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## **Migration Control through Public-Private Partnerships**

[WORK IN PROGRESS; please do not cite]

### **1. Introduction**

In immigration law, public-private collaboration can be found in the regulation of labour migration. The need for migrant labour on the part of employers is what determines whether migrant labourers can come to the Netherlands, often independently of the rules in force.<sup>1</sup> The influence of employers on the competent Ministry of Social Affairs and Labour is such that the rules have almost always been rewritten if that was what the employers' needs required. Although in these negotiated policies the employer still was required to have a work permit, often a labour market test was waived as a result of the negotiations.

The use of public-private partnerships, often in the form of a 'convenant' became rather common in the Netherlands since the 1980ties. They've been used to regulate environmental, labour, educational and migration issues. Those in favour of convenants argue that private actors will feel more inclined to comply with the result of their own negotiations than with a law imposed on them without their direct involvement in preparing such a law.<sup>2</sup> That is one reason for governments to encourage private actors to participate

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<sup>1</sup> T. de Lange (2007). *'Staat, markt en migrant. De regulering van arbeidsmigratie naar Nederland 1945-2006'* (diss. Nijmegen), The Hague: BJU, the Netherlands. (State, market and migrant. Regulating labour migration into the Netherlands 1945-2006), p. 409.

in covenants. It is generally accepted that private actors are not likely to agree with a covenant if they do not somehow benefit from it. However, covenants have also been criticized.

By the end of the 1980s, the covenant, as a tripartite agreement between the Dutch Employment Organisation, unions and employers, had made its way into managing temporary labour migration, not just in the Netherlands. Lahav describes similar arrangements in Germany and the United States, mostly involving seasonal workers.<sup>3</sup> Reference can also be made to the Seasonal Agricultural Workers' Scheme (SAWS) which is operative in the United Kingdom. This scheme enables migrant workers to be recruited by SAWS operators, who are private actors that recruit workers for their own farms or on behalf of other farmers. The scheme is governed by a 'Code of Practice' between the Home Office and the operators. Another example involving private actors can be found in the construction business in the Canadian province of Ontario. Citizenship and Immigration Canada (CIC), Human Resources Development Canada (HRDC) and the Greater Toronto Home Builders' Association entered into a Memorandum of Understanding covering the temporary employment of 500 migrant workers in shortage occupations.<sup>4</sup>

As Lahav, a political scientist, points out, »the rationale of these types of programmes, involving mostly seasonal workers, is to increase control through organization and diffuse benefits.«<sup>5</sup> She lists the benefits for all involved. Migrants benefit because they receive the opportunity to obtain skills and earn money. The states from which these migrants come benefit from remittances and a more highly skilled work force. According to Lahav the receiving state reduces illegal migration, the costs of border control and legal procedures for possible deportation and can also benefit from the taxes and social welfare contributions of the migrant workers. Finally, the employers benefit in the cases described by Lahav because of lower wages and the fact that there is no risk of heavy fines imposed for employing illegal migrants.

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<sup>3</sup> Lahav, *Immigration and the State*, p. 687.

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The Dutch legal scholar Schlössels stresses that public-private burden-sharing in administrative law – including migration law – makes us give up some essential values of the rule of law: working together with some enterprises and not with others kills the ideal of a neutral state defending mere public interests, acting without prejudice.<sup>6</sup> Schlössels also stipulates that enforcing public law through public-private partnerships lacks transparency, another valued asset of the rule of law. According to the Dutch Scientific Council on Government Policy in 2002, the future of the nation state depends on making these sacrifices; according to others it disaggregates society and the state. In this paper I would like to show how Public-Private Partnerships have shaped migration control<sup>7</sup> in the Netherlands and question if the state has lost its neutrality as feared by Schlössels, no longer acts without prejudice. Also, is there a mechanism correcting the state, keeping it from disaggregating from the rule of law? Three cases will be presented to test the influence of PPP on migration policies and their outcomes in the Netherlands: the admission policy for Polish nurses prior to the accession of Poland to the EU, the admission policy for highly skilled workers (*kenismigrantenregeling*) and the admission policy for seasonal workers from Bulgaria and Rumania, during the transitional period after their accession to the EU.

