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CONTEMPORARY URBAN
HOUSING LAW

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7 SCREENING AND EXCLUDING PEOPLE WITH LOW INCOME AND NUISANCE NEIGHBOURS FROM HOUSING: HUMAN RIGHTS PROOF?

*Michel Vols**

7.1 INTRODUCTION

The Dutch City of Rotterdam is booming. The Academy of Urbanism voted Rotterdam as the best European city of 2015 because of its innovative architecture and urban design.¹ Lonely Planet has characterised Rotterdam as one of the ten ‘best value destinations’ in 2016.² At the same time, anti-social behaviour seriously affects the quality of life of the over 600,000 residents of the City. Although other Dutch cities have to deal with anti-social behaviour too, it is said that the problems in Rotterdam, and especially in Rotterdam Zuid (the area south of the River Meuse), are the most serious in the Netherlands. A fact-finding committee established by the Dutch government even characterised the seriousness of the problems regarding the quality of life in Rotterdam Zuid as ‘un-Dutch’.³ In response, the government started a National Programme that will last for twenty years. The main objective of this National Programme is to improve the quality of life in Rotterdam Zuid by taking unorthodox measures. One of these measures is the ‘screening’ of people that want to obtain housing in Rotterdam Zuid. House seekers with no income or with a track record of anti-social behaviour will be denied a housing permit and will, consequently, not be able to obtain housing in this area.⁴ Of course, this screening and banning of housing seekers is controversial: according to some politicians and academics, the

* After this paper was peer reviewed and accepted for publication, the European Court of Human Rights ruled – as expected in this paper – that the Urban Areas Special Measures Act 2005 did not violate the right to freedom to choose a residence. See *Garib v. the Netherlands*, 23 February 2016, App. No. 43494/09.

1 See The Academy of Urbanism (2004) ‘Urbanism awards: Rotterdam takes top prize’, Retrieved on 8 June from <www.academyofurbanism.org.uk/>.

2 See Lonely Planet (2015) ‘Best value destinations for 2016’, Retrieved on 8 June 2015 from <www.lonelyplanet.com>.

3 See Eindadvies van team Deetmans/Mans over aanpak Rotterdam-Zuid, *Kwaliteitssprong Zuid: ontwikkeling vanuit kracht*, February 2011, p. 7.

4 See Nationaal Programma Rotterdam Zuid, *Uitvoeringsplan 2015-2018*, January 2015, p. 53.

screening practices violate basic human rights such as the right to freedom to choose a residence.⁵

In light of the foregoing, this paper critically examines the screening and banning of house seekers in the Dutch fight against anti-social behaviour. Can an individual seeking a house use the right to the freedom to choose his/her residence for a successful legal attack of the legislation used in the screening and banning practices? While centred on Dutch law, the analysis can be relevant for other jurisdictions facing similar issues regarding anti-social behaviour. In other jurisdictions such as the United Kingdom and the United States of America, screening and banning of specific housing seekers is used to improve the quality of life in residential areas.⁶

The paper focuses on addressing anti-social behaviour, which is a 'contested concept'.⁷ While a variety of definitions of the term anti-social behaviour have been suggested, this paper will use the definition first suggested by Millie, who saw it as behaviour that causes harassment, alarm or distress to individuals not of the same household as the perpetrator. The behaviour requires interventions from the relevant authorities (e.g. landlords or municipalities), but criminal prosecution and punishment may be inappropriate because the individual components of the behaviour are not prohibited by the criminal law, or in isolation constitute relatively minor offences.⁸

Of course, we should note that the screening of house seekers is not the only method used in the fight against anti-social behaviour; there are a number of other strategies that seek to prevent or address the problem behaviour. One strategy is to promote an approach whereby offenders and victims solve their problems amicably, as, for example, by providing a neighbourhood mediation service.⁹ However, this strategy will not be effective in every case of anti-social behaviour: in some cases, for example, one of the parties involved may refuse to participate, or the anti-social behaviour may be too severe.¹⁰ A second strategy is to discipline offenders by supervising, training, punishing and rewarding them without excluding the offender from obtaining or keeping housing.¹¹ For example, landlords may ask the courts to issue behavioural orders that prohibit individuals engaging in specified

5 A. Duivesteijn, 'De Rotterdamwet deugt niet', *S&D*, No. 10, 2005, p. 9; *Kamerstukken I* 2005-2006, 30091, nr. C, p. 31.

6 See e.g. G. Green, C. Barratt & M. Wiltshire, 'Control and care: landlords and the governance of vulnerable tenants in houses in multiple occupation', (2015) *Housing Studies* (online), available at: <www.tandfonline.com/doi/abs/10.1080/02673037.2015.1080818?journalCode=chos20>, p. 13-14; L.R. Silva, 'Criminal histories in public housing', *Wisconsin Law Review*, No. 2, 2015, p. 382.

7 A. Millie, *Anti-Social Behaviour*, Milton Keynes, United Kingdom, 2009, p. 2.

8 Id., pp. 16-17. See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 14 for several other definitions of anti-social behaviour ('overlast') as developed by the Dutch government.

9 Peper, B. *et al.*, *Bemiddelen bij conflicten tussen burens*, Eburon, Delft, 1999.

10 Ufkes, E.G. *et al.*, 'The effectiveness of a mediation program in symmetrical versus asymmetrical neighbor-to-neighbor conflicts', *International Journal of Conflict Management*, Vol. 23, No. 4, 2012, pp. 440-457.

