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Extradition by the Netherlands to Rwanda. 1. Genocide Convention; treaty relationship. 2. Application of principle of protection of legitimate expectations where there is no extradition treaty. 3. Risk of (flagrant) violation of art. 6 ECHR. Re 1. Untenable ground of appeal concerning the absence of a treaty relationship facilitating the extradition of the person requested. Re 2. The district court was assured by the guarantees given that the person requested would receive a fair trial and have the right to lodge an appeal in Rwanda. Consequently, its view that the principle of protection of legitimate expectations is not necessarily rendered inoperative merely because there is no extradition treaty with a provision guaranteeing a fair trial does not amount to an incorrect interpretation of the law nor is it manifestly unreasonable. Re 3. Due to the division of authority between the judge charged with determining whether extradition is permissible under the law and the Minister who, if the judge approves extradition, ultimately decides whether and, if so, under what conditions extradition will take place, the court can rule, in consideration of art. 6 ECHR, that extradition is not permissible only if there is evidence that the risk of the person's rights under art. 6 ECHR being flagrantly violated is so great that the Netherlands' obligation under art. 1 ECHR to protect those rights stands in the way of the extradition obligation ensuing from the applicable treaty. The mere fact that the Genocide Convention is not an 'extradition treaty' does not necessitate a different division of authority. The judge ruling on whether extradition is permissible can advise the Minister as to whether the person requested should in fact be extradited. The district court's view that there is no indication that such a risk exists is therefore not manifestly unreasonable.

Judgment

17 June 2014

Criminal Division

no. 14/00090

Supreme Court of the Netherlands

Judgment

In the appeal in cassation against the judgment of 20 December 2013, no. RK 13/4327, by The Hague District Court regarding a request by the Republic of Rwanda to extradite:

[the person requested], born in [place of birth] on [date of birth] 1975.

1 Cassation proceedings

The appeal was lodged by the person requested. On his behalf T.M.D. Buruma and G.K. Sluiter, attorneys-at-law in Amsterdam, submitted written grounds for cassation. The document setting out the grounds for cassation is attached to this judgment and forms part of it.

Advocate General D.J.C. Aben submitted an opinion that the appeal should be dismissed. The attorneys submitted their response in writing.

2. Assessment of the first ground of appeal

2.1.

It is alleged in the grounds of appeal that the district court wrongly found, or at any rate failed to provide sufficient reasons for its decision, that a treaty relationship exists between Rwanda and the Netherlands that is sufficient to allow the extradition of the person requested.

2.2.

This ground of appeal cannot result in cassation for the reasons given at points 6 to 10 of the Advocate General's opinion.

3 Assessment of the second and fourth grounds of appeal

3.1.

The second ground of appeal concerns the district court's dismissal of the defence 'that due to the absence of an extradition treaty between the Netherlands and Rwanda it may not be assumed that the principle of the protection of legitimate expectations applies in the extradition proceedings in question'. The fourth ground of appeal concerns the dismissal of the defence that the person requested would face the risk of his rights under art. 6 ECHR being (flagrantly) violated were he to be extradited to Rwanda.

3.2.1.

As regards the assessment of the ground of appeal, the contested judgment reads as follows:

'6.7. On behalf of the person requested, it has been asserted that the absence of an extradition treaty in the proper sense between Rwanda and the Netherlands leads to the conclusion that it may not be assumed that the principle of the protection of legitimate

expectations applies in the extradition proceedings in question. This would require the district court to carry out a comprehensive review in order to determine whether the person requested would receive a fair trial in Rwanda. The district court disagrees with the defence in this respect. The Republic of Rwanda and the Kingdom of the Netherlands have a treaty relationship with each other through the Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention'). Pursuant to article 26 of the Vienna Convention on the Law of Treaties, both parties are required to perform the Genocide Convention in good faith, including the provision allowing reciprocal extradition for genocide. The judge ruling on whether extradition is permissible in the present case must therefore, in principle, be able to rely on the word of the requesting state. In paragraph 50 of the extradition request Rwanda gives guarantees that should ensure the person requested receives a fair trial. In addition, paragraph 56 guarantees the right to lodge an appeal. The fact that Rwanda's guarantees concerning the right to a fair trial are not laid down in an extradition treaty but in the extradition request itself does not necessarily render the principle of protection of legitimate expectations inoperative.

