

ANNEX 1

Decision

DISTRICT COURT OF THE HAGUE

Administrative Law Division
Three-judge bench of the Aliens Chamber
Sitting at Rotterdam

Record no.: AWB 11/31019
Alien registration no. (*V-nummer*): 275.812.4753

In the case of: [REDACTED], Applicant
Counsel: Mr P.J. Schüller, lawyer at Amsterdam

Versus: **The Minister for Immigration and Asylum**, Respondent
Counsel: Mr G. M. H. Hoogvliet and Mr D. Kuiper

I. Procedural background

1. The Applicant was born on [REDACTED] and is a Congolese national.
2. On 26 September 2011, the Applicant lodged an appeal under article 59 of the Aliens Act 2000 (*Vreemdelingenwet 2000*) against a measure.
3. The appeal was heard in public on 5 October 2011. The Applicant was represented at the hearing by his counsel and Prof. G. K. Sluiter. The Respondent was represented by Mr T. Nauta.
4. By facsimile dated 12 October 2011, the District Court reopened the investigation and requested the parties to submit additional documents. By letter of 14 October 2011, the case was referred to the three-judge chamber of this court. By facsimile messages dated 18 and 19 October 2011, the Respondent transmitted additional information. By a facsimile message dated 18 October 2011, the Applicant submitted additional documents.
5. A second hearing was held before the three-judge chamber on 20 October 2011. The Applicant was represented at the hearing by his counsel and Prof. G. K. Sluiter. The Respondent was represented by his two counsel.

II. Considerations

Legal framework

1.1 Under article 68(1) of the Rome Statute of the International Criminal Court (“the Statute”), the International Criminal Court (“the Court” or “the ICC”) shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of

victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

1.2 Under article 93(7) of the Statute:

- (a) The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
 - (i) The person freely gives his or her informed consent to the transfer; and
 - (ii) The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
- (b) The person concerned shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.

1.3 Under rule 192 of the implementing rules of the Statute entitled “Rules of Procedure and Evidence” (“the Rules”):

1. Transfer of a person in custody to the Court in accordance with article 93, paragraph 7, shall be arranged by the national authorities concerned in liaison with the Registrar and the authorities of the host State.
2. The Registrar shall ensure the proper conduct of the transfer, including the supervision of the person while in the custody of the Court.
3. The person in custody before the Court shall have the right to raise matters concerning the conditions of his or her detention with the relevant Chamber.
4. In accordance with article 93, paragraph 7 (b), when the purposes of the transfer have been fulfilled, the Registrar shall arrange for the return of the person in custody to the requested State.

1.4 Pursuant to article 8:71 of the General Administrative Law Act (*Algemene wet bestuursrecht*), if proceedings can be brought only before a civil court, the decision shall so indicate.

1.5 Article 59, paragraph 1 and sub-paragraph (a) of the Aliens Act 2000, insofar as it is applicable here, provides that, where dictated by public order, an alien not in possession of a valid residence permit shall be remanded in custody with a view to deportation.

1.6 Article 93, paragraph 1 of the Aliens Act 2000, insofar as it is applicable here, provides that a measure for the restriction or deprivation of liberty pursuant to article 8:1, paragraph 1 of the General Administrative Law which is taken in accordance with Chapter 5 of the Act shall be considered equivalent to a judicial decision.

Established facts and circumstances

2.1 The Applicant was transferred from a prison in the Democratic Republic of the Congo to the ICC pursuant to article 93(7) of the Statute in order to testify as a witness in the case of *The Prosecutor v. Thomas Lubanga Dyilo* (“the Lubanga case”).

2.2 After the Applicant had completed his testimony, the ICC was requested, pursuant to article 68 of the Statute, to take appropriate measures to protect the Applicant’s safety.

2.3 By decision of 5 August 2011 (ICC-01/04-01/06), Trial Chamber I of the ICC ruled on the request, wherein it stated the following, insofar as it is applicable here:

[...] The limit of the Court's responsibility under Article 21(3) (in this context) is to ensure that defence Witness 19 is provided with a real – as opposed to a merely theoretical – opportunity to make his request for asylum to the Dutch government before he is returned to the DRC. [...]

[...] The asylum application is directed at the Dutch authorities and it is for them to decide whether it is necessary to intervene in order to take control of the witness until such time as the application and any appellate phase in those proceedings are determined. The Chamber therefore orders the Registry, in consultation with the Dutch authorities, to file a report on the procedure that needs to be followed in order for the Host State to be able to discharge its international obligations pursuant to this asylum request before defence Witness 19 is returned to the DRC (unless the request is granted). [...]

[...] The Chamber stresses that if the Dutch Government considers that the applicant has presented a sufficiently meritorious asylum application to justify deferring his departure from the Netherlands, the Court will necessarily hand over the custody of defence Witness 19 immediately to the Dutch authorities, particularly given the ICC will have no continuing power to detain him. [...]

2.4 By the subsequent order issued by Trial Chamber I of the ICC on 15 August 2011 (ICC-01/04-01/06), the Chamber decided the following, insofar as it is applicable here:

[...] As set out by the Chamber, it is for the Dutch authorities to decide whether, according to its national and international obligations, it will take control of the witness until such time as the asylum application and any appellate phase in those proceedings are determined. The Host State is urged to consider without delay whether it intends to defer defence Witness 19's departure from the Netherlands. The Registry is to consult with the Dutch authorities on the transfer of the witness into the "control" of the Netherlands if the Host State intends to defer his departure pending its decision on the asylum application. [...]

2.5 Finally, in the order issued on 1 September 2011 (ICC-01/04-01/06), Trial Chamber I of the ICC decided the following, insofar as it is applicable here:

[...] As the Host State has now informed the Chamber that it does not intend to defer the transfer of defence Witness 19 back to the DRC and it has declined to consult with the Registry on the transfer of custody to the Host State, the Request for reconsideration of the Chamber's Implementation Order is moot. [...]