11 I. Sahlin, 'Strategies for exclusion from social housing', *Housing Studies*, Vol. 10, No. 3, 1995, pp. 381-402.

behaviours.¹² Besides, local authorities may issue administrative penalty notices because of anti-social behaviour such as causing noise nuisance or growing cannabis in a home.¹³ A third strategy is to remove anti-social individuals or families against their will from the home they occupy. Under Dutch tenancy law, for example, landlords are entitled to request the court to issue an eviction order if a tenant is involved in serious anti-social behaviour.¹⁴ Besides that, Dutch local authorities are allowed to close down homes if the residents (owner-occupiers, tenants or squatters) violate public order or in the case of drug dealing.¹⁵ After the offender is made homeless, the landlord or municipality is not required to provide alternative accommodation. However, the Municipality of Rotterdam does plan to establish 'slum neighbourhoods' (*asowijken*) in which to concentrate anti-social evictees and remove them from regular residential neighbourhoods. The evictees will not be forced to live in the slum neighbourhoods, but will be offered a temporary lease, and they will have to pay rent. The slum neighbourhoods will be located at a remote location on the outskirts of the city.¹⁶

Although questions have been raised about possible human rights violations as a result of applying the foregoing strategies,¹⁷ this paper will only assess whether the strategy of screening and banning of housing seekers conflicts with human rights. This strategy can be characterised as a form of 'border control': its main objective is to psychologically exclude applicants from obtaining housing in specific territory (i.e. a neighbourhood).¹⁸ Border control aims to prevent anti-social behaviour at a very early stage, but at the same time has a very serious impact on the rights and freedoms of the person excluded from the neighbourhood.

The rest of this paper has been divided into four parts. The first part analyses the Urban Areas Special Measures Act of 2005. This piece of legislation, also known as the Rotterdam Act, entitles local authorities to ban house seekers with no or insufficient income from disadvantaged neighbourhoods. The second part contains an analysis of the Extended Urban Areas Special Measures Act of 2015 (draft version), whose main objective is to allow

12 E. Burney, *Making People Behave: Anti-Social Behaviour, Politics and Policy*, Willan Publishing, Devon, 2009.

13 M. Vols, 'Neighbors from hell: problem-solving and housing laws in the Netherlands', *The Arizona Summit Law Review*, Vol. 7, 2014.

14 Arts. 6:265 and 7:231 of the Dutch Civil Code. See M. Vols, P.G. Tassenaar, P.G. & J.P.A.M. Jacobs, 'Dutch courts and housing related anti-social behaviour: a first statistical analysis of legal protection against eviction', *International Journal of Law in the Built Environment*, No. 2, 2015, pp. 148-161.

15 Art. 174a of the Dutch Municipality Act and Art. 13b of the Dutch Opium Act. See M. Vols & M. Bruijn, 'De strijd van de burgemeester tegen drugscriminaliteit. Een eerste statistische analyse van de toepassing van artikel 13b Opiumwet', (2015) *Netherlands Administrative Law Library* (online), available at: <www.nall.nl/tijdschrift/nall/2015/10/NALL-D-15-00002>.

16 See M. Kooyman, "'Containerdorp' voor rabiate aso's in Rotterdam", *Algemeen Dagblad*, 9 May 2014.

17 Vols *supra* note 13.

18 Sahlin *supra* note 11.

local authorities to ban house seekers with a track record of anti-social behaviour from disadvantaged neighbourhoods. The third part assesses whether these pieces of legislation violate the house seekers' right to freedom to choose his or her residence. The final part presents the conclusions.

7.2 URBAN AREAS SPECIAL MEASURES ACT 2005: BANNING HOUSE SEEKERS WITH NO INCOME

Over the last three decades, the City of Rotterdam has encountered serious problems concerning crime and anti-social behaviour in residential areas.¹⁹ These problems have resulted in a local political earthquake. In 2002, the new right-wing party, Liveable Rotterdam (*Leefbaar Rotterdam*), won nearly 35% of all the votes in the municipal elections and became the city's largest political party. This position had been held by the left-wing Labour Party for decades, which was said to be unable to deal with the problems concerning anti-social behaviour. After the elections, the party's leader was assassinated by a political adversary.²⁰ Nonetheless, Liveable Rotterdam managed to form a coalition with the local liberal and Christian Democratic parties.²¹ One of the main objectives of the new board of mayor and aldermen was to improve the quality of life in the city.²² The board started to lobby politically and requested the national government and Parliament to introduce new legislation to regulate the influx of 'disadvantaged' persons (i.e. people without a job).²³

This political lobby was successful: the Urban Areas Special Measures Act came into effect in 2005.²⁴ The main objectives of this Act are to tackle large concentrations of anti-social behaviour and to improve the quality of life of residents of cities.²⁵ Although the Act is the result of political lobbying by the City of Rotterdam, and is therefore, known as the Rotterdam Act, it can also be used outside Rotterdam. Other municipalities are entitled to apply the instruments provided by the Urban Areas Special Measures Act 2005.²⁶

The Urban Areas Special Measures Act 2005 entitles the municipal council to establish a housing allocation by-law in which it can oblige prospective tenants to obtain a housing permit.²⁷ This obligation, however, is applicable only in areas that are designated by the

19 See J.C. van Ostaaijen & P.W. Tops, 'De erfenis van vier jaar Leefbaar Rotterdam', *Justitiële verkenningen*, Vol. 33, No. 2, 2007, pp. 21-22.