## **2. Work permit system in the Netherlands**

The Netherlands has a work permit system, based on the Dutch Act on Migrant Employment (*Wet arbeid vreemdelingen*). The employer has to obtain a work permit while the migrant worker has to apply for a separate residence permit. In some cases this system does not apply (scientific research based on Directive 2005/71, Blue card residence permits Directive 2009/50 and the national *kennismigrantenregeling*; the residence permit is

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<sup>6</sup> R.J.N. Schlössels (2009), 'Beginselen van behoorlijk bestuur', *Nederlands Tijdschrift voor Bestuursrecht*, pp. 270-287.

<sup>7</sup> I use the term migration control. One could also use the term migration management: it includes policies on the admission and the conditions of stay of labour migrants and their family members as well as policies on employer sanctions and other policy instruments trying to fight illegal migration and/or illegal employment of migrant workers.

the only permit required. Under the Act on Migrant Employment the employer must obtain a work permit before the migrant worker can take on his job in the Netherlands. If the employer has no work permit, administrative and in the end penal sanctions can be imposed against the employer of € 8.000 per illegally employed migrant worker. When applying for the work permit the employer must prove that (1) a vacancy was reported to the employment authorities at least five weeks prior to the application and (2) he has conducted a recruitment search for an employee on the local and on the European Economic Area (EEA) labour market. If this search does not produce any results a work permit should be granted unless the labour authorities can prove that there are plenty of qualified workers available for the job, this is all part of the labour market test applicable. The maximum duration of the work permit is three years. After three years of legal residence as an employee the migrant worker can be employed without the requirement of a work permit. Those who obtain this status after three years will not be easily made to leave and have obtained defacto permanent residence as long as they have a job.

### **3. Covenant on migration of health care workers<sup>8</sup>**

In 2002 the Dutch Employment Organisation granted 442 work permits for migrant workers in the health-care sector, mainly for nurses.<sup>9</sup> This number can be considered low and it does not lead one to expect that the arrival of these migrant workers was precluded by severe negotiations between unions, hospitals and government officials. The temporary admission of health-care workers to the Dutch labour market was regulated by a tripartite agreement between the government, unions and employers, and was called

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<sup>8</sup> This paragraph is based on previously published work: T. de Lange, 'Staat, markt en migrant. De regulering van arbeidsmigratie naar Nederland 1945-2006' (diss. Nijmegen), Den Haag: BJU 2007 (State, market and migrant. Regulating labour migration to the Netherlands 1945 - 2006, dissertation); T. de Lange, 'Tripartite agreements on labour migration -The Dutch agreement on health care workers', in: A. Böcker e.a. (red.), *Migration and the Regulation of Social Integration*, Vol. 24, p. 137-146, Osnabrück: IMIS-Beiträge, 2004 and T. de Lange & C. Pool, 'Vreemde handen aan het bed. De werving van Poolse verpleegkundigen in Nederland', *Migrantenstudies*, 2004-3, p. 130-144.

the CAZ (Convenant Arbeidsvoorziening Zorgsector, *Convenant Labour recruitment Health Care*).

It all started in 1999 with a court ruling given for a health-care institution that had applied for a work permit for a South African nurse. The court held that, as there was evidently a shortage of nursing staff on the Dutch labour market and the institution complied with all legal requirements for such a permit, the employment authorities had to grant the requested permanent work permit.<sup>10</sup> Facing increasing labour market shortages in the health-care sector, the Dutch employment authorities, employers and unions entered into negotiations to deal with the labour shortages in a more structural way. It was agreed that foreign health-care workers would be admitted *temporarily* in anticipation of the availability of newly trained, qualified Dutch workers. In May 2000 the negotiations resulted in a tripartite agreement on the recruitment and admission of non-EEA nurses, the CAZ.<sup>11</sup> The preambles of the CAZ refer to the shortage on the Dutch labour market in the health-care sector, as the court had done in its decision.