2.6 The note verbale of the Registry of the Court dated 19 October 2011 (ICC-01/04-01/06), which was submitted to this court by the Respondent by letter of the same date, states the following, insofar as it is applicable here:

[...] On the specific matter of the detained witnesses, the Registrar hereby confirms the position that the four detained witnesses, one attached to the case *The Prosecutor vs. Thomas Lubanga Dyilo* (ICC-01/04-01/06), and the remaining three attached to the case *The Prosecutor vs. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), are currently detained under the exclusive authority of the Democratic Republic of the Congo ("DRC") following the requests of both Trial Chamber I and Trial Chamber II, respectively, to facilitate their viva voce testimonies at the seat of the Court, pursuant to Article 93(7) of the Rome Statute. These persons are currently detained under the custody of the Court, pursuant to Rule 192(2) of the Rules of Procedure and Evidence of the Court and to an agreement between the Congolese authorities and the Court. [...]

[...] For its part, Trial Chamber I has ordered the Registry to also consult with the Dutch authorities on the transfer of the witness into the control of the Host State pending its decision on the asylum application. With this background into consideration, the Registrar further confirms that the ICC judges have, at no stage, issued any decision requesting the Host State to assume the custody of the four detained witnesses. The Registrar further confirms that, to date, the ICC has not made any request to the relevant Dutch authorities to assist with the transportation of the detained witnesses to a location of departure for the purposes of returning the four detained witnesses to the Democratic Republic of the Congo. [...]

2.7 The Applicant is in custody at the United Nations Detention Centre in Scheveningen.

The court rules as follows:

3.1 The first point at issue is whether this court has jurisdiction to entertain the appeal.

3.2 The District Court has jurisdiction only over those cases referred to in article 93, paragraph 1 of the Aliens Act 2000. Not at issue is the fact that the Applicant is not subject to any of the measures contemplated at article 59 of the Aliens Act 2000.

3.3.1 At issue is whether the Applicant's detention is equivalent to a measure depriving him of his liberty within the meaning of article 59 of the Aliens Act 2000.

3.3.2 In sum, the Applicant submits the following: The ICC ruled that the Applicant must have access to the Dutch asylum process and indicated that the Applicant must be transferred to the Dutch authorities pending the outcome of his asylum proceedings. The Applicant argues that, since the Dutch authorities requested the ICC to remand the Applicant in custody pending the outcome of the asylum proceedings, he is in fact being detained at the behest of the Dutch authorities. The Applicant contends that his detention pending the outcome of his asylum application can be considered to be a measure depriving him of his liberty within the meaning of article 59 of the Aliens Act 2000.

3.3.3 It follows from the passages quoted *supra* from decisions of Trial Chamber I that that Chamber instructed the Registry of the ICC to consult the Dutch authorities on the matter of the Applicant's transfer. The fact that the Dutch authorities refused to cooperate with a view to such transfer is undisputed. Furthermore, it does not appear that the ICC may unilaterally compel the Dutch State to cooperate in the transfer. The fact that the Dutch State declared its willingness to consider whether the Applicant is entitled to protection and requested the ICC to remand the Applicant in custody does not signify that that detention was henceforth under the authority and/or control of the Dutch authorities. It is clearly apparent in the note verbale from the Registry of the ICC dated 19 October 2011 that the Applicant remains in the custody of the ICC pursuant to rule 192(2) of the Rules. Contrary to the Applicant, this court sees no reason to doubt the correctness of the content of the memorandum or to consider that it was produced under undue pressure from the Dutch State. This court therefore finds no reason to reopen the investigation in order to hear witnesses or to instruct the Respondent to submit additional information on this matter.

3.3.4 For the aforementioned reasons, this court holds that the Applicant's detention cannot be equated to a measure depriving him of his liberty within the meaning of article 59 of the Aliens Act 2000.

3.4 In light of the foregoing, this court declares that it has no jurisdiction to entertain the appeal lodged on 26 September 2011 by the Applicant and the claim for damages presented therein.

3.5 This court finds no reason to include in this decision the indication referred to in article 8:71 of the General Administrative Law Act. Given that the Applicant is under the control of the ICC, he may petition the ICC in any event. For this reason, it cannot be considered that the Applicant's application can be submitted only to a civil court, even if it had jurisdiction.

3.6 This court finds no reason to rule on the apportionment of costs.

III. Decision

The District Court

in its ruling

holds that it has no jurisdiction to entertain the appeal of 26 September 2011 and the claim for damages presented therein.

Done by Judge C. Vogtschmidt, presiding, Judge J. de Gans and Judge E.A. Poppe-Gielesen, in the presence of Mr C.L. Heins, Registrar.

Registrar,
[signed]

Presiding Judge,
[signed]

Decision rendered in a public hearing on 27 October 2011.

Remedy

Under article 95 of the Aliens Act 2000, an appeal against this decision may be lodged before a higher court. In accordance with the opening words of article 84 and its sub-paragraph (d) of the Aliens Act 2000, no separate appeal to a higher court is available in respect of a decision on the claim for damages. The time limit for the filing of a notice of appeal shall be one week from the transmission of this decision. A copy of this decision must be appended to the notice of appeal. The appeal shall set out one or more grounds for appeal against this decision. It shall be addressed to the Council of State, Administrative Law Division, Appeals in Alien Affairs, Postal Box 20019, 2500 EA The Hague. For more information about how to lodge an appeal, see www.raadvanstate.nl.

Copy sent on: 28 October 2011

[stamp]: Certified copy
The Registrar of the District
Court of The Hague
[signed] p.p.