Institute on Statelessness and Inclusion

Comments on the Draft Law on the proportionality test for the Dutch Nationality Act

[Wetsvoorstel evenredigheidstoets RWN]

September 2020

The Institute on Statelessness and Inclusion (ISI) is an independent non-profit organisation, committed to promoting inclusive societies by realising and protecting the right to a nationality for all. For more on the work and expertise of ISI, please visit www.institutesi.org.

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I. Introduction

The Institute on Statelessness and Inclusion (ISI)[1] is grateful for the opportunity to comment on the Netherlands' Draft Law on the proportionality test for the Dutch Nationality Act (DNA).[2] ISI is an independent non-profit organisation, headquartered in the Netherlands, committed to ending statelessness and disenfranchisement through the promotion of human rights, participation and inclusion. It is the global civil society focal point for action to address statelessness and has a strong international reputation for its specialised expertise on statelessness and nationality issues. ISI's publications and analysis are widely used by government, civil society, UN and academic actors.

The Draft Law concerns a significant issue, with serious consequences, for a large number of people. The importance of the matter is demonstrated by the fact that several hundred people have already asked to reacquire Dutch nationality following the 2019 ruling by the Court of Justice of the European Union (CJEU)[3] that gave rise to this Draft Law. Furthermore, the explanatory memorandum to the Draft Law indicates that it is expected to receive as many as 2,000 option requests per year and as many as 23,500 people may seek to benefit from this law reform when it first enters into force, showing the scale of the problem of disproportionate loss of nationality. Furthermore, interest groups have indicated that the fact that loss of nationality is automatic readily causes it to be experienced as disproportionate by those affected; and they see many cases of serious consequences of loss of nationality ('schrijnende verhalen') in particular in relation to separation from family or motherland.[4] In view of the individuals affected by this Draft Law and the responsibility of the State for its citizens, also when they are living abroad, we feel that this Draft Law requires careful consideration. This contribution therefore aims to complement some of the points raised in other comments on the Draft Law as submitted in response to this public consultation process by interest groups and lawyers.

This commentary begins by setting out the relevant international and regional law obligations of the Netherlands in relation to loss and deprivation of nationality, considering the role of the principle of proportionality in particular (Section II). It then comments on the proposed remedy of re-acquisition by way of 'option' via Article 6 DNA (Section III), in light of these international obligations. The commentary thereafter highlights another part of Article 6 DNA that is not in line with the Netherlands' international obligations and suggests that if the right of option is to be amended as per this Draft Law, this reform also offers the opportunity to adopt a long-awaited remedy this other, urgent issue (Section IV). It concludes with the recommendation to seek a remedy at the source of the problem by reconsidering the grounds for loss by operation of law of Dutch nationality (Section V).

II. International norms relating to loss and deprivation of nationality

International law explicitly provides for the right to nationality as well as the prohibition of arbitrary deprivation of nationality. The right of everyone to a nationality was first stated in Article 15 of the Universal Declaration of Human Rights (UDHR).[5] The right of every individual to a nationality, including

[1] For more information about the Institute on Statelessness and Inclusion, please see the website http://www.institutesi.org/.
[2] Wetsvoorstel evenredigheidstoets RWN, hereinafter Draft Law.
[3] CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, ECLI:EU:C:2019:189.
[4] See the comments on the Draft Law by Nederlanders in den vreemde (NIDV), available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/143696/bestand.
[5] The UDHR is recognized as part of customary international law. See ACtHPR, *Anudo v Tanzania* (2018), Application no. 012/2015.

the right to retain and change nationality has since been enshrined in various international human rights treaties and regional instruments, including: Convention on Elimination of All Forms of Racial Discrimination (CERD), Art. 5(d)(iii); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Art. 9; Convention on the Rights of the Child (CRC), Arts. 7 and 8; and European Convention on Nationality (ECN), Art. 4. Although all persons are equal under the law and entitled to human rights, the right to a nationality often acts as an enabling right, and its enjoyment plays a central role in the recognition, protection, fulfilment, and respect of the full range of other human rights.[6] International law places restrictions on each State's right to establish its own rules related to nationality. These include the prohibition of arbitrariness, the prohibition of discrimination and the avoidance of statelessness.[7]

