

Summary

Introduction

The constitutional structure of the Kingdom of the Netherlands changed with effect from 10 October 2010 (10-10-10'), whereby Curaçao and Sint Maarten became independent countries within the Kingdom and the Netherlands Antilles was dismantled. Bonaire, Sint Eustatius en Saba became part of the Netherlands as public bodies. The three latter islands are also collectively referred to as the Caribbean Netherlands.

The immigration law of the Netherlands Antilles was laid down in the National Ordinance Admission and Expulsion (Landsverordening toelating en uitzetting (LTU)) and the Admission Decree (Toelatingsbesluit). The new Admittance and Deportation Act BES (Wet toelating en uitzetting BES (WTU-BES)), which came into effect on 10 October 2010, is based on the LTU. The WTU-BES has also partially been adapted to the Dutch Aliens Act 2000 (Vreemdelingenwet 2000) and the Dutch Aliens Decree 2000 (Vreemdelingenbesluit 2000). During the debate in 2010 on the approval of the bill, the then Minister of Justice promised the Senate to evaluate the Overseas Countries and Territories-regime (Landen en Gebieden overzee (LGO)-regime) of the Caribbean Netherlands and the further development of legislation on immigration. The WODC (Ministry of Justice and Security) has commissioned Pro Facto to evaluate the WTU-BES.

Research question and methodology

The central research question reads as follows:

How does the WTU-BES function taking into account the principles formulated around 10-10-'10, what problems can be defined and how can these problems be resolved?

The following additional questions are defined:

- 1. What was the purpose of the WTU-BES on 10-10-'10 and which policy principles were formulated at the time?*
- 2. How is the WTU-BES implemented in the Caribbean Netherlands and are the objectives of the act achieved?*
- 3. What are the implications of the WTU-BES on businesses, institutions and the local community and which problems do occur?*
- 4. Is the act future proof in light of the research findings and what does this mean, especially in regards to the current LGO-regime of the Caribbean Netherlands?*

To answer the research question a literature and document study was carried out, in which among other things the act and related legislation and regulations and the associated parliamentary documents were studied. The information from the document study has been supplemented with a number of exploratory interviews with policy makers from various

Ministries. In addition, quantitative data of the WTU-BES were analyzed. This includes data on population development and migration and numbers regarding (residence)permits, residence purposes and non-legally residing aliens. We have also identified the formation and budget of organisations involved with the implementation of the WTU-BES.

The empirical findings in this study are based on interviews with 29 respondents on Bonaire. Interviews were also held with 11 respondents on Saba and Sint Eustatius. The (group) interviews were held with employees from executive organizations on the islands, employees of the public bodies and representatives of civil society organizations and institutions (labor, healthcare and housing). The interviews were focused on the experiences of those involved with (the implementation of) the WTU-BES. Information was gathered about the functioning of the WTU-BES, experienced problems and the implications of the act on businesses, institutions and the local communities of Bonaire, Sint Eustatius and Saba.

Goals and principles

Immigration policy in the Netherlands Antilles was traditionally restrictive. The National Ordinance Admission and Expulsion focussed on the protection of the vulnerable economies of the islands, due to the small scale of the islands and consequently the limited capacity to admit aliens on the island. The European Dutch government considered the continuation of the restrictive Netherlands Antillean admission policy necessary because of the very limited possibilities (economically and socially) of the small islands to admit large numbers of people, temporarily or otherwise, into their society. In addition to a restrictive admission policy, the immigration policy in the Caribbean Netherlands has the following five core objectives:

1. strengthening and improving border supervision;
2. an asylum procedure in accordance with international obligations;
3. a careful and efficient handling of residence applications;
4. properly regulated immigration detention with sufficient safeguards;
5. a careful and humane return policy.

The underlying principle in the context of the transition with regards to immigration law was that the admission policy of the Caribbean Netherlands should continue to be simple and in particular practical in the future.

Implementation and realization of objectives

Residence applications and population development

As of 2012, the number of (applications for) residence permits is slightly decreasing in the Caribbean Netherlands. On Bonaire and Sint Eustatius most residence applications relate to the purpose of paid employment. Family formation and family reunification are also common purposes for residence applications. On Saba the main purpose for residence applications is to receive education, which is related to the Saba University School of Medicine. Despite the decline in the number of applications for residence permits, the population of Bonaire has increased considerably in recent years. Between 2010 and 2017 the population has grown with approximately 23%. On Sint Eustatius the population has increased approximately by 7% since 2010, on Saba by 13%.

