

## **Analytical note on CTIVD Report nr. 68 on deprivation of nationality as a national security measure**

*“Toezichtsrapport. Over het handelen van de AIVD in het kader van intrekking van het Nederlanderschap in het belang van de nationale veiligheid”*

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These comments were drafted by the Institute on Statelessness and Inclusion (ISI), an independent non-profit organisation, committed to promoting inclusive societies by realising and protecting the right to a nationality for all. From 2017-2020, ISI led an extensive research and consultation process – in collaboration with Open Society Justice Initiative, the T.M.C. Asser Institute and Ashurst LLP, and involving over 60 leading experts – to study global law and policy trends in relation to deprivation of nationality, explore the effectiveness of this measure and study the international standards and norms which limit and shape state action in this era. This process led to the publication of *[Principles on Deprivation of Nationality as a National Security Measure](#)*, which have been endorsed by leading international experts and human rights organisations and which articulate the international law obligations of states and apply to all situations in which states take or consider taking steps to deprive a person of nationality as a national security measure. This note offers an analysis of CTIVD Report nr. 68 on the basis of the *Principles*.

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## Context of the CTIVD report

Since 2010, there has been a gradual expansion of the powers to revoke nationality under the Dutch Nationality Act (DNA), with new grounds added in 2010, 2016 and 2017. The most recent of these amendments allows for the revocation of nationality without the need for a criminal conviction, if a person joins an organisation that is listed as constituting a threat to national security (article 14(4) DNA).<sup>1</sup> It is the implementation of this article that is the subject of the CTIVD report.

This evaluation is important because article 14(4) DNA is subject to a five-year sunset clause ('horizonbepaling'), meaning that unless Parliament decides to *extend* it, these deprivation powers will lapse again in 2022. This presents an opportunity to (re)assess whether the measure is effective and is compliant with the Netherlands' international human rights obligations.

Before examining the findings of that report, the following paragraphs offer some further context concerning article 14(4) DNA.

### *Discriminatory effect*

Only dual nationals may be subject to deprivation of nationality. In an *amicus brief* issued in October 2018, the SR Racism raised concern that this policy discriminates between mono- and dual citizens, and disproportionately affects dual nationals of "non-Western origin" – in particular Dutch-Moroccan and Dutch-Turkish dual nationals.<sup>2</sup> She recommended that the Netherlands review, without delay, the policy of nationality revocation as a counterterrorism measure, in light of the credible evidence that it is in violation of ICERD and other international legal obligations because it has "the effect of creating or perpetuating racial discrimination".<sup>3</sup> By maintaining a policy of deprivation of nationality that disproportionately affects dual nationals of "non-Western origin", for which the necessity has not been demonstrated, the Netherlands also risks perpetuating "stereotypes resulting in discrimination, hostility and stigmatization of certain groups such as Muslims, foreigners and migrants".<sup>4</sup>

### *Limited utility*

In April 2019, the National Coordinator of Counterterrorism and Security reported that between December 2017 and March 2019, the Dutch Minister of Justice and Security had revoked the nationality of 13 persons, 11 of whom under article 14(4) of the DNA.<sup>5</sup> In two cases, the revocation was reversed following a ruling of the Council of State because it violated procedural due process standards (namely non-retroactivity) and subsequently the nationality of a further five people whose cases were similar was also reinstated.<sup>6</sup> In July 2019, the Minister for Security and Justice reported that although an estimated 100 dual nationals may fall within the scope of article 14(4) DNA and could be subject to revocation of nationality, evidential issues mean it is unlikely that the Netherlands will proceed to deprivation of nationality in many more cases.<sup>7</sup> Nevertheless, members of the VVD (People's Party for Freedom and Democracy) and PVV (Party for Freedom) parties have been pressing the Minister for Security and Justice to ensure that the public prosecutor will "*prioritise* deprivation of nationality, rather than criminal prosecution", demonstrating their interest in *increasing* the use of the measure and linking this to xenophobic rhetoric.<sup>8</sup>

<sup>1</sup> <https://zoek.officielebekendmakingen.nl/stb-2017-52.html>.

<sup>2</sup> [https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration\\_Amicus.pdf](https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration_Amicus.pdf).

<sup>3</sup> ICERD Article 2(1)(c).

<sup>4</sup> CCPR/C/NLD/QPR/5, para. 10. See also SR Racism in A/HRC/38/52, para. 56. See also concerns raised by the Council of Europe High Commissioner for Human Rights when the nationality law amendment was being debated: [https://rm.coe.int/ref/CommDH\(2016\)40](https://rm.coe.int/ref/CommDH(2016)40). See also Principle 6 of the *Principles on deprivation of nationality as a national security measure*, <https://www.instituteforaction.org/year-of-action-resources/principles-on-deprivation-of-nationality>.

