

4 April 2014

Civil Division

13/00912

LZ/EE

Supreme Court of the Netherlands

Judgment

in the case of:

1. [appellant 1],

2. [appellant 2],

3. [appellant 3],

all detainees in the Detention Centre of the International Criminal Court, Scheveningen,
municipality of The Hague,

APPELLANTS in the cassation proceedings,

attorney-at-law: G.R. den Dekker,

v.

THE STATE OF THE NETHERLANDS (Ministry of Foreign Affairs and Ministry of Security
and Justice),

seated in The Hague,

DEFENDANTS in the cassation proceedings,

attorney-at-law: M.M. van Asperen and J.W.H. van Wijk.

The parties will be referred to below as '[appellant] *et al.*' and 'the State'.

1 Proceedings before courts hearing the facts

For the course of the proceedings before the courts hearing the facts the Supreme Court refers to:

a. the judgment of the preliminary relief judge at The Hague district court of 26 September 2012 in case no. 424426/KG ZA 12-808;

b. the judgments of The Hague Court of Appeal of 29 October 2012 and 18 December 2012 in case no. 200.114.941/01.

The Court of Appeal's judgment of 18 December 2012 is appended to this judgment.

2 Cassation proceedings

[appellant] *et al.* lodged an appeal in cassation against the Court of Appeal's judgment of 18 December 2012. The writ of summons in cassation is appended to this judgment and forms part of it.

The State moved that the appeal be dismissed.

Counsel presented the case on behalf of the parties. E.C. Rozeboom, attorney at the Supreme Court, also presented the case on behalf of [appellant] *et al.*

In his advisory opinion Advocate-General P. Vlas recommended that the appeal be dismissed.

Counsel for [appellant] *et al.* responded to that advisory opinion by letter of 13 December 2013.

3 Assessment of the grounds for appeal in cassation

3.1 In cassation, the following can be taken to have been established.

(i) [appellant] *et al.* are nationals of the Democratic Republic of the Congo (hereinafter: the DRC), where they were detained on suspicion of involvement in the deaths of UN military personnel and/or treason. [appellant] *et al.* and the DRC consented to [appellant] *et al.* testifying as witnesses at the International Criminal Court in The Hague (below: the ICC) in cases pending against [person 1] and [person 2]. To this end [appellant] *et al.* were transferred to the ICC in accordance with article 93(7) of the Rome Statute of the International Criminal Court (Dutch Treaty Series 2000, 120; below: the Statute) on 27 March 2011; since then they have been held in custody at the Detention Centre of the ICC in Scheveningen. On 3 May 2011 [appellant] *et al.* completed their testimony to the ICC. Under article 93(7)(b) of the Statute, a person transferred at the request of the ICC remains in custody, but is returned without delay to the requested State when the purposes of the transfer have been fulfilled.

(ii) [appellant] *et al.* submitted asylum applications to the Dutch authorities on 12 May 2011 on the grounds that they feared persecution or inhuman treatment as a consequence of testimony they had given at the ICC regarding the DRC's incumbent president Kabila.

(iii) By decision of 9 June 2011, Trial Chamber II at the ICC (below: the Trial Chamber), by which [person 1] and [person 2] are being tried and to which [appellant] *et al.* gave testimony as witnesses, ruled that while their asylum procedure was still ongoing, [appellant] *et al.* could not be sent back to the DRC pursuant to article 93(7)(b) of the Statute. The Trial Chamber referred to the investigation instigated by the ICC into the conditions of detention and the course of proceedings in the DRC following the return of [appellant] *et al.* It also observed that, in view of the principle of *non-refoulement* based on article 33 of the Refugee Convention, [appellant] *et al.* could not be returned to the DRC while their asylum procedure was still ongoing and that a solution regarding their detention would need to be sought in consultation between the ICC, the DRC and host State the Netherlands.