20 See D. Pels, *De geest van Pim*, Anthos, Amsterdam, 2003.

21 See P. Tops, *Regimeverandering in Rotterdam*, Atlas, Amsterdam, 2007, pp. 55-69.

22 van Ostaaijen & Tops *supra* note 19, pp. 22-23.

23 See Gemeente Rotterdam, *Rotterdam zet door*, December 2003, pp. 30-31 and 52.

24 See *Kamerstukken II* 2003-2004, nr. 21062, nr. 117, p. 3.

25 See *Kamerstukken II* 2004-2005, nr. 30091, nr. 3, pp. 1-2 and 13; *Kamerstukken II* 2004-2005, nr. 30091, nr. 5, p. 6.

26 *Kamerstukken II* 2004-2005, nr. 30091, nr. 3, p. 3.

27 Art. 8 of the Urban Areas Special Measures Act 2005.

Minister of Housing. The municipal council will first have to request the Minister of Housing to so designate a specific area.²⁸ In this request the council has to show that the designation order is necessary to fight 'problems that occur in urban areas' (*grootstedelijke problematiek*).²⁹ Moreover, the council has to demonstrate plausibly that the designation order complies with the principles of proportionality and subsidiarity.³⁰ After the Minister of Housing has issued a designation order and the municipal council has established a housing allocation by-law, the board of mayor and councillors is authorised to deny a housing permit to a house seeker if he or she does not have an income.³¹

In 2012, the national government evaluated the Urban Areas Special Measures Act 2005. The evaluation report shows that the City of Rotterdam is the only municipality that applied the powers laid down in the Act.³² Since 2006, the Minister of Housing has designated a number of areas in Rotterdam in which the screening instrument as laid down in the Urban Areas Special Measures Act 2005 is used. From this point onwards, the board of mayor and councillors of Rotterdam has rejected a couple of hundred housing permits because the applicants did not have an income.³³ Furthermore, it has issued several hefty administrative fines (e.g. €4,000) to residents that lived in a designated area without a housing permit.³⁴

After the evaluation, the City of Rotterdam remained the only municipality that did use the screening instruments for two more years. In 2014, however, the City of Nijmegen also started to use the powers.³⁵ Furthermore, in 2015 the municipal council of Capelle aan den IJssel sent a request to the Minister of Housing to designate areas in the municipality in order to use the screening procedure as laid down in the Urban Areas Special Measures Act 2005.³⁶

Nonetheless, the vast majority of the Dutch municipalities do not use the screening instrument provided by the Urban Areas Special Measures Act 2005. The municipalities that were interviewed during the evaluation in 2012 stated that they do not need to use

28 Art. 5 of the Urban Areas Special Measures Act 2005.

29 Art. 6 of the Urban Areas Special Measures Act 2005.

30 Art. 6 of the Urban Areas Special Measures Act 2005.

31 I Art. 8 of the Urban Areas Special Measures Act 2005.

32 Dutch Government, Evaluatierapport Wet bijzonder maatregelen grootstedelijke problematiek, 2012, p. 6, Retrieved on 8 June 2015 from <www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2012/07/18/evaluatie-wet-bijzondere-maatregelen-grootstedelijke-problematiek.html>.

33 Id., p. 7. See also A. Ouwehand & W. Doff, 'Rotterdam zet symboolpolitiek door', *Tijdschrift voor de Volkshuisvesting*, No. 5. 2013, pp. 6-16.

34 See case law: Afdeling Bestuursrechtspraak Raad van State (hereafter ABRvS) 26 February 2014, ECLI:NL:RVS:2014:622; ABRvS 26 March 2014, ECLI:NL:RVS:2014:1041; ABRvS 26 March 2014, ECLI:NL:RVS:2014:1042; ABRvS 26 March 2014, ECLI:NL:RVS:2014:1043; Rechtbank Rotterdam (District Court Rotterdam) 16 August 2012, ECLI:NL:RBROT:2012:BX5631.

35 *Kamerstukken I* 2013-2014, 33797, nr. E, p. 2.

36 See Gemeente Capelle aan den IJssel (2015) 'Rotterdamwet oplossing voor Capelse kwetsbare buurten', Retrieved on 8 June 2015 from <www.capelleaandenijssel.nl/>.

the powers to improve the quality of life or that they consider the powers as a disproportionate measure to tackle anti-social behaviour.³⁷ Another interesting finding of the evaluation is that a number of municipalities say they do not use the powers laid down in the Urban Areas Special Measures Act 2005, because they – in close collaboration with the police and housing associations – have already developed another procedure to screen prospective tenants.³⁸ This other procedure can be characterised as a ‘covert’ screening procedure³⁹ and will be discussed in the next section of this paper.