<sup>5</sup> National Coordinator of Counterterrorism and Security, *Report Integrated Approach Terrorism* (2019). Available at:

<https://www.netv.nl/binaries/Rapportage%20integrale%20aanpak%20terrorismetcm31-385959.pdf> (pp. 11).

<sup>6</sup> B v State Secretary of Justice and Security [2019] Ruling 201806104/1/V6; Z v State Secretary of Justice and Security [2019] Ruling 201806107/1/V6;

<https://www.parlementairemonitor.nl/9353000/1/9vvi5epmj1ev0/vl28lb9mrgtf>.

<sup>7</sup> <https://www.rijksoverheid.nl/documenten/kamerstukken/2019/07/15/tk-uitvoering-motie-laan-geselschap-en-van-toorenburg-over-de-intrekken-van-het-nederlandschap>.

<sup>8</sup> <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2019/06/25/antwoorden-kamervragen-over-het-bericht-nederlandschap-afpakken-van-syrierganger-blijkt-ondanks-wet-lastig-ondanks-wet-lastig/antwoorden-kamervragen-over-het-bericht-nederlandschap-afpakken-van-syrierganger-blijkt-ondanks-wet-lastig.pdf>.

### *Lack of effectiveness*

On 31 October 2019, two Dutch women approached the embassy in Ankara, Turkey, requesting consular assistance to help them return to the Netherlands. The embassy accepted and began to process the request of one of these women, but the other – a dual Dutch-Moroccan national – was informed that she had been deprived of her nationality on 30 October (i.e. a day earlier) and simultaneously declared an ‘undesirable alien’, such that her return to the Netherlands would not be permitted. Despite this being communicated to the Turkish authorities and a high-level mission being conducted by the Dutch government to speak to the government of Turkey about the case, less than three weeks later, both women were deported by Turkey to the Netherlands.<sup>9</sup> This case demonstrates not only how the policy of deprivation of nationality is leading to differences of treatment, but also that denationalisation does not necessarily prevent return.

### *Danger of further erosion of institution of Dutch citizenship*

On (at least) two occasions, initiatives have been presented in parliament to further expand legislative powers to deprive citizens of their Dutch nationality. In September 2019, in the context of a parliamentary debate on the criminalisation of ‘stay in territory controlled by terrorist organisation’, PVV MP de Graaf put forward a motion that would have called upon the government to introduce measures through which to deprive nationality from a citizen who engaged in such conduct. This was backed by PVV and FvD but did not receive enough support to pass.<sup>10</sup> In October 2019, PVV MP Markuszower proposed a motion relating to ‘youth criminality’ which observes that “Moroccan youths (ages 12-18) are 3.5 times more likely to be suspected of a crime than Dutch youths” and requests the government to revoke nationality from youths with dual citizenship who commit a violent crime and their family members, after they have completed their sentence and to deport them.<sup>11</sup> These initiatives demonstrate the risk of further instrumentalization of (debate about) citizenship as a privilege or as conditional by particular political parties.

## **The CTIVD Report**

On 16 June 2020, Minister Ollongren shared CTIVD Report nr. 68 with Parliament:<sup>12</sup> *“Toezichtsrapport. Over het handelen van de AIVD in het kader van intrekking van het Nederlanderschap in het belang van de nationale veiligheid”*.<sup>13</sup> In this report, the Dutch Review Committee on the Intelligence and Security Services (CTIVD) evaluates the implementation of article 14(4) DNA, with a particular focus on the role and functioning of the General Intelligence and Security Service (AIVD). The role of the AIVD is to issue an official report (*Ambtsbericht*) in cases where it has identified an individual who has joined one of the listed terrorist organisations and therefore may be considered to pose a threat to national security within the terms of article 14(4) DNA – thus forming the basis to initiate further proceedings to investigate whether deprivation of nationality is possible (e.g. the person holds dual nationality and deprivation of nationality would not impede criminal investigation and prosecution).

The report concludes that the AIVD has generally executed its role diligently and that the twelve official reports that it issued in relation to article 14(4) DNA were sufficiently motivated and lawfully issued. Four concrete recommendations are made to improve the practice of the AIVD, three of which – according to Minister Ollongren – had already been implemented by the time the report was sent to Parliament.<sup>14</sup>

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<sup>9</sup> <https://www.trouw.nl/binnenland/twee-syriegangers-melden-zich-in-ankara-een-is-net-geen-nederlandse-meer-b4d0354c/>; and <https://zoek.officielebekendmakingen.nl/kst-29754-535.html>.