The prohibition of arbitrary deprivation of nationality applies to all situations of involuntary withdrawal of nationality, including (automatic) loss of nationality by operation of law:

> *"While the question of arbitrary deprivation of nationality does not comprise the loss of nationality voluntarily requested by the individual, it covers all other forms of loss of nationality, including those that arbitrarily preclude a person from obtaining or retaining a nationality, particularly on discriminatory grounds, as well as those that automatically deprive a person of a nationality by operation of the law, and those acts taken by administrative authorities that result in a person being arbitrarily deprived of a nationality."*[8]

Deprivation of nationality is arbitrary when it is not proportionate. The consequences of a decision to deprive someone of their nationality must be assessed against the principle of proportionality. Invocation of processes to deprive a person of nationality must never serve to suspend the obligations of the State to respect and protect the human rights of the person who is the object of the deprivation. The direct and indirect human rights impacts on the person(s), their family members, in particular their children, must be taken into account where deprivation of nationality is sought. Indeed, the UN Human Rights Council has stated that "loss or deprivation of nationality must meet certain conditions in order to comply with international law, in particular […] being proportional to the interest to be protected,"[9] adding that "with any decision to deprive a person of nationality, States have a duty to carefully consider the proportionality of this act."[10]

The principle of proportionality should be paramount in all decisions on deprivation of nationality[11] and the consequences of deprivation or loss of nationality of a person should be assessed against it.[12] This Principle therefore requires States to carry out an individual assessment, to determine that the immediate and long-term impact of deprivation of nationality on the rights of the individual, their family, and on society is proportionate to the legitimate purpose being pursued; the deprivation of nationality is the least

[6] See UN Human Rights Council (UNHRC), 'Human Rights and arbitrary deprivation of nationality: Report of the Secretary-General', A/HRC/19/43 (2011), available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/19/43
[7] Principles on Deprivation of Nationality as a National Security Measure (2020), available at: https://files.institutesi.org/PRINCIPLES.pdf.
[8] Emphasis added, Report of the Secretary-General on Human Rights and Arbitrary Deprivation of Nationality (2009), A/HRC/13/34, para 23 .
[9] UNHRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', A/HRC/25/28 (2013).
[10] UNHRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', A/HRC/25/28 (2013), para 10.
[11] ILEC Guidelines (2015), section II. ILEC Project, *Guidelines Involuntary Loss of European Citizenship* ("ILEC Guidelines") (2015), available at: http://www.ilecproject.eu/sites/default/files/GUIDELINES%20INVOLUNTARY%20LOSS%20OF%20EUROPEAN%20CITIZENSHIP%20.pdf. The "ILEC project", led by the University of Maastricht from 2013-2015, culminated in the publication of a set of Guidelines on Involuntary Loss of European Citizenship (ILEC Guidelines). These guidelines offer a useful example for the development of principles relating to arbitrary deprivation of nationality, and relate specifically to the EU context.
[12] ILEC Guidelines (2015), section I.10.

intrusive means of achieving the stated legitimate purpose; and the deprivation of nationality is an effective means of achieving the stated legitimate purpose.[13]

A key question in determining the proportionality is "the impact of withdrawal of nationality on the individual's ability to access and enjoy other human rights."[14] Deprivation resulting in statelessness would be arbitrary as the impact on the individual outweighs the purpose of the measure pursued by the State,[15] but even in cases where statelessness does not result, the proportionality must be weighed. States must pay attention to a number of elements when applying the principle of proportionality, including the consequences of the deprivation for the person involved and their family members, with particular regard to whether or not they would lose their residence rights in the country where the person held nationality and the rights attached to residence.[16] Also, the proportionality test should be applied individually for each person affected by the deprivation of nationality and special consideration should be given to the status of children, with "best interests of the child" being the guiding principle.[17]

The CJEU has considered proportionality in relation to nationality matters more elaborately in *Janko Rottmann v. Freistaat Bayern*. In this case, the Court confirmed that an EU principle of proportionality applies to domestic decisions of EU Member States on the withdrawal of nationality. It explained that it is "for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law".[18] The Court continues:

> *"[I]t is necessary […] to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union. In this respect it is necessary to establish, in particular, whether that loss is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality."*[19]

In the case of *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, the CJEU provides further guidance on the principle of proportionality, adding to the explanations in the *Rottmann* case. In case of loss of EU citizenship, the authorities need to carry out a full assessment based on the principle of proportionality enshrined in EU law.

