Judgement of the Raad van State, 21 February 1995

Raad van State

No. R02.93.2274
Date decision: 21 February 1995.

AFDELING BESTUURSRECHTSPRAAK

Judgement in the decision between:

Jose Maria Sison, of Filipino nationality (Appellant)

and

the State Secretary of Justice (Defendant).

In a decision dated 13 July 1990, the defendant rejected the requests of appellant to be admitted as a refugee and to be granted a residence permit.

In a letter of 6 August 1990, received by defendant on 11 August 1990, appellant submitted a request for reconsideration to the defendant.

No action was taken on this request within the three-month period provided for in article 34, second paragraph of the Aliens Law so that this request following that provision must be considered as having been rejected.

Against this fictive rejection, the appellant on the basis of the Aliens Law made an appeal in writing dated 6 December 1990, received by the Raad van State on 10 December, to the rechtspraak department of the Raad van State.

In a decision dated 17 December 1992, No. R02.90.4934, RV 1991, 12, the Afdeling Rechtspraak nullified the decision of the defendant. This present decision relates to said decision.

In a decision dated 26 March 1993, No. 8702.16.0027, the defendant, deciding on the request of the appellant for reconsideration, again rejected this. The decision (beslissing) is relates to this judgement (uitspraak).

Against this decision, the appellant made an appeal in writing dated 23 April 1993, received by the Raad van State on 26 April 1993, to the Afdeling Rechtspraak of the Raad van State on the basis of the Aliens Law.

Appellant justified his appeal in writing dated 25 May 1993. This letter relates to this decision.

Upon request, the defendant submitted an appeal in writing dated 17 February 1994.

Appellant has submitted in writing a further memorandum dated 29 September 1994, supplemented in writing on 30 September 1994 and 18 November 1994.

The dispute was handled on 12 January 1995 in a public hearing of the Afdeling Bestuursrechtspraak, in which the appellant himself and represented by R.D. van As of Nieuwegein, and the defendant, represented b y Mr K. Bravenboer, employee of the department appeared and argued further their positions.

At the same time, the Minister of Foreign Affairs, represented by Mr. D.M. Vinkeles Melchers, employee of the ministry, was heard during the hearing.

<u>In the law</u>

On 1 January 1994 the Law of 16 December 1993 became effective, amending the Law on legal organizations, the General Administrative Law, the Law on the Raad van State, the Appeals Law, the Law on Bureaucrats 1929 and other laws, as well as retracting the Law on administrative decisions of the state (completing the first phase of the reform of legal organization) Stb. 1993.650. From the transitory provisions laid down in part 6, article I of this law follows that the dispute must be handled applying the law that was valid before 1 January 1994, except for to the provisions in article 8:75 of the General Administrative Law concerning the costs of the handling the case.

I. Regarding the appeal of the appellant in so far as this concerns the rejection of his appeal for reconsideration of the refusal to admit him as refugee.

Following article 15, first paragraph of the Aliens Law, foreigners who come from a land where they have valid reasons to fear persecution because of their religious or political belief or their nationality or because they belong to a certain race or to a certain social group can be admitted as a refugee.

It is stated in the second paragraph of this article that admission cannot be refused except on serious reasons in connection with the general interest, in case the foreigner because of the refusal is immediately forced to go to a land as meant in the first paragraph.

In the abovementioned decision of 17 December 1992 the Afdeling rechtspraak nullified the fictive rejection by the defendant of the request of the appellant for reconsideration of the refusal of admission as refugee and the granting of a permit to stay because, according to its judgment, the defendant did not sufficiently show which supposed acts of the appellant led him to his conclusion that article 1(F), introduction and under C of the Treaty of Geneva of 28 July 1951 regarding the status of refugees as amended by Protocol of 31 January 1967 of New York, from hereon referred to as :The Treaty, is applicable to the appellant.

In the contested decision, the defendant again (in zaak voorzien) and now decided that the appellant is not entitled to protection under the provisions of the Treaty, on the grounds defined by article 1(F), introduction and under a and b of this Treaty. The defendant primarily based this decision on his decision to refuse the appellant admission due to serious reasons in general interest on the basis of Article 15.

The decision will first of all examine if defendant on the basis of this interpretation can refuse admission as a refugee on grounds of article 15, second paragraph of the Aliens Law.

