Chinese cooks and the revision of the Aliens Employment Act

A violation of the right to property and the non-discrimination principle under the ECHR?

February 2016

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1. Introduction

On 1 January 2014 the revised Aliens Employment Act (Wet arbeid vreemdelingen, hereinafter: Wav[1]) entered into force establishing more restrictive conditions for allowing low skilled third country nationals (TCNs) to work in the Netherlands. In the 12 years before its revision, the Wav granted TCNs free access to the Dutch labour market after they had legally worked for a specific employer during three uninterrupted years.[2] That term was extended to five uninterrupted years in the revised law. In addition, the new Wav tightened the rules for granting employment permits to employers. It also limited to one year the maximum period for which a residence permit would be given to a worker (before, that limit was three years). The changes in the Wav are detailed in Chapter one of this expert opinion.

Between May 2014 and February 2016, Dutch Courts pronounced 13 judgments in 236 cases[3] concerning the revision of the Wav. The claims related to issues arising from the absence of transitional arrangements for migrants affected by the new legislation. The majority of cases concerned Asian cooks, predominantly Chinese,[4] who appealed against the State's refusal to grant them free access to the Dutch labour market as a result of the stricter requirements imposed by the new rules.

The applicants in the three cases brought before the Migration Law Clinic have Chinese nationality and worked as cooks in Chinese restaurants in the Netherlands. They arrived in the country between January and July 2011, when the old Wav still applied, and obtained temporary residence permits valid for three years for the purpose of employment. Their residence permit was granted in order to work for a specific employer who held the required employment permit. A few months before they would complete the three-year term and consequently obtain free access to the labour market, the new Wav entered into force. Before the expiration of their residence permits, the Chinese cooks applied for a renewal of the residence permit before the competent authority, the Immigration and Naturalisation Service (Immigratie- en Naturalisatie Dienst, hereinafter: IND), which is part of the Ministry of Security and Justice. They also requested that their residence permits be provided with the specific annotation that would grant them free access to the labour market in conformity with what they expected to obtain upon completion of the three-year term.

Referring to the new Wav, the IND denied their requests. It argued that none of the three Chinese cooks fulfilled the five-year requirement for acquiring unrestricted access to the labour market. In sum, at the moment they completed the three-year period, which would ensure them freedom for carrying out work under the old law, the Chinese cooks fell short on the five-year term imposed by the new law.

The three applicants lodged objections (bezwaar) against the decisions. The IND held on to its initial position that the Chinese cooks did not meet the criteria for obtaining free access to the labour market under the new Wav. In addition, it denied the renewal of the residence permits for the cooks whose employers failed to obtain new employment permits, since the new Wav tightened the rules for that as well.

The three Chinese cooks then brought appeals against these decisions before the district court of The Hague.[5] They claimed that the absence of a transitional arrangement in the implementation of the new Wav breached their right to property under Article 1 Protocol 1 of the European Convention on Human Rights (ECHR) and their right to non-discrimination, protected by

[1] In order to avoid confusion between the two versions of the Act, in the course of this opinion the old version of the Wav will be referred to 'Wav (old)'. The new Wav will be referred to as 'Wav (new)'.

[2] See Chapter 1 of this expert opinion.

[3] For the complete list of judgments see Annex 1.

[4] See section 3.1.2, under 'The evidence of indirect discrimination in the present case'.

[5] In migration cases, the Court of The Hague is sitting also in other locations in the Netherlands. The cases of Chinese cooks studied by the Migration Law Clinic were examined by the courts in Haarlem, Arnhem and Groningen.

Article 14 of the ECHR. According to the Chinese cooks, the new Wav should not be applied in their case in so far as it barred free access to the labour market after three years of uninterrupted lawful labour. They referred to Article 94 of the Dutch Constitution, which states that statutory regulations in force within the Kingdom shall *not be applicable* if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons. Basically, the Chinese cooks claimed that applying the 5-year term of the new Wav instead of the 3-year term of the old Wav would be unconstitutional in their case. In all three cases the district court dismissed the claims and upheld the IND's decision. The applicants are entitled to higher appeal before the Administrative Jurisdiction Division of the Council of State, the highest Dutch court in migration law cases.

The enforcement of the new Wav without a transitory arrangement had a great impact not only on Chinese workers, but also on the Asian restaurants that employed them.[6] Restaurants were even facing the risk of bankruptcy.[7] As a result of pressure from the branch, ten months after the new law entered into force, the Ministry of Social Affairs and Employment (SAE) – the primary authority responsible for the implementation of the Wav – announced a temporary agreement with the Asian restaurant branch.[8] The so-called Wok-Agreement of 1 October 2014 established the temporary suspension of the more restrictive rules of the new Wav for issuing a pre-determined amount of work permits to Asian restaurants.[9]

This expert opinion describes the political and legal backgrounds permeating the Chinese cooks' cases and provides answers on whether the change in legislation combined with the lack of transitional arrangements constitutes a breach of rights protected by the ECHR. On the main issue regarding the prolongation of the minimum period of work from three to five years as precondition for a migrant to obtain free access to the labour market, this opinion will answer the following questions:

1. Does the prolongation from three to five years constitute a violation of the migrants' right to property, protected by Article 1 Protocol 1 ECHR?
2. Does the prolongation constitute a breach of the prohibition of discrimination in the enjoyment of the rights and freedoms set forth in the ECHR on the basis of Article 14 ECHR, in conjunction to Article 1 of Protocol 1 ECHR and Article 1 Protocol 12?

The abovementioned questions will be dealt with, respectively, in Chapters 2 and 3 of this expert opinion. Chapter 4 will answer the following question:

3. Have all domestic remedies been exhausted, as established by Article 35(1) ECHR as an admissibility criterion for applications lodged before the European Court of Human Rights?

Chapter 5 also includes the question on whether the Wok-Agreement represented an available and effective remedy for the Chinese cooks of the cases at hand.

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[6] De Volkskrant, *Chinese horeca onder druk door gebrek aan koks* (27 March 2014) http://www.volkskrant.nl/economie/chinese-horeca-onder-druk-door-gebrek-aan-koks~a3623366/ accessed 27 October 2015.

[7] C Ullersma and R Imkamp, 'Wijziging Wav: Is het ontbreken van overgangsrecht aanvaardbaar?'*AM&R* (2014), p 418.

[8] Tijdelijke regeling van de Minister van Sociale Zaken en Werkgelegenheid van 25 september 2014, tot wijziging van de Regeling uitvoering Wet arbeid vreemdelingen 2014 in verband met het vervallen van de toets op aanwezig prioriteitgenietend aanbod voor aanvragen van de Aziatische horeca. Wijzigingsregeling Regeling uitvoering Wet arbeid vreemdelingen 2014 (vervallen toets op aanwezig prioriteitgenietend aanbod aanvragen Aziatische horeca), 30 September 2014, Staatscourant no 27559.

[9] See for the details of the agreement section 5.3.

1. Revision of the Wav

1.1 Introduction

On 11 April 2011 the process of revision of the Wav was officially initiated when the Minister of Social Affairs and Employment (SAE) and the Minister of Immigration and Asylum forwarded a policy memorandum to the Second Chamber of the Dutch Parliament detailing the cabinet's plan for tightening legislation on migrant employment.[10] The government then proposed to further reduce the number of work permits issued to TCNs. It wished to do so by maximising the employment of local and EU labour supply. The underlying idea was to make jobs available for local unemployed persons living on social benefits. The government also proposed to make it more difficult for workers from outside the EU to get free access to the Dutch labour market.[11] The bill was introduced on 9 November 2012.

In 2013, during the final discussions in parliament, the Green Left Party (GroenLinks) voiced concerns about the lack of a transitory arrangement for those migrants already working in the Netherlands on the basis of the old Wav.[12] The Minister of SAE, Lodewijk Asscher, responded expressing the opinion that no general transitional arrangement was necessary and that the government could rather adopt different measures.[13] The Minister did not address the interests of the migrant workers. Instead he approached the question from the perspective of whether a lack of transitional arrangement would affect labour supply.[14]

On 12 November 2013 the First Chamber of the Dutch Parliament approved the proposal for the revision of the Wav.[15] On that occasion the Green Left Party, voting against, made a statement in which it referred to the absence of an answer by the Minister to 'repeated questions' about the negative consequences for workers who were allowed to work legally for three years.[16] The new law entered into force on 1 January 2014 without transitional provision.[17] This chapter will compare the two versions of the Wav and explain the main changes relevant for the cases at hand.

1.2 The Aliens Employment Act before 1 January 2014

Before the changes in legislation that entered into force on 1 January 2014, Article 2(1) Wav (old) contained a general prohibition for employers to hire foreigners without a proper employment permit (tewerkstellingsvergunning).[18] Article 2(2) Wav (old) asserted that the prohibition was not applicable to a foreigner who was hired by an employer in possession of an employment permit. In practice that meant that the employer was the party to whom an employment permit was granted, that being one permit per employee.

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[10] Ministerie van Sociale Zaken en Werkgelegenheid, *Aanbiedingsbrief bij de notitie Arbeidsmigratie van buiten de EU*, 2011, AV/SDA/2011/5618.

[11] Ibid, p 1-2. See also section 3.1.1, under 'Establishing the comparable group'

[12] *Kamerstukken I* 2013/14, 33 475, D, p 4. See also C Ullersma and R Imkamp, 'Wijziging Wav: Is het ontbreken van overgangsrecht aanvaardbaar?' *AM&R* (2014), p 418.

[13] Ibid.

[14] *Kamerstukken I* 33475, Handelingen No 7, item 10. p 66.

[15] *Kamerstukken I* 33475, Handelingen No 7, item 6.

[16] Ibid. 'Op mijn herhaaldelijk gestelde vragen waarom werkgevers en werknemers zelfs na drie positieve arbeidsmarkttoetsen nog steeds twee jaar extra in onzekerheid moeten verkeren, met alle gevolgen voor de integratie van dien, heeft de minister niet geantwoord.'

[17] *Staatsblad* 2013, nr. 556.

[18] This general prohibition is valid only for TCN workers who do not enjoy more favourable conditions, more specifically workers from outside the EU or the European Economic Area who come from countries who do not have special treaties with the Netherlands in the area of labour migration.

In turn, the foreign worker was responsible for applying for (and obtaining) a temporary residence permit in order to enjoy legal residence and the right to employment in the Netherlands.[19] The request for a residence permit had to be coordinated with the request for the employment permit because none of the two permits was effective alone. Since June 2013, employers were authorised to apply for the residence permit on behalf of the worker.[20] Workers from outside the European Union falling under this rule were thus only entitled to work for the specific employer to whom an employment permit was granted and dependent on the employer for the acquirement of the necessary permits.

Article 8(1)(a) Wav (old) stated that an employment permit should be denied in case priority labour (such as Dutch citizens and EU citizens) was available for the job. Additionally, Article 9(1)(a) Wav (old) established that an employment permit could be denied when the employer was unable to show that he had engaged in sufficient efforts to fill the vacancy with the available priority labour. In the context of an application for an employment permit, the Implementing Institute for Employee Insurances (Uitvoeringsinstituut Werknemersverzekeringen, hereinafter: UWV) applied a priority labour test. [21] Article 11(1) WAV (old) provided that an employment permit could be granted for a maximum period of three years.

The prohibition imposed in Article 2 Wav (old) did not apply if a TCN was in possession of a residence permit containing an annotation by the Minister of Justice indicating that the holder of the permit had free access to the labour market.[22] Article 4(2)(b) Wav (old) specified that the annotation would be given to any foreigner who had held a valid temporary residence permit for the purposes of work during an uninterrupted period of at least three years.[23] That meant that a foreigner could work for any employer, and not only for the one to whom the respective employment permit was granted. The three year term of the Wav (old) had remained unchanged since at least 2002. A comparison of that provision in the 16 versions of the Wav before 1 January 2014 that are available on the government's website shows that for at least 12 years this rule had been the exactly the same.[24] The predecessor of the Wav, the Wet arbeid buitenlandse werknemers (Wabw), in force since 1979, also contained a three year term for free access to the labour market.[25]

1.3 The new Wav of 1 January 2014

The new Wav introduced stricter requirements for employers and foreign workers:

1. An employment permit will not be granted when priority labour is *present* (aanwezig), instead of *available* (beschikbaar) meaning that the UWV could refuse issuing an employment permit as long as there are local or EU nationals registered as seeking work;

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[19] The Wav (old) refers to the temporary residence permit as defined in the then valid drafting of the Aliens Act 2000 (Vreemdelingenwet 2000, VW), Stb 2013, 347 and Stb 2013, 347, Art 14.

[20] Amendments of the Aliens Act 2000 (Vreemdelingenwet 2000) known as Modern Migration Policy, *Staatsblad* 2012, nr. 258 and *Staatsblad* 2013, nr. 165.

[21] The UWV falls under the competence of the Ministry of Social Affairs and Employment and is the national authority responsible for granting an employment permit. See Art 5 Wav (both old and new).

[22] The annotation, referred to in Art 4(1) Wav (old) is placed on the back of the temporary residence permit card and reads: 'arbeid in loondienst, twv niet vereist' (employment, employment permit not required).

[23] Art 14 Aliens Act 2000.

[24] Versions of the Wav for the period between 1 September 1995 and 1 April 2001 are mentioned on the official website, but not available. See: http://wetten.overheid.nl/BWBR0007149/geldigheidsdatum_07-01-2016/informatie accessed 8 January 2016. In the 16 versions compared, Art 4:2(b) is worded in precisely the same manner, stating that the annotation referred to in Art 4:1 which grants free access to the labour market will be given to the foreigner who has held a temporary residence permit for the purpose of employment, as meant in Article 14 of the Aliens Act 2000, for a continuous period of three years and whose main residence has subsequently not been established outside the Netherlands.

[25] See T de Lange, *Staat, Markt en migrant,* The Hague: Boom Juridische Uitgevers 2007, pp 217-219, 280-282.

2. The maximum period for granting an employment permit was reduced from three years to one year; and
3. The minimum period for a migrant to obtain free access to the labour market was extended from three to five uninterrupted years of work for a specific employer.

Priority labour

One of the most important changes brought by the new Wav regards the new wording of Article 8(1)(a). While the old provision established that the Minister of SAE would deny an employment permit on the basis of priority labour being *available* (beschikbaar), the new version imposes an obligation on both the Minister of SAE and the Minister of Security and Justice (S&J) to deny an employment permit when priority labour is *present* (aanwezig). Additionally, Article 8(1)(c) Wav (new) provides that an employment permit will be refused in case the employer cannot demonstrate to have made sufficient effort to hire national or EU citizens.[26]

The new wording of Article 8(1)(a) Wav (new) implies that the government does not need to demonstrate that priority workforce is both available and suitable to the employer. It is sufficient if labour supply 'exists' in the territory of the Netherlands and the EU as a whole. As long as local and EU workers are registered as seeking a job in a specific function, the UWV can deny employment permits for that function, regardless whether the priority workers are actually suitable for the job.

The Implementing Regulation on the new Wav also specifies that regarding Chinese-Indonesian restaurants, grillrooms, pizza places, döner snack bars, cafeterias and other similar businesses, 'a permit will be refused if general serving and kitchen staff is present in the labour market.' [27] Another important change is that the maximum period for granting an employment permit is reduced from three to one year.[28] This, combined with the stricter requirement under Article 8(1)(a) of the Wav (new), means that in practice employers will have much more difficulties to obtain an employment permit for workers from outside the EU.