(iv) By decision of 24 August 2011 the Trial Chamber held that in view of the guarantees offered by the DRC regarding the security of the witnesses, there were no longer any grounds to delay the return of [appellant] *et al.* to the DRC, but that the ICC could not order the return of [appellant] *et al.* while their asylum procedure was still pending in the Netherlands.

(v) By decision of 16 September 2011 the Trial Chamber noted that the position of the DRC was that [appellant] *et al.* must be returned to the DRC without delay, while the opinion of the Dutch authorities was that they must remain in custody in the Detention Centre of the ICC pending a decision on their asylum applications.

(vi) In its decision of 1 March 2012 the Trial Chamber noted *inter alia* that:

‘11. As a result of the failure of the consultations to produce any alternative solution, the Court has found itself bound in the following position. On the one hand, since the witnesses have finished their testimony and their security in the DRC in case of return is guaranteed, the Court has no reason anymore to maintain custody over the witnesses and should return them. On the other hand, the Court’s obligation to return the witnesses has been suspended until the final outcome of their asylum claim. Given this situation, the Court has had so far no other choice but to keep the three detained witnesses in its custody, in accordance with article 93(7) of the Statute. This situation continues until today. (...)

18. Although the detention of the witnesses by the DRC and the custody of the Court are clearly interrelated, the Chamber has no authority to review the detention of the witnesses by the DRC. The Chamber notes, in this regard, that the Court has not been advised by the DRC of any change in their detention status. In the absence of such notification by the Congolese authorities, the witnesses are to remain in detention while they are in the custody of the Court.

(...)

20. As regards the legality of the continued detention of the witnesses by the Court since the completion of their testimony, the Chamber notes that the custody of the Court on the basis of article 93(7) of the Statute has so far been maintained because the existence of the asylum claim has engendered an extraordinary situation, in which the Court has very little room for manoeuvre. The Chamber reiterates, in this respect, that the processing of the witnesses’ asylum applications must not cause the unreasonable extension of their detention under article 93(7) of the Statute and that, in light of *inter alia* Article 21(3) of the Statute, the Court cannot contemplate prolonging their custody indefinitely.’

(vii) On 1 June 2012 the Trial Chamber ruled *inter alia* on the request by [appellant] *et al.* that the court declare that the ongoing detention was the primary responsibility of host state the Netherlands and no longer a matter within the exclusive jurisdiction of the ICC.

The Trial Chamber denied this request and observed:

‘14. As it recalled at paragraph 1 above, the Court has custody of the Detained Witnesses under article 93(7) of the Statute. In its aforementioned decisions of 9 June and 24 August 2011, as reiterated in its decision of 1 March 2012, the Chamber clearly set out the grounds for their detention, also stating unequivocally that “the processing of the witnesses’ asylum applications must not cause the unreasonable extension of their detention under article 93(7) of the Statute [...]”. Accordingly, in response to the third issue raised by duty counsel, the Chamber need only to refer him to these two decisions, both public documents which can therefore be tendered in court if necessary. (...).’

(viii) At first the State refused to consider the asylum applications of [appellant] *et al.* After the aliens chamber of The Hague district court, sitting in Amsterdam, ruled by judgment of 28 December 2011 (ECLI:NL:2011:RBSGR:BU9492) that the fact that [appellant] *et al.* were under the jurisdiction of the ICC did not detract from the applicability of procedures for assessing asylum applications under the Aliens Act 2000, the asylum applications of [appellant] *et al.* were accepted for consideration by the State. By decisions of 31 October 2012 and 28 November 2012 the asylum applications of [appellant] *et al.* were denied, applying article 1F of the Refugee Convention because, stated briefly, there were serious reasons for considering that they had committed crimes against peace, war crimes or crimes against humanity. It was also decided that there was no reason to assess whether there was a real risk of an infringement of article 3 or 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) upon expulsion. By judgment of 14 October 2013 (ECLI:NL:RBAMS:2013:6688, 6692 and 6705), The Hague district court, sitting in Amsterdam, quashed these decisions and ordered the Minister for Immigration to take new decisions, in accordance with these judgments.