One would expect that the employer organisations, backed by a clear Court decision and evident shortages, would have negotiated a more liberal policy on admission than under the existing Act. However, this was not the case. The government had wanted – in order to prevent ›brain drain‹ from the sending countries – nurses not to be recruited from countries having a shortage of nurses. However, the WAV does not provide for such a restriction. The government had also wanted the nurses to be admitted for a maximum period of two years. A rotation system was introduced under which the nurses would have to leave the Netherlands for at least one year before being eligible for a second term of two years, thus never getting free access to the Dutch labour market and never being able to obtain a permanent residency status. The WAV only allows for such a rotation system in cases of clear abuse of the work-permit system. Furthermore, the CAZ provided no procedural benefits for employers: they still had to report the vacancies and conduct a

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<sup>10</sup> Rechtbank Den Haag zittingsplaats Haarlem 2 July 1999, Rechtspraak Vreemdelingenrecht 1999, no. 72.

<sup>11</sup> Staatscourant 2000 no. 141 and Staatscourant 2002 no. 19. Tripartite Agreements on Labour Migration

recruitment search for at least five weeks prior to applying for the work permit. In addition to the legal requirements for obtaining a work permit under the WAV, employers agreed to provide language courses for the nurses before their arrival in the Netherlands. Employers also agreed to participate in sectoral training programmes for national employees. As a result, the CAZ did not liberalise the admission procedure for employers. On the contrary, it imposed more obligations. Moreover, the covenant denies migrant workers the right to a permanent residency status. One positive element for the employers and the unions, who represented the interests of national workers, was that they agreed on financial support from the government for projects initiated by health-care institutions to lessen the shortages on the national healthcare labour market.

### 3.1. Benefits of PPP?

As pointed out above, according to Lahav's analysis of temporary programmes in the form of tripartite agreements, one of the benefits for the receiving state is to reduce illegal migration. Given the importance of healthcare work it is unlikely that many foreign nurses were illegally employed. However, they were probably employed under different trainee schemes which were not intended for filling regular vacancies. The Dutch employment authorities have been aware of the abuse of these trainee schemes for many years, and the CAZ can be seen as a means of reducing this abuse. More likely however in our case is that the public private partnership was used to reduce permanent migration. The Dutch government was surely troubled by the Court's decision, which in the end meant that the government did not have an argument to reject permanent work permits for health-care workers because of the labour market situation. As the government aimed at a restrictive immigration policy, it needed an instrument to prevent ›masses‹ of health-care workers from coming in. Parliament feared more than 7,000 migrant nurses would have to be admitted. For the government, the benefit of the covenant is that it generally increases the commitment of employers to the norms of a restrictive immigration policy. As ensuring the

temporariness of what is intended to be temporary labour migration is one of the most difficult aspects of the temporary schemes, it can be argued that the government assumes that employers will comply with the temporariness of migrant labour more willingly if they themselves have previously agreed on it.

The sending states were to benefit from the CAZ as the health-care workers were not to be recruited from sending states that faced shortages of health-care workers themselves, such as Surinam. The rotation system would have to benefit the sending states as well. As the migrant workers would not be able to obtain a permanent residency status in the Netherlands, they would eventually return to their home countries with better skills, the government claimed. However, the CAZ did not include any arrangements on remittances.

The migrant workers were not officially represented by a specific migrant organisation or by a representative from their country of origin. As future employees they were represented by the Dutch labour unions, or supposed to be represented by them. However, it has been argued that unions tend to represent the interests of national employees.<sup>128</sup> The migrant workers did benefit from the programme because it enabled them to work in the Netherlands. While the district court had decided that migrant health-care workers could be employed permanently given the sectoral labour market shortages, the CAZ only granted a temporary right to work in the Netherlands. Migrant health-care workers would have been better off with just the WAV. Their legal right to a permanent status was violated by the CAZ negotiators; as Schlössles fears, in this case indeed the public-private partnership demolished the rule of law as the government officials forced upon them an agreement that gave them less rights than the law does without this being obvious at the all for the private parties negotiating.