Free access to the labour market

The minimum time for obtaining free access to the labour market under the new Wav was extended from three to five years of uninterrupted legal employment.[29] However, the new Wav does not exclude the possibility that such free access could be granted in other cases. The wording of Article 4(1) Wav (new) remained essentially unchanged, which means that free access continues to be granted by virtue of a residence permit containing an annotation indicating that no employment restrictions apply to the holder.

When the Chinese cooks entered the Netherlands for the purpose of work, the old Wav applied. By the time their three-year term was fulfilled, the new Wav had entered into force. As a result of the lack of a transitional arrangement, the new legislation applied to their application for renewal of their residence permits. Only a few months before obtaining the right to free access to the Dutch labour market these migrants were confronted with a stricter requirement: five instead of three years of uninterrupted legal employment in the Netherlands. The cooks nevertheless applied for a residence permit with an annotation of free access to the labour market with the IND, which was refused because they did not fulfil the five year requirement.

[26] Art 9(1)(c) Wav (old).
[27] Uitvoeringsregels, behorende bij de artikelen van de Regeling uitvoering wet arbeid vreemdelingen 2014, Bijlage I, para 10.
[28] Art 11(1) Wav (new).
[29] Art 4(2)(b) Wav (new).

1.4 Single permit: implementation of Directive 2011/98/EU

Almost simultaneously with the abovementioned amendment of the Wav, another change in the law took place rigorously affecting the dual system requiring an employment permit (for the employer) and a residence permit (for the worker). This change entered into force on 1 April 2014.[30]

The Aliens Act 2000 (Vreemdelingenwet 2000, hereinafter Vw 2000) introduced the requirement that a foreigner must hold a single permit for residence and work, in order to reside and work in the Netherlands. This permit comprises an employment permit and a residence permit.[31] The requirement of a separate employment permit was abolished, though the provisions in the Wav on employment permits were maintained, mainly to cover old situations from before 1 April 2014. Article 2(1) Wav (new) now provides that the general prohibition of hiring foreigners in the Netherlands applies if the employer is not holding a valid employment permit *or* if the employed foreign worker is not in the possession of a single permit.

According to Article 14a Vw 2000, the State Secretary of Security and Justice (S&J) must ask advice from the UWV[32] before taking a decision on a request for a single permit for residence and work. The UWV advises on whether the requirements of the Wav are met. However, the Vw 2000 does not contain an express obligation for the State Secretary of S&J to follow the advice of the UWV. Arguably, this is the consequence of Article 5 of Directive 2011/98, stating that there must be one competent authority to issue the single permit.[33]

Since June 2013, it is normally the employer who submits an application with the IND for obtaining the single permit for the employee. Subsequently, the IND asks the UWV for a labour market advice on whether a single permit can be granted.[34] That advice must follow the conditions applicable under the priority labour rule established in Article 8:1 (a) (b) and (c) Wav (new).[35]

Though it is necessary for a good understanding of the cases to describe this law change, it should be noted that the introduction of the system of a single permit for residence and work is not directly relevant for the cases of the Chinese cooks. They did not apply for single permits.

1.5 Conclusion

This chapter explained that the new Wav entered into force without a transitional arrangement for those migrant workers already present in the Netherlands on the basis of the old Wav. The Minister of SAE was questioned in parliament about the immediate entering in force of the new legislation, but responded that no transitional arrangement was necessary.

The main changes in the Wav entering into force on 1 January 2014 are the following:

1. An employment permit will not be granted when priority labour is *present* (aanwezig), instead of *available* (beschikbaar) meaning that the UWV could refuse issuing an employment permit as long as there are local or EU nationals registered as seeking work;
2. The maximum period for granting an employment permit was reduced from three years to one year; and

[30] *Staatsblad* 2014, nr. 128

[31] Not all TCNs are entitled to the single permit, see infra no 26, para 1, 'Uitzonderingen gecombineerde vergunning'.

[32] Implementing Institute for Employee Insurances (Uitvoeringsintituut Werknemersverzekeringen, abbreviated: UWV)

[33] However, point 16 of the Preamble states that the designation of the competent authority under this Directive should be without prejudice to the role and responsibilities of other authorities and, where applicable, the social partners, with regard to the examination of, and the decision on, the application.

[34] Art. 14a Vw 2000. See also Regeling uitvoering Wet arbeid vreemdeling 2014, Art 1(2).

[35] Ibid.

3. The minimum period for a migrant to obtain free access to the labour market was extended from three to five uninterrupted years of work for a specific employer.

The result of these changes for the Chinese cooks in the cases brought before the Migration Law Clinic is that they now have to work two extra years for a specific employer. At the same time their right of residence became much more uncertain, since the requirements for obtaining a work permit have become much stricter. In fact, under the new Wav, permission for low-skilled work as a cook will always be refused as priority labour for the job will always be 'present'. As a consequence their legal stay will be terminated eventually, and, instead of building a future in the Netherlands, they will have to leave the country. It will be impossible for the Chinese cooks to build a period of five years uninterrupted lawful work, necessary to obtain free access to the labour market.

2 Assessing the new Wav in the light of the right to property

2.1 Introduction

This chapter will analyse the question whether the extension of the period before a foreign working can get free access to the labour market (from three to five years) without a transitory arrangement, constitutes a breach of Article 1 of Protocol 1 to the ECHR. This provision guarantees the right to property and provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws at it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In general, three steps need to be taken in order to consider whether there has been a violation of the right to property under Article 1 Protocol 1 ECHR.[36] First it should be assessed whether a claim to a future right to enter freely on to the labour market constitutes a property right in the sense of the Convention (section 2.2). Secondly it should be analysed whether there is an interference with the right to property (section 2.3). Finally it should be examined whether the interference has a legal basis and a legitimate aim (section 2.4) and whether it is proportionate (section 2.5).

2.2 A future right of free access to the labour market: a property right?

The Chinese cooks based their expectation to get free access to the Dutch labour market on Article 4(2)(b) Wav (old). This provision stated that TCNs would get free access to the Dutch labour market after three consecutive years of legal employment and residence in the Netherlands. After that they would have a right to stay in the Netherlands and work for any employer without being required to have an employment permit. The cooks have fulfilled the conditions to get free access to the Dutch labour market as stated in the old Wav and they now claim that they have a property right under Article 1 Protocol 1 ECHR. The question is whether their claim to a future right to get free access to the labour market constitutes a right to property.

In the case of *Marckx* the ECtHR held that Article 1 Protocol 1 ECHR in substance guarantees a right to property, as it states that everyone has a right to peaceful enjoyment of his or her possessions.[37] For the Chinese cooks to fall under the right to property, their claim to a future right to enter freely on to the labour market must be a 'possession' in the sense of Article 1 Protocol 1 ECHR.

The concept of 'possession' in the first paragraph of Article 1 Protocol 1 ECHR has a broad and autonomous meaning.[38] The concept extends to all manner of things which have an economic value.[39] The ECtHR has stated that it is 'not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as

[36] M Carss-Frisk, *Handbook No. 4: The right to property. A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights* Strasbourg: Council of Europe 2001, p 9.
[37] ECtHR 13 June 1979, *Marckx v Belgium*, Appl no 6833/74, para 63.
[38] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart Publishing 2013, p 387.
[39] Ibid.

'possessions', for the purposes of this provision'.[40] In each case it should be examined whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 Protocol 1 ECHR.

Legitimate expectation

In *NKM v Hungary* the ECtHR pointed out that 'possessions' within the meaning of Article 1 Protocol 1 ECHR can be either 'existing possessions' or assets, including claims, in respect of which an applicant can argue that he has at least a 'legitimate expectation' that they will be realised.[41] Property rights can thus be future entitlements. In that case there must be a 'legitimate expectation' which is a component part of, or at least attached to, the property right concerned.[42] The question is when there is a 'legitimate expectation'. The ECtHR as well as legal scholars have made efforts to concretise the notion of 'legitimate expectation'.[43]

In general, for a person to accomplish the 'legitimate expectation' condition, two cumulative criteria must be fulfilled. Firstly, the person concerned should be able to base his or her claim on the law. This means that there must be sufficient basis for the interest in national law through a legal provision or a legal act such as a judicial decision.[44] A legal provision can serve as a basis for a 'legitimate expectation', as long as it is applicable to the instant case.[45] In many situations before the ECtHR, a change in the law was at the origins of the dispute between the applicant and the state.[46] The legal provision that is relevant for the applicant's claim can be decisive for the 'legitimate expectation'.[47] The legal provision must on the one hand be binding, applicable and sufficiently clear and must on the other hand bear on property rights.[48] .

Secondly, the person concerned must fulfil the statutory conditions established in the legal provision.[49] The requirement to fulfil these two cumulative criteria is more concrete than the mere hope of the applicant to get a restitution, which is not enough to conclude that there is a 'legitimate expectation' in the sense of Article 1 Protocol 1.[50] An applicant can only not be said to have a 'legitimate expectation' when s/he does has a currently enforceable claim that is sufficiently established. In the cases of *Gratzinger and Gratzingerova v Czech Republic* and *Jantner v Slovakia*, the claims for restitution of property under Article 1 Protocol 1 ECHR were declared inadmissible as 'it could not be said that the applicants had any property rights which had been adversely affected by their reliance on a legal act'.[51] The applicants did not fulfil the statutory conditions for the restitution of property and had not shown that they had a claim which was sufficiently established to be enforceable.

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[40] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 72.

[41] ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11, para 34.

[42] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 84. See also ECtHR 24 June 2003, *Stretch v United Kingdom*, Appl no 44277/98, para 35.

[43] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 82. An overview of the notion of 'legitimate expectation' is given by the ECtHR in ECtHR (GC) 28 September 2004, *Kopecký v Slovakia*, Appl no 44912/98, paras 45 et sqq.

[44] Ibid, paras 49 and 52.

[45] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 127.

[46] Ibid, p 128.

[47] Ibid.

[48] Ibid, p 161.

[49] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 129.

[50] ECtHR (GC) 10 July 2002, *Gratzinger and Gratzingerova v Czech Republic*, Appl no 39794/98, para 73 and ECtHR 4 March 2003, *Jantner v Slovakia*, Appl no 39050/97.

[51] ECtHR (GC) 28 September 2004, *Kopecký v Slovakia*, Appl no 44912/98, para 51.

In *Pine Valley Developments Ltd and Others v Ireland*[52] the ECtHR found that the applicant companies had a 'legitimate expectation' as they were granted an outline planning permission and had purchased land with a view to its development.[53] The applicant companies in other words had a 'legitimate expectation' that they would be able to develop a property in accordance with the duly registered development plan. The case *Stretch v United Kingdom* concerned the inability to renew a building lease after expiry of the original lease containing an option to renew.[54] The ECtHR decided that 'the applicant must be regarded as having at least a legitimate expectation of exercising the option to renew and this may be regarded, for the purposes of Article 1 of Protocol No. 1, as attached to the property rights granted to him (...) under the lease'.[55] The 'legitimate expectation' in *Stretch* was derived from the applicant's reasonably justified reliance on a legal act which had a sound legal basis and which affected the applicant's property rights.[56] The ECtHR held that 'the applicant not only had the expectation of deriving future return from his investment in the lease but, as was noted in the Court of Appeal, the option to renew had been an important part of the lease'.[57] In case *Pine Valley Developments* as well as in *Stretch* 'the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment'.[58]

It should be noted that the ECtHR has made clear in its case law that the Convention does not provide a right to *acquire* property. In *Van der Mussele v Belgium* a pupil lawyer who was required by law to provide certain services without receiving remuneration or compensation (pro deo cases) was not considered to be deprived of his 'possessions'.[59] Therefore, the ECtHR concluded that there was no violation of Article 1 Protocol 1 ECHR.

Economic value

Property should also be of a certain economic value, in order to fall within the scope of Article 1 Protocol 1 ECHR.[60] Where the applicant demonstrates that there is an established economic interest, this can be sufficient to establish a protected property right.[61] In the case of *Tre Traktörer Aktiebolag v Sweden* the ECtHR held that a licence to serve alcoholic beverages amounted to a 'possession' within the meaning of Article 1 Protocol 1.[62] The Court held that 'the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business'.[63]

Application to the Chinese cooks cases

The first question is whether the Chinese cooks had a 'legitimate expectation' that their claim to enter freely on to the labour market would be realised. The Chinese cooks base their claim on Article 4(2)(b) Wav (old), a provision which entailed the requirements for obtaining a work permit and free access to the Dutch labour market. This provision was binding, applicable and sufficiently clear. The

[52] ECtHR (GC) 28 September 2004, *Kopecký v Slovakia*, Appl no 44912/98, para 45.
[53] ECtHR 29 November 1991, *Pine Valley Developments Ltd and Others v Ireland*, Appl no 12742/87, para 51.
[54] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 83; ECtHR (GC) 28 September 2004, *Kopecký v Slovakia*, Appl no 44912/98, para 46.
[55] ECtHR 24 June 2003, *Stretch v United Kingdom*, Appl no 44277/98, para 35.
[56] ECtHR (GC) 28 September 2004, *Kopecký v Slovakia*, Appl no 44912/98, para 47.
[57] ECtHR 24 June 2003, *Stretch v United Kingdom*, Appl no 44277/98, para 40.
[58] ECtHR (GC) 28 September 2004, *Kopecký v Slovakia*, Appl no 44912/98, para 47.
[59] ECtHR 23 November 1982, Van der *Mussele v Belgium*, Appl no 8919/80.
[60] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart Publishing 2013, p 388.
[61] Ibid.
[62] ECtHR 7 July 1989, *Tre traktörer aktiebolag v Sweden*, Appl no 10873/84, para 53.
[63] Ibid.

Chinese cooks fulfilled the requirements of this provision as they worked and lived legally in the Netherlands for three consecutive years. The Chinese cooks therefore had a 'legitimate expectation' that they would get free access to the Dutch labour market based on stable legislation which was binding, applicable and sufficiently clear.

Furthermore, the Chinese cooks were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment (see the cases of *Pine Valley Developments* and *Stretch*[64]). They have left China to find work in the Netherlands with the expectation that after three consecutive years of living and working legally in the country they would get free access to the labour market.

It is disputable whether the Chinese cooks are to be regarded as *acquiring* property by obtaining free access to the labour market. In the case of *Van der Mussele* the pupil lawyer had no 'legitimate expectation' to get reimbursed based on stable legislation, whereas the Chinese cooks base their claim on stable legislation (Article 4(2)(b) Wav (old)) containing a three year term that had been in force since 1979. The Chinese cooks as a consequence cannot be said to *acquire* new property, as they have a claim, in respect of which they can argue that they had at least a 'legitimate expectation' that it would be realised.

Taking into account the foregoing considerations, it can be concluded that the Chinese cooks had a 'legitimate expectation' that their claim to a future right of free access to the labour market would be realised. As a consequence this claim is a 'possession' in the sense of Article 1 Protocol 1 ECHR.

In order to fall within the scope of Article 1 Protocol 1 ECHR, it is also required that the property is of a certain economic value. The Chinese cooks are not exempted from the requirement to work for an employer who is permitted to hire them. Furthermore, it will be very difficult for them to continue working and living in the Netherlands, because the priority labour test has become stricter. Free access to the labour market grants the Chinese cooks independence in relation to their employers. They have more negotiation power, they can switch freely between employers and choose the employer that is more profitable in terms of salary and career prospects. If the cooks are granted free access to the labour market, they do not need a single permit for residence and work. This makes them more competitive in the labour market. An employer would rather hire someone suitable for the job who is free on the labour market, because applying for a 'single permit' is an endeavour with an insecure outcome and it costs money. There is thus an established economic interest, which is sufficient to establish a protected property right.