> *"That examination requires an individual assessment of the situation of the person concerned and that of his or her family in order to determine whether the consequences of losing the nationality of the Member State concerned, when it entails the loss of his or her citizenship of the Union, might, with regard to the objective pursued by the national legislature, disproportionately affect*

[13] Deprivation of nationality that does not serve a legitimate aim is arbitrary under international law, and therefore prohibited. In order to assess whether the purpose is legitimate, it has been held that the purpose must be clearly defined. *Draft Commentary to the Principles on Deprivation of Nationality as a National Security Measure* (2020), available at: https://files.institutesi.org/PRINCIPLES_Draft_Commentary.pdf.
[14] UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05, available at: https://www.refworld.org/docid/5ec5640c4.html, para 94.
[15] UNHCR, 'Tunis Conclusions' (2014), para 23.
[16] See UNHCR), 'Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality' ("Tunis Conclusions") (March 2014), available at: https://www.refworld.org/docid/533a754b4.htmlhttps://www.refworld.org/docid/533a754b4.html, para 22, see also UNHRC Guidelines No 5 (2020), para 95 ; ILEC Guidelines (2015), section II.4.
[17] ILEC Guidelines (2015), sections II.5 and II.6.
[18] CJEU, *Janko Rottmann v Freistaat Bayern* (2010), Case C-135/08, ECLI:EU:C:2010:104, para 55.
[19] CJEU, *Janko Rottmann v Freistaat Bayern* (2010), Case C-135/08, ECLI:EU:C:2010:104, para 56.

the normal development of his or her family and professional life from the point of view of EU law. Those consequences cannot be hypothetical or merely a possibility."[20]

The competent national authorities or courts should furthermore ensure, as part of this assessment, that the loss of nationality is consistent with the Charter of Fundamental Rights of the EU, and in particular consistent with the right to respect for family life as stated in Article 7 of the Charter. That article is required to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of the Charter.[21] Indeed, with regard to minors, the Court states that authorities must also take into account, in the context of their individual examination, possible circumstances from which it is apparent that the loss of nationality by the minor concerned fails to meet the child's best interests as enshrined in Article 24 of the Charter because of the consequences of that loss for the minor under EU law.[22]

The principle of proportionality also requires that deprivation of nationality is effective in achieving the stated legitimate purpose: "[a]ccording to the principle of proportionality, a measure must be necessary, effective, as well as proportional to the goal to be achieved".[23] It has been emphasized that "deprivation of nationality must be the least intrusive instrument of those that might achieve the desired result, and [it] must be proportional to the interest to be protected".[24] According to the Human Rights Committee in General Comment No. 27 on Article 12 ICCPR: "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instruments amongst those, which might achieve the desired result".[25]

To reacquire Dutch citizenship under the Draft Law, an individual needs to show that the competent authorities could have reasonably foreseen that the loss of nationality had disproportionate consequences. In light of the foregoing, it is important to acknowledge that in such cases, the original loss of nationality, being foreseeably disproportionate, amounted to a violation of the prohibition of arbitrary deprivation of nationality under international law.

III. The proposed remedy of reacquisition by way of 'option' via Article 6 DNA

This section outlines a number of specific concerns with regard to the Draft Law and the proposed remedy of reacquisition of Dutch citizenship by way of option via Article 6 DNA, in light of relevant international standards which protect the right to a nationality and prohibit arbitrary deprivation of nationality.