3.2 In these interim relief proceedings, [appellant] *et al.* asked that the State be ordered to declare to the ICC that the Netherlands is willing to receive [appellant] *et al.* and enter into consultations with the ICC for this purpose. They based their case on a claim of wrongful treatment of them by the State by virtue of the latter’s refusal to cooperate with their transfer by the ICC. In doing so the State is said to be allowing a situation to persist that is contrary to articles 5 and 13 of the ECHR in which [appellant] *et al.* have been wrongfully detained without being able to pursue any legal remedy against that detention.

3.3 The interim relief judge allowed the application for interim relief. In doing so, the judge ruled, summarily stated, that [appellant] *et al.* were in a situation (as regards their detention) that was without prospect of change; since 24 August 2011 their detention is no longer lawful and it is unclear whether they can have the lawfulness of their detention examined by a competent court. The possibility cannot be excluded that the ICC having its seat on Dutch territory could be a sufficient basis for assuming that the Netherlands has jurisdiction, all the more so since Dutch asylum procedures are preventing [appellant] *et al.* from being returned to the DRC. The State has an obligation to concern itself with the fate of [appellant] *et al.* and is not permitted to leave them in the custody of the ICC pending the asylum procedures, to which there was no end in sight.

3.4 The Court of Appeal subsequently denied the application for interim relief on the basis of the following considerations.

[appellant] *et al.* were detained in the DRC and for this reason they were also in the custody of the ICC as witnesses pursuant to article 93(7) of the Statute and the agreement made by the ICC with the DRC. The basis for their custody was and is therefore the basis on which they were detained in the DRC. The detention by the ICC is derived from this. If [appellant] *et al.* wish to institute legal remedies against their detention as such, they must do so in the DRC. Neither the Dutch courts nor the ICC (see the Trial Chamber's decision of 1 March 2012, at 18) has jurisdiction to give a ruling on the legality of that detention, even if it is alleged that their continued detention or the absence of legal remedies against such detention in the DRC is in violation of internationally recognised human rights. Although [appellant] *et al.* have invoked the rights safeguarded by the ECHR this cannot serve as a basis for an exception to this rule, since it follows from the judgment of the European Court of Human Rights (ECtHR) of 9 October 2012, no. 33917/12 (*[person 3] v. the Netherlands*) (ECLI:NL:XX:2012:BY2306) that the fact that [appellant] *et al.* are present on Dutch territory and have applied for asylum in the Netherlands does not mean that questions touching on the legality of their detention are thereby brought within the jurisdiction of the Netherlands (consideration 2.2).

The Trial Chamber did not hold that a basis for continued detention is absent. The Court of Appeal interprets the judgments of the Trial Chamber as meaning that the Trial Chamber considers the continued detention by the ICC to be undesirable since [appellant] *et al.* have completed their testimony, but that a special and unforeseen situation has arisen as a result of the asylum application which makes it legally impossible to return [appellant] *et al.* to the

DRC, and that as long as return remains impossible article 93(7) of the Statute provides the basis for continued detention (consideration 2.3).

Unlike the interim relief judge the Court of Appeal also does not consider that the situation of [appellant] *et al.* is without prospect of change. Quite apart from the legal remedies which they may have in the DRC, their detention by the ICC can be expected to end once a final decision has been taken on their asylum application. Although the asylum procedure may still take some considerable time, this does not mean that their situation is without prospect of change (consideration 2.4).

In view of the above, the Court of Appeal need not consider whether the current detention of [appellant] *et al.* is in violation of articles 5 or 13 of the ECHR. Questions touching on the legality of their detention do not come within the jurisdiction of the Netherlands as referred to in article 1 of the ECHR. Nor does the State have any legal obligation to receive [appellant] *et al.* from the ICC. Neither under Dutch law nor under the provisions of the ECHR (see the judgment concerning [person 3]) does the fact they have applied for asylum in the Netherlands mean that they may await the outcome of the asylum procedure on Dutch territory (consideration 2.5).