It should thus be concluded that the Chinese cooks' claim to a future right to free access of the Dutch labour market can be brought within the scope of Article 1 Protocol 1 ECHR. The next section will discuss whether there is an interference with the right to property.

2.3 Is there an interference with the right to property?

An interference with the right to property is either a confiscation or a regulation. In its case law the ECtHR makes a distinction between three rules in addressing Article 1 Protocol 1.[65] The first rule is the general principle of peaceful enjoyment of property set out in the first paragraph of Article 1 Protocol 1 ECHR.[66] The second rule covers deprivation of possessions. The second sentence of the first paragraph of Article 1 Protocol 1 states that 'no one shall be deprived of his possessions except

[64] ECtHR 29 November 1991, *Pine Valley Developments Ltd and Others v Ireland*, Appl no 12742/87 and ECtHR 24 June 2003, *Stretch v United Kingdom*, Appl no 44277/98.

[65] M Carss-Frisk, *Handbook No. 4: The right to property. A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights* Strasbourg: Council of Europe 2001, p 21.

[66] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart Publishing 2013, p 389.

in the public interest and subject to the conditions provided for by law and by the general principles of international law'. These conditions should be applied if the case is considered to fall under the second rule.[67] The third rule is established in the second paragraph of Article 1 Protocol 1 ECHR and lays down that Contracting states are entitled to control the use of property in accordance with the general interest.[68] The State's right of the state is however not absolute. [69] Although the rules are called the 'three distinct rules', the ECtHR held that 'the three rules are not 'unconnected'.[70] The ECtHR explained that 'the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule'.[71]

The second rule (deprivation of property) entails either a formal expropriation or transfer of ownership or a *de facto* taking of property.[72] In *Papamichalopoulos v Greece* for example the applicants owned a piece of land and had permission to build a hotel on the land. However, at a certain moment the applicants' land was transferred to the Navy as a result of a military dictatorship assuming control in Greece. According to the ECtHR, this occupation of the land constituted a clear interference with the applicants' exercise of their right to peaceful enjoyment of their possessions.[73] There was no explicit purpose of controlling use of property and there was also no formal expropriation.[74] However, the ECtHR considered that there was a *de facto* expropriation in this case, as the applicants lost all ability to dispose of the land and no attempts were made to date to remedy the situation complained of.[75]

Whenever an infringement is not covered by the second or third rule, the infringement will be dealt with under the general principle of peaceful enjoyment of possessions (the first rule).[76] This rule can only be invoked when an interference of the *substance* of property has taken place.[77] There is an interference with a legitimate expectation if a person's entitlement is denied or reduced in a way that the 'essence' of the right to benefits is frustrated.[78] In *Wieczorek v Poland* the ECtHR held that 'an important consideration in the assessment of such interference under this provision is whether the applicant's right to derive benefits from the social insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights'.[79]

An example of a case in which the ECtHR found that the 'essence' of pensions rights was not frustrated is *Domalewski v Poland.* In this case the applicant lost the special and privileged 'veteran status', which had entitled him to an extra allowance in addition to his normal pension. The ECtHR considered that the applicant had retained all the rights attached to his ordinary pension, emanating from the contributions he had paid into his pension scheme. It held that Article 1 Protocol 1 did not give an individual a right to a pension of a specific amount and that the loss of the applicant's 'veteran status' did not result in the 'essence' of his pension rights being impaired.[80]

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[67] Ibid.
[68] Ibid
[69] Ibid.
[70] ECtHR 7 July 1989, *Tre traktörer aktiebolag v Sweden*, Appl no 10873/84, para 54.
[71] Ibid.
[72] M Carss-Frisk, *Handbook No. 4: The right to property. A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights* Strasbourg: Council of Europe 2001, p 21.
[73] ECtHR 24 June 1993, *Papamichalopoulos and others v Greece*, Appl no 14556/89, para 41.
[74] Ibid.
[75] Ibid, para 45.
[76] Ibid.
[77] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart Publishing 2013, p 389.
[78] ECtHR 8 December 2009, *Wieczorek v Poland*, Appl no 18176/05, para 57.
[79] ECtHR 8 December 2009, *Wieczorek v Poland*, Appl no 18176/05, para 57.
[80] ECtHR, 15 June 1999, *Domalewski v Poland*, Appl no 34610/97.

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The new provision in the Wav[81] which provides that only after five years instead of three years a worker can get free access to the labour market is a regulation that constitutes an interference with the right to property. It more precisely amounts to an interference with the Chinese cooks' right to peaceful enjoyment of their possessions as protected by the first sentence of Article 1 Protocol 1 and thus falls under the first rule. It can be argued that the 'essence' of the Chinese cooks' property right is frustrated, and that the case of the Chinese cooks is considered to fall under the first rule. The new Wav may also be considered under the second rule as a *de facto* taking of property. If the case is considered as a *de facto* taking of property, it can be argued that the case primarily falls under the second rule (deprivation of possessions). It is up to the ECtHR to determine how the facts of the Chinese cooks' case must be interpreted in light of Article 1 Protocol 1, and whether the first rule or the second rule applies. But in either interpretation due regard should be paid to the facts of the case.

It could be argued that the new Wav was effectuated in conformity with the legitimate power of the Government to regulate access of TCN's to the Dutch labour market. If access to the labour market is considered to fall within the scope of the concept of 'property', regulating access to the labour market should consequently also be regarded as falling within the third rule. The claim of the Chinese cooks, that the state should have safeguarded their legitimate expectation based on the law, does not in any way impair the right as such of the state to regulate access to the labour market, it only means that the state cannot use its legislative power in an arbitrary way, without taking any legitimate interests into account.

In this regard it is relevant to note the radical and drastic effect of the new Wav on the position of the Chinese cooks. In Chapter 1 it has been shown that is has become virtually impossible for the Chinese cooks to gain free access to the labour market under the new Wav. The priority labour test has become considerably stricter and will unavoidably lead to denial of a single permit to the Chinese cooks. Furthermore the duration of the permit is limited to one year, thus considerably increasing the risk of gaps between periods of lawful labour. In fact, such gaps already occurred in the cases of the three Chinese cooks. It was only due to the Wok-agreement that some temporary access to the labour market could be regained. However, but that agreement is of a limited and temporary nature and will not remedy the loss of the prospect of free access the labour market. Further, after expiry of Wok-agreement, it will become impossible for the Chinese cooks to obtain continued lawful residence, which means that they eventually will have to return to their country.

Under these circumstances an excessive burden was laid upon the Chinese cooks. In this expert opinion it is therefore assumed that there has been an interference with their right to property under either the first or the second rule of Article 1 Protocol 1.

2.4 Is the interference justified?

In order to be justified, the interference must have a legal basis (principle of lawfulness) and must serve a legitimate aim (principle of legitimate aim). These requirements will be discussed in this section.

2.4.1 Principle of lawfulness

An interference in the right of property must have a legal basis which is accessible, sufficiently precise and foreseeable.[82] In *NKM v Hungary* the ECtHR emphasised that 'the existence of a legal

[81] Art 4(2)(b) Wav (new).

[82] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart

basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness'.[83] The ECtHR stated that 'the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness'.[84] The ECtHR furthermore stated that 'in particular, a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities (..). Similarly, the applicable law must provide minimum procedural safeguards commensurate with the importance of the principle at stake'.[85]

In general, a measure is foreseeable if it allows a person to foresee, to a degree that is reasonable in the circumstances, the consequences of a given action.[86] A situation is for example not 'foreseeable' if 'it was only in the final decision, the judgment of the Court of Cassation, that the constructive-expropriation rule could be regarded as being effectively applied'.[87]

Application to the Chinese cooks cases

The new Wav is accessible and sufficiently precise, because the Chinese cooks can know, on the basis of the published text of the law, the consequences of their actions. It can thus be said that the interference has a legal basis which is accessible and sufficiently precise.

However, to be 'foreseeable' the law should provide guarantees against arbitrariness as the Court required in *NKM v Hungary*.[88] The lack of a transitory arrangement for the group of Chinese cooks can arguably be seen as absence of guarantees against arbitrariness with regard to their right to property. There are thus reasons to doubt whether the requirement of lawfulness, for the purpose of Article 1 Protocol 1 ECHR, is met.

2.4.2 Principle of a legitimate aim

Secondly, the interference with the peaceful enjoyment of possessions can only be justified if it serves a legitimate aim in the general interest.[89] Article 1 Protocol 1 – in contrast to other articles in the Convention – does not contain a catalogue of objectives which justify interferences with the right to property. The ECtHR decides on a case by case basis whether the interference with the right to property serves a legitimate aim.

Member states have a wide margin of appreciation when deciding the legitimacy of an aim. In general, the ECtHR respects the legislature's judgment of the state on what 'public interest' is, except when that judgment is manifestly without reasonable foundation.[90] When the interference concerns the implementation of social and economic policies by a legislative action, the interference is presumed to have a legitimate aim.[91] In that scenario, the burden of proof will shift to the applicant to demonstrate that the State's judgment is manifestly without reasonable foundation.[92]

Publishing 2013, p 390; ECtHR 30 May 2000, *Carbonara and Ventura v Italy*, Appl no 24638/94, para 64; ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11, para 46.

[83] ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11, para 47.

[84] Ibid.

[85] Ibid, para 48.

[86] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart Publishing 2013, p 391.

[87] ECtHR 30 May 2000, *Carbonara and Ventura v Italy*, Appl no 24638/94, para 69.

[88] ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11.

[89] ECtHR 8 December 2009, *Wieczorek v Poland*, Appl no 18176/05, para 59.

[90] ECtHR 21 February 1986, *James and Others v United Kingdom*, Appl no 8793/79, para 46, ECtHR 12 November 2002, *Zvolský and Zvolská v the Czech Republic,* Appl no 46129/99, para 67 and ECtHR 15 September 2009, *Moskal v Poland*, Appl no 10373/05, para 61.

[91] D Harris, M O'Boyle, C Warbrick and E Bates, *Law of the European Convention on Human Rights* Oxford: Oxford University Press 2009, p 668.

[92] Ibid.

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The general purposes of the new Wav, to control access of TCN's to the Dutch labour market, cannot be considered illegitimate. Also the extension of the minimum period for obtaining free access to the labour market from three to five years, can be seen as serving a legitimate aim in the general interest, concerning the implementation of social policies by legislative action.

The revision of the Wav aims to strengthen preference to Dutch and EU citizens (priority rule) and to promote the temporary character of labour migration (employees from outside the EU are only necessary to fill in temporary vacancies, where there is no candidate available in the Netherlands or the EU).[93] The Dutch state also aims to provide more legal certainty, so that employers and the labour migrants do not develop wrong expectations about a long stay.[94] The Dutch state has a large margin of appreciation in formulating the aims of the measure at stake.

2.5 Is the interference proportionate?

An interference must not only have a legal basis and serve a legitimate aim in the general interest. It must also be proportionate: there must be a reasonable relationship of proportionality between the means used and the aim sought to be realised.[95] Therefore, the interference must strike a 'fair balance' between the demands of the general interest of the community and the requirement to protect the applicant's individual fundamental rights. [96]

In *NKM v Hungary* the ECtHR held that 'the question to be answered is whether, in the applicant's specific circumstances, the application of the tax law imposed an unreasonable burden on her or fundamentally undermined her financial situation – and thereby failed to strike a fair balance between the various interests involved'.[97] According to the ECtHR, the 'fair balance' test is inherent to the whole Convention and should also be applied in dealing with the second and third rules of Article 1 Protocol 1 ECHR.[98] The identification of the type of interference seems to be less important for the outcome of the case than the process that takes place in assessing the 'fair balance'.

The proportionality test has to establish whether the interference has to lead to a 'fair balance' between the interests of the parties at stake. The ECtHR must therefore decide whether a 'fair balance' is maintained in a manner that it is consonant with the applicant's right to the peaceful enjoyment of his possessions.[99] If an applicant has a 'legitimate expectation' in the sense of Article 1 Protocol 1, this can be used as an argument in favour of the applicant in the 'fair balance' test.[100]

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[93] *Kamerstukken I* 2013/14, 33475, E, p 7.

[94] Ibid, p 8.

[95] ECtHR 21 February 1986, *James and Others v United Kingdom*, Appl no 8793/79, para 50: 'Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

[96] ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11, paras 42 and 60.

[97] Ibid, para 42.

[98] P Olsson, 'Every Natural or Legal Person is Entitled to the Peaceful Enjoyment of His or Her Possessions: Article 1, Protocol 1 to the European Convention on Human Rights', in: F Dorssemont, K Lörcher and I Schömann (eds), *The European Convention on Human Rights and the Employment Relation*, London: Hart Publishing 2013, p 389.

[99] ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11, para 61.

[100] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 197.

2.5.1 Care or fault by the applicant and good governance by the State

In the case of *AGOSI v United Kingdom* the ECtHR recognised that 'the striking of a fair balance depends on many factors and the behaviour of the owner of the property. The degree of fault or care which he has displayed, is one element of the entirety of circumstances which should be taken into account'.[101] The ECtHR in this context has also referred to the principle of 'good governance'. In *Moskal v Poland* the Court held that 'the principle of 'good governance' requires that where an issue in the general interest is at stake it is incumbent on the public authorities to act in good time, in an appropriate manner and with utmost consistency'.[102] This means that authorities should act very precisely, especially when the matters at stake are of vital importance for the individuals concerned.

This means that changes in the law should be announced timely to the persons concerned.[103] A timely announcement has been given if the person concerned knew or could have known that there would be a change in law and could prepare himself or herself for this change in law. Timely announcements can mitigate a breach of the principle of legal certainty and the principle of trust. The legal certainty principle is underlying the protection of 'legitimate expectations'.[104]

Application to the Chinese cooks cases

In order to assess the degree of fault or care which the Chinese cooks have displayed, it is important to question whether the Dutch state issued timely announcements on the new measure. The Chinese cooks made their decision to come to the Netherlands under the old Wav. The underlying idea of the old Wav was to improve the integration of migrants and their family members into Dutch society.[105] The Dutch state's purpose was that foreign employees (and their family members) would stay in the Netherlands for a long time.[106] According to the Dutch state the position of foreign employees on the Dutch employment market had to be improved.[107] The old Wav clearly intended to strengthen the legal position of foreign workers and to keep them in the Netherlands for a long time. Therefore the Dutch state also provided foreign workers with free access to the labour market after three years of legal work and stay. The Chinese cooks therefore had the expectation under the old Wav that working in the Netherlands would be the first step to a long stay.

In comparison, the underlying idea of the new Wav is completely different. According to the Dutch state it aims to strengthen the preference for Dutch and EU citizens (priority rule) and promote the temporary character of labour migration. Employees from outside the EU are only necessary to fill in temporary vacancies, where there is no candidate available in the Netherlands or the EU.[108] The Dutch state also states that the stricter rules enhance legal certainty, by preventing that the employer and the labour migrant develop wrong expectations about a long stay. According to the Dutch government it is unlikely under the new Wav that the labour migrant and his family members get the expectation that the grant of the employment permit would be the first step to a lengthy stay in the Netherlands.[109] The foreign worker has to decide whether s/he wants to work in knowing that it is unlikely that starting to work in the Netherlands would lead to a lengthy stay.[110]

The Chinese cooks made their decision to come to the Netherlands thinking they had the prospect of getting free access to the Dutch labour market after three consecutive years of working.

