemdelingenbesluit* (Vb); Immigration Decree). For a conviction under Articles 140a and 134 Criminal Code a custodial sentence of eight years or more may be imposed. The IND (Immigration and Naturalisation Service) may also grant a residence permit on humanitarian non-temporary grounds to former Dutch persons who were born and bred in the Netherlands (Art. 3.51 section 1 sub. d Vb) and to former Dutch persons who were born abroad, but have special ties to the Netherlands (Art. 3.51 section 1 sub. e Vb). It is however likely that the Dutch government will argue that residence should be denied because of national security interests. The Aliens Act may allow for the withdrawal of residence in the case of terrorist acts, but such decisions have to be proportional and in compliance with Art. 8 ECHR (the right to family life).

52 STRONKS 2013.

6. Conclusion

History shows that over the years the Dutch government has enacted laws to deprive people who had been fighting in other countries of their Dutch nationality, but that it was eventually concluded time and time again – although sometimes after a considerable period of time – that nationality had to be restored to large numbers of people. Although the case at hand is different in that statelessness is prevented, we have argued that this does not in itself solve the problem of the loss of nationality, but rather creates the problem of depriving dual nationals of the only effective nationality that they have. It may therefore be expected that deprivation due to this new Bill will eventually lead to the restoration of citizenship for people who belong in the Netherlands, even if they have done things that ‘we’ do not like.

According to some academics, ‘the war on terror’ has resulted in a process of ‘unmaking citizenship’, meaning that the significance of nationality is eroded for dual nationals, who have come to be seen as enemy nationals.⁵³ Others have argued that dual nationality allows states to use their ‘flexible sovereignty’ against dual nationals.⁵⁴ Whatever one wants to call it, it is clear that dual nationality is sometimes not or is no longer an advantage for individuals, but rather a liability.

Besides, the Bill arguably violates the prohibition of discrimination on grounds of nationality (at least indirectly) and on grounds of national or ethnic background as people with dual nationality will more often than people with single Dutch nationality have a non-Dutch ethnic background. The government has not yet given a convincing objective justification for the differential treatment and it can be doubted whether this is at all possible. In most cases, it will not be possible to use the Bill against returning jihadists either because they have single Dutch nationality or because they are minors or have committed the crimes as minors. We have also argued that even if their nationality could be withdrawn, it is not certain that residence can also be refused and expulsion can take place.

53 NYERS 2006.

54 STASIULIS and ROSS 2006.

We conclude that the Bill is bound to be more symbolic than a serious prevention of radicalisation and terrorism.⁵⁵ Moreover, it may have the negative side-effect of enlarging the difference between ‘us’ and ‘them’ and not recognising that at least all ‘Dutch nationals who were ‘born here’, regardless of having single or dual nationality, should be seen and treated as ‘us’. The jihadists concerned are ‘our own terrorists’, like it or not, and the Netherlands should not burden other countries with radicalised Dutch people. From a human rights perspective, the Bill will result in nothing but trouble.

Postscript

On September 4, 2014, the Minister of Security and Justice submitted a revised Bill to Parliament, which no longer contains an automatic loss of Dutch nationality. It also only allows for the withdrawal of Dutch nationality for crimes committed *after* the entry into force of that Act, and not for crimes committed before that date, as the first draft had done.⁵⁶ It extends the grounds for the withdrawal of Dutch nationality due to irrevocable convictions for terrorist acts as stipulated in Article 14 DNA – as we have seen, this was already possible since 2010 – due to Article 134a Criminal Code. The reason for revising the Bill was the critical advice delivered by the *Raad voor de Rechtspraak* (Council for the Judiciary) and the *Adviescommissie voor Vreemdelingenzaken* (Advisory Committee on Migration Affairs). In light of the arguments presented in our contribution, we are of course very pleased that the automatic loss of nationality no longer forms part of the Bill. However, what remains is a Bill for the withdrawal of nationality which treats dual nationals and single nationals differently.⁵⁷ Together with D’Oliviera, we are of the opinion that nationality law is not a suitable instrument to combat terrorism, and the government should limit itself to measures in the sphere of criminal law.⁵⁸

55 Compare MANTU 2014, at p. 270.

56 *Second Chamber*, 2014-2015, 34 016, nrs. 1-3.

57 Contrary to the earlier Bill, it allows the withdrawal of nationality only for crimes committed after its coming into force.

58 D’OLIVIERA 2014.

In the first debate in the *Parlementaire commissie voor veiligheid en justitie* (Parliamentary Commission for Security and Justice), political parties voiced their concerns over the effectiveness of the Bill. We find it rather worrying that none of the more principled issues that we discussed in this contribution were addressed.⁵⁹

59 *Second Chamber*, 2014-2015, 34 016, no. 4.

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