

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: 27 /06/2014	Case number: ² 201310217/1/V1
Parties to the case: applicant, 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: http://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=79789&summary_only=&q	
(If no, please attach the decision as a Word or PDF file):	
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): Democratic Republic of the Congo	
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: 1F
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:
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: ECHR Articles 1, 2, 3, 6 and Sixth Protocol Article 1.

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

1951 Refugee Convention

Exclusion Clauses 1F

Mass killings, rape, ethnic violence, looting, grave human rights violations, armed groups, regional instruments

Key facts (as reflected in the decision):

The applicant, who is a national of the Democratic Republic of the Congo, testified before the International Criminal Court (ICC) in The Hague, the Netherlands, and subsequently filed an asylum application in the Netherlands. The State Secretary of Security and Justice refused the applicant's asylum application on 31 October 2012 with reference to considerations that there were serious grounds to believe that he had committed acts covered by the Article 1(F) of the 1951 Refugee Convention in his capacity as Interim President and Commissioner for Safety and Defence of the Front des Nationalistes et Intégrationnistes (FNI) in the DRC.

On 14 October 2013, the District Court of The Hague judged the appeal against the State Secretary's decision to be founded, annulled the decision to reject the applicant's asylum application and decided that the State Secretary must take a new decision, taking into account the District Court's considerations.

Both the applicant and the State Secretary appealed against this decision.

In the course of the procedure the State Secretary requested the Ministry Foreign Affairs to provide a report on the individual circumstances of IC. The State Secretary however took a decision without awaiting the outcome of the research. The Council of State considered the applicant's appeal in this regard grounded, but considered that the applicant had not in any way been affected by the State Secretary's course of action since he had had an opportunity to react to the MFA report and the State Secretary's decision at the court hearing before the lower court.

The Council of State decided that the lower court had wrongly assessed Article 1F not to be applicable. Given the leading position within the FNI and the military structure of the NFI (and the close contacts with the Force de Résistance Patriotique en Ituri (FRPI)) and the atrocities committed by the NFI combatants, there was "knowing and personal participation" in crimes as meant in Article 1F of the 1951 Refugee Convention.

The Council of State dismissed the State Secretary's argumentation that there was no reason for him to assess independently whether the applicant's deportation would contravene Article 3 of the ECHR. Although the applicant's return to the DRC would be carried out under the ICC's responsibility, this does not mean that the Dutch authorities do not have their own responsibility to assess whether returning the applicant to the DRC would infringe the Netherland's non-refoulement obligations.

The Council of State held that the applicant's deportation would not amount to a violation of Article 3 of the ECHR: the guarantees obtained by the ICC in this regard are sufficient. The Congolese Minister of Justice and Human Rights has guaranteed that the applicant will be tried soon and will not be harmed.

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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6.5 The foregoing shows that the applicant has held leadership positions in the FNI since June 2003 and that in March 2003 the FNI and the FRPI decided to merge into a single organisation, which from that moment on could be considered an organized armed group. Further, the foregoing shows that, between June 2003 and April 2004, combatants of that organization committed crimes as meant under Article 1(F) on a large scale. The leadership positions of the applicant justify the State Secretary's conclusion that the applicant had such influence over the conduct of the FNI/FRPI combatants that he can be held co-responsible for the crimes committed by the combatants. Also, through his leadership positions and by obtaining funds, the applicant contributed to maintaining that organization. The District Court therefore wrongly considered that the State Secretary had not made it plausible that the applicant meets the requirement of personal participation.

8.4 Insofar as it should be deduced from the State Secretary's explanation at the session of the Council of State that the Netherlands and the ICC have agreed that the applicant, even when he has been detained by the Dutch authorities pursuant to immigration laws, in the case of a refusal of his asylum request would be brought back to the DRC under the responsibility of the ICC and that consequently he will not be returned by the Netherlands, this does not entail that the Netherlands is not obligated to judge whether the applicant, after his return to the DRC, is at serious risk of becoming subject to treatment in violation of Article 3 of the ECHR and, if such is the case, to not cooperate in repatriating the applicant.

9.4 Considering the obligation to cooperate as laid down in the ICC Statute and given the aforementioned principle of mutual trust, the State Secretary too can attach great weight to the protective measures and guarantees given by the Congolese authorities to the ICC in respect of the applicant's safety. The exceptional situation in the ECHR's Othman judgment is therefore not applicable.

9.6 Considering this combination of circumstances, the protective measures constitute a sufficient guarantee that the applicant, upon his return to the DRC, will not be subjected to treatment in violation of Article 3 of the ECHR. The District Court therefore rightly considered that the State Secretary rightly took the position that the applicant has not made it plausible that he would, upon his return to the DRC, be at a real risk of ill-treatment.

10.2 (.)

That the applicant was detained unlawfully and without charge from 2007 until his transfer does not lead to the conclusion that upon return he will be at a real risk of a flagrant denial of justice. The protective measures as listed under 9.3 indeed mean that the ICC's Victims and Witnesses Unit (VWU) will visit the applicant regularly to assess his security situation and will be able to oversee whether the Congolese authorities respect the due process principles guaranteed by Article 6 of the ECHR. Additionally, according to the report of the Registry of 16 April 2014, the Procureur-Général de la République, the highest judicial authority of the DRC, has promised that the criminal prosecution against the applicant will, upon his return to the DRC, commence at the Haute Cour Militaire in Kinshasa. Given the principle of good faith as described under 9.4 that applies to the relationship between the ICC and States Parties and also has relevance for compliance with Article 6 of the ECHR, the State Secretary was entitled to rely on these protective measures and this guarantee.

With regard to Article 2 ECHR

11.2

Additionally, the MFA's general official report on the DRC, which the applicant has not contested, states that the Congolese authorities have not executed the death penalty since 2002 and there is a de facto moratorium on it. Also, the Congolese Minister of Justice and Human Rights confirmed to the ICC, through a letter dated 20 October 2012, the existence of a moratorium on the death penalty and promised that the Congolese authorities would not execute any death sentence in the case of the applicant.

Considering this promise, in the light of the principle of mutual trust as described under 9.4, as well as the existence of a moratorium, and that the ICC through the VWU will oversee compliance therewith, the State Secretary rightly took the position that the applicant has not made it plausible that upon return to the DRC he would be at a real risk of being subjected to the death penalty.

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

This decision replaces the decision of 14 October 2013 of the District Court of The Hague.

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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