7.3 EXTENDED URBAN AREAS SPECIAL MEASURES ACT 2015: BANNING ANTI-SOCIAL HOUSE SEEKERS

In approximately fifteen Dutch municipalities, the local authority, housing associations and the police have made policy agreements regarding the screening and banning of anti-social people from rental housing.⁴⁰ The organisations agreed that the housing association will request the local authority and police to screen prospective tenants in order to prevent anti-social behaviour in residential areas.⁴¹ The mayor and police chief will analyse the police files to assess whether any reports concerning anti-social behaviour (e.g. noise nuisance, intimidating behaviour, the growing of cannabis) have been made concerning the prospective tenant.⁴² Based on this screening, the local authority will advise the housing association whether or not to offer housing to the applicant.⁴³

Although almost no evaluations of this screening instrument have been made, the organisations involved are enthusiastic about the screening and banning of house seekers.⁴⁴ According to them, the screening instrument is effective and does have a preventive effect, because the organisations published the screening requirements.⁴⁵ However, the Dutch government believes the local practices are illegal because the police are not entitled to share the police data with the other organisations. Although Article 16 (1) of the Dutch Police Data Act allows the police to share data with the mayor if that is necessary for the maintenance of public order, it does not allow the police to share data in order to prevent housing-related anti-social behaviour.⁴⁶ To entitle the police to share data with the mayor,

37 Dutch government *supra* note 32, p. 7.

38 *Id.*, p. 8.

39 Sahlin *supra* note 11.

40 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 1.

41 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 2.

42 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 2.

43 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 2.

44 See *Kamerstukken II* 2015-2016, 34314, nr. 3, pp. 8 and 22-23; *Kamerstukken II* 2015-2016, 34314, nr. 4, pp. 9-12.

45 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 8; *Kamerstukken II* 2015-2016, 34314, nr. 4, p. 10.

46 See *Kamerstukken II* 2015-2016, 34314, nr. 3, pp. 5-6.

and, consequently, allow the current screening and banning practices, the government submitted (a draft version of) the Extended Urban Areas Special Measures Act to the House of Representatives in 2015.⁴⁷

The system proposed by this draft is similar to but more complicated than the Urban Areas Special Measures 2005. Again, the municipal council is entitled to establish a housing allocation by-law in which it can oblige house seekers to obtain a housing permit.⁴⁸ The obligation to obtain a housing permit is, again, applicable only in areas that have been designated by the Minister of Housing.⁴⁹ The municipal council first has to request the Minister of Housing to issue a designation order in which he designates a block of buildings, a street or an area in order to make the obligation to have a housing permit applicable. In its request, the council has to provide reasons for the request and prove that the designation order is necessary to fight anti-social behaviour. The municipal council has to, for example, provide (statistical) evidence of the level of anti-social behaviour and crime in the block of buildings, street or area.⁵⁰ Moreover, it will have to demonstrate plausibly that the designation order complies with the principles of proportionality and subsidiarity.⁵¹

After the Minister of Housing has issued a designation order and the municipal council has established a housing allocation by-law, the board of mayor and councillors is responsible for processing the applications for housing permits. In the case that someone applies for a housing permit, the board will screen the applicants. The municipal council decides which procedure is needed and has to demonstrate plausibly which screening procedure is required in the local setting.⁵² There are two screening procedures: a screening based on a Certificate of Good Conduct (hereafter CGC) and a screening based on the police registers.⁵³

In the first procedure (GCG) the police will assess whether the house seekers were involved in behaviour that resulted in a criminal prosecution.⁵⁴ If this procedure is applicable, the applicant has to apply for a CGC, and the Minister of Justice and Security will assess whether the applicant has been criminally prosecuted in the last four years. If no CGC is issued, the board will, in principle, not issue the housing permit.⁵⁵

In the second procedure the police registers are checked to assess whether the applicant was involved in anti-social behaviour that did not result in criminal prosecution. This anti-

47 See *Kamerstukken II* 2015-2016, 34314, nr. 2.

48 Art. 10 of the Extended Urban Areas Special Measures Act 2015.

49 Art. 8 of the Extended Urban Areas Special Measures Act 2015.

50 Art. 6 (3) of the Extended Urban Areas Special Measures Act 2015.

51 Art. 10 of the Extended Urban Areas Special Measures Act 2015.

52 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 35.

53 Arts. 10 and 10a of the Extended Urban Areas Special Measures Act 2015.

54 Arts. 5 and 6 of the Extended Urban Areas Special Measures Act 2015. See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 32.

55 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 32.

social behaviour is only reported to the police or is, for example, addressed with eviction or sanctions based on administrative law (e.g. an administrative penalty notice or a banning order issued by the mayor).⁵⁶ The Extended Urban Areas Special Measures Act 2015 contains an exhaustive list of offences that can be taken into account in this second screening procedure.⁵⁷ For example, nuisance behaviour such as noise nuisance that causes harm or distress to individuals or endangers the safety or health of individuals should be taken into account. The Explanatory Memorandum mentions some examples of nuisance behaviour that can be taken into consideration in the screening procedure: wandering on the walkway of the apartment building aimlessly spying or staring into the neighbours' home, littering the building, relieving oneself on the street, blocking the building's entrance with a shopping cart or rubbish bag, driving a scooter on the pavements and even ringing the neighbour's bell and running away.⁵⁸