What were the benefits for the employers in the health-care sector? It is doubtful that the recruitment of migrant health-care workers has enabled employers to deal with their staff shortages. In 2002 no more than 442 work

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<sup>12</sup> Judith Roosblad, *Vakbonden en Immigranten in Nederland (1960–1997)*, Amsterdam: Aksant 2002.

permits were applied for, while at the beginning of that year over 15,000 vacancies in the health-care industries existed. As the number of illegal migrant workers in the health-care sector is expected to be low, fear of sanctions against the employers would not have been great. Most work-place controls are aimed at industries employing mainly unskilled (illegal) migrant workers. Fear was therefore also an unlikely reason to enter into this agreement. Also, no wage benefits were agreed upon. The migrant nurses had to receive the same salaries as national workers and equal taxes and social welfare contributions had to be paid. One reason for employers to enter into the CAZ could have been the financial consequences: additional financial aid from the government for training national workers. This financial aid may explain why the employers agreed to a more restrictive admission policy with no procedural benefits. Also, accepting these more restrictive rules may have had the advantage of certainty; had they awaited legislation from the government to restrict the influx of migrant health-care workers, no one would have known in advance what the rules would be like. The employers may have also overlooked the negative aspects of the rotation system, which was immediately criticized by lawyers.<sup>13</sup> The rotation system was criticized for being unpractical: the day an employer and foreign employee would want to continue their working relationship beyond the restricted time-frame, so is the argument, the government, possibly pressured by parliament, would accommodate the wishes of the employer and decide to let the migrant worker stay. Finally, lawyers criticized the CAZ as being in conflict with the WAV; no legal system allows the setting aside of statutory law by agreements or policy measures.<sup>14</sup> Either the negotiators representing employers were not aware of this aspect or they did not mind a more restrictive policy, especially on the extension of work permits, as this would only possibly become a problem in the future. The negotiators may have concentrated on securing their short-term benefits as long as financial aid was given and certainty existed on what the rules would be like.

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<sup>13</sup> Kees Groenendijk and Robyn Barzilay, *Verzwakking van de rechtspositie van toegelaten vreemdelingen (1990–2000)*, Utrecht: BJU 2001, pp. 43.

<sup>14</sup> Eke Gerritsma, *Weigering tewerkstellingsvergunning in verband met tekort verpleegkundigen in Suriname*, in: *Migrantenrecht*, 6. 2002, p. 171.



### 3.2. Private parties doubts

In spite of the lawyers' criticism, at first the CAZ seemed to be accepted by all parties involved. However, during a review of the CAZ in 2002 it became clear that employers tended to feel obliged to comply with the CAZ, although they doubted that the temporariness of the employment was in compliance with the WAV.<sup>15</sup> Even though employers had voiced doubts, a first group of nurses from the Philippines ended their two-year term of employment in the Netherlands in December 2002. Their employers complained in the media that they could not keep their appreciated Philippine staff members and that the nurses had to leave the Netherlands.<sup>16</sup> Why did employers complain but did not oppose the CAZ restrictions on the legal right to an extension of the work permit in court? Possibly, these employers wanted to maintain a good working relationship with the employment authorities. Court proceedings against the employment authorities were not regarded as desirable, even if employers knew they had a strong case. Employers would rather comply with the applicable requirements. This is also reflected by the CAZ review of 2002, in which employers made policy recommendations to the government, hoping the government would develop a less restrictive admission policy for health-care workers.

Apparently employers of migrant workers preferred making recommendations to pressuring the government in court proceedings. As a party in a public-private partnership, fighting the other in court takes away the supposedly existing relationship of trust. This aspect fascinated me during my research at the time: employers trusted that government officials would inform them correctly about their rights, that they would not cheat them out of their rights. However, that is exactly what the government officials under the umbrella of the popular public-private partnership, had done.

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<sup>15</sup> Frits Tjadens and Hans Roerink, *Arbeidsmigratie door verpleegkundigen naar Nederland*, Utrecht 2002, pp. 13f.

<sup>16</sup> Which they didn't as most of them found a job in the UK. 'Dan maar naar Engeland', in: *Trouw*, 14 December 2002.