Loss on the grounds of international mobility is outmoded

First of all, the ground for loss of nationality that this Draft Law tries to remedy is out of date. Providing for loss of nationality under Articles 15(1)(c) and 16(1)(d) DNA is based on the idea of a (lack of) a genuine or effective link or bond between a person and the State. Even though international law, and in particular the 1961 Convention on the Reduction of Statelessness (1961 Convention), acknowledges that States may

[20] CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, ECLI:EU:C:2019:189, para 44.
[21] CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, ECLI:EU:C:2019:189, para 45.
[22] CJEU, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* (2019), Case C-221/17, ECLI:EU:C:2019:189, para 47.
[23] ILEC Guidelines (2015), section I.10.
[24] ILEC Guidelines (2015), section I.10.
[25] Human Rights Committee, 'General Comment No. 27: Freedom of movement (article 12)' (1999) CCPR/C/21/Rev.1/Add.9, para 14.

want to make provision to ensure that nationals maintain an effective connection, developments since should also be taken into consideration:

> *"The notion of what constitutes an effective connection to a State has changed since the drafting of the 1961 Convention. Society has evolved such that people are much more mobile, and it is no longer unusual for a person to habitually reside in a country other than their country of citizenship. Contracting States are encouraged to take these developments into account."*[26]

The European Convention on Nationality (ECN), adopted more recently, also permits States to provide for loss of nationality in case of lack of a genuine link between the State Party and a national habitually residing abroad.[27] However, as also noted in other commentary to this Draft Law,

> *"[…] the term "lack of a genuine link" applies only to dual nationals habitually residing abroad. Moreover, this provision applies in particular when the genuine and effective link between a person and a state does not exist, owing to the fact that this person or his or her family <u>have resided habitually abroad for generations</u>. It is presumed that the state concerned will have taken all reasonable measures to ensure that this information is communicated to the persons concerned."*[28]

Lack of a genuine link is deemed to relate to situations of inter-generational habitual residence abroad. In light of contemporary international mobility, a period of 13 years of residence abroad – even if slightly expanded from the previous timeframe of 10 years absence – is not (any longer) a proper expression of lack of a genuine link or bond between an individual and the State. It would be prudent to carefully reconsider the appropriateness of this ground for nationality loss – especially, as others have noted in their responses to this internet consultation, given the stated interest of the Dutch government of modernising the rules on nationality.

Approach proposed in Draft Law fails to <u>prevent</u> disproportionate impact from loss of nationality

Secondly, the Draft Law does not address the problem at its source as the aforementioned provisions on loss of nationality in the DNA are not adapted to include an assessment of proportionality, but instead a new ground for option is introduced. Other comments on the Draft Law have referred to this as 'bizarre'.[29] ISI also questions this decision, because this does not fit within the overall structure of the DNA, and of Article 6 DNA in particular. The new provision for option requires an individual examination, whereas the other grounds for option in Article 6 DNA are about simple confirmation of nationality once certain eligibility criteria have been met.

Moreover, the remedy by way of 'option' results in a person first losing Dutch nationality, even when this could be foreseen to have a *disproportionate* impact. This remedy does not *prevent* that impact; it opens a procedure to address it later that furthermore relies on the initiative of the person concerned. Concerns have been raised in other comments on the Draft Law about the burden of proof on the person affected

[26] UN High Commissioner for Refugees (UNHCR), Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness, May 2020, HCR/GS/20/05, available at: https://www.refworld.org/docid/5ec5640c4.html, para 37.
[27] Article 7(1)(e) ECN.
[28] Explanatory Report of the ECN, as cited with emphasis added, in comments to the Draft Law by Everaert Advocaten Immigration Lawyers (mr. drs. H. de Voer), available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/141262/bestand.
[29] See the comments on the Draft Law by Nederlanders in den vreemde (NIDV), available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/143696/bestand.

to show the disproportionate effect (rather than on the state to show the absence of a disproportionate effect).[30] The proposed remedy of reacquisition of nationality with retroactive effect does also not necessarily guarantee a full remedy of the disproportionate *impact(s)* that have already resulted from the loss of nationality – it may have (had) consequences for family life, best interests of the child or the rights of EU citizens as protected in the EU Charter of Fundamental Rights (see also Section II) that cannot be reversed or corrected retroactively and it remains unclear whether and/or how further reparation will be available. Furthermore, the costs relating to this remedy are to be incurred by the person in applying for option in the form of application costs (191 EUR), in spite of the fact that they are the victim of disproportionate – and thereby arbitrary – deprivation of nationality.