Furthermore, the list contains some other offences⁵⁹: (b) illegal use of a premise (e.g. using the premise for prostitution, handling large amounts of stolen goods or illegal sub-letting); (c) insulting or discriminating remarks or other types of intimidation/bullying of neighbours or visitors; (d) acts of violence, overt use of force, threats and assault of neighbours or visitors; (e) offences punishable under the Opium Act that have been committed in the home or in the locality thereof (e.g. growing cannabis in the premise); (f) public drunkenness in the locality of the home; (g) property offences such as house burglary and bag snatching with a direct connection to the home; (h) arson and vandalism in the locality of the home and (i) radical, extremist or terrorist acts that are illegal under the Criminal Code.⁶⁰

The board of mayor and councillors will request the Chief of Police to provide a report of all police data over the last four years related to the applicant and his or her prospective co-occupiers concerning the offences mentioned in the exhaustive list.⁶¹ Based on this police report, the board will decide whether to issue the housing permit or not. It has to take into account a number of criteria⁶²: (a) the nature and seriousness of the anti-social behaviour mentioned in the police report; (b) the frequency of the anti-social behaviour and how the different offences relate to each other; (c) the nuisance experienced by neighbours owing to the anti-social behaviour; (d) the amount of time between the period the anti-social behaviour took place and the moment the house seekers applied for a

56 See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 35.

57 Art. 10a (2) of the Extended Urban Areas Special Measures Act 2015.

58 *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 38.

59 Art. 10a (2) of the Extended Urban Areas Special Measures Act 2015.

60 Art. 10a (2) of the Extended Urban Areas Special Measures Act 2015. See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 38.

61 Art. 10b (1) and (2) of the Extended Urban Areas Special Measures Act 2015.

62 Art. 10b (4) of the Extended Urban Areas Special Measures Act 2015. See *Kamerstukken II* 2015-2016, 34314, nr. 3, pp. 42-44.

housing permit and (e) the possible impact of this type of anti-social behaviour on the quality of life in the designated area in which the applicant wants to live.⁶³

The (draft version of the) Extended Urban Areas Special Measures Act 2015 has received considerable critical attention from the media⁶⁴ and from academics,⁶⁵ but also from the influential Netherlands Institute for Human Rights.⁶⁶ The Institute acknowledged that severe anti-social behaviour can have a negative impact on the human rights of the people that have to suffer from such behaviour.⁶⁷ However, the Institute argues that the measures as laid down in Extended Urban Areas Special Measures Act 2015 will result in the social exclusion of people, which is at odds with the idea of human rights.⁶⁸ Furthermore, the Institute argues that screening based on the (draft version of the) Extended Urban Areas Special Measures Act 2015 will result in a violation of house seekers' human rights.⁶⁹ In the next section of this paper, I assess whether the screening and banning of house seekers indeed violates their right to choose their residence.

7.4 POSSIBLE VIOLATION OF RIGHT TO FREEDOM TO CHOOSE A RESIDENCE

Screening and banning of house seekers may violate their right to freedom to choose a residence. This right is codified in Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of Protocol No. 4 to the ECHR. According to Article 12 ICCPR, everyone lawfully within the territory of a state has the freedom to choose his residence. This right can, however, be limited as long as the restriction is provided by law and is necessary to protect national security, public order, public health or morals or the rights and freedoms of others.⁷⁰

Article 2 of Protocol No. 4 to the ECHR lays down the same right. Paragraph 3 of this Article requires limitations to be in accordance with law and to be necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protec-

63 Art. 10b (4) of the Extended Urban Areas Special Measures Act 2015.

64 In September 2015 the Extended Urban Areas Special Measures Act 2015 was analysed by Zembla, a leading investigative journalism show. See <www.zembla.vara.nl> [accessed 23 October 2015].

65 See e.g. G. van Eijk, 'Rotterdamwet: 'gedragseis' voor bewoners?', 30 augustus 2013, Retrieved on 23 October 2015 from <www.socialevraagstukken.nl/rotterdamwet-gedragseis-voor-bewoners/>.

66 The Netherlands Institute for Human Rights explains, monitors and protects human rights; promotes respect for human rights in practice, policy and legislation; and increases the awareness of human rights in the Netherlands. See <www.mensenrecht.nl> [accessed 23 October 2015].

67 See College voor de Rechten van de Mens, 'Advies inzake het conceptwetsvoorstel wijziging van de wet bijzondere grootstedelijke problematiek', 3 February 2015, p. 2.

68 Id.

69 Id.

70 Art. 12 of the ICCPR.

tion of the rights and freedoms of others.⁷¹ Paragraph 4 of the Article, however, states that ‘in particular areas’ less strict requirements are applicable. The restriction still needs to be in accordance with the law, but instead that interference is necessary in democratic society, it should be ‘justified by the public interest in a democratic society’.⁷²

In this section I will analyse whether a house seeker can use the right to freedom to choose his/her residence for a successful legal attack of the legislation used in the screening and banning practices. Instead of developing a legal argument in regard to why the screening practices can be characterised as a violation of the right to freedom to choose a residence, I will use another method to answer this paper’s main question. Based on the Explanatory Memoranda of both the Urban Areas Special Measures Act 2005 and the Extended Urban Areas Special Measures Act 2015 and Dutch case law, I will develop the possible line of defence of the Dutch government against legal attacks on these pieces of legislation. After the possible line of defence of the government developed, I will assess whether it will hold in Strasbourg.