### 3.3. The Court enforces the rule of law

In the end, health-care institutions did invoke their rights under the WAV in Court, early 2003. The most important case concerned a Polish nurse who had been admitted to the Netherlands for one year under a temporary trainee scheme. After completion of that traineeship, the health-care institution obtained a work permit for her under the CAZ. When extension of this work permit was denied, the healthcare institution took the employment authorities to court. The employer argued that the CAZ could not set aside the WAV, so that a permanent work permit should be granted. The employment authorities defended the CAZ and the rotation system as a part of the restrictive Dutch immigration policy. The employment authorities argued that the CAZ constituted applicable law as the unions and employer organisations had not urged the employment authorities to abolish the CAZ. The Court held that the WAV could not be set aside by the covenant. If the WAV enables an employer to obtain a permanent work permit, and the employer has sufficiently demonstrated why he needs a migrant worker, a permanent work permit must be granted.<sup>17</sup> The employment authorities complied; the permanent work permit for the Polish nurse was granted. The Haarlem court's decision that the CAZ could not set aside the WAV raises at least two interesting points on the use of public-private agreements as instruments to manage migration. Firstly, the court implicitly plays an important role in defending the rights of unrepresented third parties, in this case the migrant worker. Secondly, attention has to be drawn to the employment authorities arguing (in short) that as long as unions or employers have not terminated the tripartite agreement, it can replace existing law. If this were true, this kind of public-private partnership – however convenient for most parties involved – is a severe blow to the rule of law: it will be those selected parties that are involved in the negotiations making law, not democratically elected members of parliament. I'm aware

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<sup>17</sup> Voorzieningenrechter Rechtbank Den Haag zp. Haarlem 5 March 2003, AWB 03/1857, in: Jub 2003, p. 261.

that more often than not these democratically elected MP's act on behalf of the same parties involved in these negotiations. However, the parliamentary control of the legislative process obviously has more checks and balances than the negotiating process of a public-private partnership. Also, there's no transparency as not all covenants are (immediately) published or incorporated in official policy guidelines.

#### 3.4. Governments position after the Courts decision: business as usual

Despite the Courts decision, the CAZ was still applied by the government in June 2004. That month the agreement automatically lapsed as enough newly trained national health care workers had to be available by then. The 2003 Court decision didn't get a lot of attention from employers and wasn't followed by other Court decisions, which enabled the government to ignore it but for the one case in which the decision was given. What may have played a role is that in the end, little health care workers were recruited at all and most of the nurses under the CAZ-scheme came from Poland. If they'd worked one year they obtained permanent residence after the accession of Poland to the EU on May 1, 2005, meaning they didn't need to fight the restrictive CAZ in order to obtain permanent residence.<sup>18</sup>

#### **4. Highly paid migrant workers-scheme**

The next - briefly described - example regards the Dutch *kennismigrantenregeling* or 'highly paid migrant workers' scheme, which was implemented in 2004. This scheme was the result of a dialogue between the government (the ministry of justice) and big employers, mainly multinationals: more a form of public-private collaboration than a clear partnership. The admission scheme agreed upon wasn't made public as a covenant or the result of public-private partnership but as official policy of the government. With the highly skilled migrant regulation, the selection of

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<sup>18</sup> C. Pool, 'Migratie van Polen naar Nederland in een tijd van versoepeling van migratieregels', Den Haag: BJU 2011.

the migrant labourer has now been fully privatised: the employer who can afford a salary of just under €50,000 for the migrant labourer has automatically proved that that employee is necessary to the Dutch labour market. A work permit is no longer required. If the employer wishes to pay that salary, the residence permit is granted (unless the government raises any public order exceptions). The essence of the programme agreed upon between public and private parties is that the government does review the *company* first. The company has to be registered in the Netherlands and show it has paid taxes and employee benefits as required. It is the individual employer – not the employers organisation as was the case with the previously described CAZ – that enters into a pre-designed covenant with the immigration authorities and by doing so agrees on taking on the responsibility for the repatriation of the migrant worker at the end of the employment. Also, the employer is required to inform the authorities timely of changes in the situation of the migrant worker, and relevant documents need to be kept by the employer in file for five years.