As such, the proposed remedy in the Draft Law can be regarded as not constituting the least intrusive means to ensure that the DNA is in line with EU law, and can therefore be considered disproportionate. A less intrusive means would be to include an assessment of the proportionality in view of EU law before nationality is lost, which would require adaptation of the form of withdrawal from one that entails automatic loss by operation of law to one which allows for this *ex ante* proportionality test.

Proposed option procedure does not provide a remedy in all cases

Thirdly, the manner in which the new option procedure is set out in the Draft Law is not a suitable way to resolve all of the issues raised in the case of *M.G. Tjebbes and Others v. Minister van Buitenlandse Zaken*, because it overlooks some important consequences. Lawyers and interest groups have indicated that they see that the introduction of this ground of option could have a discriminatory effect.[31] If this is the case, the measure would be continue to be arbitrary in view of international law (see also Section II).

Moreover, nationality that has been lost *in violation of the principle of proportionality* (i.e. where it should not have been lost at all) cannot be subsequently regained if the person is deemed a threat to national security or public order. Authorities can thus act disproportionately, resulting in loss of nationality, but refuse to remedy this overreach of power by invoking reasons of national security or public order. The latter are wholly unrelated to the purpose of the original grounds for loss (i.e. lack of genuine link). When combined, this approach can effectively amount to deprivation of nationality on grounds of national security, for which strict rules apply according to the DNA[32] and international law.[33]

Importantly, the possibility of (re)acquisition of nationality is also not extended to children of Dutch citizens who lost their nationality if they have already reached the age of majority. This impairs the value of the new provision in redressing historic wrongs (i.e. providing a remedy for situations where loss of nationality had a disproportionate effect in the past), even though the law should apply to any situations from on or after 1 November 1993. For example, if a person lost their nationality under the relevant clause in 1994 and subsequently had a child, that child would not have acquired Dutch nationality (even though the parent's loss of nationality was disproportionate and therefore arbitrary), but would by now have reached the age of majority and be excluded from the opportunity to benefit from this law reform.

[30] See the comments on the Draft Law by Stichting Nederlanders Buiten Nederland, available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/144074/bestand.
[31] E.g. the comments on the Draft Law by NIDV, available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/143696/bestand, and Stichting Nederlanders Buiten Nederland, available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/144074/bestand.
[32] Article 14 DNA.
[33] Principles on Deprivation of Nationality as a National Security Measure (2020), available at: https://files.institutesi.org/PRINCIPLES.pdf.

IV. The failure to further reform Article 6 DNA

If Article 6 DNA on the right of option is to be amended to introduce a new route to reacquisition of nationality that has been lost in breach of the principle of proportionality, this reform should also encompass an amendment to the clause for stateless children that has been found to contradict the international obligations that the Netherlands has.

The Netherlands is failing to guarantee the right of every child to acquire a nationality, in accordance with its obligations under the CRC, the International Covenant on Civil and Political Rights and 1961 Convention on the Reduction of Statelessness. Specifically, Article 6(1)(b) of the DNA discriminates against children born stateless in the territory based on residence status and only accords children with *lawful* residence the right to opt for Dutch nationality.

The UN High Commissioner for Refugees (in 2011),[34] the Commissioner for Human Rights of the Council of Europe (in 2014),[35] the Netherlands Institute on Human Rights (in 2014),[36] the UN Committee on the Rights of the Child (in 2015),[37] the UN Human Rights Committee (in 2019),[38]and the Special Rapporteur on contemporary forms of racism (in 2019)[39] have all called upon the Netherlands to find solutions for stateless children born in the Netherlands, notably by rescinding the requirement of lawful stay for their acquisition of Dutch nationality. Moreover, a judgment by the District court in Overijssel found Article 6(1)(b) DNA to be in violation of international law,[40] and an individual communication is currently also pending on this issue before the UN Human Rights Committee.[41]

In 2016, a public consultation was held on a law providing for the amendment of Article 6 of the DNA, as part of a bill whose main focus was the establishment of a statelessness determination procedure. The draft was heavily criticized,[42] and the legislative process has since stalled.