<sup>10</sup> <https://zoek.officielebekendmakingen.nl/h-tk-20182019-106-22.html>.

<sup>11</sup> <https://zoek.officielebekendmakingen.nl/kst-28741-64.html>.

<sup>12</sup> <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/06/16/aanbieding-ctivd-rapport-intrekking-nederlanderschap>.

<sup>13</sup> <https://www.rijksoverheid.nl/documenten/rapporten/2020/04/29/toezichtsrapport-over-het-handelen-van-de-aivd-in-het-kader-van-intrekking-van-het-nederlanderschap-in-het-belang-van-de-nationale-veiligheid>

<sup>14</sup> <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/kamerstukken/2020/06/16/aanbieding-ctivd-rapport-intrekking-nederlanderschap/Aanbieding+CTIVD-rapport+TK+intrekking+Nederlanderschap.pdf>.

Nevertheless, the CTIVD report contains further critical analysis and information regarding the implementation of article 14(4) DNA that is of value to the wider evaluation of its effectiveness and the compliance of this measure with international human rights law. The report raises three key issues:

1. *High cost of implementation vs. limited practical utility of article 14(4) DNA*

In establishing the context in which article 14(4) DNA and the role of the AIVD were first introduced, the CTIVD report recalls that the AIVD was not a proponent of this measure. The AIVD expressed concern that its primary investigatory function may come under pressure through the demand that it take on the role of issuing official reports in respect of article 14(4) DNA. The CTIVD goes on to note that already by August 2017 (5 months after the introduction of this measure), the AIVD concluded that a lack of sufficient information to support the issuance of official reports would mean that this would “almost never happen” and reiterated that it did not see its role as encompassing undertaking active investigations with a view to facilitating deprivation of nationality from Dutch citizens.<sup>15</sup> Developments in Syria in early 2019 brought attention back to the measure provided for in article 14(4) DNA and led to a motion in Parliament in March 2019, that all cases of Dutch nationals who were leaving the Netherlands to join jihadist groups in Syria and Iraq (*uitreizigers*) to be investigated as to the possibility of deprivation of nationality. This necessitated the establishment, within the AIVD of a *Taskforce Ambtsberichten*, through which capacity was diverted away from other intelligence work of the AIVD.<sup>16</sup>

The *Taskforce* was operational for three months, from June – September 2019, examining “over 100 cases” of suspected dual national *uitreizigers*. This led to just 9 official reports being issued for the purpose of pursuing deprivation of nationality under article 14(4) DNA. In total, the AIVD has issued twelve such reports since the legislation was introduced in March 2017, leading to deprivation of nationality in eleven cases, of which five were later reversed as a result of the Council of State’s ruling on the issue of non-retroactivity.<sup>17</sup> The sum result of this measure to date appears therefore to have been the deprivation of nationality from six Dutch citizens. As of September 2019, these six cases were reportedly still in appeals proceedings<sup>18</sup> – the current status of these cases is not mentioned in the CTIVD report. It is also unclear whether one of these six cases is that of Fatima H., who despite being deprived of Dutch nationality was deported back to the Netherlands from Turkey<sup>19</sup> – in spite of the stated purpose of the measure being to prevent return. Nor is it clear how many of the remaining five people who were stripped of nationality are, in fact, still alive.<sup>20</sup>

In just six of over 100 potential cases, there was sufficient information to support deprivation of nationality under article 14(4) DNA, demonstrating the limited utility of the measure. It is important to recall that this target group of 100 *uitreizigers* is also only a subset of the total number of around 300 Dutch nationals who were leaving the Netherlands to join jihadist groups in Syria and Iraq. In other words, the measure provided for in article 14(4) DNA cannot be applied to two thirds of *uitreizigers*. This results in inequality of treatment,<sup>21</sup> but also demonstrates that the Netherlands must find other measures to deal with the potential threat to national security posed by mono nationals, who represent the majority of *uitreizigers* in practice. This raises the additional question of whether nationality deprivation is the least intrusive means of achieving the national security objective.

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<sup>15</sup> See page 10 of the CTIVD report.

<sup>16</sup> ‘Onder meer een landenonderzoek in het kader van de inlichtingentaak buitenland tijdelijk moest worden stilgelegd’. See page 12 of the CTIVD report.

<sup>17</sup> <https://www.parlementairemonitor.nl/9353000/1/9vvi5epmjl5y0/vl281b9mrgtf>.

