



## **Regularisation of undocumented migrants in the Netherlands - potential of Article 12(4) ICCPR and the GCM**

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### **Introduction**

The regularisation of undocumented migrants remains one of the most contested areas of migration law in the Netherlands, particularly where domestic legal frameworks often fail to reflect the lived realities of long-term residents without formal nationality. During a recent talk at Vrije Universiteit Amsterdam, organised by the Amsterdam Law Forum, Dr. Younous Arbaoui explored the potential of Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), alongside the Global Compact for Migration as underutilised legal tools capable of addressing this divide. Central to this discussion was the evolving interpretation of the right to enter and leave “one’s own country” and how this concept may have extended beyond strict nationality to encompass individuals with close and enduring ties to a state.

This follow-up blog reflects on key discussion points raised by Dr. Arbaoui throughout the session. It includes recent jurisprudence from the Dutch Council of State, the Human Rights Committee's interpretation of arbitrariness under Art. 12(4) and many other interesting ideas. By engaging with comparative case law and contrasting the ICCPR framework with Article 8 of the European Convention on Human Rights (ECHR), this blog aims to assess whether Article 12(4) ICCPR can realistically function as a pathway, or at least a safeguard, towards regularisation in the Dutch context.

### **Expanding the meaning of “one’s own country”**

A central question that was raised by Dr. Arbaoui during his lecture concerned the scope of the notion of “one’s own country” under Article 12(4) of the ICCPR. As clarified by the Human Rights Committee in General Comment No. 27, a country may be regarded as “one’s own” not only on the basis of formal nationality, but also where an individual has developed ‘special ties’ or ‘close and enduring connections’ with a particular state, such that they can no longer be considered a mere alien. Dr. Arbaoui noted that these connections may arise during both lawful and unlawful residence. Furthermore, the Committee has repeatedly emphasised that the absence of nationality does not preclude an individual from invoking the protection of Article 12(4).

This broader understanding of the article is reflected in cases such as *Nystrom v Australia*, *Warsame v Canada*, and *Cayzer v Australia*, where the decisive factor was not legal status, but rather the depth of the individual's social, familial, and personal integration into the concerned state. In these cases, the applicants had spent most of their lives in the host state and maintained little to no meaningful ties with their countries of origin. As a result, the Committee accepted that the host state could, in practice, constitute their “own country.” This jurisprudence, therefore, illustrates that Article 12(4) is capable of capturing the lives of longterm undocumented migrants, who despite lacking formal nationality, have formed enduring connections that render expulsion particularly severe and potentially incompatible with the aims of the Covenant.

### **What does “deprivation” mean under Article 12(4)?**

Equally significant to the discussion is the interpretation of what it means to be “deprived” of the right to enter one's own country within the meaning of Article 12(4). “Deprivation” is not limited to formal expulsion orders or explicit refusals of entry. As discussed during the session, the concept also encompasses indirect forms of interference. Direct interference includes measures such as expulsion or administrative barriers preventing entry or residence within the territory. However, deprivation may also arise indirectly through a state's failure to guarantee the safe and effective enjoyment of the rights protected by the Covenant. In this regard, General Comment No. 31 establishes that states are subject to positive obligations to give effect to the provisions of the ICCPR, including by protecting individuals from foreseeable threats that would render their continued residence impossible in practice.

The case of *Jiménez Vaca v Colombia* successfully illustrates this when the applicant was forced to leave the country due to serious threats to his life and the authorities' failure to provide adequate protection. The Human Rights Committee found that such state inaction amounted to a violation of the applicant's right to remain, as the absence of protection effectively deprived him of the possibility of staying in his own country. This expansive understanding of deprivation is particularly relevant in the context of undocumented migrants, as it insinuates that exclusion is not only the result of formal immigration measures, but also from systemic failures that make lawful and dignified residence unattainable.

### **Arbitrariness and the high threshold under Article 12(4)**

As stated beforehand by Dr. Arbaoui, the basis of Article 12(4) of the ICCPR is that the



deprivation of entering one's own country must not occur in an arbitrary manner, therefore a citizen in principle should not be restricted from entering their own country, but when exactly does deprivation of the right to enter one's own country become arbitrary? The Human Rights Committee has established that there is in fact an extremely high threshold to be met for the deprivation of the entry of one's own country to be perceived as "reasonable" and therefore non-arbitrary, if any steps are taken towards deprivation that are not met with ICCPR standards, the deprivation was done so arbitrarily, even if it is done so in accordance with national law. General Comment No. 27 indicates that the margin for justifying such deprivation is extremely narrow in which deprivation is reasonable, implying that any justifications for such an act are limited due to the potential conflict with human rights. In the case of *Budlakoti V. Canada*, the Human Rights Committee has set factors that indicate that the deprivation of the right is arbitrary. Factors include arbitrariness if deprivation is: unjust, unpredictable, unreasonable, unnecessary, or disproportionate, interests must also be balanced as even in cases of violence deportation and deprivation would still be considered arbitrary under certain circumstances. In the case of *Budlakoti V Canada*, the nature of a non-violent crime made deportation (or deprivation of entering their own country) arbitrary, due to the disproportionate nature of the punishment for the crime.