[101] ECtHR 24 October 1986, *Agosi v United Kingdom*, Appl no 9118/80, para 54.
[102] ECtHR 15 September 2009, *Moskal v Poland*, Appl no 10373/05, para 51.
[103] See also Voorlichting van de Raad van State, Doc no 33400 XV, p 6.
[104] M Sigron, *Legitimate expectations under article 1 of protocol no. 1 to the European Convention on Human Rights*, Cambridge: Intersentia 2014, p 187.
[105] *Kamerstukken I* 2013/14, 33 475 E, p 7.
[106] Ibid, p 6-7.
[107] Ibid, p 8.
[108] Ibid, p 7.
[109] Ibid, p 8.
[110] Ibid, p 8.

They did not know that the Wav would be revised at the moment they decided to come to the Netherlands. The negotiations on the revision of the Wav started later, on 11 April 2011.[111] Accordingly, the Dutch state did not comply with the principle of 'good governance' to act in good time, in an appropriate manner and with utmost consistency.

2.5.2 Lack of a transitory arrangement

Whether or not a transitional arrangement is foreseen for the applicant is an important aspect of the proportionality test. If no transitional period is foreseen, a measure can inflict an 'individual and excessive burden' on the persons involved and as a consequence be disproportionate.[112] In *NKM v Hungary* the ECtHR observed 'that the legislature did not afford the applicant a transitional period within which to adjust herself to the new scheme'.[113] The ECtHR found the measure to constitute an excessive and individual burden for the applicant.[114] It held that it is not admissible that persons who act in good faith on the basis of law are frustrated in their statute-based expectations without specific and compelling reasons.[115] The ECtHR held that 'therefore the measure cannot be held reasonably proportionate to the aim sought to be realised'.[116]

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It was already set out in Chapter 1 that there was no transitory arrangement for foreign workers who already held a work permit at the time the new Wav entered into force. The Ministry of SAE and the Asian restaurants branch reached a temporary agreement ten months after the entering into force of the new Wav.[117] This temporary agreement states that for a period of two years (from the 1 October 2014 onwards) the UWV will not apply the priority labour test as provided in Article 8(1)(a), (b) and (c) Wav (new) to Asian restaurants or migrants who intend to work in such restaurants in function of levels 4 to 6 (specialist cook, sous-chef/all-around cook or chef).[118] The covenant more specifically provides that the permit shall be granted for a maximum period of one year and can be extended for an equal period, as long as the employer has complied with the conditions regarding training of new personnel.[119]

Nevertheless, this agreement does not in any way effectively prevent the Chinese cooks' loss of the prospect to free access to the labour market. They still do not have any realistic possibility to gain free access to the labour market – be it sooner or later. As there is a gap between the 1st of January 2014 (entry into force of the new Wav) and the 1st of October 2014 (starting date of the Wok-agreement) the period of lawful work is interrupted for all those cooks whose initial working permit expired between these dates.[120] This makes it in any case impossible for them to fulfil five years of uninterrupted lawful work counting from the first date they started working in the Netherlands. It is still less probable, that a fresh period of uninterrupted lawful work can be built, as the possibility to work lawfully will most likely stop after the expiry of the Wok-agreement.

[111] Ministerie van Sociale Zaken en Werkgelegenheid, *Aanbiedingsbrief bij de notitie Arbeidsmigratie van buiten de EU*, 2011, AV/SDA/2011/5618.
[112] The Raad van State also recognised that the legal certainty principle can be frustrated if no transitory law is provided. See Voorlichting van de Raad van State, Doc no 33400 XV, p 6.
[113] ECtHR 14 May 2013, *NKM v Hungary*, Appl no 66529/11, para 71.
[114] Ibid, para 72.
[115] Ibid, para 75.
[116] Ibid, para 75.
[117] See Section 5.3.
[118] Werkvergunning Aziatische Horeca, UWV, 2014. Available at: https://www.werk.nl/werk_nl/werkgever/meerweten/werkvergunning/werkvergunning-aziatische-horeca, acessed 27 October 2015.
[119] See Section 5.3.
[120] See Section 5.3 for a more detailed analysis of the specific cases presented in this expert opinion.

Consequently, the Chinese cooks presented in this expert opinion would in any case fail to meet the requirement of uninterrupted legal employment in the Netherlands.

2.5.3 Compensation

Also relevant in the context of the proportionality test is whether the state has foreseen any compensation for the applicant. In case *Pressos Compania Naviera SA v Belgium* the ECtHR stated that 'compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants'.[121] The ECtHR made clear that it will be considered a disproportionate interference when property is taken without payment of an amount reasonably related to its value. In that context the ECtHR also mentioned that a 'total lack of compensation can be considered justifiable under Article 1 (P1-1) only in exceptional circumstances'.[122]

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The Chinese cooks did not receive any financial or other compensation for their loss of the prospect of free access to the Dutch labour market.

2.5.4 Conclusion

Having regard to the fact that there were no timely announcements – that is, not before the Chinese cooks came to the Netherlands - and that no effective transitory arrangement was provided for the Chinese cooks, the new measure of the Dutch state implies an 'individual and excessive burden' for the Chinese cooks. It can be concluded that in the cases of the Chinese cooks there was no fair balance between the public interest and the individuals' rights. The new rules in the new Wav which extended the period of three years to five years can therefore not be held reasonably proportionate.

2.6 Conclusion

The foregoing considerations are sufficient to conclude that there has been a violation of Article 1 Protocol 1 ECHR. The Chinese cooks had a 'legitimate expectation' under Art. 4(2)(b) Wav (old) that their claim to a future right of free access to the labour market would be realised. This claim should therefore be considered a 'possession' in the sense of Article 1 Protocol 1.

In the new Wav, the requirement of a minimum three-year uninterrupted legal work and residence was extended to five years, making the rules on free access of foreigners to the Dutch labour market stricter. The provisions of the new Wav constitute an interference with the applicant's rights under Article 1 Protocol 1 ECHR. This interference with the applicants' property rights, was arguably not lawful because of absence of guarantees against arbitrariness, though it fell within the scope of the legitimate aims pursued by the new Wav.

By omitting to a transitory arrangement for the group to which the Chinese cooks belonged, the state failed to strike a 'fair balance' between the public interest and the individuals' rights. The interference therefore does not satisfy the requirement of proportionality. It can be concluded that the extension from three to five years before being able to obtain free access to the market, in the absence of a transitory provision, constitutes a breach of Article 1 Protocol 1.

[121] ECtHR 20 November 1995, *Pressos Compania Naviera SA and Others v Belgium*, Appl no 17849/91, para 38.
[122] Ibid, para 38.

3. Assessing the new Wav in the light of the prohibition of discrimination

3.1 Introduction

During the legislative process of the new Wav, it must have been apparent to the legislator that the interests of a group of Chinese cooks and their employers were particularly affected. The Chinese restaurants had been the only protesters against the legislative change and against the absence of a transitory arrangement.[123] These protests were reported by the news media.[124] Moreover, in the First Chamber of the Dutch Parliament questions were asked specifically about the implications of the changes for the position of Chinese cooks.[125]

Efforts of the Chinese restaurant owners' employers – united in the branch association "Vereniging Chinese Horeca Ondernemers" resulted in the government signing the so-called 'Wok-Agreement' after the bill was approved by the parliament. As is shown below in section 3.5, this agreement did not safeguard the interests of the cooks, and did not remedy their lost prospect of free access to the labour market after three years. The Wok-agreement served the interest of the restaurant owners. The cooks themselves had no clear influence on the debate.

Determining the group of Chinese cooks affected

There are concrete indications of the size of the group of Chinese cooks concerned. In a written comment on questions from the First Chamber on the bill, the Minister of SAE stated that, in the past, some 1,700 employment permits were granted with respect to Chinese cooks.[126] Furthermore, the Koninklijke Horeca Nederland (KHN), the biggest hospitality industry association in the Netherlands, estimated that between 800 and 1000 cooks from countries including China, Indonesia and Thailand were affected by the legislative change and the lack of a transitory period.[127] According to a report published by the Netherlands Institute for Social Research, statistical information indicates that in 2009 43% of employees with a Chinese background were employed in Chinese restaurants.[128]

Although the Minister of SAE proved to be able to provide the First Chamber of the Dutch Parliament with a number of 1,700 employment permits granted with respect to Chinese cooks, attempts by the drafters of this Expert Opinion to verify these data with the competent institutions had no success. Searches through the websites of the UWV, the IND and the Central Bureau of Statistics of the Netherlands (CBS), did not provide any concrete data. Similarly, the IND wrote to Mr Kleijweg (the lawyer in the cases presented to the Migration Law Clinic) that there are no available data indicating precisely how many permits were granted specifically to Chinese cooks for the purposes of working in the hospitality industry and in particular in Chinese or Asian restaurants.[129] Various attempts by Mr. Kleijweg to obtain the data through the Wet openbaarheid van bestuur (Act transparency of administration) failed as yet.

In an alternative attempt to establish whether the Chinese cooks were the most affected by the change in the law, the authors of this opinion conducted a research to establish the

[123] Vereniging Chinese Horeca Ondernemers, *Waar zijn de koks?*, www.vcho.nl/column/waar-zijn-de-koks/ accessed 15 February 2016.

[124] De Volkskrant, *Chinese horeca onder druk door gebrek aan koks* (27 March 2014) www.volkskrant.nl/economie/chinese-horeca-onder-druk-door-gebrek-aan-koks~a3623366/ accessed 15 February 2016.

[125] *Kamerstukken I* 2013/14, 33 475 E, pp 2-3.

[126] Nadere Memorie van Antwoord, EK 2013/2014, 33 475, E, p 2.

[127] De Volkskrant, *Chinese horeca onder druk door gebrek aan koks* (27 March 2014) http://www.volkskrant.nl/economie/chinese-horeca-onder-druk-door-gebrek-aan-koks~a3623366/, accessed 15 February 2016.

[128] M Gijsberts, W Huijnk, and R Vogels, 'Chinese Nederlanders', pp 86.

[129] Letter from IND to Mr A G Kleijweg (6 August 2015).

characteristics of the persons most affected by the legislative change, and specifically by the absence of a transitory arrangement. In particular, the collection of data was conducted by searching the website <uitspraken.rechtspraak.nl/>, the national database of Dutch case law, by using the keywords 'overgangsrecht' ('transitory arrangement') and 'Wav'. The dates of search were limited to cases ruled upon after 1 January 2014, i.e. the date where the new law came into effect, and up until 12 February 2016. This search produced 24 results, which were divided as follows:[130]

- Twelve judgments concerned Chinese nationals working in the Asian catering sector who were affected by the lack of a transitional arrangement. These claimants either sought free access to the labour market or a renewal/extension of their work permit. An additional thirteenth judgment was found, which has not yet been published and therefore did not show in the results of the search.[131]
- Seven judgments (16 applicants) concerned the Wav in general. The cases either involved appeals against administrative fines for illegally employing Bulgarians or Romanians or the applicant's nationality or employment was not mentioned or was not Chinese. In these cases the revision of the Wav was not one of the central points. Therefore these cases were not taken into consideration during the calculation of the following data.
- Five judgments, which referred to different laws, such as the Environmental Management Act. These cases were not taken into consideration during the calculation of the following data.

For the purpose of this expert opinion only the first category of cases is relevant. The 13 judgments in this category accounted for 61.9% of all judgments related to the Wav between 1 January 2014 and 12 February 2016. All these judgments are connected to claims relating to the lack of a transitory arrangement for the new Wav. All but one applicant in these 13 judgments are of Chinese nationality.[132] In some cases, there were multiple applicants, one judgment having 118 applicants and another judgment having 92 applicants. The number of applicants in all cases on the 13 judgments amounted to 236.[133] Thus, 235 Chinese cooks lodged 13 procedures in which the lack of a transitional arrangement was expressly challenged.

This information produces enough evidence to make plausible that the extension of the period for free access to the labour market of three to five years primarily affected an identifiable group of Chinese cooks. The number of 1,700 mentioned by the Minister of SAE, respectively 800 – 1000 (KHN) are not improbable in the light of the fact that no less than 235 Chinese cooks took the initiative to mount procedures.

3.2 A case of discrimination?

From the foregoing, a picture emerges of a legislator, knowingly limiting the legitimate prospect of free access to the labour market for a group of Chinese cooks. This is a group grossly identifiable by nationality and profession, functioning as employees in an equally identifiable branch of Chinese restaurant owners. According to this picture, the legislator consciously refused, even after expressly having being asked so, to safeguard the legitimate claim of these cooks by a transitory arrangement. If this picture is correct, it might be argued that these cooks were discriminated in their quality of employee, as they were treated differently from their employers in the same branch. Instead of liberating the Chinese cooks from the elective discretion of employers, by granting them the promised free access to the labour market, these cooks were held in a prolonged dependent

[130] See Annex I: 'Comparative table'.
[131] District Court The Hague in Groningen, 4 February 2016, AWB 15/281, which concerned one of the three cases brought before the Migration Law Clinic.
[132] See Annex I: 'Comparative table'.
[133] Ibid.

position from Chinese restaurant owners, without any guarantee that free access to the labour market would ever still be achieved.

One of the core questions that will unavoidably arise when investigating whether there might be discrimination in the sense of Article 14 ECHR or Article 1 Protocol 12 ECHR, is whether the Chinese cooks on one hand and the Chinese restaurant owners on the other hand, may be considered to be in a comparable situation. In the words of the Court, discrimination means 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations'.[134] The Court examines the position of the applicant(s) and compares it with that of others who are treated more favourably. The situations of the comparator groups need not be identical; [135] the applicant must be able to show that he was treated differently compared to those in an 'analogous situation',[136] or a 'similar situation'[137] or in a 'relevantly similar situation',[138] with the latter formulation being the one currently preferred by the Court. Oftentimes, the only way to assess whether two groups are in a similar situation is to examine whether such differentiation is justified[139].

In this case, the Chinese workers and the Chinese restaurants had in common that the new Wav was threatening their position and that they had some parallel interests regarding the outcome of the legislative process. Their financial interests were linked to the same branch of Chinese restaurants. Further, both groups represent the same aspect of Chinese culture, they also possibly share Chinese nationality. However, their interests are not the same. The intent of the Government was to make Chinese cooks redundant by obliging the restaurant owners to hire Dutch cooks or other cooks belonging to the priority labour. The interest of the Chinese restaurants was to continue hiring Chinese cooks, presumably for considerations of language, cooking culture, probably also to avoid accessory costs, and because they claimed that Dutch cooks usually do not stay long. The interest of the Chinese cooks was to continue working in the Netherlands, independently, possibly in the same Chinese restaurants, and to build a future in the Netherlands on the basis of free access to the labour market.

Arguably, the Netherlands favoured the Chinese restaurant owners by providing – in the Wok-agreement – a limited opportunity to hire Chinese cooks again, but severely disadvantaged the group of Chinese cooks by effectively skipping their legitimate expectation of free access to the labour market.