The population growth of the Caribbean Netherlands is largely caused by immigration. Most immigrants originate from the European Netherlands, the United States, the Dominican Republic, Venezuela, Peru and Colombia. Since 2016 the number of applications of Venezuelans for a work permit has doubled.

Implementation

The most important executive organizations of the WTU-BES are the military police (KMar) and the immigration and naturalization service (IND CN). The IND CN is responsible for executing the immigration policy on Bonaire, Sint Eustatius and Saba. This means that the IND CN assesses all applications for a residence permit or certificate of law from aliens or Dutch nationals who want to reside on these islands, for example to work. The IND CN checks whether the application meets the set conditions. The KMar is responsible for border control of the airports and the sea borders of the three islands. Checks are mainly performed at airports. Little or no staff capacity is available for inspections at seaports and coastal protection; enforcement has little priority here.

The actors involved generally experience no big issues with implementing the WTU-BES. The IND CN and the KMar nevertheless experience a number of legal and procedural inconveniences. The legal inconveniences concern some specific aspects of the act. It is for example not really possible to: check Dutch nationals on their maximum length of their stay within the islands, reject an application for a residence permit for European Dutch nationals who want to live in the Caribbean Netherlands but at the same time do not want to revoke themselves from the European Netherlands, or deny a person access to the Caribbean Netherlands of whom it is known that he previously did not leave in time following his permit for short stay. In addition, there are some provisions of the act that are difficult to interpret.

The legal and procedural inconveniences faced by the IND CN mainly affect their efficiency. In principle, the KMar can adequately carry out border supervision with the legal instruments provided by the WTU-BES. Most of the noticed difficulties affect the practice of admission and expulsion, but they do not have direct consequences for border supervision. An exception to this is that according to the parties involved it is not really possible to reject a person after he previously has been deported or has resided in the Caribbean Netherlands without a legal status.

Residence purpose paid employment

An important residence purpose with regards to the WTU-BES is paid employment. In 2016 this concerned 56% of all temporary residence permits on Bonaire, 63% on Sint Eustatius and 30% on Saba. The condition to obtain a residence permit is that a work permit must have been granted. Employers are required to request a work permit, which are issued on the basis of the BES Aliens Employment Act (Wet arbeid vreemdelingen BES (Wav BES)). The objective of the Wav BES is to protect the local labor market, prevent displacement of the local workforce and prevent illegal employment. There is a close relationship between the WTU-BES and the Wav BES: the Wav BES provides material standards for issuing a residence permit.

The RCN-unit SZW is responsible for issuing a work permit (to the employer). Before the IND CN can issue a residence permit, the RCN-unit SZW must first have issued a work permit. An employer is required to make an effort to fulfill a job with available local laborers. This is the so-called island test (eilandtoets). Almost all the interviewed entrepreneurs, employers and non-governmental organizations criticized the island test, because it has a lengthy procedure and is regarded as too bureaucratic.

It has been found that under the current circumstances there is poor insight on demand and supply of the labor market and locally there are barely suitable laborers available to fulfill vacancies. In very few cases the island test results in finding a local laborer for a vacancy.

Article 5 paragraph 7 of the Wav BES offers the possibility of refraining from the island test, if it is clear in advance that no local labor force is available because of the specific nature of the job in question. The Article has been applied in Saba in such a way that instead of a notification period of five weeks a period of two weeks is used for certain functions. This Article could also offer opportunities for various positions (which are difficult to fulfill with local laborers) on Bonaire and Sint Eustatius, because there is poor insight in supply and demand of the local labor market, the supply of local laborers is limited and there is no concrete and demonstrably effective job placement service.

Restrictive admission policy

The most important material objective of the WTU-BES is a restrictive admission policy. It can nevertheless be concluded that the WTU-BES consists of relatively few material standards. Dutch and American nationals do in principle not need a residence permit and a work permit, because according to the WTU-BES they have a direct right to access (under certain conditions) to the islands. For countries such as Venezuela, Colombia, Peru and the Dominican Republic (where many immigrants come from), there are no visa requirements for a short stay. Therefore there are no major barriers to gain access to the Caribbean Netherlands based on the WTU-BES. The most important restriction is that in order to qualify for a short stay a person is required to have sufficient means to earn a livelihood.

The restrictive nature of the admission policy of the Caribbean Netherlands is mainly related to the conditions that are set for obtaining a work permit (and therefore a residence permit with the residence purpose of paid employment). This manifests itself, among other things, through the island test and its strict enforcement. This means that the (restrictive) admission and expulsion policy is materially more determined by the Wav Bes than by the WTU-BES.