## **Article 12(4) and Article 8 ECHR: a comparison**

Whilst the nature of the article 12(4) suggests that its purpose is for individuals returning to their country of nationality rather than migrants who gained residency, the Human Rights Committee and general comments suggest a more complex relationship in terms of the phrase "own country". General Comment 27 acknowledges that the phrase "own country" is actually intended to recognize a relationship between a person and their country of residence, implying that the phrase "own country" refers to individuals having strong ties and personal connections to the country in question through the building of extended networks, lived experiences, and contribution to general society. Paragraph 19 of General Comment 27 establishes that this effectively allows Article 12(4) to be used as a shield against arbitrary deportation of migrant citizens. This might be reinforced by Article 8 of the ECHR that states everyone has the right and respect to a private and family life where the established threshold is that the citizen must have established a "private life" through social networks, language, etc.

An example of this is the Human Rights Committee case of *Warsame v Canada* in which the efforts to deprive a Somalian national from entering their resident country of Canada was deemed arbitrary, largely due to the fact that the citizen in question had lived in Canada for 20



years with no ties to Somalia at all; No personal connections, no network, and inability to speak the language. In this situation Warsame's forced return to Somalia would be considered arbitrary as Canada could be considered their "own country" due to factors such as residency, family ties, and an intention to remain. In comparison we have the case of *Madafferi v Australia* where the Human Rights Committee did not consider Australia the resident's "own" country. Whilst the resident did live there for a long period of time it was established that he would in fact be able to return to his national country of Italy due to factors such as speaking the language, existing ties, and ability to legally return there without harm. Despite his existing ties and connections to Australia through establishment of a family, Australia still wouldn't have been deemed his 'own country'. Similarly *Nystrom v Australia* also demonstrates this through the deportation of a Swedish national despite their connection to Australia due to their ability to return legally and their retention of their original nationality. Whereas article 12 (4) of the ICCPR's threshold is that they must establish that the country is their "own country" through factors such as close ties, or being an absorbed member of the community. Article 8 has an incredibly broad margin of appreciation as states have significant discretion in comparison to the ICCPR where there is a narrow margin due to a smaller allowance for state interference.

## **Article 12(4) as a safeguard against deportation**

It is important to note that although these provisions can reinforce one another, they differ in their legal application. Lawyers often rely on Article 8 of the ECHR first due to its broader margin of appreciation, which grants states significant discretion when balancing immigration control against the right to private and family life. If an Article 8 claim is unsuccessful, Article 12(4) of the ICCPR may serve as an alternative safeguard against deportation. Unlike Article 8, however, Article 12(4) requires individuals to demonstrate that the state in question constitutes their "own country," typically through factors such as close personal ties, long-term residence, and integration into the community. While Article 8 allows a relatively wide margin for state interference, Article 12(4) is interpreted more narrowly, leaving less room for states to justify deprivation of the right to enter or remain in one's own country.

Throughout his discussion, Dr. Arbaoui emphasised that Article 12(4) ICCPR is far from a dormant provision. When interpreted in line with the Human Rights Committee's jurisprudence, the notion of "one's own country" extends beyond formal nationality and begins to reflect lived realities, including long-term residence, social integration, and the



absence of meaningful ties elsewhere. For undocumented migrants in the Netherlands and beyond, this interpretation challenges the assumption that expulsion is a neutral administrative measure, highlighting instead its profound impact on an individual's sense of belonging and connection to the place they call home.

## **Conclusion**

Article 12(4) ICCPR may not be able to provide a direct route to regularisation and inclusion, but it offers something equivalently important: a powerful shield against arbitrary exclusion when in front of the law. Read alongside the Global Compact for Migration, Article 12(4) of the ICCPR invites individuals to rethink regularisation as a response to enduring ties, dignity and the reality of feeling at home; rather than an exception, something that Dr. Arbaoui brilliantly conveyed throughout his talk.