Almost right from the start of the scheme, although some employers kept using the old work permit procedure, the applications under the *kennismigrantenregeling* exceeded the work permit applications in similar categories of labour. In 2008 for instance, 6410 residence permits were granted for *kennismigranten* over 2374 for workers for whom a work permit had been granted.<sup>19</sup> The extra responsibilities did not seem to scare of employers. [future: sponsor will be made responsible for migration worker to leave country etc. Even more migration control responsibilities for less hassle at the moment of entry. Large companies don't fear these responsibilities, smaller ones may not be able to comply to the administrative requirements and be excluded from applying for work permits]

[analysis needs to be worked on. In short: line of power clear, transparent, more trustworthy government, no hidden agenda – highly skilled migrant workers are welcome to stay instead of lower skilled nurses and agricultural

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<sup>19</sup> EMN-study (2010) *Tijdelijke en circulaire migratie* (temporary and circular migration).VOLLEDIGE VERWIJZING

workers – employers(organisations) are more aware of the law and do not want to give up rights]

## **5. Public-Private Project for seasonal workers**

In the Dutch agricultural sector it has long been difficult to motivate nationals to do harvesting jobs. Migrant workers have been picking strawberries and harvesting asparagus since the 1980ties. Since 1994 the Dutch Act on Migrant Employment has a special paragraph on seasonal labour. The general requirements described in par. 2 apply. Furthermore, the permit will only be granted for a maximum of 24 weeks. Due to the shortages employers have been applying for work permits, resulting in negotiations with the labour authorities: responsible for granting the work permits, but also responsible for creating jobs for the Dutch unemployed. This dual responsibility of the labour authorities, also reflected in the labour market test, creates an incentive for the labour authorities to try and negotiate a win-win deal with employers: make them hire some unemployed nationals in change for some temporary or limited group of migrant workers. In a way, employers are being made responsible for fighting unemployment although the unemployed are not the employees they want and the unemployed don't want the offered jobs.

[This case needs further elaboration]

In short, the agricultural organisations and the labour authorities did not enter into a covenant like the health care sector did earlier. They did nevertheless agree on a so called *Stappenplan* a document listing the steps to be taken by the farmer prior to applying for a work permit, including how to full fill the required recruitment of national workers. Government and agricultural organisation opened a website together [www. Seasonalwork.nl](http://www.Seasonalwork.nl) in order to assist farmers in their search for national and EU workers who do not require work permits. This is again a form of a public-private partnership. Early 2011 the Dutch Minister of Social Affairs Kamp – member

of a Christian-Liberal cabinet strongly pressured by Geer Wilders into a restrictive migration agenda – announced that he would no longer grant work permits for Bulgarian and Rumanian workers and that farmers should use nationals or Polish workers instead. The Minister changed the *Stappenplan* and the farmers were confronted with more requirements regarding the recruitment of unemployed nationals. The Netherlands has the lowest unemployment rate in the EU- even in the current crisis unemployment is all time low - but nevertheless the Minister argued that there were more unemployed looking for a job.

In April, just when the harvesting season was about to start, many work permit applications for seasonal labour were rejected because this new recruitment policy wasn't followed. A lot of negotiations started, but in the end the farmers went to the Court. Again, the Court held that the negotiated *Stappenplan* unloaded more responsibilities unto the farmers than the relevant Laws allowed for.<sup>20</sup> Apart from this issue, it was argued by the farmers that changing the policy towards Bulgarian and Rumanian workers is in conflict with article 14 of the Annexes to the Accession Treaties, but the Court did not need this European Law argument to grant the claim and decide that the work permits had to be granted.

Just weeks later the Minister again proclaims in negotiations with the Agricultural organisation and voiced in the media, that he will no longer grant work permits for these EU nationals who will in the end be free on the Dutch labour market by January 2014 latest. Like with the health care sector, the government uses ppp in order to enforce a policy it can soon no longer hold at all due to European legal obligations. It remains puzzling to me why private organisations negotiate with a government that evidently tries to cheat them out of their rights. Individual farmers are taking their cases to the Courts, but as Courts are short staffed during the summer and the harvesting season is almost over it's not so certain they will all get the work permits before the seasons over.

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<sup>20</sup> Court The Hague 22 juli 2011

[this case needs further investigation]

*Conclusion: the Dutch state turns its back on the rule of law*

[to be concluded]

## **AUTHOR**

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