

(Unofficial UNHCR translation)

JUDGMENT

District Court the Hague, sitting in Amsterdam

Case number: AWB 06/24277

judgment of the Grand Chamber for Alien Affairs,

in the case of:

xxx, claimant,
counsel: mr A.M. van Eik, lawyer in Amsterdam,

and

the Minister for Immigration and Asylum, successor in law of the Minister for Alien Affairs and Integration,
defendant,
counsel: mr G.M.H. Hoogvliet, lawyer in the Hague

[...]

10.2. The court has seen the underlying documents of the MFA Country Report (of February b200, RB) and according to these documents the court has the opinion that the conclusions made in the report – meaning that all officers and noncommissioned officers have been working on the macabre sections of the KhAD/WAD and have been involved in the arresting, interrogating, torturing and sometimes executing of suspected persons – can be drawn from the underlying sources.

11.1. Given the above outlined judging framework it is of importance if the claimer has brought in enough concrete leads to doubt the accuracy or completeness of this information. Claimer has drawn attention on several reports of Dr. Giustozzi en Dr. Rubin. In addition, claimer has referred to the previously mentioned UNHCR-Note of May 2008.

11.2. The court notes that the Administrative Jurisdiction Division of the Council of State (AJDCS) has held in several judgments that both the reports of Dr. Giustozzi en Dr. Rubin and the UNHCR-Note are not considered to be concrete leads for doubting the accuracy or completeness of the Country of Origin Report of 29 February 2000. The court refers in this context to the decision of the Administrative Jurisdiction Division of the Council of State of 24 September 2009. The court sees no reason to judge differently on this matter.

11.3. The late-mentioned decision made by the AJDCS gave rise to the court to ask for the sources of information underlying the UNHCR-Note. Indeed, according to the decision of the AJDCS by 24 September 2009, the UNHCR-Note can not be regarded as being a concrete lead for doubt. In this statement it was decisive that the report gave no insight into the sources of information on which the UNHCR-Note is based.

Therefore, according to the AJDCS it was not clear whether the sources of the UNHCR-Note can be classified as objective, independent and reliable. In a letter of 4 October 2010 the UNHCR has provided the requested information by the court and has been provided access to the sources of the UNHCR-Note.

11.4. In the opinion of the court the information provided by the UNHCR is insufficient to conclude that the UNHCR-Note can be regarded as a concrete lead for doubting the accuracy or completeness of the MFA Country Report. The court considers it relevant that the mentioned sources of rank and function without exception concern (former) employees of the KhAD/WAD. Moreover, the research undertaken by UNHCR took place in the period 2001-2008, well after the period the report deals with, namely the years 1978-1992. The only exception on this is the information from F. Ermacora, the UN Special Rapporteur for Afghanistan. Moreover, the court considers it important that the UNHCR could not provide further underlying information, for example in the form of transcripts of interviews. Although the court has requested for this information, in connection with privacy concerns the UNHCR was not able to provide these documents.

12. The court concludes that the defendant (the Minister, RB) can rely on the accuracy and completeness of the MFA Country Report in the absence of concrete leads for doubting this conclusion. In the following paragraphs the application by the defendant of 1 (F) Refugee Convention in the case concerned is examined.

13.1. The Minister has a steady policy – given the information from the MFA Country Report of 29 February 2000 –that article 1(F) of the Refugee Convention is applied in general with respect to officers and noncommissioned officers of the KhAD/WAD. This policy is confirmed in a letter of defendant to the Parliament on 22 May 2002 (TK 2001-2002, 19637, nr. 520, p.3). In this letter it is stated that for this group it can be assumed that the presupposition that “knowing and personal participation” is applicable, implying that the burden of proof is on the applicant that Article 1F is not applicable in his case. According to the defendant all cases are assessed individually to determine whether the alien has showed to be an exception to the abovementioned rule.

13.2. The court states that a with article 1(F) of the Refugee Convention corresponding provision is in the meantime put in place in article 12 of the Directive 2004/83/EG of the Council of 29 April 2004 with regards to minimum norms for the recognition of citizens of third countries and stateless persons as a refugee or a person who otherwise needs a form of international protection and the content of the provided protection (Qualification Directive). The Qualification Directive has come into effect on 9 November 2004. The implementation term has expired on 10 October 2006. The court determines that the contested decision was taken before the implementation term was expired. That means that the Qualification Directive was not yet effective. The Court of Justice of the European Union (from now on: the Court) has delivered a judgment on 9 November 2010 on the interpretation of Article 12, second paragraph, of the Qualification Directive (c-57/09 en C-101/09, LJN: BO5518). Given the fact that the exclusion grounds as included in Article 12, second paragraph, of the Qualification Directive are in correspondence with article 1(F) of the Refugee Convention, the court of Amsterdam considers it appropriate to include the interpretation of Article 12, second paragraph, in this judgment.

13.3. In the considerations under 94 to 98 of the mentioned arrest the Court considers the following:

94 It follows from all those considerations that the exclusion from refugee status of a person who has been a member of an organisation which uses terrorist methods is conditional on an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of Directive 2004/83.

95 Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned - regard being had to the standard of proof required under Article 12(2) - a share of the responsibility for the acts committed by the organisation in question while that person was a member.

96 That individual responsibility must be assessed in the light of both objective and subjective criteria.

97 To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

98 Any authority which finds, in the course of that assessment, that the person concerned has - like D - occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted.

13.4. In the light of the considerations of the Court the defendant (the Minister, RB) has - in the case to be judged upon now - according to the court not sufficiently motivated his decision with the referral to the MFA Country Report of 29 February 2000, offering the opportunity for the claimer to provide counterevidence. The defendant should have conducted an individual investigation to the specific facts of the claimers' case and determine the individual responsibilities in accordance with objective and subjective criteria as mentioned in the judgment by the Court.

The defendant also assumed that the individual circumstances could play a role in the light of the application of article 1(F) of the Refugee Declaration, but considers the burden of proof lies with the claimer and that it is his responsibility to provide counterevidence. In the light of the precedent – quoted - considerations of the Court, that point of view is no longer tenable.

14. The conclusion is that the decision is not carefully prepared and insufficiently motivated and is taken in contravention with article 3:2 and 3:46 of the General

Administrative Law Act. The court declares the appeal grounded and annuls the contested decision.

[...]