The government’s line of defence is relevant, because a house seeker from Rotterdam has decided to challenge the Urban Areas Special Measures Act 2005, after he or she was denied a housing permit. Given the European requirement that all national remedies need to be exhausted before a complaint can be filed with the European Court of Human Rights,⁷³ the appeal against the denial of the housing permit has already resulted in national case law. The Administrative Law Division of the Council of State (the Supreme Administrative Court), however, did not qualify the decision to reject the housing permit as a violation of the right to freedom to choose a residence.⁷⁴ Consequently, a house seeker that was denied a housing permit has filed a complaint with the European Court.⁷⁵ It is expected that the European Court will deal with this case in 2016 or 2017. Of course, the European Court will not assess a possible violation of human rights by the application of the Extended Urban Areas Special Measures Act 2015, but its decision will certainly influence the way local authorities will use the powers laid down in this Act.

For now it is safe to assume that the Dutch government will not dispute that the denial of a housing permit qualifies as an interference with the house seekers’ right to freedom to choose his or her residence. In the Explanatory Memoranda of the Urban Areas Special

71 Art. 2 (3) of Protocol No. 4 to the ECHR.

72 Art. 2 (4) of Protocol No. 4 to the ECHR. See D.J. Harris *et al.*, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2009, pp. 738-739.

73 Art. 35 of the ECHR.

74 ABRvS 4 February 2009, ECLI:NL:RVS:2009:BH1845, para. 2.3.2; ABRvS 18 June 2014, ECLI:NL:RVS:2014:2168, para. 3.1. See also Rechtbank Rotterdam (District Court Rotterdam) 4 April 2008, ECLI:NL:RBROT:2008:BD0270, para. 2.3.

75 A. Liukku & P. Smits, ‘Niet meer dan enkele tientallen mensen in wijken geweigerd – Veroordeeld tot een huis met schimmel’ *Algemeen Dagblad*, 28 March 2009, p. 12. The right to freedom to choose a residence did not result in many cases at the ECHR level. See *e.g. Tatishvili v. Russia*, 22 February 2007, App. No. 1509/02.

Measures Act 2005 and the Extended Urban Areas Special Measures Act 2015, it has acknowledged that such a denial will result in a restriction of the right.⁷⁶ However, the government will dispute that this restriction can be characterised as a violation of the right to freedom to choose a residence. It will use a number of arguments to substantiate this position.

First, the government is most likely to argue that the restriction of the right is in accordance with the law.⁷⁷ The screening practices have a sufficient statutory basis: the (Extended) Urban Areas Special Measures and the local housing allocation by-laws. These pieces of legislation are precise and meet the requirements that stem from the principles of accessibility and foreseeability.⁷⁸ Both the (Extended) Urban Areas Special Measures Act and the housing allocation by-laws will be published and will contain a list of all the factors that will be taken into account in the screening procedure.⁷⁹ Consequently, according to the government, the restriction will not be contrary to the principle of legal certainty.⁸⁰

Will this first element of the government's line of defence hold in Strasbourg? The domestic legality of the interference cannot be disputed, because the government will point to the (Extended) Urban Areas Special Measures Act and the housing allocation by-laws that authorise the screening and denial of housing permits. Next, the European Court will assess whether these pieces of legislation are adequately accessible.⁸¹ This requirement will also be fulfilled, because the (Extended) Urban Areas Special Measures Act, the Explanatory Memoranda and the by-laws are published and can, for example, be found online. Lastly, the European Court will analyse whether the law is formulated with sufficient precision.⁸² Probably, the European Court will conclude that this is the case with regard to the Urban Areas Special Measures Act 2015. The grounds on which a housing permit can be denied are very clear: if an applicant does not have an income, the housing permit will be refused.⁸³

In the case that the Extended Urban Areas Special Measures Act 2015 will be challenged in the future, the applicant may argue that this piece of legislation does not meet these requirements and refer, for example, to the advice of the Netherlands Institute for Human Rights. In its advice regarding the draft version of the Act, the Institute argues that the grounds under which a housing permit can be denied are not precise enough. It is unclear which criminal offences may result in the denial of the permit. The Institute, therefore,

76 *Kamerstukken II* 2004-2005, nr. 30091, nr. 3, p. 16; *See Kamerstukken II* 2015-2016, 34314, nr. 3, p. 49.

77 *See Kamerstukken II* 2015-2016, 34314, nr. 3, p. 49.

78 *Id.*

79 *Id.*

80 *See Id.*

81 *Sunday Times v. UK*, ECHR (1979) Series A, No 30.

82 *Id.*

83 Art. 8 of the Urban Areas Special Measures Act 2005.

concludes that the Act does not comply with the principle of foreseeability.⁸⁴ In the latest version of the Extended Urban Areas Special Measures Act 2015 and the Explanatory Memorandum, however, the government has included more precise descriptions and examples of the types of anti-social behaviour and criminal offences that may result in the denial of the housing permit.⁸⁵ As a result, it is likely that the European Court will conclude that the law is formulated with sufficient precision and that, consequently, the interference is in accordance with the law.