<sup>18</sup> *Ibid.*

<sup>19</sup> <https://www.trouw.nl/binnenland/twee-syriegangers-melden-zich-in-ankara-een-is-net-geen-nederlandse-meer-b4d0354c/>

<sup>20</sup> According to data from the AIVD, one in three Dutch *uitreizigers* has died in battle. See <https://www.aivd.nl/onderwerpen/terrorisme/dreiging/uitreizigers-en-terugkeerders>

<sup>21</sup> See above on the criticism of the UN Special Rapporteur on contemporary forms of racism for the wider implications of such as policy.

2. *Lack of evidence of the positive effect of article 14(4) DNA on national security*

What follows from the overview above of the implementation of article 14(4) DNA in the three years since it entered into force is that it has been of limited practical utility. The AIVD was already cognisant of this reality at the time that the introduction of these powers was being debated, but the legislation anyway passed. The CTIVD report furthermore recalls that the AIVD was also doubtful of the direct effect that deprivation of nationality would have on national security in a broader sense. According to the report, the AIVD at the time indicated that:

*“While the measure may raise a barrier to return to the Netherlands, it does not remove the (potential) threat posed by the individual. The AIVD would still have to continue to investigate the threat that a person potentially poses, even if that person has lost their Dutch nationality. Terrorist activities can continue, whereby citizens or objects abroad can also be or become the target. People can also secretly return to the Netherlands”.*<sup>22</sup>

While it falls beyond the scope of this CTIVD evaluation to assess whether deprivation of nationality has had an impact on national security, the report does not offer any evidence of such a benefit. In its conclusion, while establishing that those official reports that were issued by the AIVD were sufficiently motivated, the CTIVD reiterates that it is “uncertain whether the measure will have the desired effect of preventing return of *uitreizigers*”. It also indicates that “should there be evidence that the measure is not having the desired effect, the question of whether it makes a sufficient contribution towards national security can be re-assessed”.<sup>23</sup> Given the very limited number of cases in which article 14(4) DNA has been invoked in practice, it may be difficult to assess what the contribution has been towards national security. However, if Fatima H. is one of the (only) six Dutch citizens who was stripped of her nationality and she has since nonetheless been returned to the Netherlands, there appears to be sufficient reason to critically and urgently reassess the effectiveness of the measure.

3. *Low threshold for deprivation of nationality, despite far-reaching, permanent human rights impact*

Deprivation of nationality is an instrument that has a far-reaching impact in human rights terms. The loss of nationality has as a consequence the loss of the rights attached to nationality, impairs the enjoyment of many other rights and the loss of Dutch nationality has direct implications also for the enjoyment of EU citizenship. Nationality has also been recognised by the European Court of Human Rights as an element of an individual’s social identity<sup>24</sup> and its loss therefore has a deep impact on a person’s identity.<sup>25</sup>

The right to a nationality is enshrined in international legal instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Nationality. Arbitrary deprivation of nationality is prohibited. These norms are elaborated in detail in the *Principles on deprivation of nationality as a national security measure*, published in March 2020.<sup>26</sup> International law, for example, demands that withdrawing nationality is shown to be necessary in order to achieve a specific, legitimate purpose and that it is

<sup>22</sup> See page 10 of the CTIVD report. The original text reads: “Ook was her directe effect van het intrekken van het Nederlandserschap op de nationale veiligheid in brede zin, wat de AIVD betreft, beperkt. De maatregel werpt zeker een barrière op voor het terug kunnen keren van personen naar Nederland, maar nam de (potentiële) dreiging die vanuit een persoon uitgaat niet weg. De AIVD zou targets waarvan een dreiging uitgaat moeten blijven onderzoeken, ook als deze targets het Nederlandserschap verliezen. Terroristische activiteiten kunnen immers blijven doorgaan, waarmee burgers en objecten in het buitenland ook doelwit kunnen zijn of worden. Ook kunnen targets heimelijk naar Nederland terugreizen”.

<sup>23</sup> See page 18 of the CTIVD report. The original text reads: “Hoewel niet zeker is of de maatregel het gewenste effect zal hebben, namelijk het preventief uit Nederland weren van uitreizigers, werpt deze wel een zekere barrière op. [...] Op het moment dat zou blijken dat de maatregel anders uitpakt dan gehoopt, kan worden heroverwogen of deze in voldoende mate bijdraagt aan de nationale veiligheid”.

<sup>24</sup> ECtHR Application no. 53124/09, 11 October 2011.

