

nationale ombudsman

Report

Limits to cross-border checks

An investigation into ‘preboarding checks’ by Royal Netherlands Marechaussee officers at Athens airport

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Reading guide

This report concerns an investigation by the Ombudsman in the light of an individual complaint about a check carried out at Athens airport. In the course of this investigation, the National Ombudsman decided to extend it and, at his own initiative, to investigate the entire procedure carried out during 'preboarding checks' conducted by the Royal Netherlands Marechaussee (KMar) at Athens airport.

This report looks at the issues raised by the complainant, the responses of the authorities involved to the complaint and the Ombudsman's opinion on it. This is followed by a report of the investigation conducted at the Ombudsman's own initiative into preboarding checks and a recommendation to the Minister of Defence.

The complaint

The National Ombudsman received a complaint from the complainant asserting that he felt ethnically profiled and discriminated against. At Athens airport, the complainant was the only person (and the only person of Arab appearance) selected for an additional identity check from a group of around 60/70 passengers. He was selected for the additional check by a female member of Greek ground staff at the Greek airport. His passport was then inspected by a member of the Dutch KMar.

He submitted a complaint to the KMar. Because his complaint was not dealt with to his satisfaction, he turned to the Ombudsman. He asked the National Ombudsman to investigate whether this was a case of ethnic profiling/discrimination by the KMar by making inquiries as to whether the KMar issues instructions (i.e. instructions to the ground staff of local handling agents or airlines concerning the selection made by the ground staff). If such instructions exist, the complainant is asking the Ombudsman to issue an opinion on their content.

The complainant also complained about the refusal by the KMar officer in Athens to give his name and job title when asked and about the KMar's handling of the complaint.

Finally, the complainant believes that the independent KMar complaints committee neglected to investigate whether the KMar issues instructions with regard to the selection process.

The National Ombudsman's investigation into the complaint

In November 2021, the Ombudsman initiated an investigation, asked the ministers of Defence and Foreign Affairs for a reaction to the complaint and put several questions to them, some of which related to the pilot scheme that the KMar has been running at Athens airport since April 2019. The Ombudsman also opened an investigation into the KMar complaints committee.

The complaint was described as follows:

The complainant is complaining that he was ethnically profiled in a check at the airport and that the KMar officer concerned refused to give his name and job title. The complainant is also complaining about the manner in which the KMar and the complaints committee handled his complaint about it.

In his opening letter, the National Ombudsman referred to a letter from the Minister of Defence, which shows that the Dutch state has an interest in the deployment of the KMar at the Greek airport in order to combat illegal immigration, document fraud and cross-border crime¹.

Among other things, the Ombudsman's questions to the Minister related to:

- the agreements made with the Greek authorities concerning the cooperation and the allocation of responsibilities;
- the relationship between the limited (facilitating/advisory) role of the KMar officers at the airport on the one hand and the background to the pilot scheme on the other, which according to the Ministry of Defence aims to help combat illegal immigration, document fraud and cross-border crime.

The Ombudsman also asked to be provided with the documents relating to this pilot scheme (cooperation agreement, etc.).

The Ombudsman's questions to the independent KMar complaints committee:

¹ This is mentioned in the letter of 14 April 2021 from the Minister of Defence to the complainant's authorised representative, which included the decision on the request made in accordance with the Government Information (Public Access) Act (WOB).

The complainant believes that the committee acted wrongfully in failing to investigate whether the KMar issues instructions with regard to the selection process. The internal complaint file (including the advice and decision on the complaint) does not show that further information was requested concerning the pilot scheme at the Greek airport.

The response to the WOB² request submitted on behalf of the complainant shows that the complaints committee (or at least the secretary, by email) enquired about the background to the cooperation and the existence of more detailed agreements concerning the checks at the Greek airport.

- 1) Did the complaints committee initiate further investigations into the pilot scheme? If it did: in what way was this done and what was the outcome of that investigation?
- 2) The complaint file does not include any information about any (further) investigation by the complaints committee. In drawing up the decision, did the KMar Commander have access to more/different/further information concerning the investigation into the complaint than that included in the complaint file?