Second, the government will most surely argue that restriction of the house seekers' rights serves a public interest and pressing social need. Screening aims to safeguard the safety and security in residential areas and to improve the quality of life in cities. The restriction pursues, according to the government, a legitimate aim, namely the protection of public order and the right and freedoms of others.⁸⁶ The screening of house seekers will prevent anti-social behaviour and crime, and public order will be maintained. Furthermore, the rights and freedoms of the residents suffering from anti-social behaviour will be protected. The government will probably advance that by screening, the authorities fulfil positive obligations that stem from the right to respect for the private life and home of residents affected by anti-social behaviour.⁸⁷

It is very likely that the second element of the government's line of defence will hold in Strasbourg too. As Harris and others have argued, 'the breadth of most of the grounds for interference is so wide (...) that the state can usually make a plausible case that it did have a good reason for interfering with right'.⁸⁸ Moreover, it will be hard for an applicant to convince the European Court that the given reason (i.e. protection of public order and the right and freedoms of others) is not the 'real' reason. According to Harris and others, the European Court has not been willing to accept such an 'allegation tantamount to bad faith' easily.⁸⁹

The objective of the third element of the government's line of defence will be to convince the European Court that screening and banning of house seekers is 'necessary in a democratic society'.⁹⁰ The Dutch government will probably emphasise that a margin of appreci-

84 See College voor de Rechten van de Mens *supra* note 67, pp. 3-4.

85 Art. 10a (2) Extended Urban Areas Special Measures Act 2015. See *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 38.

86 See *Kamerstukken II* 2004-2005, 30091, nr. 3, pp. 16-18; *Kamerstukken II* 2004-2005, nr. 30091, nr. 5, p. 9; *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 49; ABRvS 4 February 2009, ECLI:NL:RVS:2009:BH1845, para. 2.3.2; Rechtbank Rotterdam (District Court Rotterdam) 4 April 2008, ECLI:NL:RBROT:2008:BD0270, para. 2.3.

87 *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 49.

88 Harris *et al.* *supra* note 72, p. 348.

89 *Id.*

90 The government might also argue that Art. 2 (4) of Protocol No. 4 to the ECHR is applicable and the interference is 'justified by the public interest in a democratic society'. Still, it will probably advance the same arguments as presented in this section of the paper.

ation is applicable.⁹¹ Moreover, it is expected that the government will minimise the significance of the restriction itself.⁹² The government will argue that the restriction is limited with regard to space and time.⁹³ The screening practices will not take place in the whole of the Netherlands, but only in carefully designated areas for a specific period of time (i.e. four years).⁹⁴ The government will also minimise the effects of the screening practices, by stating that there will be plenty of other options for house seekers to find suitable accommodation outside the designated areas.⁹⁵

Furthermore, the government is most likely to argue that the screening and banning of house seekers comply with the principles of proportionality and subsidiarity and are suitable to address crime and anti-social behaviour.⁹⁶ It will emphasise the seriousness of the problems concerning anti-social behaviour and crime and, at the same time, minimise the significance of the restriction of the house seeker's right.⁹⁷ Furthermore, the government will argue that the problems cannot be addressed successfully with instruments that have a less serious impact on the applicant's right. In addition, the government will probably point out that the screening of house seekers will only be used as a matter of last resort.⁹⁸

Additionally, the government will advance that the built-in procedural safeguards will ensure that at every stage of the decision-making process the authorities are obliged to assess whether the decision they make complies with the principle of proportionality.⁹⁹ For example, both the Minister of Housing and the municipal council are statutorily obliged to assess whether the designation order and housing allocation by-law are necessary and suitable instruments to address the problems.¹⁰⁰ The board of mayor and councillors will have to assess in every single case whether the decision to reject a housing permit is in accordance with the principle of proportionality.¹⁰¹ The authorities are also statutorily obliged to check whether alternative – less intrusive – instruments have been applied before in the fight against anti-social behaviour in the area.¹⁰²

91 *Kamerstukken II* 2004-2005, nr. 30091, nr. 3, p. 17.

92 *Kamerstukken II* 2004-2005, nr. 30091, nr. 3, p. 16; *Kamerstukken II* 2004-2005, nr. 30091, nr. 5, p. 9.

93 *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 51.

94 *Kamerstukken II* 2004-2005, 30091, nr. 3, pp. 16-17; ABRvS 4 February 2009, ECLI:NL:RVS:2009:BH1845, para. 2.3.2.

95 *Kamerstukken II* 2004-2005, 30091, nr. 3, p. 16; *Kamerstukken I* 2005-2006, 30091, nr. C, pp. 17-18; *Kamerstukken II* 2015-2016, 34314, nr. 3, pp. 50-51.

96 *Kamerstukken II* 2004-2005, 30091, nr. 3, pp. 18-20; *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 50.

97 *Kamerstukken II* 2004-2005, 30091, nr. 3, p. 19; *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 51; ABRvS 4 February 2009, ECLI:NL:RVS:2009:BH1845, para. 2.3.2; Rechtbank Rotterdam (District Court Rotterdam) 4 April 2008, ECLI:NL:RBROT:2008:BD0270, para. 2.3.

98 *Kamerstukken II* 2004-2005, 30091, nr. 3, p. 18.

99 *Kamerstukken II* 2004-2005, 30091, nr. 3, p. 20; *Kamerstukken I* 2005-2006, 30091, nr. C, pp. 17 and 31-32; *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 50.

