

CASE LAW COVER PAGE TEMPLATE

Name of the court ¹ (English name in brackets if the court's language is not English): Raad van State (Council of State)	
Date of the decision:	17-05-2016
Case number:²	201506251/1/V1
Parties to the case: Applicant v. State Secretary for Security and Justice	
Decision available on the internet? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, please provide the link: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=87736 (If no, please attach the decision as a Word or PDF file): ECLI:NL:RVS:2016:1441	
Language(s) in which the decision is written: Dutch	
Official court translation available in any other languages? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If so, which):	
Countr(y)(ies) of origin of the applicant(s): Syrian	
Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): the Netherlands	
Any third country of relevance to the case:³	
Is the country of asylum or habitual residence party to:	
The 1951 Convention relating to the Status of Refugees <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based: Article 1(F)
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Relevant articles of the Convention on which the decision is based: X
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Relevant articles of the Convention on which the decision is based: X
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Relevant articles of the Convention on which the decision is based: X
For EU member states: please indicate which EU instruments are referred to in the decision	Relevant articles of the EU instruments referred to in the decision: European Convention on Human Rights

Topics / Key terms: (see attached 'Topics' annex):

1951 Refugee Convention

Rome Statute of the International Criminal Court

ICTY

Armed forces/Military

Denial of refugee status

Key facts (as reflected in the decision): [No more than 200 words]

In the Netherlands, knowing and personal participation are required in order to apply Article 1(F) Refugee Convention. The applicant is a Syrian man. The applicant's application for asylum in the Netherlands was denied by the State Secretary on 28 April 2014 and the State Secretary simultaneously issued a ten year entry ban. With its judgment of 14 July 2015 the court of first instance quashed the State Secretary's decision, urging the State Secretary to issue a new decision taking into account the court of first instance's considerations. The lower court concluded that the man had knowingly participated, but not to have personally participated in the alleged crimes.

The State Secretary lodged an appeal against this judgment with the Administrative Jurisdiction Division of the Council of State. Uncontested was the fact that the applicant was in the Syrian army from 7 October 2009 until his desertion on 16 February 2013, and that he was platoon commander. Also uncontested was the fact that during this period, the Syrian army committed crimes in the sense of Article 1(F) of the 1951 Refugee Convention during this period. It is not in dispute that IC, as platoon commander, handed over his men to a company commander. His men perpetrated human rights violations under this company commander. The State Secretary argued that IC should not have handed over his men.

Key considerations of the court (translate key considerations (containing relevant legal reasoning) of the decision; include numbers of relevant paragraphs; do not summarize key considerations) [max. 1 page]

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5. The State Secretary brought forward in his appeal that the court of first instance unjustly concluded that the State Secretary's conclusion that the IC had "personally participated", which led to the conclusion that Article 1(F) could be applied, was not sufficiently motivated.

5.2. Contrary to what the court of first instance argued, it is not relevant that the platoon commander had transferred the actual authority over his men to a company commander, under whom the alleged crimes took place. The moment he transferred them to the company commander, they were under his authority and leadership. The Council of State concludes that the State Secretary was right in stating that the IC did not take any necessary and reasonable measures within his power as platoon commander in order to prevent or limit the crimes that would be committed. The Council of State finds support for this statement in a judgment by the ICTY in the Orić-case and the ICC in the Bemba Gombo case, in which it was stated that not taking any measures to prevent or limit the crimes that are about to be committed provide shortcomings to the commander's responsibility according to Article 28(a)(ii) of the Statute. Because the IC never tried to stop his men from going to Damascus, and did not take any other measures to prevent or limit the crimes they would commit, he is responsible for the crimes his troops committed and the IC has thus "personally participated".

5.3. The court of first instance did not acknowledge that the State Secretary's conclusion that the IC could be held responsible for the crimes committed by his platoon and could thus be denied refugee status on the basis of Article 1(F), was correct and duly motivated.

6. The appeal is founded and the court of first instance's decision must thus be quashed.

9.1. During the initial appeal, the IC brought forward that the State Secretary unlawfully imposed an entry ban, as he could not return to Syria or any other country. The State Secretary explicitly mentioned that deportation to Syria would not happen. The Council of State considered that, due to the severe nature of Article 1(F), the circumstance that deportation to Syria is not possible does not mean that an entry ban cannot be issued. The IC failed to substantiate why he can't reside outside the territory of the European Union, thus being unable to comply with the obligation to leave. The appeal opposing the imposed entry ban is thus declared unfounded.

10. Secondly, the IC stated that because the State Secretary acknowledged that deportation to Syria is not an option due to the principle of *non-refoulement* (Article 3 ECHR), he would be entitled to protection in the form of a residence permit. The appeal is declared inadmissible now that it has been decided that the State Secretary lawfully considered the IC has been involved in crimes as meant by Article 1(F). According to paragraph C2/6.2.8 of the Alien circular 2000, a person may be entitled to a residence permit once he has stayed in the Netherlands for more than ten years, while in the situation of being unable to be deported due to Article 3 ECHR.

Judgment

The Council of State declares the appeal founded, and thereby:

- 1) Quashes the court of first instance's judgment of 14 July 2015
- 2) Declares the appeal opposing the imposed entry ban unfounded
- 3) Declares the appeal opposing the denial of the asylum application inadmissible.

Other comments or references (for example, links to other cases, does this decision replace a previous decision?)

Judgment of 30 June 2006, Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia (IT-03-68-T:www.icty.org) – case against N. Orić.

Judgment of 21 March 2016, Trial Chamber III of the International Criminal Court (ICC-01/05-01/0803343:www.icc-cpi.int) – case against J. Bemba Gombo.

EXPLANATORY NOTE

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.
2. Where applicable, please follow the court's official case reference system.
3. For example in situations where the country of return would be different from the applicant's country of origin.

For any questions relating to this form, please contact the RefWorld team at the address below.

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