The response from the Minister of Defence

In February 2022, in response to the letter, the Ombudsman received a general explanation from the Minister of Defence³, also on behalf of the Minister of Foreign Affairs, concerning the presence of the KMar at Athens airport, a view about the complaint and a response to the questions put⁴.

This response can be summarised as follows:

An increase in the number of fake, forged or so-called lookalike travel documents, especially on flights from Athens, led the KMar to ask the Greek authorities to deploy a KMar officer in the capacity of immigration liaison officer in the context of a pilot scheme at Athens airport. As part of this pilot scheme, the KMar is cooperating with the Greek authorities and the airlines in order to combat 'secondary migration movements' that are related to criminal offences, such as document fraud and human trafficking.

The members of KMar staff who have been deployed as immigration liaison officers at Athens airport have extensive experience and expertise in identity verification and identity fraud, especially relating to travel documents. They carry out their work under the auspices of the Greek authorities. The KMar officers are present at the boarding gate where flights to the Netherlands depart. In response to requests from the Greek authorities or airline staff during the boarding process, the KMar officers provide advice concerning the status of a travel document. The KMar officers' powers are limited to assessing travel documents at the request of the Greek authorities or airline staff.

The decision to have a travel document assessed by the KMar officer is taken by the airline or airport staff responsible for the boarding process. The KMar officer does not have the power to do this. Equally, the KMar officer does not have the power to issue instructions or directions concerning who should be selected for an additional travel document check. The KMar officers do not provide any training about the way in which airline or airport staff should act.

The agreements made with the Greek authorities are described in the 'Manual on cooperation' and in the letter from the KMar to the Greek authorities dated 14 November 2018 with the subject 'Request to host an NLD Immigration officer'. These agreements show that the immigration liaison officers' task is limited to providing advice in support of the authorities. The officers make available their expertise in the field of identity verification and identity fraud. They can advise the Greek authorities by providing essential information relating to passengers who are subjects of their country or hold travel documents from their country and/or issues relating to residence permits issued by their country.

² Request for information based on the Government Information (Public Access) Act then in force.

³ The Ombudsman enquired about the Minister of Foreign Affairs' response. The letter/response from the Minister of Defence of 8 February 2022 was agreed with the Minister of Foreign Affairs and can partly be considered to be a response from this minister.

⁴ The Minister of Defence's response to the Ombudsman of 8 February 2022 is included as an appendix.

The airlines are not mentioned in the 'Manual on cooperation'. What happens in practice is that airline staff are standing at the gate together with the Greek authorities and the immigration liaison officers. The immigration liaison officers work under the auspices of the Greek authorities.

If the Greek authorities or airline staff have doubts about a travel document (both have the power to select travel documents), the formal procedure is that the request for a selected document to be assessed by an immigration liaison officer is made via the Greek authorities. Since, according to formality, the airlines submit the request to the Greek authorities, the 'Manual on cooperation' also applies when airline staff ask for a travel document to be assessed by an immigration liaison officer.

What happens in practice is that the airline staff ask the immigration liaison officer directly for advice if there are doubts about the authenticity of a travel document.

During the boarding process, a member of airline staff can decide independently, based on their own assessment, to ask the KMar officer present for advice in cases where he or she has doubts about a travel document's authenticity. The Minister also stated that she was not aware of the criteria on the basis of which a member of airline staff makes this decision.

The Ombudsman received several additional documents from the Minister, including the 'Manual on cooperation' and the letter from the KMar with the subject 'Request to host an NLD Immigration officer'. The Ombudsman also received the report from the KMar officer who was responsible for the period when the complainant's check took place.

The response from the independent KMar complaints committee

In response to the Ombudsman's questions, the complaints committee stated the following (presented concisely).

