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Alternatives for judicial review ex lege as stipulated in the *Rijkswet op het Nederlanderschap*

A legal research to find alternative procedures for the ex officio act that
 leads to judicial review of the decision to revoke Dutch nationality
 in artikel 22a of the *Rijkswet op het Nederlanderschap*

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Summary

Introduction

Article 14(4) of the Dutch *Rijkswet op het Nederlanderschap* (RWN) grants the Minister of Justice and Security the competence – in short – to revoke Dutch nationality in the interest of national security from someone older than sixteen who is outside of the Kingdom of the Netherlands and who has joined an organization that participates in an armed conflict and poses a threat to national security. Article 22a RWN provides that a decision pursuant to Article 14(4) RWN is always subject to judicial review by an administrative court, either because the person concerned has lodged an appeal within the time limit (4 weeks), or because the person concerned, if he has not appealed, is deemed to have lodged an appeal with the administrative court. In the latter case, an appeal is automatically (*ex lege*) established in name of the person concerned (automatic judicial review). The administrative court becomes aware of such an appeal because the Minister informs the District Court in The Hague of the decision to revoke the Dutch nationality pursuant to Article 14(4) RWN.

The automatic judicial review is an unusual legal construction in administrative law. During the discussion of the bill introducing Article 22a RWN in the Senate, Member of Parliament Van Dijk (SGP) submitted a motion requesting the government to investigate alternatives for this provision that results in a judicial review *ex lege* (automatic judicial review). The background to the motion accepted by the Senate is that the question can be asked whether too much legal protection by way of judicial review is offered to those from whom the Dutch nationality is revoked under Article 14(4) RWN.

Research question

The central question of the research is as follows:

What are (potential) alternative procedures for the ex officio act that leads to judicial review of the decision to revoke Dutch nationality?

Research activities

To answer the research question, an inventory and analysis has been made of procedures that could serve as (an inspiration for) a possible alternative arrangement for the automatic judicial review procedure that is currently laid down in Article 22a(3) RWN, as well as an analysis of the possibility of deleting the provision(s) that arrange for the automatic judicial review. First of all, the research looks at the option to apply the general provisions for judicial review laid down in chapters 6 and 8 of the *Algemene wet bestuursrecht* (Awb, General Administrative Law Act), the so-called 'zero option'. Subsequently alternatives were examined: to introduce a so-called confirmation ruling by an administrative court (*bekrachtigingsprocedure*) for the decision by the Minister (to be asked by the Minister when the person concerned does not appeal), and to provide compensatory measures for legal protection in case the provisions arranging for the judicial review *ex lege* are deleted. Five interviews were also held for the research. We present the findings of the research below. We end with a brief conclusion.

Zero option

In the opinion of the researchers, there are no decisive legal objections to the so-called zero option, which means that Article 22a RWN – which provides for the judicial review *ex lege* – is deleted and that judicial review of the decision to revoke the Dutch nationality on the basis of Article 14(4) RWN will be based on chapters 6 and 8 of the Awb. Neither the European Convention of Human Rights (ECHR) nor the Charter of Fundamental Rights of the European Union (EU Charter) require decisions

based on Article 14(4) RWN to provide for more extensive judicial review and guarantees than the regular judicial review procedure laid down in the Awb. Relevant for this conclusion is that Article 6:11 Awb offers the possibility that an appeal is lodged after the time-limit and is nevertheless assessed as admissible by the administrative court. Also relevant is the case-law based on Article 4:6 Awb, which stipulates the way in which public authorities must respond to requests to re-assess a decision that has become legally irrevocable. The case law offers to persons concerned an opportunity to request a review of the decision to revoke his or her Dutch nationality and Dutch law will allow for judicial review.

Confirmation by an administrative court

As far as the alternatives to the current regulation are concerned, the first question was whether the procedure most likely to be included in the Environment and Planning Act, namely the requirement for any expropriating governmental body to ask for confirmation of its decision by an administrative court, could provide inspiration for an alternative to the current Article 22a RWN procedure to be included in the RWN. This leads to a procedure that can be described as follows:

- persons concerned can ask for judicial review by an administrative court within 6 weeks (after notification in the prescribed manner) against the decision pursuant to Article 14(4) RWN;
- if the person concerned asks for judicial review in time, the appeal will be dealt with in accordance with the regular procedure of chapter 8 Awb;
- if the person concerned is unable to ask for judicial review in time, the Minister submits the decision to revoke the Dutch nationality *ex officio* to the court for confirmation;
- the Minister's obligation to submit his decision to the court for confirmation does not detract from the fact that that decision enters into force after notification of the decision in the prescribed manner;
- within the framework of the confirmation procedure, a full review of the decision by the administrative court takes place, as currently provided for in Article 22a(5) RWN;
- the person concerned has the opportunity during the confirmation procedure to raise concerns about the decision submitted to the court for confirmation;
- against the ruling of the administrative court on the request for confirmation, the Minister and the person concerned can appeal to the Administrative Jurisdiction Division of the Council of State.