The vast majority of applications for temporary residence permits are honored (in 2016 93% of the requested temporary residence applications were granted on Bonaire, on Sint Eustatius 97% was granted and on Saba 99,5%). This does not mean that the WTU-BES does not have any restrictive value. It is plausible that the influx of aliens from, in particular, South American countries such as Colombia, Ecuador, the Dominican Republic and Venezuela, would be considerably larger without the WTU-BES, especially on Bonaire and Sint Eustatius. For that matter the number of people who are residing on Bonaire without a legal basis is illustrative. Estimates vary from 200 to 1.000, or in other words from about 1% to more than 5% of the total population.

There is no programmatic supervision and adequate enforcement of the WTU-BES. With regards to admission to the Caribbean Netherlands the WTU-BES is adequately implemented, but the available capacity for detection and expulsion of aliens who are no longer a legal resident is insufficient. In the interviews it became clear that not only capacity, but also expertise is an issue concerning the expulsion of illegal aliens.

Besides legislation and regulations, a vision of the future can also contribute to a restrictive admission policy. In (probably)¹ 2009 or 2010 the *Master plan strategic development of Bonaire 2010-2025* was adopted. The Master plan consists of four development scenarios. However, no choice has ever been made between these scenarios. There is currently no policy or vision that explicitly deals with the question of the maximum amount of residents Bonaire can cope with and how migration can be regulated substantially. For Sint Eustatius and Saba this doesn't seem to be an issue.

¹ The document has no date.

Implications

The implications of the WTU-BES mainly concern the population increase of Bonaire (almost a quarter since 2010). The WTU-BES has made this growth possible (because the act is adequately implemented) and there is no strategic vision that hinders this development. It is clear that Bonaire cannot keep up with this particular growth on all levels. There is a major shortage of houses on Bonaire. It takes about 12 years before someone on a waiting list is eligible for a house. Healthcare, on the other hand, is still adequate.

The procedure for obtaining a residence permit including a work permit is twelve weeks. Five weeks hereof are related to the island test. It appears that the impact of the Wav BES is not that local laborers get a job, but that it takes about three months before a vacancy is filled by someone (from abroad). This means that there is a chronic undercapacity at businesses that are for example active in tourism and construction. There are in addition implications for healthcare, because it can take a long time to get a (medical) specialist (who is not locally available) to fulfill a vacancy.

It is not clear what the maximum number of residents is that Bonaire – in view of the present and future facilities with regards to for example the housing market and healthcare – can handle. It is clear that the growth that Bonaire is experiencing in recent years probably cannot continue at this rate. The facilities are not sufficiently equipped. The WTU-BES and the Wav BES do not offer the right (legal) instruments to stop the growth. This requires a restrictive policy on substantive grounds, based on a vision that is preferably developed by the Administrative Board and the Island Council of Bonaire.

Future-proofness

The legal and procedural bottlenecks that have become clear in this research do not deal with the core of the act. The inconveniences can (partially) be resolved by applying a comparable solution as in the European Netherlands in the past has been implemented to overcome the same type of problems. The WTU-BES is well executable and is future-proof, also with regards to the current LGO-regime.

The overseas territories of the Kingdom of the Netherlands are associated with the European Union through the so-called Overseas Countries and Territories-regime (LGO-regime). The LGO-regime means that the scope of European law is partly applicable to the Caribbean Netherlands. This is limited: only the so-called LGO-regime of part IV of the Treaty on the Functioning of the European Union (VWEU) applies to the Caribbean parts of the Kingdom. Another status under European law is the so-called Ultraperipheral area (Ultraperifeer gebied (UPG-status)). The basis for the UPG-status can be found in Article 349 VWEU. According to this provision, (in principle all) European law is applicable on the UPG.

Due to the developments of the LGO-regime in the jurisprudence of the Common Court of Justice and the LGO-decree, European law has an increasingly important role in the relationship between the European Netherlands and the public bodies in the Caribbean area. This results in limitations of the powers of the legislator and the government in the Hague. This could relate in particular to measures that can be interpreted as affecting the citizenship rights of European citizens in the Caribbean Netherlands or measures that in any way lead to unequal treatment between Dutch people on both sides of the ocean (while guaranteed rights are affected by European law). The question is whether the LGO-regime itself is future-proof. This in light of the developments of case law of the Common Court of Justice and the LGO-decree, which tend to more uniformity between European law and law of the LGO. Our

respondents have little interest in this subject. Those who do – with possibly a single exception – are not supporting an adjustment of the LGO-regime.