In response to repeated questioning as to whether he was in any way involved/had any influence on the choice of the person whose documents were subjected to an additional check by him, the respondent answered in the negative. According to the respondent, the choice was made by the Greek officials involved. The respondent was not aware of any agreements about this between the Dutch and Greek authorities involved.

According to the committee, the question of whether the selection process may have been based on agreements between the Dutch and Greek authorities is not of relevance in assessing the actions of the respondent. This is because the respondent indicated that, in any case, he did not make these kinds of choices/was not involved in them/had no influence over them.

However, after the hearing, the complaints committee did attempt to ascertain whether agreements had been made between the Dutch and Greek authorities and, if so, what these agreements were. This was an additional 'action' made by the complaints committee for the sake of completeness, the result of which could have no influence on its judgement concerning the actions of the respondent. This did not show that the respondent – contrary to his statements in the complaints procedure – could indeed have had a say in the choice of persons whose travel documents were subjected to an additional check by him. Moreover, the further information obtained in this way confirmed that it is solely the responsibility of Greek officers to determine which persons have their travel documents checked and that the KMar officers stationed there exercised no influence whatsoever over this and were also unable to exercise any such influence.

A written report of this additional investigation conducted 'for the sake of completeness' was not added to the complaint file. If this had happened and if the complaints committee had then wished to take it into account in

its judgement, it would be expected that the parties would be given an opportunity to respond to that. This does not appear to have happened, according to the complaints committee.

Response to the report on the findings

The National Ombudsman sent the report on the findings to the Minister, the complaints committee and the complainant. The Minister and the complaints committee stated that the report on the findings was a true description of their positions and they had not found any inaccuracies.

On behalf of the complainant, several points were raised. For example, the description of the complaint was supplemented at his request. The other suggestions were not adopted since this information was already included elsewhere in the report.

The Ombudsman's opinion with regard to the complaint

The complainant's complaint about the Minister

As indicated above, the complaint to the Ombudsman briefly relates to the following:

- the selection process;
- the refusal by the KMar officer in Athens to give his name and job description;
- the handling of the complaint.

According to the Minister, the member of staff from the Greek 'handling agent' at the airport independently made the decision to show the complainant's passport to the KMar officer present according to the standard working procedure. The KMar officer played a facilitating role only.

The Minister considers that part of the complaint about the KMar officer (the selection process) to be unfounded.

The Ombudsman shares the Minister's judgement. Based on the information obtained in the investigation and a visit to Athens airport, the Ombudsman concludes that the KMar officers in Athens have an advisory role only. They are not responsible for the selection process. It therefore follows that this was not a case of ethnic profiling/discrimination by the KMar officer. The Ombudsman's staff discussed and explained this in a conversation with the complainant.

With regard to the other parts of the complaint, in her response to the Ombudsman, the Minister nevertheless declared the complainant's complaints to be well-founded. For example, the Minister's response to the complaint includes the following:

"In accordance with Article 2 of the Official Police Instructions for the KMar and other investigating officers (Ambtsinstructie voor de politie, de KMar en andere opsporingsambtenaren), a KMar officer has a duty to identify themselves when appearing in civilian clothing (unless exceptional circumstances prevent this) and the KMar officer must identify themselves when appearing in uniform if requested to do so. According to Article 2 of the Official Police Instructions, the KMar officer should therefore have identified himself in response to the complainant's request irrespective of whether he was wearing civilian clothing or in uniform at Athens airport on 31 October 2019. I therefore also consider this part of the complaint to be well-founded."

In addition, the Minister also agrees with the KMar Commander's judgement that, in the informal phase of complaint handling, insufficient care was applied in tackling the complaint.

The complainant's complaint about the complaints committee

The documents received by the complainant in response to his WOB request show that, after the hearing, the complaints committee made an attempt to ascertain whether any further agreements had been made between the Dutch and Greek authorities and, if so, what these agreements were. When asked, the complaints committee said that this was an additional 'action' made by the complaints committee for the sake of completeness, the result of which could have no influence on its judgement concerning the actions of the respondent. A written report of this additional investigation conducted 'for the sake of completeness' was not added to the complaint file.