It is not predictable whether the ECtHR will consider the Chinese workers and their employers as groups within a comparable situation. Several different situations have been found to be 'similar', and thus discriminatory. For instance, a French farmer who had acquired long-term resident status in Poland and Polish farmers were in similar situations with regard to their right to enter a Polish specialised social security regime.[140] Likewise, children born in wedlock and those born out of wedlock were in similar situations as regards their inheritance rights.[141] Conversely, the Court has not found the situations to be similar between, on the one hand, two sisters who were not exempt from inheritance tax, and on the other hand, married couples who were exempt from such taxes. This was due to the fact that 'the very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act

[134] ECtHR (GC) 7 July 2011, *Stummer v Austria*, Appl No 37452/02, para 87 and ECtHR (GC) 13 November 2007, *DH and Others v Czech Republic*, Appl No 57325/00, para 175.
[135] ECtHR 13 July 2010, *Clift v United Kingdom*, Appl No 7205/07, para 66.
[136] ECtHR 22 October 1996, *Stubbings and others v United Kingdom*, Appl Nos 22083/93 and 22095/93, para 71.
[137] ECtHR 13 June 1979, *Marckx v Belgium*, Appl No 6833/74, para 32.
[138] ECtHR (GC) 29 April 2008, *Burden v United Kingdom*, Appl No 13378/05, para 60.
[139] B Rainey, E Wicks and C Ovey, *European Convention on Human Rights* Oxford: Oxford University Press, 2014, p 579.
[140] ECtHR 27 November 2007, *Luczak v Poland*, Appl No 77782/01.
[141] ECtHR 1 February 2000, *Mazurek v France*, Appl No 33406/97, paras 44-47.

union is that it is forbidden to close family members'.[142] Similarly, non-residents receiving a UK pension were not in a similar position to pensioners residing in the UK, as the latter group were contributing to the economy and were paying taxes.[143]

In this expert opinion, it will be assumed that there is an arguable case that the Chinese cooks may claim to be discriminated in comparison to the Chinese restaurant employers by the refusal of the Dutch legislator to include a transitory provision in the new Wav.

Indirect discrimination?

The new Wav does not contain any express reference to Chinese restaurants or Chinese cooks. Thus, in the cases of Chinese cooks there is no issue of direct discrimination. However, it may be the case that there is indirect discrimination. The ECtHR will still examine, like in cases of direct discrimination, whether there is a difference in treatment of persons in relevantly similar situations. In that context the focus is on the *effects* of a measure. According to the ECtHR 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group'.[144] In finding the disproportionate effects of a general policy, the Court will look into the *de facto* situation,[145] as it may be difficult for the applicants to prove discriminatory treatment.[146] Therefore, less strict evidential rules are applicable in cases of alleged indirect discrimination.[147]

Proving indirect discrimination

The use of statistics has been accepted as a way of establishing indirect discrimination.[148] In *DH and others v Czech Republic* the Court relied on the statistics provided by the applicants to establish the discriminatory effects of the contested law. The ECtHR held that 'when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence.'[149] In the absence of any official information, the Court accepts statistics submitted by the applicants which may not be entirely reliable, but which nevertheless reveal a dominant trend.[150]

Where the evidence suggests a discriminatory effect, the burden of proof shifts to the respondent state. Therefore, it becomes the responsibility of the state to show that 'the difference in treatment is not discriminatory' and that 'the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin'.[151] Discriminatory intent on behalf of the relevant state authorities is not necessary.[152]

As regards the question of what constitutes *prima facie* evidence capable of shifting the burden of proof on to the respondent state, the ECtHR has held that the distribution of the burden

[142] ECtHR (GC) 29 April 2008, *Burden v United Kingdom*, Appl No 13378/05, para 62.
[143] ECtHR (GC) 16 March 2010, *Carson v United Kingdom*, Appl No 42184/05, paras 86-89.
[144] ECtHR (GC) 13 November 20007, *DH and Others v Czech Republic*, Appl No 57325/00, para 175.
[145] Ibid, para 175.
[146] Ibid, para 186, citing ECtHR 6 July 2005, *Nachova and Others v Bulgaria*, Appl Nos 43577/98 and 43579/98, paras 147 and 157.
[147] Ibid, para 186.
[148] ECtHR 6 January 2005, *Hoogendijk v the Netherlands*, Appl No 58641/00.
[149] ECtHR (GC) 13 November 2007, *DH and Others v Czech Republic*, Appl No 57325/00, para 188. See in contrast, ECtHR (GC) 16 March 2010, *Oršuš and Others v Croatia*, Appl No 15766/03, where statistics were deemed insufficient to prove indirect discrimination.
[150] ECtHR (GC) 13 November 2007, *DH and Others v Czech Republic*, Appl No 57325/00, para 191.
[151] Ibid, paras 189 and 195.
[152] Ibid, para 194.

of proof is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.[153]

Application to the Chinese cooks cases
Above it was shown that there is sufficient evidence making plausible that the extension of the period for free access to the labour market of three to five years primarily affected these cooks. This is *prima facie* evidence leading to a shift of the burden of proof to the Netherlands, to show that the difference in treatment is not discriminatory.

3.3 Discrimination under Article 14 ECHR

The foregoing sections undertook to draw a general outline of how the Chinese cooks' case may be analysed as a case of indirect discrimination. While, in that analysis, references to relevant case law of the ECtHR were already made, it still must be assessed more precisely whether the case falls within the terms of Article 14 ECHR. This provision guarantees equality before the law by prohibiting discrimination. It specifically provides that '[t]he enjoyment of the rights and freedoms in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

In its assessment whether Article 14 ECHR has been violated, the ECtHR investigates four questions. First, it examines whether the case falls within the 'ambit' or 'scope' of one of the Convention provisions (section 3.4). Second, it whether the applicant is treated differently than a similar group on the basis of a ground protected by under Article 14 (section 3.5). Lastly, it examines whether that difference in treatment can be reasonably justified (section 3.6).[154] With regard to the latter, the Court places a large emphasis on the width of the margin of appreciation left to states. Each of these questions will be in turn discussed in the following sections.

3.4 Does the case fall within the 'ambit' of Article 1 Protocol 1?

In cases involving Article 14, the ECtHR starts by reiterating that Article 14 complements the other substantive provisions of the Convention and its Protocols. Thus, it does not have an independent existence,[155] because it has effect only in relation to 'the enjoyment of rights and freedoms set forth' in the Convention and its Protocols.[156] Furthermore, the applicability of Article 14 does not presuppose a violation of the other Convention right; it is sufficient for a case to fall 'within the ambit' of one or more of Convention or Protocol Articles.[157] In the cases of the Chinese cooks, it seems natural, first to think of Article 1 Protocol 1 ECHR as this was the provision investigated in Chapter 2 of this expert opinion.

With regard to property right cases, i.e. cases where the complaint is brought under Article 14 in conjunction with Article 1 of Protocol 1 ECHR, the relevant test is whether 'but for the discriminatory ground about which the applicant complaints, he or she would have had an

[153] Ibid, para 178.
[154] B Rainey, E Wicks and C Ovey, *European Convention on Human Rights* Oxford: Oxford University Press 2014, p 567.
[155] ECtHR 23 July 1968, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium (Belgian Linguistics case)*, Appl Nos 1474/62, 1677 /62, 1691/62, 1769/63, 1994/63, and 2126/64, part I-B, para 9.
[156] D Harris, M O'Boyle, C Bukley and E Bates, *Law of the European Convention on Human Rights* Oxford: Oxford University Press 2014, p 786.
[157] ECtHR (GC) 6 July 2005, *Stec and Others v United Kingdom*, Appl Nos 65731/01 and 65900/01, para 39. See also ECtHR 28 May 1985, *Abdulaziz, Cabales and Balkandali v United Kingdom*, Appl Nos 9214/80, 9473/81 and 9474/81, para 71.

enforceable right under domestic law in respect of the asset or possession in question'.[158] In *Stec and Others v United Kingdom*, the ECtHR found that, although Protocol 1 does not include the right to receive a social security payment, since the state decided to create a benefits scheme, it should do so in a manner compatible with Article 14 ECHR.[159] It therefore found the case to fall within the ambit of Article 1 Protocol 1 ECHR. Furthermore, in *NKM v Hungary*, the ECtHR held that legitimate expectations counted as 'possession' of property for the purposes of interpreting Article 1 Protocol 1 ECHR and found a violation of Article 1 Protocol 1.[160]

Conversely, the Court has also found cases not to fall within the scope of Article 14, especially where there is no 'possession' in the context of Article 1 Protocol 1. For instance, in *Prince Hans-Adam II of Lichtenstein v Germany*, the Court found that the applicant's claims to ownership of a painting, which had originally belonged to his father and had been expropriated by the Czechoslovakian authorities, did not amount to a 'legitimate expectation' and thus a possession in the sense of the Court's case law.[161] Therefore, the Court concluded that the applicant could not claim that he had been discriminated against.[162] Furthermore, in *Roche v United Kingdom*, the ECtHR found that a claim in negligence did not count as 'possession' because it did not have a basis in national law.[163]

The ECtHR has extended the ambit of Article 14 ECHR to cases where the state has created a certain 'right' under national legislation, which exceeds the minimum standards of the Convention.[164] For example, in *EB v France*, national authorities refused a single person to adopt a child because of her sexual orientation.[165] The Court held:

> The prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide.[166]

Application to Chinese cooks cases

In Chapter 2 of this opinion it was concluded that there was a violation of Article 1 Protocol 1 ECHR with regard to the Chinese cooks. If that conclusion is accepted, there can be no doubt that the case also falls within the ambit of the right to property. But if the reasoning of Chapter 2 would be challenged, the question rises to what extent the right to property might still be engaged. At any rate, the economic value will have to be taken into account. It is undeniable that a considerable economic interest was involved, both for the cooks and for the restaurants. Therefore it seems reasonable to depart from the assumption that the discrimination case falls within the ambit of the right to property.

[158] ECtHR (GC) 7 February 2013, *Fabris v France*, Appl No 16574/08, para 52. See also ECtHR (GC)18 February 2009, *Andrejeva v Latvia,* Appl No 55707/00, paras 76-79 and ECtHR (GC) 6 July 2005, *Stec and Others v United Kingdom*, Appl Nos 65731/01 and 65900/01, paras 54-55.
[159] ECtHR (GC) 6 July 2005, *Stec and Others v United Kingdom*, Appl Nos 65731/01 and 65900/01, para 55.
[160] ECtHR 4 November 2013, *NKM v Hungary*, Appl No 66529/11, para 35.
[161] ECtHR (GC) 12 July 2001, *Prince Hans-Adam II of Liechtenstein v Germany*, Appl No 42527/98, para 85.
[162] Ibid, para 92.
[163] ECtHR (GC) 19 October 2005, *Roche v United Kingdom*, Appl No 32555/96, paras 129 and 133.
[164] OM Arnardóttir, 'Discrimination as a magnifying lens: Scope and ambit under Article 14 and Protocol No. 12' in: E Brems and J Gerards (eds) *Shaping Rights in the ECtHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* Cambridge: Cambridge University Press, 2013, p 337.
[165] ECtHR (GC) 22 January 2008, *EB v France*, Appl No 43546/02.
[166] Ibid, para 48.

3.5 Is there difference in treatment based on a protected ground?

Upon establishing the difference in treatment in similar situations, the next step is to establish whether this falls under a protected ground. This is a vital step in the analysis, as only differences in treatment based on an identifiable characteristic or 'status' are capable of amounting to discrimination within the meaning of Article 14.[167] The list of grounds is not exhaustive, as indicated by the use of 'such as'.[168] The French version, 'toute autre situation', indicates an even broader approach.

3.5.1 Difference in treatment on the basis of nationality or national origin

Article 14 explicitly mentions national origin as one of the grounds upon which discrimination is prohibited. In such cases, 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.[169] Cases invoking discrimination on the basis of nationality are primarily related to issues of a pecuniary nature and are invoked in conjunction with Article 1 Protocol 1 ECHR.[170] There must be a factual link between the claimant and the respondent state in such cases, such as tax contributions or having resided in the country for a long period.[171]

For instance, in *Gaygusuz v Austria*, the Court found that the refusal to grant the applicant part of his retirement pension in advance as a form of emergency assistance, was exclusively based on the fact that he was not an Austrian national. The applicant fulfilled all the other legal criteria.[172] The Court paid particular attention to the fact that he had been legally living in Austria for several years. In *Koua Poirrez v France*, a national of Ivory Coast was refused a benefit for disabled persons because he was not a French national. The Court again emphasised that he was legally resident in France and that he fulfilled all the other criteria for the benefit.[173]

Application to the Chinese cooks cases

The Chinese cooks had legal residence in the Netherlands when they invoked their legitimate expectation in applying for an extended residence permit with the annotation of free access to the labour market. In that respect, an unfavourable distinction made on the basis of their nationality must be seen as a distinction 'exclusively based' on nationality in the sense of the *Gaygusuz* and *Koua Poirrez* judgments.

Is there a distinction between the Chinese restaurants and the Chinese cooks on the basis of nationality? The restaurants as such do not have a nationality, they are legal persons recognised under Dutch law. The mere fact that they are specialised in Chinese or Asian food does not alter that. However, it is undeniable that the Chinese nationality of the cooks is one of the distinguishing features in the whole history. Their exclusion from free access to the labour market is based on their quality of 'third country national'. When reacting to the issue of a transitional arrangement, the Minister of SAE argued in terms of replacing the cooks by alternative labour supply and using them

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[167] ECtHR (GC) 16 March 2010, *Carson and Others v United Kingdom*, Appl No 42184/05, para 61.

[168] ECtHR 8 June 1976, *Engel and Others*, Appls Nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, para 72.

[169] ECtHR 16 September 1996, *Gaygusuz v Austria*, Appl No 17371/90 para 42; ECtHR (GC)18 February 2009, *Andrejeva v Latvia*, Appl No 55707/00, para 87.

[170] F Edel, 'The Prohibition of discrimination under the European Convention on Human Rights' (Human rights files, No 22, Council of Europe, 2010), pp 137-8. See ECtHR 16 September 1996, *Gaygusuz v Austria*, Appl No 17371/90 and ECtHR 30 September 2003, *Koua Poirrez v France*, Appl No 40892/98.

[171] Fundamental Rights Agency, *Handbook on European non-discrimination law*: Vienna: FRA 2010, http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf accessed 15 February 2016, p 109.

[172] ECtHR 16 September 1996, *Gaygusuz v Austria*, Appl No 17371/90, paras 46-50.

[173] ECtHR 30 September 2003, *Koua Poirrez v France*, Appl No 40892/98, paras 47-48.

to train their successors. In Parliament, he said: 'I just gave the example of a permit of one and a half year for cooks who can train other cooks. In that measure there is also the possibility of looking to whether an employer has sufficient time to train people. I think that this is more effective than a general transitional term. In some cases there is no need for a transitional period, because there is (priority labour) supply.'[174]

In essence, the exclusion of the group of Chinese cooks impairs their option to belong to the 'priority labour' themselves. The priority labour consists of Dutch citizens, EU citizens and TCN's who have been granted free access to the labour market. The prioritised position of EU citizens in relation to TCN's is generally considered not to be discriminatory, as this priority stems from the fundamental right to free movement laid down in the TFEU. Therefore, the leading question is, why Chinese cooks are not given the same position regarding priority labour as all those other TCN's who were already granted free access to the labour market. The answer is, that the legislator does not want any more TCN's to belong to the priority labour. This was already clearly stated in 2011 when the Government said that it sought to secure that workers from outside the EU would less easily become free on the Dutch labour market.[175]

It should be concluded that the exclusion of the legally residing Chinese cooks by the measures of the new Wav can be said to be exclusively based on the fact that they are third country nationals.

3.5.2 Difference in treatment on the basis of 'other status'

If nationality would not be the distinguishing ground, could it be said that the cooks are discriminated on the basis of another status? The term 'other status' is an open-ended category, allowing for different grounds to be considered as discriminatory. However, the interpretation and application of 'other status' is a complicated affair, with the ECtHR being inconsistent in both aspects.

On the one hand, the Court has ruled that Article 14 'is not concerned with all differences of treatment but only with differences having as their basis or reason a personal characteristic by which persons or group of persons are distinguishable from each other'.[176] Characteristics such as illegitimacy,[177] sexual orientation,[178] residence,[179] immigration and refugee status[180] have been found to constitute 'other status'.