100 Art. 6 of the Urban Areas Special Measures Act 2005.

101 Art. 3:4 of the Dutch General Administrative Law Act.

102 *Kamerstukken II* 2004-2005, nr. 30091, nr. 3, p. 14; *Kamerstukken I* 2005-2006, 30091, nr. C, p. 17; *Kamerstukken II* 2015-2016, 34314, nr. 3, p. 52.

The most important element of the applicant's legal challenge will probably be that the screening and banning practices are not necessary in a democratic society. The applicant may, for example, refer to the advice of the Netherlands Institute for Human Rights again. In its advice, the Institute doubts whether there is a pressing social need to introduce the powers as laid down in the Extended Urban Areas Special Measures Act 2015. It argues that the powers laid down in the Urban Areas Special Measures Act 2005 are only used in one municipality and that it therefore doubts whether is necessary to expand the screening and banning instruments.¹⁰³

Nonetheless, it is unlikely that the third element of the government's line of defence will not hold in Strasbourg. The European Court will probably conclude that the government makes a plausible claim that screening and banning practices are necessary in a democratic society. In assessing whether the interference is necessary in a democratic society, the European Court will most certainly rely on the doctrine of the margin of appreciation. This doctrine is a power conceded to the state and 'envisages that power will be exercised in the first instance by organs of the states properly addressing the various elements of the Convention relevant to (...) assessing the justification given for interfering with it'.¹⁰⁴ The European Court assesses whether the state has not exceeded this power of appreciation.¹⁰⁵

Still, the European Court is likely to review the national decisions leading to the screening and the denial of a housing permit. It will assess whether the reasons given by the Dutch authorities to justify the screening and banning practices are relevant and sufficient.¹⁰⁶ It will also review whether a pressing social need for the interference exists and whether the restriction of the right was proportionate to the fight against anti-social behaviour.¹⁰⁷ With regard to this, it is important to note that the European Court accepted in earlier cases that Dutch authorities took special measures to overcome an emergency situation related to anti-social behaviour (i.e. drug dealing) in specific areas and, consequently, interfere with the right to liberty of movement. This right is codified in Article 2 of Protocol No. 4 to the ECHR too.¹⁰⁸

Overall, however, it is most likely that the European Court will emphasise the margin of appreciation and point to the built-in procedural safeguards, which oblige the authorities involved to assess the proportionality of their decision at every stage of the decision-making process. Given these points, the European Court will probably conclude that the Netherlands

103 College voor de Rechten van de Mens *supra* note 67, p. 4.

104 Harris *et al.* *supra* note 72, p. 350.

105 *Id.*

106 *Handyside v. UK*, ECHR (1976) Series A, No. 24.

107 See Harris *et al.* *supra* note 72, p. 350.

108 See *Oliviera v. the Netherlands* 2002-IV; *Landvreugd v the Netherlands* 36 EHRR 1039. See Harris *et al.* *supra* note 72, p. 741.

did not exceed its power of appreciation and that, therefore, the interference is necessary in a democratic society.

7.5 CONCLUSION

In this paper, the aim was to assess whether a person seeking a house can use the right to freedom to choose his/her residence for a successful legal attack of the legislation used by Dutch local authorities for the screening and banning of house seekers. The analysis above shows that the government's line of defence against such a legal attack will probably hold in Strasbourg. The European Court is most likely to conclude that the screening and banning of house seekers does not violate Article 2 of Protocol No. 4 to the ECHR, because the interference with the right is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society. Of course, one may question whether it is really necessary to introduce screening and banning instruments and whether these instruments are really effective in tackling anti-social behaviour.¹⁰⁹ However, the European Court will probably refer to the doctrine of the margin of appreciation and will refer to the built-in safeguards that oblige the Dutch authorities to assess the proportionality of the measures at every stage of the decision-making process. It is unlikely that the European Court will characterise the (Extended) Urban Areas Special Measures Act 2005/2015 as a violation of the right to freedom to choose a residence.

Of course, the conclusion that the screening and banning practices do not violate the house seekers' right to freedom to choose a residence does not mean that the (Extended) Urban Areas Special Measures Act 2005/2015 is fair, just or reasonable. The analysis, however, suggests that a legal challenge based on the right to freedom to choose a residence should be avoided by people who are prone to challenge the screening and banning instruments. Such an attack will take a considerable amount of time and is not likely to be successful. Therefore, it is wiser to challenge the screening and banning on a societal and political level and try to convince Parliament and local politicians not to expand or use the powers laid down in the (Extended) Urban Areas Special Measures Act 2005/2015.

¹⁰⁹ See Ouwehand & Dof *supra* note 33; G. van Eijk, 'Rotterdamwet ijzersterk voorbeeld van principle-free politics', *Vers Beton. Rotterdams Tijdschrift*, 9 mei 2013, Retrieved on 23 October 2015 from <<https://vers-beton.nl/2013/05/rotterdamwet-ijzersterk-voorbeeld-van-principle-free-politics/>>; G. van Eijk *supra* note 65; M. Adams & W. Witteveen, 'Drie dimensies van de rechtsstaat', *Nederlands Juristenblad*, Vol. 20, 2014, pp. 1364-1373. According to the Dutch government, research shows that screening and banning will be effective in the fight against anti-social behaviour. See *Kamerstukken II* 2015-2016, 34314, nr. 4, pp. 9-13.

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