The criticism related to the criterion of "stable" residence, which, according to the draft explanatory memorandum, will be interpreted such as to allow a stateless child born in the country to acquire Dutch nationality after 5 years' residence, without lawful stay, only if the parents have cooperated with the state at all times in removal proceedings. Firstly, this condition of stable residence contravenes the explicit and unambiguous terms of the 1961 Convention on the Reduction of Statelessness. This instrument provides for an exhaustive number of specific conditions that may be attached to granting nationality to otherwise stateless children born in the territory of States Parties[43] and a requirement such as the one proposed is

[34] UNHCR, Mapping Statelessness in the Netherlands, November 2011 https://www.refworld.org/docid/4eef65da2.html.
[35] Report by Nils Muiznieks following his visit to the Netherlands from 20-22 May 2014, CommDH(2014)18, https://rm.coe.int/16806db830?mc_cid=24df302e1c&mc_eid=52b81a63d2.
[36] *Status naturalisatie van staatloze kinderen zonder verblijfsrecht*, 12 November 2014, https://www.mensenrechten.nl/en/node/592?mc_cid=24df302e1c&mc_eid=52b81a63d2.
[37] CRC/C/NDL/CO/4, para 33.
[38] CCPR/C/NLD/CO/5, para 23.
[39] A/HRC/44/57/Add.2, para 88.
[40] District Court Zwolle, 09-09-2010, Awb 09/2212.
[41] Denny Zhao v. The Netherlands, UN Human Rights Committee, Communication No. 2001/2010 (case filed in 2016, decision pending).
[42] See responses by the Netherlands Institute for Human Rights, international and national NGOs, UNHCR and lawyers groups on Draft Law on a statelessness determination procedure here: https://www.internetconsultatie.nl/staatloosheid/reacties.
[43] 1961 Convention, Article 1(2). That this list is exhaustive is also clear from UNHCR, *Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, HCR/GS/12/04, 21 December 2012, para. 36. See furthermore ENS, *Ending Childhood Statelessness: A Comparative Study of Safeguards to Ensure the Right to a Nationality for Children Born in Europe*, ENS Working Paper 01/16, which complements the earlier report on childhood statelessness by ENS: ENS, *No Child*

not included. Secondly, this condition also stands in violation of the CRC. Article 2(2) of the CRC obligates states to "*take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*" The stable residence requirement, however, solely concerns the actions or inactions of the parent(s) or guardians of the child. Restricting the application of a safeguard that is designed *specifically* to assure access to a nationality for a child who would otherwise be stateless, on the basis of immigration criteria, will result in that child remaining stateless, significantly impacting on his or her enjoyment of other child rights.[44] The denial of nationality rights to an otherwise stateless child on this basis, is therefore a violation of Article 2 and Article 7 of the CRC as well as the principle of the best interests of the child enshrined in Article 3(1). The Committee on the Rights of the Child made this position clear in its recommendation to the Netherlands, as well as in its review of other state parties to the CRC.[45] Thirdly, imposing this condition, with the result of punishing the child for the parents' action, also undermines the right to private life protected under the ECHR. Nationality is an element of a child's social identity and must therefore be protected in accordance with article 8 ECHR.[46] Statelessness is never in a child's best interests,[47] and the imposition of criteria which may lead a child to face uncertainty as to his or her entitlement to nationality creates a situation which is contrary to article 8 ECHR.[48] Specifically, according to the European Court of Human Rights, when laws which are aimed to penalise parents, also *"affect the children themselves, whose right to respect for private life […] is substantially affected […] a serious question arises as to the compatibility of that situation with the child's best interests, respect for which must guide any decision in their regard"*.[49]

To date, no amendment to the DNA to address this issue of non-compliance with the child's right to a nationality has been tabled for debate in Parliament. The identification of this issue and subsequent failure to act to protect children's rights and their best interests have lasted over a long period. The Netherlands is due to report on the progress made in addressing this to the Committee on the Rights of the Child in view of the list of issues identified by the Committee before 15 October 2020:

> *"Please also inform the Committee of any legislative measures taken or envisaged to ensure that all stateless children born or present within the territory of the State party, irrespective of residency status, have access to citizenship without any preconditions, and how the State party ensures that stateless children or children with an unknown nationality can access education, health and social provision and services."*[50]

In view of increasing international pressure and criticism on the Netherlands, there is a clear need to ensure the the urgent adoption of the necessary legislative measures in order to eradicate statelessness

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Should Be Stateless (ENS 2015), available online at http://www.statelessness.eu/sites/www.statelessness.eu/files/ENS_NoChildStateless_final.pdf.

[44] UN General Assembly, *Secretary-General report on Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless*, A/HRC/31/29, 16 December 2015.

[45] CRC, *Concluding Obligations on the fourth periodic report of the Netherlands* (8 June 2015) CRC/C/NDL/CO/4, para 32 – 33; and CRC, *Concluding Observations: Czech Republic,* CRC/C/CZE/CO/3-4, August 2011, para 38.

[46] European Court of Human Rights, Application No. 53124/09, *Genovese v. Malta*, 11 October 2011.

[47] African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 2 on Article 6 of the ACRWC: "The Right to a Name, Registration at Birth, and to Acquire a Nationality"*, ACERWC/GC/02, 16 April 2014.

[48] See also European Court of Human Rights, *Mennesson v. France,* Application No. 65192/11, 26 June 2014, paras 97-99.

[49] European Court of Human Rights, *Mennesson v. France,* Application No. 65192/11, 26 June 2014, para 99.

[50] Emphasis added, Committee on the Rights of the Child, 11 November 2019, CRC/C/NLD/QPR/5-6, available at: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiIzBaPVcehuN9sMenrIu9kzTehMaZuOhQkmJZhbdrhgQrz5JjfRBtm47%2fsVneO2ytrTnvLQVhoF8HuTjc1zlUKKEW66hEzGLWQWRem%2fLS%2b2.

of children in the Netherlands and to guarantee children's right to a nationality without discrimination. This draft law provides a perfect opportunity to address this, as it is already changing Article 6 DNA.

V. Conclusion

This commentary to the Draft Law on the proportionality test for the Dutch Nationality Act shows that allowing the (foreseeably) disproportionate loss of nationality by operation of law is a serious matter, that leads to violation of the international law prohibition of arbitrary deprivation of nationality. This should be resolved by addressing the root cause of the problem, rather than adopting an unsuitable and incomplete "patch" for the problem by opening up a new procedure for reacquisition of nationality. As others have also raised in their comments on the Draft Law,[51] the Dutch Nationality Act is overdue for modernisation, to which a commitment was also made in the current coalition agreement (*'Regeerakkoord'*).[52] Such an approach demands a careful reconsideration of the necessity of continuing to provide for loss or deprivation of nationality on the grounds of international mobility. Should this be retained, the proportionality assessment must be undertaken *ex ante,* before nationality is lost, to prevent a disproportionate impact by halting the nationality deprivation process if such a consequence is foreseen. At the same time, as this commentary highlights, it does remain urgent to reform Article 6 DNA , but rather with a view to addressing the ongoing failure to guarantee the right of every child to acquire a nationality, and ensure that all children born stateless in the Netherlands can acquire a nationality without discrimination. Any amendment to Article 6 or otherwise of the Dutch Nationality Act should include provision for these long-awaited changes also.

[51] Comments to the Draft Law by Everaert Advocaten Immigration Lawyers (mr. drs. H. de Voer), available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/141262/bestand; by NIDV, available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/143696/bestand, and by Stichting Nederlanders Buiten Nederland, available at: https://www.internetconsultatie.nl/evenredigheidstoets/reactie/144074/bestand.

[52] Regeerakkoord 'Vertrouwen in de toekomst' (10 oktober 2017), available at: https://www.rijksoverheid.nl/regering/documenten/publicaties/2017/10/10/regeerakkoord-2017-vertrouwen-in-de-toekomst, p. 6.