On the other hand, the ECtHR has developed a diverging line of case law where the emphasis is placed on the phrase 'any ground such as' and the broader meaning of 'status' implied by the French text ('toute autre situation'). In such cases, any difference in treatment concerning one of the Convention rights can be considered before the Court.[181] For instance, in *Engel*,[182] the ECtHR found that military rank was sufficient to be considered as a status, while in the subsequent

[174] *Kamerstukken I* 2013/14, 33475, Handelingen No 6, item 10.
[175] Ibid, p 1-2.
[176] ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v Denmark*, Appl Nos 5095/71, 5920/72 and 5926/72, para 56.
[177] ECtHR 13 June 1979, *Marckx v Belgium*, Appl No 6833/74 and ECtHR (GC) 7 February 2013, *Fabris v France*, Appl No 16574/08.
[178] ECtHR 21 May 1996, *Sutherland v United Kingdom*, Appl No 25186/94.
[179] ECtHR 18 December 1986, *Johnston v Ireland*, Appl No 9697/82 and ECtHR 23 October 1990, *Darby v Sweden* Appl No 11581/85.
[180] ECtHR 27 September 2011, *Bah v United Kingdom*, Appl No 56328/07 and ECtHR 6 November 2012, *Hode and Abdi v United Kingdom*, Appl No 22341/09.
[181] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' *Human Rights Law Review* (2013), p 104.
[182] ECtHR 8 June 1976, *Engel and Others v Netherlands*, Appl Nos 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72, para 72.

Rasmussen v Denmark case, it did away with the requirement of establishing the ground altogether.[183]

In *Carson and others v United Kingdom*,[184] the Court tried to reconcile its two approaches:

> [The Court] has established in its case-law that only differences in treatment based on a personal characteristic (or 'status') by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of Article 14 (…) However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words ''any ground such as'' (in French ''notamment'') (...) It further recalls that the words ''other status'' (and a fortiori the French 'toute autre situation') have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence. Thus, in previous cases the Court has examined under Article 14 the legitimacy of alleged discrimination based, inter alia, on domicile abroad (…) and registration as a resident (…) . It is true that regional differences of treatment, resulting from the application of different legislation depending on the geographical location of an applicant, have been held not to be explained in terms of personal characteristics... However, (…) these cases are not comparable to the present case, which involves the different application of the same pensions legislation to persons depending on their residence and presence abroad.[185]

Nevertheless, even since *Carson*, the Court has continued to differentiate in its application of 'status', by continuing to use both lines of case law in different instances.[186] Oftentimes the ECtHR refrains from explaining the reasons the discrimination applies to a personal status by instead invoking earlier judgments in which Article 14 was found applicable.[187] For instance, in *Bah v United Kingdom*,[188] the Court did not explain why immigration status counted as a 'personal' characteristic or why it was a ground of discrimination.[189] Similarly, in *Stummer v Germany*, the Court simply declared that it had been undisputed that 'being a prisoner is an aspect of personal status for the purposes of Article 14',[190] without giving any reasons as to why.

In sum, the current practise of the Court stands as follows. In some instances, the Court disregards the ground of discrimination or, if it does mention the ground, it does not elaborate on the reasons for finding such a ground. Alternatively, it uses the 'personal status' criterion.[191] Therefore, it is difficult to determine which line of case-law is the most suitable or which one will be followed by the Court. As the first two alternatives are at the Court's discretion, an attempt will be made to examine whether a 'personal characteristic' can be established.

Application to the Chinese cooks cases

For the purposes of this opinion, the question is whether being a Chinese cook can be considered as a personal characteristic for the purposes of 'other status'. As was outlined above, the ECtHR has accepted several different characteristics as constituting status, including immigration status. In that regard, being a low-skilled migrant worker, and in particular being a Chinese cook, could also be

[183] ECtHR 28 November 1984, *Rasmussen v Denmark*, Appl Nos 8777/79, para 34.
[184] ECtHR (GC) 16 March 2010, *Carson and others v United Kingdom*, Appl No 42184/05.
[185] Ibid, paras 70-71.
[186] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' *Human Rights Law Review* (2013), p 112.
[187] Ibid, p 110. For example, ECtHR (GC) 2 November 2010, *Şerife Yiğit v Turkey*, Appl no 3976/05, para 79.
[188] ECtHR 27 September 2011, *Bah v United Kingdom*, Appl No 56328/07.
[189] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' *Human Rights Law Review* (2013), pp 109-10.
[190] ECtHR (GC) 7 July 2011, *Stummer v Austria*, Appl No 37452/02, para 90.
[191] J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' *Human Rights Law Review* (2013), p 112.

accepted as a characteristic. As was evidenced above, the persons most affected by the lack of a transitory period were Chinese cooks working in Chinese restaurants who had come to the Netherlands. In their quality of being low-skilled third country national workers they were treated essentially more disadvantageously than the restaurants employing them.

In sum, it has been established that the Chinese cooks are being discriminated against either an indirect manner. While there was no transitory arrangement for any of the other TCNs falling under the scope of the Wav, as evidenced above, the largest number of persons who were affected by this absence of a transitory period were the Chinese cooks. In particular, the discrimination can be based on two grounds: first, their nationality as such; second, their characteristic of being Chinese low-skilled migrant workers. In light of this, it must now be examined whether this discrimination is justifiable.

3.6 Is the difference in treatment justified?

In general, when ruling upon the validity of a justification brought forward by the state, the ECtHR has indicated a two-step approach on the basis of which it will make its assessment.[192] The first is concerned with the legitimate aim that has to be at the basis of the state's measure.[193] The legitimate aim should be an aim that lies in the general interest of a state. Public policy goals in the context of taxes or employment can reach the threshold of the legitimate aim standard.[194] The Court mentions that it needs to see 'understandable reasons' for a state's actions in order to accept the justification brought forward.[195] This is a reflection of the margin of appreciation granted to the state: the Court does not apply a rigorous scrutiny but accepts the legitimacy of the aim as long as it is understandable. Arbitrary distinctions, however, are prohibited.

Secondly, there should be a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[196] There should be a fair balance between the protection of general interests by the state on the one hand, and respect for the Convention rights on the other hand.[197] The ECtHR takes into account some kind of compensation in executing the fair balance test: this is a relevant factor in the assessment of the reasonable relationship of proportionality.[198] Moreover, when it comes to justifications based on nationality or ethnic origin, a very persuasive justification is needed in order to circumvent a breach of article 14 ECHR.[199]

In contrast, the Court does not go into subsidiarity as such: it only looks at whether there is a reasonable relationship of proportionality on the basis of the chosen measure by the state. The court does not consider whether another measure is less restrictive for achieving the same goal. It falls within the margin of appreciation to choose between different alternatives for policy making by the state.[200]

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[192] ECtHR (GC) 4 October 2012, *Chabauty v France*, Appl no 57412/08, para 53.
[193] DJ Harris and M O'Boyle*, Law of the European Convention on Human Rights,* Oxford: Oxford University Press 2014, p 794.
[194] ECtHR, 28 May 1985, *Abdulaziz, Cabales and Balkandali v United Kingdom*, Appl Nos 9214/80, 9473/81 and 9474/81, para 72. See also ECtHR (GC) 13 November 2007, *DH and others v Czech Republic,* Appl no 57325/00, para 196.
[195] ECtHR (GC) 4 October 2012, *Chabauty v France*, Appl no 57412/08, para 53.
[196] ECtHR, 28 May 1985, *Abdulaziz, Cabales and Balkandali v United Kingdom*, Appl Nos 9214/80, 9473/81 and 9474/81, para 72. See also ECtHR (GC) 13 November 2007, *DH and others v Czech Republic,* Appl no 57325/00, para 196.
[197] Ibid.
[198] ECtHR (GC) 4 October 2012, *Chabauty v France*, Appl no 57412/08, para 55.
[199] R O'Connell, 'Cinderella comes to the ball: Article 14 and the right to non-discrimination in the ECHR' *Legal Studies* (2009), p 15.
[200] David John Harris and Michael O'Boyle*, Law of the European Convention on Human Rights* (3rd edn, Oxford University Press 2014), p 795.

The proportionality test means that a fair balance should be struck between the interests of the individual and those of the community as a whole.[201] However, the assessment by the ECtHR is not with absolute scrutiny, since a state enjoys a certain manoeuvring freedom in this fair balance test to treat similar cases differently.[202]

This manoeuvring freedom by the state is known as the margin of appreciation: the Court considers states to be better suited to apply laws in a certain way, since they have direct knowledge on their society and its needs.[203] This the ECtHR finds especially true for public interests based on 'social or economic grounds'.[204] It is only when the state's actions taken into account in the fair balance test are 'manifestly without reasonable foundation' that a justification by the state for differential treatment is not accepted by the Court.

However, according to the Gaygusuz judgment, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention. [205]

Application to the Chinese cooks cases

Firstly, there should be a legitimate aim in the new Wav implemented by the Dutch state. [206] In Chapter 2 it was already assessed that there was such a legitimate aim. Secondly, it should be assessed whether the new Wav complies with the proportionality test applied by the Court. A fair balance should be struck between the interests of the Dutch state on the one hand, and the interests of the Chinese cooks on the other hand. In the case of the Chinese cooks, it is problematic whether the Dutch state complies with the requirement of proportionality.

As mentioned before, the Chinese cooks left behind home and family to start making a living in the Netherlands. It was concluded in Chapter 2 that they had a legitimate expectation, based on the existing rules laid down in the old Wav, to remain in the Netherlands for a long period of time, since they expected to eventually receive free access to the labour market after three consecutive years of work. Their lives have now dramatically been changed by the new Wav, as was explained above. As their prospect on continued legal residence after expiry of the Wok agreement is annihilated, they will have to return to their country eventually.

If it is accepted that the Chinese cooks were discriminated exclusively on the ground of their nationality, a narrow margin of appreciation applies, according to the Gaygusuz-doctrine. The government should put forward very weighty reasons to justify their exclusion from the legitimate expectation of free access to the labour market.

But also if nationality is not the sole ground of the exclusion, it still questionable whether a fair balance has been struck here, seeing the limited size of the group of Chinese migrant workers. A transitional arrangement for the Chinese cooks enabling them to become part of the priority labour, would have been proportionate and would not have caused substantial damage to the overall goal of the new Wav in the long term. In Chapter 2 it was concluded that the refusal to insert a transitional arrangement led to an excessive burden for the Chinese cooks. Accordingly, there are reasons to state that the refusal of a transitory arrangement was 'manifestly without reasonable foundation'.

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[201] ECtHR, 28 May 1985, *Abdulaziz, Cabales and Balkandali v United Kingdom*, Appl Nos 9214/80, 9473/81 and 9474/81, para 72.

[202] Ibid.

[203] ECtHR 21 February 1986, *James and Others v United Kingdom,* Appl no 8793/79, para 52.

[204] Ibid.

[205] ECtHR 16 September 1996, *Gaygusuz v Austria*, Appl No 17371/90, para 42.

[206] Fundamental Rights Agency, *Handbook on European non-discrimination law*: Vienna: FRA 2010, http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf accessed 15 February 2016, p 45.

3.7 Discrimination under Article 1 Protocol 12 ECHR

Article 14 ECHR is supplemented by Article 1 of Protocol 12 ECHR. Protocol 12 has entered into force on April 1 2005 and has been ratified by only 19 Contracting States to the ECHR, among which the Netherlands. The text of Article 1 Protocol 12 reads as follows:

> 1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 1 Protocol 12 contains a wider prohibition of discrimination than Article 14 ECHR, because it concerns any right, even if it does not fall within the scope of the Convention. This includes the enjoyment of rights specifically granted to individuals.[207] Neither the exact scope of Article 1 Protocol 12, nor the substantive meaning of 'any right set forth by law' has been set out yet. The reasons for that is that it concerns a relatively recent provision with only a small number of ECtHR cases available.[208] However, the Explanatory Report to Article 1 Protocol 12 ECHR clarifies that a state measure falls within the scope of this article 'where a person is discriminated against:

1. in the enjoyment of any right specifically granted to an individual under national law;
2. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
3. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
4. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[209]

This section seeks to examine whether there is a violation of Article 1 Protocol 12 in the cases of the Chinese cooks.

3.7.1 The ambit of Article 1 Protocol 12 ECHR

A small amount of cases under Article 1 Protocol 12 ECHR provides for a line of jurisprudence. Whenever the grounds for appeal of a case include both Article 1 Protocol 12 and another provision of the ECHR, the Court ignores the plea regarding the former article when a violation of the latter has already been confirmed.[210] Moreover, in cases where both Article 14 and Article 1 Protocol 12 ECHR are being brought forward by the applicant, the Court seems to choose to investigate a possible breach within the ambit of Article 14 ECHR first, after which the Court considers a possible violation of Article 1 Protocol 12.[211] When the Court has accepted that a certain case falls within the ambit of Article 1 Protocol 12, it continues to interpret this provision in the same way as Article 14

[207] Ibid, p 821.
[208] Ibid.
[209] ECtHR 9 December 2010, *Savez Crkava 'Rijec Zivota' and others v Croatia*, Appl no 7798/08, para 105.
[210] Ibid, para 106.
[211] ECtHR (GC) 22 December 2009, *Sejdic and Finci v Bosnia and Herzegovina*, Appl nos 27966/06 and 34836/06, para 38.

ECHR.[212] This similarity is also illustrated by the way the Court sometimes finds a violation of both Article 1 Protocol 12 and Article 14 ECHR in one and the same case, while it does not distinguish between violations of the separate articles. It mentions the violation of both articles in one breath.[213]

3.7.2 The content of Article 1 Protocol 12

The Court interprets Article 1 Protocol 12 ECHR as providing for a general prohibition of discrimination, because of the wording of the article ('any right set forth by law' – not limiting its scope to the Convention rights).[214] Apart from the indicated difference in scope between both Article 14 and Article 1 Protocol 12 ECHR, both should be interpreted in the 'same manner', according to the Court.[215] This means that the term 'discrimination' in both provisions should be interpreted similarly, since the 'meaning of this term (…) was intended to be identical to that in Article 14 (…).'[216]

Application to the Chinese cooks cases
In the Chinese cooks cases, Article 1 Protocol 12 ECHR would only have a complementing value if the matter would not turn out to fall within the ambit of Article 1 Protocol 1 ECHR. The question is then whether the right to free access to the labour market after three years of uninterrupted lawful labour under the old Wav can be said to provide 'a right set forth by law'. This would not be an overwrought interpretation. In the terms of the Explanatory report, it could be said that the first category applies: 'The enjoyment of any right specifically granted to an individual under national law'. For the rest, the considerations under section 3 would be analogously applicable.

3.8 Conclusion

In light of the above, it can be concluded that the extension from three to five years before being able to obtain a permanent working permit, in the absence of a transitional arrangement, constitutes a violation of Article 14 ECHR in conjunction to Article 1 of Protocol 1 ECHR. First, there is enough evidence to make plausible that the extension of the period for free access to the labour market of three to five years primarily affected an identifiable group of Chinese cooks. Second, the case falls within the ambit of Article 14 on account of their legitimate expectation to a right to property under Article 1 Protocol 1 ECHR. Third, the Chinese cooks were severely disadvantaged in comparison to the Chinese restaurant owners by skipping their legitimate expectation of free access to the labour market. There was a discrimination exclusively based on the nationality of the Chinese cooks, and at any rate discrimination on the ground that they had the quality of being low-skilled third country national workers. Fourth, it was found that such a difference in treatment is not justified. In the light of justification, a narrow margin of appreciation should be applied if it is assessed that distinction was made exclusively on the ground of nationality. Within that margin, no fair balance has been struck between the interests of the Chinese cooks on the one hand, and the state's interests in providing for only a relatively small number of jobs for Dutch citizens on the other hand. But even if a wider margin of appreciation would apply, it can be said that the exclusion of the Chinese cooks from their legitimate claim to free access to the labour market was 'manifestly without reasonable foundation'.