<sup>25</sup> See further on the history, use and impact of deprivation of nationality as an instrument of governments the detailed analysis provided in ISI’s *World’s Stateless Report 2020*, [https://files.institutesi.org/WORLD'S\\_STATELESS\\_2020.pdf](https://files.institutesi.org/WORLD'S_STATELESS_2020.pdf).

<sup>26</sup> <https://www.institutesi.org/year-of-action-resources/principles-on-deprivation-of-nationality>.

the least intrusive means of achieving that aim.<sup>27</sup> A policy or practice of nationality deprivation that does not meet all of these criteria is by definition arbitrary. So too is denationalisation that is discriminatory in purpose or effect;<sup>28</sup> deprivation of nationality that results in statelessness<sup>29</sup> or directly leads to a violation of other (in particular non-derogable) rights;<sup>30</sup> or withdrawal of citizenship that is executed without due process.<sup>31</sup>

The use of deprivation of nationality as a national security measure has met with criticism from international and regional bodies, such as the Parliamentary Assembly of the Council of Europe.<sup>32</sup> The critique relates to both the human rights implications and the potential counter-effectiveness of the measure from a counter-terrorism perspective because it does not remove the threat and may, in the longer term, increase the risk.<sup>33</sup> UN Security Council Resolutions call for states to investigate and prosecute terrorism through their national criminal justice frameworks – efforts that are best served through organised return and undermined by policies of deprivation of nationality.<sup>34</sup>

The CTIVD recalls in its report that in the implementation of article 14(4) DNA: “the interest served with the revocation of Dutch citizenship must be weighed against the interest of investigation, prosecution and trial of the person concerned and the possibility of enforcement of a custodial sentence. *Where possible, criminal prosecution is pursued, but if this is not possible or not expedient, withdrawal of Dutch citizenship may be a measure that is necessary in the interest of national security*”.<sup>35</sup> While it is important to prioritise investigation and prosecution of terrorist activities, in accordance with UN Security Council resolutions, what is concerning about the approach outlined here is that deprivation of nationality appears to be pursued in cases where there is *insufficient evidence* to pursue criminal investigation. This means that the bar for deprivation of nationality under article 14(4) is *significantly lower* than the threshold for criminal prosecution – and the procedure followed lacks the stringent procedural safeguards that are in place for criminal proceeding. Given the far-reaching consequences of deprivation of nationality and the likely permanence of the measure – as opposed to time-bound counter-terrorism tools such as temporary travel bans that are subject to regular scrutiny – the low threshold of evidence in regard to the (criminal) actions of the person is highly problematic.

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<sup>27</sup> Principle 7 of the *Principles on deprivation of nationality as a national security measures*.

<sup>28</sup> Principle 6 of the *Principles on deprivation of nationality as a national security measures*.

<sup>29</sup> Principle 5 of the *Principles on deprivation of nationality as a national security measures*.

<sup>30</sup> Principle 9 of the *Principles on deprivation of nationality as a national security measures*.

<sup>31</sup> Principles 7.6 and 8 of the *Principles on deprivation of nationality as a national security measures*.

<sup>32</sup> See <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=25430&lang=en>.

<sup>33</sup> Dr David Malet has studied the longer-term perspective of the use of deprivation of nationality for national security purposes and warns that that “Arab states preventing jihadis from returning from Afghanistan in the 1990s led to waves of foreign fighters spreading to war zones and failed states around the world. Osama Bin Laden is Exhibit A of the folly of stripping a foreign fighter’s citizenship and then washing your hands and assuming the individual is no longer your problem”. See <http://www.internationalaffairs.org.au/australianoutlook/isis-foreign-fighters-keep-enemies-closer/>.

<sup>34</sup> Open letter for Members of the European Council for Foreign Relations, [https://www.ecfr.eu/article/commentary\\_open\\_letter\\_a\\_managed\\_return\\_of\\_isis\\_foreign\\_fighters](https://www.ecfr.eu/article/commentary_open_letter_a_managed_return_of_isis_foreign_fighters).

<sup>35</sup> Emphasis added. See page 10 of the CTIVD report. The original text reads “Bovendien moet het belang dat wordt gediend met het intrekken van het Nederlanderschap worden afgewogen tegen het belang van opsporing, vervolging en berechting van de betrokkene en de mogelijkheid van tenuitvoerlegging van een vrijheidsstraf. Daarbij geldt dat waar mogelijk wordt ingezet op strafrechtelijke vervolging, maar wanneer dit niet mogelijk is of niet opportuun is, intrekken van het Nederlanderschap een maatregel kan zijn die in het belang van de nationale veiligheid noodzakelijk is”.