3.5 In essence, the grounds of appeal can be summarised as follows:

(a) that the Court of Appeal wrongly held that article 93(7) of the Statute is a sufficient basis for the continued detention of [appellant] *et al.* at the ICC as witnesses, and in this connection gave an untenable interpretation to the decisions of the Trial Chamber in the case of [appellant] *et al.* (in particular parts 1.2-1.4 and 2.1-2.2);

(b) that the Court of Appeal failed to appreciate that the jurisdiction of the Dutch courts over the territory of the State is not restricted by article 1 ECHR and that the Dutch courts can in fact conclude that the absence of effective legal remedies against the continued detention of [appellant] *et al.* infringes the rules laid down *inter alia* in article 5 (4) ECHR (parts 1.5-1.8, 3.1-3.2 and 4.1-4.2).

3.6 Article 93(7)(a) of the Statute provides that the ICC may request the temporary transfer of a person in custody for the purposes of *inter alia* obtaining testimony, and that the person concerned may be transferred if he freely gives his informed consent to the transfer and the requested State agrees to the transfer, subject to such conditions as that State and the ICC may agree. It has been established that [appellant] *et al.* were transferred to the ICC under

this provision. The basis for their detention in the Detention Centre of the ICC is therefore the basis for detention that arose in the DRC in conjunction with the agreement between the DRC and the ICC pursuant to article 93(7)(a) of the Statute.

In a number of decisions the Trial Chamber has ruled on the question of whether the detention of [appellant] *et al.* in the Detention Centre, pending the outcome of their asylum procedure in the Netherlands, can be continued. It has ruled that compliance with the ICC's obligation arising from article 93(7)(b) of the Statute to return the witnesses to the DRC without delay once their testimony has been completed, must be suspended in connection with the exercise by [appellant] *et al.* of their internationally recognised fundamental right to an effective remedy in relation to their asylum applications. In the Trial Chamber's opinion, the basis for this continued detention has remained article 93(7) of the Statute. In this connection it did note that the asylum procedures 'must not cause the unreasonable extension of their detention under article 93(7) of the Statute and that, in light of *inter alia* Article 21(3) of the Statute, the Court cannot contemplate prolonging their custody indefinitely', but did not see this as giving reason to terminate the continued detention in the Detention Centre.

3.7 The fact that the custody in the Detention Centre of the ICC is being effected on the territory of the Dutch State does not mean that the Netherlands has jurisdiction over the detention. Section 88 of the International Criminal Court Implementation Act (Bulletin of Acts and Decrees 2002, 314) provides that Dutch law does not apply to deprivation of liberty which is ordered by the ICC and effected in premises made available to the ICC in the Netherlands. It must be assumed that this provision applies equally to defendants and witnesses detained under the responsibility of the ICC in the Detention Centre.

Neither is the Netherlands obliged to accept jurisdiction within the meaning of article 1 of the ECHR regarding the review of the lawfulness of the detention of a witness in the Detention Centre of the ICC under article 93(7) of the Statute. This point was explicitly decided in the ECtHR decision of 9 October 2012 in the case of [*person 3*] *v. the Netherlands* (ECLI:NL:XX:2012:BY2306). This decision too concerned the detention of a witness from the DRC under article 93(7) of the Statute. The ECtHR held that the legal ground for this detention was the arrangement entered into between the DRC and ICC under Article 93(7) of the Statute, and that this was reflected by the decisions of the Trial Chamber, which meant that there was no legal vacuum (consideration 75). The ECtHR also observed that the detention had a basis in the provisions of international law governing the functioning of the ICC and that the ICC has powers to order protective measures to ensure that the

fundamental rights of witnesses are not violated and actually makes use of those powers, in which connection the fact that exercising powers will not necessarily result in release by the authorities of the DRC cannot be a deciding factor; the ECHR does not therefore impose on a State that has agreed to host an international criminal tribunal on its territory the burden of reviewing the lawfulness of deprivation of liberty under arrangements lawfully entered into between that tribunal and States not party to it (considerations 79-80). The fact that asylum applications submitted by the witnesses are under consideration does not change that (considerations 81-83).