[212] Ibid; ECtHR (GC) 22 December 2009, *Sejdic and Finci v Bosnia and Herzegovina*, Appl nos 27966/06 and 34836/06, para 55 and ECtHR (GC) 18 July 2013, *Maktouf and Damjanovic v Bosnia and Herzegovina*, Appl nos 2312/08 and 34179/08, para 88.
[213] ECtHR 15 July 2014, *Zornic v Bosnia and Herzegovina*, Appl no 3681/06, para 32.
[214] Ibid, para 53.
[215] Ibid, para 55.
[216] ECtHR 15 July 2014, *Zornic v Bosnia and Herzegovina*, Appl no 3681/06, para 27.

The only difference occurring between Article 14 and Article 1 Protocol 12 ECHR is the ambit of these provisions: while Article 14 ECHR only accounts for a prohibition of discrimination occurring within the ambit of any other Convention provision, Article 1 Protocol 12 ECHR also applies to rights which are in general 'set forth by law' and thus are not required to fall within the scope of any of the ECHR provisions. As for the substance of the prohibition of discrimination, no differences exist between the two provisions. Since we concluded that the instant case of the Chinese cooks falls within the scope of the right to property as laid down in Article 1 Protocol 1 ECHR, there is no complementing value of basing the application before the ECtHR on Article 1 Protocol 12 ECHR as well, next to Article 14 ECHR. However, if the ECtHR would decide the Chinese cooks case does not fall under the scope of Article 1 Protocol 1 ECHR after all, the Chinese cooks claim of a violation could be based on Article 1 Protocol 12 ECHR instead of on Article 14 ECHR.

4. Have the applicants exhausted the domestic remedies available?

4.1 Introduction

In order to answer the question whether all domestic remedies were exhausted, it is in the first place important to know what was asked and what was refused. The purpose of the procedures lodged by the Chinese cooks was to obtain a residence permit with free access to the labour market. So, the relevant questions are: who is, in the Dutch legal system, responsible for the issuing of such a residence permit and what are the legal remedies available against a refusal?

The Chinese cooks applied for the desired permit with the State Secretary of Security and Justice (State Secretary of S&J) who is indeed the competent authority, according to the Vw 2000 (Aliens Act 2000), to grant and refuse residence permits. A complication in cases like this is, that the criteria for residence permits related to the labour market are not laid down in the Vw 2000, but in the Wav. This Act appoints the Minister of SAE as the competent authority. Before 1 April 2014, the date on which the single permit for residence and work was introduced,[217] an ambiguous system existed, under which the employer had to apply with the Ministry of SAE for an employment permit with regard a certain foreign worker and the worker had in his turn to apply with the State Secretary of S&J for the residence permit.[218] This was the system under which the Chinese cooks entered the Netherlands. In brief: their legal position was fully dependent on their employer and the main authority deciding whether they were allowed to work was the Minister of SAE.

This has changed as a consequence of the implementation in the Netherlands of EU Directive 2011/98. Since 1 April 2014, only one authority is responsible for the issuing of a single permit for residence and work: that is the State Secretary of S&J. The Minister of SAE has now merely an advisory role. Under Article 14a Vw 2000, the advice of the UWV, a body functioning under the supervision of the Ministry of SAE, is required before the State Secretary of V&J decides on a request for a combined permit for residence and work. The task of the UWV is to advise on whether the requirements of the Wav are met. Though the opinions of the UWV are normally observed, the Vw 2000 does not formulate an obligation for the State Secretary to do so.[219]

The application by the Chinese cooks for a residence permit, which is the object of the present litigations, fell under the new legislation implementing EU Directive 2011/98 as of 1 April 2014. They did however not apply for a single permit for residence and work, but for a residence permit with the annotation that the holder is free on the labour market, that is, without any authority for the Minister of SAE to check whether there would be prioritised workers for the job they wished to do.

This does not release the State Secretary of S&J from observing the Wav. The rules defining the cases in which a residence permit has the effect of free access to the labour market are laid down in the Wav and lower legislation elaborating the Wav in more detail. Normally, the State Secretary of V&J is bound to apply those rules of the Wav when deciding whether a residence permit has the effect of free access to the labour market. However, the Chines cooks argued that the State Secretary should not apply the five-year term in the new Wav in their case, because that would constitute an infringement of their right to property laid down in Article 1 Protocol 1 ECHR.

The question which will be addressed in this section is whether the legal avenue pursued by the Chinese cooks complies with the obligation to exhaust domestic remedies.

[217] *Staatsblad* 2013, nr. 128.

[218] Since June 2013, the Dutch system authorises the employer to apply for the residence permit on behalf of the worker.

[219] See also section 1.4.

4.2 The obligation to exhaust domestic remedies

The obligation to exhaust domestic remedies is a principle of customary international law expressed in Article 35(1) ECHR as one of the admissibility criteria for applications brought before the ECtHR.[220] The rule is one of the elements of the subsidiarity principle, under which the ECtHR operates.[221] It complements the obligation of states, following Article 13 ECHR, to offer effective remedies before a national authority to those whose rights and freedoms as set forth in the Convention are violated. Because it is assumed that effective domestic remedies are available, the Convention requires applicants to make full use of those first, before recurring to the ECtHR.[222]

A domestic remedy must be available not only in theory, but also in practice, and must be effective, which includes it having a precise time limit in order to avoid uncertainty.[223] In the situation where several remedies are available, established case law determines that the applicant is free to elect which one is more suitable to his or her situation. This means that when one remedy is used, it is not obligatory to pursue another one that essentially has the same purpose.[224] In the case of *Karakó v Hungary*, the ECtHR held that the applicant 'was not required to avail himself of an additional legal avenue in the form of a civil action' because he had already pressed criminal charges.[225] 'In this respect, the Court recalls that, where several remedies are available, the applicant is not required to pursue more than one'.[226] In *Kozacıoğlu v Turkey* the Grand Chamber noted: 'It should also be reiterated that an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and that, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required.'[227]

Applicants are required to comply with all rules and procedures imposed by domestic law. In cases when an appeal before a national court is rejected due to a procedural mistake, the application will also be considered inadmissible to the ECtHR. Yet, if the national authorities have decided to examine the claim notwithstanding procedural mistakes and non-compliance with the form or language required, the application will be rendered admissible for the purpose of Article 35(1) ECHR.[228]

In *Kozacıoğlu v Turkey* the Court asserted that the obligation to exhaust domestic remedies must be applied with a certain 'degree of flexibility and without excessive formalism'. When examining the admissibility criteria under Article 35(1) ECHR the Court must 'take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies.'[229]

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[220] Council of Europe/European Court of Human Rights, *Practical Guide on Admissibility Criteria* (2014), http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf accessed 24 February 2016, p 22. The Admissibility Guide mentions that this principle is found in case law of the International Court of Justice (case Interhand – *Switzerland v United States*, 1959) and international human rights treaties such the International Covenant on Civil and Political Rights, the American Convention on Human as Rights and the African Charter on Human and People's Rights.

[221] European Court of Human Rights, *Subsidiarity: a two-sided coin?*, 30 January 2015, p 1.

[222] Council of Europe/European Court of Human Rights, *Practical Guide on Admissibility Criteria* (2014), http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf accessed 24 February 2016, p 22.

[223] Ibid, p 24.

[224] Ibid, p 23. The Court has consistently confirmed this in amongst others ECtHR 24 January 2008, *Riad and Idiab v Belgium,* Appl nos 29787/03 and 29810/03, para 84 and ECtHR (GC) 19 February 2009, *Kozacıoğlu v Turkey,* Appl no 2334/03, para 40 et seq.

[225] ECtHR 28 July 2009, *Karakó v Hungary*, Appl no 39311/2005, para 14.

[226] Ibid.

[227] ECtHR 19 February 2009, *Kozacıoğlu v Turkey* [GC], Appl no 2334/03, para 40.

[228] Ibid, p 23.

[229] ECtHR (GC) 19 February 2009, *Kozacıoğlu v Turkey,* Appl no 2334/03, para 40.

The next sections will answer the question whether the four Chinese cooks exhausted the domestic legal remedies, thus fulfilling one of the admissibility criteria for applications before the ECtHR. For that, it is necessary to explain which are the effective domestic remedies available in the present cases and whether the Wok-Agreement was one of them. Also important will be the assessment on whether Article 35(1) ECHR requires applicants to follow alternative legal avenues in order to exhaust domestic remedies.

4.3 The domestic remedies available in the present cases

Chapter 7 Vw 2000 comprises the domestic remedies available for TCNs present or residing in the Netherlands. As a general rule, appeals must be lodged within four weeks after the contested decision.[230] Cases regarding temporary residence permits in the meaning of Article 14 Vw 2000[231] fall under the general rules on remedies contained in the law.[232]

In the cases under analysis in this opinion, the avenue prescribed in the applicable legislation was followed. The decisions denying the renewal or extension of residence permits were contested before the IND and subsequently before the District Court and in higher appeal before the Judicial Division of the Council of State.[233] The Chinese Cooks had no other legal option available with regard to their wish to obtain a residence permit with free access to the labour market.

However, in a judgment in one of the present cases the District Court The Hague suggested an alternative legal avenue as where to seek a legal remedy.[234] 'If the applicant wants to assess whether the amendments to the Wav (old) qualify as unlawful legislation, he must apply to the civil court.'[235] The ground for this consideration of the Court was, that it is not competent to deal with the question of whether a formal law is invalid. The Court therefore points to the possibility of an alternative legal avenue for the applicant as to address his complaints, namely by challenging the validity of the legislation before a civil Court.

Indeed, there is case law in the Netherlands, according to which the lawfulness of formal legislation may, under certain circumstances, be challenged before a civil court.[236] However, the Chinese cooks did not intend to challenge the lawfulness of the new Wav in itself. They did not allege that the new Wav is, partially or as a whole, invalid in general terms. They merely stated that a particular provision of the new Wav should not be applied in their particular case, as required by Article 94 of the Dutch Constitution, because it conflicts with binding provisions of the ECHR.

Administrative Courts like the District Court The Hague, in first instance, and the Administrative Jurisdiction Division of the Council of State, in higher appeal, are perfectly competent and even obliged to test the lawfulness of application of legal provisions against the ECHR. See for instance the judgment of the of the Administrative Jurisdiction Division of the Council of State of 21 September 2011, in which a regulation implementing the Remigratiewet was considered to infringe on Article 14 ECHR.[237] The District Court The Hague erred in interpreting the limited purpose of the proceedings initiated by the Chinese cooks. The alternative suggested by the Court had no relevance for the cases at issue.

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[230] Art 69(1) Vw 2000.

[231] The types of residence permits described in Art 14 Vw 2000, more specifically in Art 14(5) Vw 2000, are the ones connected to the Wav (old and new).

[232] Art 72(1) Vw 2000. The Wav also provides for complaints, administrative objections and appeals to the courts, which can be lodged by the alien in person, his legal representatives, his special representative, his referent or a lawyer.

[233] Administrative Jurisdiction Division of the Council of State, 'Bezwaar, beroep en hoger beroep in reguliere zaken', available at: https://www.raadvanstate.nl/onze-werkwijze/bestuursrechtspraak/vreemdelingenkamer.html, accessed 9 January 2016.

[234] District Court Haarlem 11 November 2015, AWB 14/18237, ECLI:NL:RBDHA:2015:13842.

[235] Ibid para 5.1.

[236] See eg Supreme Court 16 May 1986, *Nederlandse Jurisprudentie* 1987/251.

[237] Administrative Jurisdiction Division of the Council of State 21 September 2011, no 201406604/1/V6.

Another alternative avenue was suggested by the IND in a decision dismissing an objection of one of the Chinese cooks. The IND stated that the objection should instead have been brought before the Ministry of SAE 'In this case, the contested decision is not the result of an amendment to the Vw 2000, but to the Wav. Any opposition thereto is outside the sphere of influence of the IND. There are remedies available against the decision regarding the employment permit. Objections concerning the employment permit procedure can be raised in those proceedings.'[238] Thus, according to the IND, the Chinese cooks should have lodged proceedings against the Ministry of SAE. What kind of proceedings the IND had in mind was not specified. Under the system before 12 December 2013, only an employer could challenge the refusal of an employment permit in an administrative procedure. The worker had no such opportunity.

Furthermore, in the present case no employment permit nor a single permit for residence and work was asked for. As set out above, the Chinese cooks applied for a residence permit with an annotation that the holder is free on the labour market, without any need for an employment permit. Issuing such a permit belongs to the sole competence of the State Secretary of S&J under the Vw 2000. No alternative avenue as suggested by the IND was available.

4.4 Is the Wok-agreement an effective remedy?

Ten months after the entering in force of the new Wav, the Ministry of SAE reached a temporary agreement with the Asian restaurants branch.[239] The agreement[240] entered in force on 1 October 2014. It comprises the temporary suspension of the priority labour test provided in Article 8:1 (a) (b) and (c) applied by the UWV to evaluate applications for temporary employment submitted by Asian restaurants or migrants who intend to work in such restaurants in function of levels 4 to 6 (specialist cook, sous-chef/all-around cook or chef).[241]

The permit is granted for a maximum period of one year and can be extended for an equal period, as long as the employer has complied with the conditions regarding training of new personnel. The terms of the agreement are designed as to allow 'within a reasonable period that sufficient priority labour fill vacancies of cooks in the Asian restaurant industry'. Employers who do not comply with the conditions may have their permits refused or withdrawn.[242]

The government established six-month quotas for employment permits/single permits for residence and work, granted under the agreement. Applications submitted above the limits specified below will be subject to the usual priority test.[243] The quotas were:

a. 1 October 2014 until 31 March 2015: 900
b. 1 April 2015 until 30 September 2015: 750
c. 1 October 2015 until 31 March 2016: 750
d. 1 April 2016 until 30 September 2016: 750

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[238] IND beschikking 28 April 2014, Zaaknummer Z1-4826247854, p 2. For the purpose of clarification: by 'those proceedings' the IND means those before the UWV.

[239] The Asian restaurants branch consists of the companies associated to the business organisations Vereniging Chinese Horeca Ondernemers (VCHO), Koninklijke Horeca Nederland (KHN) and Thai Restaurant Association (TRA).

[240] Tijdelijke regeling van de Minister van Sociale Zaken en Werkgelegenheid van 25 september 2014, tot wijziging van de Regeling uitvoering Wet arbeid vreemdelingen 2014 in verband met het vervallen van de toets op aanwezig prioriteitgenietend aanbod voor aanvragen van de Aziatische horeca. Wijzigingsregeling Regeling uitvoering Wet arbeid vreemdelingen 2014 (vervallen toets op aanwezig prioriteitgenietend aanbod aanvragen Aziatische horeca), 30 September 2014, *Staatscourant,* nr 27559.

[241] Werkvergunning Aziatische Horeca, UWV, 2014. Available at: https://www.werk.nl/werk_nl/werkgever/meerweten/werkvergunning/werkvergunning-aziatische-horeca, accessed 27 October 2015.