A confirmation procedure can provide a solution for a (perceived) problem with the current regulation, namely the legal fiction that the person concerned is deemed to have lodged an appeal, while he is usually unable to contact his legal representative and, moreover, will not attend the hearing. A confirmation procedure could solve this problem, since it does not provide for the legal fiction that the person concerned has lodged an appeal but will provide for a (mandatory) guaranteed intervention of the administrative court for any decision of the Minister to revoke Dutch nationality pursuant to Article 14(4) RWN. A confirmation procedure therefore ties in better with the idea that the general interest requires that an administrative court reviews any such decision of the Minister. In such a confirmation procedure, it should be stipulated (as is the case in the current regulation) that the Minister's decision enters into force after the prescribed manner of notification and that the administrative court will review all aspects of the decision in the confirmation procedure.

Compensatory legal protection provisions without the right of appeal

If the provisions regulating the judicial review *ex lege* laid down in Article 22a RWN are deleted from the RWN, the general provisions on judicial review in chapters 6 and 8 of the Awb remain. The particularly intrusive nature of the decision to revoke a person's Dutch nationality could be a reason to offer the person concerned compensation for the (potential) restriction of the right to a fair trial. This compensation can be sought in clarifying the manner of notification of the decision, the possibilities for the person concerned to ask for judicial review after the appeal period has expired and to arrange for an extension of the appeal period. With regard to these three compensation options, the researchers arrive at the following findings:

- Notification

According to the Explanatory Memorandum of the RWN, the government assumes that publication in the Government Gazette will be seen as a suitable means of publication (pursuant to Article 3:41(2) Awb). To guarantee publication in the Government Gazette is seen as the notification of the decision, this way of notification should be explicitly prescribed in the RWN.

- Admissibility of an appeal after the appeals period

It is highly uncertain whether deleting the provisions regulating the judicial review *ex lege* laid down in Article 22a from the RWN shall make the court more leniently apply the possibility of allowing judicial review while the appeal is lodged after the appeal period (Article 6:11 Awb) against a decision to revoke a person's Dutch nationality. However, the researchers believe it is undesirable at this point to amend the RWN with the aim of a more lenient application of Article 6:11 Awb, particularly because it is difficult to find any justification for such a special treatment in the RWN, while for other decisions with severe consequences such a special scheme does not exist. Moreover, the irrevocability of the decision to revoke Dutch nationality would not be fully certain for a long period. Long-term uncertainty concerning the nationality of a person is undesirable.

- Appeal period

Deleting the provisions regulating the judicial review *ex lege* laid down in Article 22a from the RWN will result in the appeal period being 6 weeks in accordance with the Awb. It is conceivable that, in order to compensate for deleting the specific provisions, the legislature could choose to arrange a longer appeal period; such an extension would increase the legal protection possibilities of the person concerned, but also the longer appeal period is associated with a longer period of legal uncertainty as to the legality of the decision to revoke the Dutch nationality of the individual concerned. Furthermore, the researchers are of the opinion that there is no justification for offering the person concerned a more generous possibility for judicial review than the general provisions in the Awb offer.

Lastly, if the judicial review *ex lege* is removed from Article 22a RWN, the case law of the Dutch administrative courts about the way in which the Minister must respond to a request to re-assess a decision that has become legally irrevocable, is relevant. It guarantees that if a person submits such a request concerning the decision to revoke his or her Dutch nationality pursuant to Article 14(4) RWN, this request will not be allowed to be denied without justification and by simply referring to the decision previously taken (see Article 4:6 Awb). The procedure of judicial review against a decision to deny such a request, allows for obligations arising from EU law to be upheld.

Conclusion

As far as the alternative procedures are concerned for the appeal procedure currently provided for in Article 22a RWN against a decision to revoke a person's Dutch nationality pursuant to Article 14(4) RWN, the findings of this research are as follows. There are no decisive legal objections to the zero option (which entails deleting the provisions concerning the judicial review *ex lege*). However, because of the drastic nature of such decision and because decisions revoking a person's Dutch nationality usually involve intervention by a court (since they are almost always the consequence of a criminal conviction) the zero option can be considered undesirable. In that case, introduction of a confirmation procedure is an alternative to the existing procedure of judicial review *ex lege* that could be seriously considered. In all cases, the RWN should stipulate that publication in the Government Gazette is the way to notify the Minister's decision to revoke a person's Dutch Nationality pursuant to Article 14(4) RWN.