The Ombudsman is assessing the complaints committee's actions in accordance with the requirement to ensure the proper provision of information. According to this, the government must ensure that citizens receive the right information and that this information is accurate, complete and clear. It must not only provide information when the citizen requests it, but also at its own initiative.

In the Ombudsman's opinion, it would have been appropriate for the complaints committee – independent of its investigation carried out 'for the sake of completeness' – to have been transparent and inform the parties involved about this.

During the hearing with the complaints committee, the complainant also urged it to investigate further. He complains that the committee acted wrongfully in failing to investigate whether the KMar issues instructions with regard to the selection process. However, from the response to his WOB request, the complainant is only now 'discovering' that a (limited) further investigation did actually take place.

The Ombudsman does not consider this action by the complaints committee to be proper and considers the complaint to be well-founded on this point.

Conclusion with regard to the complaints by the complainant

The complaint concerning the KMar Commander's actions investigated, attributed to the Minister of Defence, are well-founded with regard to:

- The KMar officer's refusal to give his name and job description;
- The way in which the complainant's complaints were handled;

The complaint is unfounded with regard to:

- Ethnic profiling/discrimination by the KMar.

The complainant's complaint about the complaints committee is well-founded.

The investigation conducted at the Ombudsman's own initiative

In October 2022, the Ombudsman informed the Minister of Defence that the investigation was being widened. The investigation was no longer limited to the complainant's complaint. In addition, 'at his own initiative', the Ombudsman investigated the entire procedure carried out during 'preboarding checks' conducted by the KMar officers at Athens airport.

The Ombudsman's investigators then held interviews with individuals from the KMar in the Netherlands involved in running this project and with the KMar officer involved in checking the complainant. With the latter, the investigators discussed his involvement in the check on the complainant as well as his activities within the context of the pilot scheme in Athens.

Interviews with KMar staff

Interview with Acting Head of the Border Management Cluster and the Staff Adviser of the Border Management Cluster

In December 2022, an interview was held with the Acting Head of the Border Management Cluster and the Staff Adviser of the Border Management Cluster. Below are details of some of what emerged during the interview:

The agreements concerning the preboarding checks at airports in Greece are renewed on a twice-yearly basis. They have now been implemented and are therefore no longer a pilot scheme.

Whenever airline and handling agents' staff who conduct the boarding checks think that they see a document that does not look right, they ask for advice from the KMar. If it appears that something is not right, they call in the Greek police. In the case of what are referred to as 'risky flights', the Greek police are often present or nearby and can therefore be summoned quickly. The KMar is unaware of what happens to the person whose documents appear not to be in order. The KMar is also unaware of whether the citizen involved is informed of the possibility of submitting a complaint or taking recourse to a legal remedy.

KMar officers at Athens airport provide advice only and are not involved in the selection of passengers. Nor do they provide training to aviation staff.

Interview with the accused official and the Staff Adviser of the Border Management Cluster

In February 2023, Ombudsman staff interviewed the official responsible for the additional check on the complainant's travel document and the Staff Adviser of the Border Management Cluster.

The official explained the process involved in launching the pilot scheme and explained what his work at the gate involved. He said that the KMar officers at Athens airport were not only involved in checking Dutch documents, but also occasionally chatted with passengers. If someone has a Dutch passport and cannot respond to a simple question in Dutch such as 'Good morning, are you travelling with hand baggage only?' and the only thing they say is: 'Amsterdam', that can raise suspicion.

The official pointed out that human trafficking is a huge problem and that there are hundreds of people at Athens airport every day attempting to get out of Greece. Anybody who is picked up and not permitted to travel further is taken away by the Greek police and often released relatively quickly. This can sometimes involve hundreds of people every day. The Greek authorities (police) have insufficient capacity. The official advised the Ombudsman's staff to check out the situation on the ground in Athens themselves.