6.8

As stated above, the district court must assume that the requesting state, Rwanda in this case, will fulfil the guarantees it has given, unless there are compelling reasons to assume that the requesting state will not properly perform the obligations it is under in the case at hand. Any defence based on these reasons must be supported by sufficiently substantiated and specific grounds. In this regard, the defence argued that – despite the guarantees given by Rwanda – the person requested would, if extradited, be at risk of his rights under article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) being flagrantly violated. The defence substantiates this risk by arguing that a) the general political situation in Rwanda renders a fair trial impossible, b) the Gacaca proceedings were not fair, c) the trial (at first instance) in the Ingabire case was not fair, and d) the trial in the [A] case was not being conducted fairly. In the opinion of the district court, however, the defence failed to substantiate sufficiently how the general political situation in Rwanda is likely to result in a flagrant violation of art. 6 ECHR in this specific case. Although the district court, like the defence, considers it plausible that within Rwandan society lawyers who defend persons accused of genocide attract negative reactions, the district court does not consider this sufficient reason to assume that, in this specific case, it will therefore be impossible for the person requested to engage a professional attorney to defend him. Furthermore, the person requested will not be tried by a Gacaca Court. The proceedings in the [B] case are irrelevant to the assessment of this case because the Transfer Law did not apply to that case and the acts the person requested was suspected of are not comparable

to that in the case at hand. In the opinion of the district court, arguments a, b and c, either individually or in conjunction with each other, do not lead to the conclusion that a flagrant violation of art. 6 ECHR is likely to occur.

The district court considers the trial in the [A] case relevant to the assessment of the present case. The Transfer Law applied in that case too and the defendant was also suspected of involvement in the genocide of 1994. The district court saw in the trial observation reports of the Mechanism for International Criminal Tribunals for the [A] case that there were obstacles impeding a fair trial: the prosecutor appeared to be unaware of the defendant's right to remain silent and to examine witnesses for the prosecution; the right to legal aid was honoured only after a long period of insistence; the defence had difficulty identifying and interviewing exculpatory witnesses abroad; the authorities were slow to activate the witness protection mechanism and the file was initially not translated into the defendant's language. However, the district court also saw that the High Court responded appropriately to some of these obstacles: it was made possible for defence witnesses to be examined by an individual appointed for that purpose by the High Court; a translation of the case file was ordered and the defence was allocated financial resources. A number of other obstacles, such as inadequate witness protection, were resolved without the High Court's involvement. The problems regarding the right to remain silent and the right to examine witnesses for the prosecution have not yet been put to the High Court and there is no information in the trial observation reports concerning the current state of affairs. Taking the information in all the reports into consideration, the district court is of the opinion that there is no justification for assuming in advance that a flagrant violation of the right to a fair trial will take place in the [A] case. Consequently, the proceedings in the [A] case do not justify the assumption that there is a serious risk of such a violation occurring in the case at hand.'

3.2.2.

The extradition request of 23 September 2013 referred to in the foregoing considerations contains the following:

'K. Guarantees on human rights

(...)

50. The fair trial guarantees contained in the Law relating to the transfer of Cases to Rwanda and the Constitution of the Republic meet internationally accepted minimum standards of due process and can be summarised as follows:

- a. The right to a fair and public hearing by a competent, independent and impartial court;
- b. the right to a presumption of innocence;

- c. the right to be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him or her;
- d. the right to have adequate time and facilities for the preparation of his or her defense, and to communicate with counsel of his or her own choosing;
- e. the right to be tried without undue delay;
- f. the right to be tried in his or her presence;
- g. the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right, and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- h. the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- i. not to be compelled to testify against himself or herself or to confess guilt.'

3.3.

The district court considered the guarantees given in the extradition request to be sufficient assurance that the person requested will receive a fair trial in Rwanda and be able to exercise his right of appeal. Consequently, the court's view that the principle of protection of legitimate expectations is not necessarily rendered inoperative merely because there is no extradition treaty with a provision guaranteeing a fair trial does not amount to an incorrect interpretation of the law nor is it manifestly unreasonable.

3.4.1.

Due to the division of authority between the judge charged with determining whether extradition is permissible under the law and the Minister who, if the judge approves extradition, ultimately decides whether and, if so, under what conditions extradition will take place, the court can rule, in consideration of art. 6 ECHR, that extradition is not permissible only if there is evidence that the risk of the person's rights under art. 6 ECHR being flagrantly violated is so great that the Netherlands' obligation under art. 1 ECHR to protect those rights stands in the way of the extradition obligation ensuing from the applicable convention. The mere fact that the Genocide Convention is not an 'extradition treaty' does not necessitate a different division of authority. The judge ruling on whether extradition is permissible can advise the Minister as to whether the person requested should in fact be extradited, just as the district court did.

3.4.2.

The district court's view that there is no evidence that the risk referred to in 3.4.1 exists is not manifestly unreasonable, even in the light of what was adduced by and on behalf of the person requested.

3.5.

The grounds of appeal are untenable.

4 Assessment of the remaining grounds

The grounds cannot result in cassation. Pursuant to section 81 of the Judiciary (Organisation) Act, no further reasons need be given for this conclusion since these grounds of appeal do not raise questions of law that need to be answered in the interests of the uniform application or development of the law.

5 Decision

The Supreme Court dismisses the appeal.

This judgment was given by vice-president A.J.A. van Dorst as presiding judge and by justices B.C. de Savornin Lohman and J. de Hullu, in the presence of S.P. Bakker, clerk of the court, and pronounced at a public hearing on 17 June 2014.