[242] Tijdelijke regeling van de Minister van Sociale Zaken en Werkgelegenheid van 25 september 2014, para 19a.

[243] Ibid

In the cases under consideration in this expert opinion, the Wok-agreement was of no avail to remedy the damage caused by the new Wav to the Chinese cooks. In one case seven months separated the expiration of the applicant's residence permit and the entrance into force of the covenant.[244] Even if the cook concerned would qualify to continue working in the Netherlands under the temporary agreement, the gap in his legal residence period would render the previous three years he had worked invalid for the purposes of obtaining a residence permit with unrestricted access to the Dutch labour market. Therefore, the applicant would have to work yet another five years for a specific employer, in addition to the three years he had already worked. As it has been assessed above, the conditions for obtaining a single permit for residence and work have been tightened considerably in the new Wav, making it virtually impossible for Chinese cooks to continue working lawfully after expiration of the Wok-agreement.

The same would be applicable to the Chinese cook in the second case[245], who would have a gap of at least two months. In the third case the applicant did qualify for a combined one-year single permit for residence and work on the basis of the temporary agreement.[246] However, by the time his new one-year permit started, he had already a seven months and 21 days gap in his legal residence. The Wok-agreement does not address the gap in the legal stay of the applicants in the present cases and therefore cannot be considered an effective remedy.

It follows from case law of the ECtHR that only remedies which are available at the relevant time and are accessible, capable of providing redress in respect of the applicants' complaints and offering reasonable prospects of success need to be exhausted.'[247] The agreement rectifies, albeit temporarily, the needs of the business owners affected by the Wav (new), but fails to provide an effective remedy for the migrant workers in the cases discussed in this opinion. Resorting to the agreement is not a remedy that would address the main complaint, namely not being given free access to the labour market after three years of legal employment in the Netherlands.[248] It is therefore safe to conclude that the temporary arrangement between the government and the Asian restaurants branch cannot be considered an effective remedy in the present cases.

4.5 Conclusion

This chapter has shown that the applicants made use of the available remedies in accordance with the domestic procedures. It has also been established that the covenant between the Ministry of SAE and the Asian restaurants branch cannot be considered an effective remedy, because it could not possibly redress the applicants' main complaint. The alternative remedies suggested by a district court was not relevant and an alternative suggested by the IND did not exist.[249]

In addition, according to case law of the ECtHR, the migrants are not required to pursue eventual alternative remedies – such as questioning the legality of the Wav before a civil court – even if they were applicable and effective to the cases in question. Once higher appeals are brought before the Council of State, it is safe to conclude that the domestic remedies have been exhausted and therefore eventual applications to the ECtHR would be deemed to fulfil the admissibility criteria imposed by Article 35(1) ECHR.

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[244] AWB 14/11151.
[245] AWB 14/18237.
[246] District Court The Hague in Groningen, 4 February 2016, AWB 15/281.
[247] Council of Europe/European Court of Human Rights, 2014, *Practical Guide on Admissibility Criteria*, p 24.
[248] As the District Court of The Hague specifies in para 8.3 of the judgment in case AWB 14/18237: 'the applicant contends primarily that the contested decision deprives him of his right to free access to the labour market, which is inconsistent with the right to property.'
[249] Council of Europe/European Court of Human Rights, 2014, *Practical Guide on Admissibility Criteria*, p 22. Example of cases are: *Moreira Barbosa v Portugal* (dec.); *Jeličić v Bosnia and Herzegovina* (dec.); *Karakó v Hungary*, para 14; *Aquilina v Malta* [GC], para 39; *Riad and Idiab v Belgium*, para 84; *Kozacıoğlu v Turkey* [GC], para 40 et seq.; *Micallef v Malta* [GC], para 58 and *Jasinskis v Latvia*, para 50 and paras 53-54.

5. Conclusion

This expert opinion concerns the cases of three Chinese cooks, who worked in the Netherlands when the Wav was revised. The new Wav introduced stricter requirements for employers and foreign workers:

1. the minimum period for a migrant to obtain free access to the labour market was extended from three to five uninterrupted years of work for a specific employer.
2. an employment permit will not be granted when priority labour is *present*, instead of *available* meaning that the UWV could refuse issuing an employment permit as long as there are local or EU nationals registered as seeking work;
3. The maximum period for granting an employment permit was reduced from three years to one year;

As a result of these changes the Chinese cooks lost their prospect to obtain free access to the labour market at any time in the future. Considerable time gaps occurred in their cases, meaning they should start all over again building an uninterrupted period of five years of lawful employment. The temporary suspension of the priority labour test as a result of an agreement between the Ministry of SAE and the Asian restaurants branch (the Wok-agreement) provided only temporary relief for the Chinese cooks. After expiration of the agreement it will be virtually impossible for Chinese cooks to obtain single permits for residence and work. Eventually they will have to leave the country. This situation raised questions of compatibility with the ECHR. More specifically, this legal opinion sought to answer the following three research questions:

- Does the prolongation from three to five years before being able to obtain free access to the market, in the absence of a transitory period, constitute a breach of Article 1 Protocol 1 ECHR?
- Does the prolongation constitute a breach of the prohibition of discrimination in the enjoyment of the rights and freedoms set forth in the ECHR on the basis of Article 14 ECHR, in conjunction to Article 1 of Protocol 1 ECHR and Article 1 Protocol 12 ECHR?
- Have all domestic remedies been exhausted as is required by Article 35(1) ECHR?

The right to property

Firstly, this expert opinion looked at the possibility of a violation under Article 1 Protocol 1 ECHR. It concluded that the claim of the Chinese cooks regarding the future right of free entry to the labour market falls within the scope of Article 1 Protocol 1 ECHR, because it should be considered 'a possession'. The Chinese cooks had a legitimate expectation of free access to the Dutch labour market, since they fulfilled all conditions for such access until the new Wav was introduced. The provisions laid down in the old Wav had remained unchanged for years and therefore provided for stable domestic legislation. Also, economic value is present, now that the ability to work freely in the labour market would provide the Chinese cooks with an income.

This expert opinion also found that an interference with the right to property under Article 1 Protocol 1 ECHR has occurred. The new Wav extended the period after which a foreign worker gets free access to the labour market from three years to five years of legal employment in the Netherlands. Furthermore the priority labour test which prioritises Dutch and EU citizens above TCNs has become stricter. These two measures have rendered the possibility to build a future in the Netherlands for the Chinese cooks virtually impossible. The Dutch state has therefore interfered with the very essence of their right to property.

Finally, it was examined whether the interference with the right to property is justified. The revision of the Wav was published in a publicly available source and the clear consequences of the law follow from its text. Therefore it was concluded that the interference has a legal basis which is

accessible and sufficiently precise. However, the new Wav was not foreseeable in the sense of the ECtHR's case law. It offered no protection against arbitrary interferences by the public authorities with regard to the Chinese cooks, in the absence of a transitional arrangement. The Wav was revised in the light of the social policy goal of prioritising Dutch citizens over TCNs. The ECtHR has considered this to be a legitimate aim in its case law.

This expert opinion concluded that the interference with the Chinese cooks' right to property does not comply with the principle of proportionality. No timely announcement has been made of the plans to change the rules laid down in the old Wav. At the moment the Chinese cooks left China and were granted a permit in order to work in the Netherlands, the (plans for) the revision of the Wav had not been announced. Moreover, no effective transitory measure has been provided by the Dutch state. The agreement between Asian restaurants and the minister, as mentioned above, does not ensure that they will gain free access to the Dutch labour market. Thirdly, the new Wav caused an individual and excessive burden for the Chinese cooks, since the new legislation will end their ability to work in the Netherlands. The Dutch state therefore did not strike a fair balance between its own interests and those of the Chinese cooks. We concluded that there is a violation of the right to property in the instant cases.

Non-discrimination

The second research question that has been answered by this expert legal opinion concerns a possible breach of the prohibition of discrimination as laid down in Article 14 ECHR and Article 1 Protocol 12 ECHR. As to that question, the case of the Chinese cooks falls within the ambit of Article 14. Since the instant case falls under the scope of Article 1 Protocol 1 ECHR, a Convention right can be invoked here. Therefore, Article 14 ECHR applies.

The provisions of neither the old or new Wav mention the group of Chinese cooks. Therefore there is no direct discrimination. However, there is plausible evidence of indirect discrimination. Both the numbers regarding working permits granted under the Wav compared to the number of Chinese cooks, as well as the fact that only Chinese cooks have been protesting against the new Wav, indicate that the Chinese cooks are especially affected by the new Dutch legislation. Also, almost two-third of cases before the Dutch courts concerning the Wav and the absence of transitory law were filed by Chinese cooks. Though the employers were granted some relief in the form of the Wok-agreement, the precarious position of the Chinese cooks remained fundamentally unchanged. There has thus been a difference in treatment in the form of indirect discrimination under Article 14 ECHR.

In contrast with the Chinese restaurants, the Chinese cooks were severely disadvantaged by the revision of the Wav, because their prospect ever to belong to the category of 'priority labour' with free access to the labour market was blown away. Instead, the Chinese cooks will eventually have to leave the Netherlands. The question raises whether the Chinese cooks are treated differently on the basis of a protected ground under Article 14 ECHR. Arguably their eternal exclusion from free access to the Dutch labour market is based on their nationality or on their quality of low-skilled migrant workers with the nationality of a third country. If their exclusion is based exclusively on their nationality, only 'very weighty reasons' can justify the impugned measure. If their exclusion is based on their quality of low-skilled third country national worker, it must be noted that the refusal to insert a transitional arrangement led to an excessive burden for the Chinese cooks in comparison to the burden laid upon the restaurants. Accordingly, there are reasons to state that the refusal of a transitory provision was 'manifestly without reasonable foundation'.

When it comes to the conditions of justification set forth by the ECtHR, the Dutch state has a legitimate goal concerning the adaptation of labour market policy. However, this expert opinion concluded that there is no justification for indirect discrimination in the instant case, because the Dutch state did not comply with the proportionality test. The Dutch state did not strike a fair balance between the interests of the State itself and the interests of the Chinese cooks. It is concluded that there is a violation of the prohibition of discrimination as laid down in Article 14 ECHR.

Article 1 Protocol 12 ECHR also entails the prohibition of discrimination. According to the ECtHR both Article 1 Protocol 12 ECHR and Article 14 ECHR are substantively equal when it comes to the interpretation of 'discrimination' as such. Furthermore, a possible justification of an interference with the prohibition of discrimination is construed equally under both Article 14 ECHR and Article 1 Protocol 12 ECHR. The only difference is the ambit of the provision. While Article 14 ECHR can only be invoked when a case also falls within the ambit of another provision within the ECHR, Article 1 Protocol 12 has a scope that includes 'any right set forth by law'. Since we concluded that the case of the Chinese cooks falls within the scope of the right to property as laid down in Article 1 Protocol 1 ECHR, there is no complementing value of basing the application before the ECtHR on Article 1 Protocol 12 ECHR as well, next to Article 14 ECHR. However, if the ECtHR would decide the Chinese cooks case does not fall under the scope of Article 1 Protocol 1 ECHR after all, the Chinese cooks claim of a violation could be based on Article 1 Protocol 12 ECHR instead of on Article 14 ECHR, as the three year term of the old Wav constitutes a 'right set forth by law'.

Exhaustion of domestic remedies

In order to file an application before the ECtHR, the Chinese cooks should exhaust domestic remedies. The applicants have been lodged an appeal before the district court in the Netherlands in accordance with the applicable legislation. Alternative avenues suggested by the district court The Hague and the IND were investigated in this expert opinion and found irrelevant or not existing.

Moreover, the agreement between the Ministry of SAE and the Asian restaurants cannot be considered a remedy for the Chinese cooks, since it does not provide for a possibility to redress the applicants' main complaint regarding free access to the Dutch labour market. Furthermore, neither the possibility of filing a complaint before a civil court by asking for preliminary questions, nor submitting an appeal to the Ministry of SAE, would be required under Article 35 ECHR.

Once an appeal will have been filed to the Dutch Council of State, being the highest court in the Netherlands for asylum cases, eventual applications before the ECtHR will comply with the admissibility criterion of exhaustion of domestic remedies as laid down in Article 35(1) ECHR.

Annex I: Comparative Table

Search dates: 1/1/2014 – 12/2/2016; search words: 'overgangsrecht', 'wav'

Cases with Chinese/Asian applicants working in restaurants

Case Number	Date of Judgement	Case notes	Link
AWB 14/3277	21 May 2014	Chinese national, seeking extension of residence permit and free access to labour market	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:10037
AWB 14/10763, 14/10849, 14/10848, 14/10841, 14/10852, 14/10818, 14,10854, 14/10802, 14/10851, 14/10829, 14/15027, 14/15082, 14/15083, 14/15084	10 July 2014 Appeal: 28 November 2015	Employees and owners of Chinese catering establishments, all Chinese, seeking exemption from rule to apply for work permits	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:8924 Appeal: http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2015:3302
AWB 14/13208 14/19930	5 December 2014	Four Chinese nationals working as cooks at Chinese restaurants; seeking extension of work permits	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14850

AWB 14/13925 + 91 others	16 December 2014	All Chinese (with the exception of one applicant, who is Malaysian) and all work as cooks in Asian restaurants; seeking free access to the labour market	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:16504
AWB 14/14521	16 December 2014	Chinese national, working as cook at restaurant; seeking access to the labour market and complained about the absence of transitional provisions	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:16459
AWB 14/11151	6 February 2015	Chinese national, seeking extension of residence permit	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:4643
AWB 15/2734	17 July 2015	Chinese national seeking extension of permit;	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBOVE:2015:3468
AWB 14/16744 + 117 others	7 August 2015	Chinese (nationality assumed, not specified in the judgment, but implied) seeking either free access to labour market or extension of work permit	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:9481
AW 15/208	4 September 2015	Chinese national working in a restaurant; seeking free access to labour market (typo identifies him as Chilean)	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:12632

AWB 15/11145	11 November 2015	Chinese national working as cook; complained about lack of transitional period	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:13286
AWB 14/18237	20 November 2015	Chinese national, working at Chinese restaurant, seeking free access to the labour market	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:13842

Cases with other facts under the Wav

Case number	Date	Case notes	Link
AWB 14/25018 AWB 14/25023 AWB 14/25027 AWB 14/25030	5 December 2014	Nationality or employment sector of claimants not mentioned	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14851
201309723/1/V6	17 December 2014	Fine under the Wav	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2014:4545
AWB 10/5424 12/2676 12/6479 12/6480	20 February 2015	Fine under the Wav	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2015:891
AWB 14/1118 14/1121 14/1131	20 March 2015	Fine under the Wav	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2015:1854
AWB 14/2992	7 April 2015	Fine under the Wav	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBOVE:2015:1703

201503562/1/V6	2 December 2015	Fine under the Wav	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2015:3701
AWB 15/9124	24 December 2015	Two Indonesian applicants seeking free access to labour market; employment sector not mentioned	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:15590

Cases that show on the search, but are not related to the Wav (not included in the calculation)

Case Number	Date	Case Notes	Link
201212004/1/A4	8 January 2014	Case regarding the Environmental Management Act	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2014:3
201302548/1/A4	5 February 2014	Case regarding the Environmental Management Act	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2014:300,
AWB 12/1861 12/1862 12/1863	3 March 2014	Case concerning building permit	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBLIM:2014:1932,
201309314/1/A4	26 June 2015	Case regarding the Environmental Management Act	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2015:1970,
201404380/1/R3, 201408209/1/R3	7 October 2015	Case regarding the Planning Act	http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RVS:2015:3105