Visit to Athens airport

In consultation with the Greek Ombudsman, the decision was made to examine how the preboarding checks happen in practice. The Greek Ombudsman obtained permission from the Greek authorities for the KMar to be shadowed at Athens airport.

On the KMar side, the Staff Adviser of the Border Management Cluster coordinated the visit to Athens. On their arrival at Athens airport, the Ombudsman's staff had contact with the KMar officer responsible for the preboarding checks during the visit.

Preboarding checks at Athens airport

Staff from both the Greek and Dutch ombudsmen were present during three preboarding checks on flights departing for the Netherlands from Athens in July 2023. They also had extensive discussions with the KMar officers present. They gained a good impression of the procedure.⁵

⁵ An extensive report of the visit to Athens is included as an appendix.

The Ombudsman's staff were able to see and hear that the KMar officers at the airport are in an exceptional position. They are experts in travel documents and are standing by ready to offer their expertise. However, they are completely dependent on the airport staff in this process. It is these staff who decide whether a document is offered to the KMar officers for advice.

The KMar officers are aware at all times that they are at the airport in a 'guest' capacity and that it is important that their presence there remains accepted. At the same time, they consider it to be their (important) task to prevent fake documents entering circulation.

Recommendation

The National Ombudsman has concerns about the position of citizens whose travel documents are inspected as part of preboarding checks. As the case that led to the investigation shows, it is unclear which authority a citizen can turn to if they believe there has been a case of wrongful or inappropriate action.

It is plausible to expect that, in the future, there will be more frequent cooperation with countries similar to that currently happening with the Greeks. Combating 'secondary migration movements' that are related to criminal offences, such as document fraud and human trafficking is, after all, one of the key pillars of migration policy.

The National Ombudsman believes that, in this kind of international cooperation, attention should be paid to the position of the citizen who is subjected to these kinds of (preboarding) checks. When agreements are made about checks, it is appropriate that agreements concerning legal protection and complaint handling should also be included on the agenda. Particularly when inspections and checks are involved, there is a risk of complaints about the selection process (who is subjected to a check) and the way in which these checks are conducted.

Combating discrimination is an important (national) issue in the Netherlands. The prevention of ethnic profiling in (preventive) checks and inspections is a particular area of focus. This means that it is important for the government to focus attention on this, even in cases where there is cooperation with international partners in conducting the checks.

From the responses from the Minister and from the KMar, the Ombudsman infers the following:

- during the boarding process, airline staff⁶ make an independent decision based on their own assessment as to whether to ask for advice from the KMar officer;
- the criteria on the basis of which a member of airline staff asks for advice is not known to the Dutch government;
- KMar officers do not provide any training about the way in which airline staff should act;
- airline staff are however given training/instructions by others;
- if KMar officers notice that selection is taking place on inappropriate grounds (e.g. based on ethnicity), that should give them cause to discuss this with the Greek authorities.

The National Ombudsman takes the view that it should be recommended that the Dutch authorities (in this case the Minister of Defence and/or the KMar Commander) enter into discussions with the Greek authorities on the subject of the training received by ground staff. This should involve checking or asking which instructions or training are provided and offering to make a contribution to this. This matters because it is in the course of this training that an explanation is given as to how and when selection for checks should take place.

⁶ The use of the term airline staff should also be taken to mean airport staff. Checks are carried out by staff from the airline and/or the airport.

In view of the cooperation involved in the preboarding checks, the Ombudsman deems it appropriate for a contribution to be made to the training in the form of expert advice. The KMar officers have the necessary expertise and this will enable them to help prevent ethnic profiling.

The Dutch KMar officers are dependent on the Greek authorities for implementation. On the ground, the KMar officers have an advisory role and no say about how checks are conducted. In the Ombudsman's opinion, the fact that they have this role is why it matters that clear agreements are made before engaging in the cooperation itself. These agreements should relate to legal protection, complaint handling and – in order to prevent discrimination – the instructions and training given to ground staff who are responsible for the selection process. The aim of all of this is to protect the citizen.

The National Ombudsman,

Reinier van Zutphen

Appendices