3.8.1 There are insufficient grounds to conclude that, irrespective of the above, the State is obliged to receive [appellant] *et al.* from the ICC.

3.8.2 Pursuant to the Statute, upon the transfer to the ICC under article 93(7) of the Statute of witnesses held in custody, no review takes place of the lawfulness of the grounds for detention that arose in the requested State, evidently with a view to promoting the proper and fair handling of criminal cases pending before the ICC, to which witness testimony is of essential importance.

Accordingly, the ICC does not consider that it has the jurisdiction to review the lawfulness of the basis for witnesses' detention in the requested State. The Trial Chamber ruled to this effect in consideration 18 of the decision of 1 March 2012 as cited in consideration 3.1 of this judgment above at (vi), regarding the detention of [appellant] *et al.*, and this was subsequently confirmed in a majority decision of 1 October 2013 of the Trial Chamber (ICC-01/04-01/07-3405), considerations 24-28. As was observed in consideration 28 of the latter decision of the Trial Chamber, this is connected with the fact that taking a different view would result in the cooperation procedures agreed between the States Parties to the Statute and the fundamental principle of state sovereignty being greatly eroded; the ICC's functioning depends on the arrangements agreed in the Statute between the States Parties, including the Netherlands, *inter alia* on 'International cooperation and judicial assistance' (Part IX of the Statute, which includes article 93).

3.8.3 In this connection it is important to note that if the Dutch State receives [appellant] *et al.*, it might no longer be possible to guarantee that, if their asylum application is definitively denied, [appellant] *et al.* can be returned to the DRC in accordance with article 93(7) of the Statute; in the event that [appellant] *et al.* are held in aliens' detention, such detention is governed by the rules that apply in the Netherlands and cannot be extended indefinitely. In this light, an obligation on the State to receive [appellant] *et al.* from the ICC would erode the

cooperation procedures agreed in the Statute between the States Parties and the fundamental principle of state sovereignty in an unacceptable manner.

3.8.4 However, if it is decided in the context of the asylum procedure that [appellant] *et al.* must be granted residence permits or that expelling them to the DRC would violate the principle of *non-refoulement*, the State will be required to act accordingly, which means that it cannot cooperate with returning them to the DRC. In line with the above, the Trial Chamber held in consideration 21 of its decision of 1 October 2013 that under the Statute the ICC would be duty bound to order the return of [appellant] *et al.* to the DRC if their asylum application was denied and the Dutch authorities found that the principle of *non-refoulement* would not be violated and that, if the opposite situation were to arise, [appellant] *et al.* would be transferred to the Dutch authorities by the ICC. The fundamental rights and freedoms of [appellant] *et al.* would in this way be sufficiently guaranteed, even although the ICC does not consider itself as having jurisdiction to review their detention as such and the State is not obliged to receive them from the ICC during the asylum procedure.

3.9 In light of the foregoing, the grounds of appeal referred to in consideration 3.5 above are untenable. Neither can the other grounds of appeal result in cassation. In light of section 81, subsection 1 no further reasons need be given, since those grounds of appeal do not warrant the answering of questions of law in the interests of the uniform application or development of the law.

4 Decision

The Supreme Court:

denies the appeal;

orders [appellant] *et al.* to pay the costs of the appeal in cassation, until the time of this judgment assessed on the State's side at €818.34 in disbursements and €2,200 in fees. This judgment was given by vice president F.B. Bakels as presiding judge and justices A.M.J. van Buchem-Spapens, C.A. Streefkerk, C.E. Drion and M.V. Polak, and pronounced in open court by justice G. de Groot on 4 April 2014.