Following article 1(F) of the Treaty, the provisions of this Treaty are not applicable to a person of whom there are serious reasons to suppose that:

a. he has committed a crime against peace, a war crime against humanity as described in the international agreements which have been created to make definitions in connection with these crimes;

b. He has committed serious nonpolitical crimes outside the land he has fled from before he was admitted to this land as a refugee;

c. He is guilty of having committed crimes which are contrary to the objectives and principles of the United Nations.

In support of his view that the appellant is not entitled to the protection of the Treaty, on the basis defined by article 10, introduction and under a and b of this Treaty, the defendant in the contested decision asserted the following:

From a letter of the Internal Security Service (BVD) of 3 March 1993 it appears that the appellant is the present chairman and leader of the Communist Party of the Philippines. Furthermore, the military arm of the CPP, the New People's Army, is under the Central Committee and, therefore, the appellant.

The Internal Security Service has ascertained that the appellant is in fact guiding the NPA. The NPA -- and those connected to it -- is responsible for the great number of terror acts in the Philippines.

As example of the so-called terror acts, the defendant in the contested decision has given:
--the murder of 40 inhabitants (mainly helpless women and children) in the village of Digos in the island of Mindanao on 25 June 1989;
--the shooting of 14 persons among them children in the village of Dipalog in August 1989;
--the execution of four inhabitants in the village of Del Monte on 16 October 1991.

Furthermore, the defendant has pointed out to the purge that took place in 1985 among the members of the CPP and NPA of which an estimated 800 members of these organizations were murdered without due process (trial).

Above all, the Internal Security Service, according to the defendant, has ascertained that the CPP/NPA has maintained contacts with terrorist organizations spread out all over the whole world, while there have also been observations of personal contacts between appellant and representatives of similar organizations.

In support of his view that the NPA is guilty of violent acts, the defendant in the contested decision at the same time has pointed to a publication of Amnesty International with the title "The killing goes on", dated February 1992, as well as to press publications on which this is based.

In the defendant's opinion the terror acts committed under the appellant's responsibility are to be considered as crimes against humanity as intended (defined) in article 1(F), introduction and under a of the Treaty. It concerns acts which is opposed by what the UNHCR calls "international instruments relating to article 1F(a) of the 1961 Convention" in Annex VI of the Handbook on Procedures and Criteria for Determining Refugee Status. In particular, according to the opinion of the defendant, these heretofore mentioned acts can be considered as a violation of article 3(a) of the Treaty of Geneva of 12 August 1949. Defendant further pointed to the International Convention on civil and political rights of 19 December 1966 and the International Treaty against Torture and other Inhuman or Cruel Acts or Punishments of 10 December 1984.

Above all, as the defendant put it in the contested decision, the terror acts committed on the authority and under the responsibility of the appellant can be considered as nonpolitical acts, were committed outside the country of flight as intended in article 1(F), introduction and under b, of the Treaty. The here intended acts are, according to the opinion of the defendant, of exceptionally serious nature and are not related in his view to the political objective for which they were committed.

The Afdeling applying article 77, third and fourth part of the law on the Raad van State has studied productions 27 to 34 of the departmental dossier, as well as the letter contained in the contested decision of the BVD addressed to the defendant of 3 March 1993 based on operational material.

The Afdeling judges the foregoing, as follows:

The Afdeling considers on the basis of the mentioned materials as perfectly assumable (voldoende aanemelijk) that the appellant in the period of the contested decision was the chairman and leader of the CPP. Further the pieces justify the conclusion that the NPA is under the Central Committee of the CPP and that the appellant from the Netherlands in the

period of the contested decision at least tried to in fact give guidance to the NPA. That the NPA is responsible for a great number of terror acts in the Philippines the Afdeling considers on the basis of public sources, like the report of Amnesty International, perfectly assumable. The pieces offer further points to anchor on for the judgment that the appellant has tried to give direction to activities committed in the Philippines, such as earlier mentioned under the responsibility of the NPA. It also comes forward in the pieces that there are points to anchor on for the correctness of the supposition of the defendant that the CPP/NPA maintains contacts with terrorist organizations spread all over the world and that there have been personal contacts between appellant and representatives of such organizations. Those pieces, however, do not offer sufficient evidence for the fundamental judgment that the appellant to that extent has given direction and carries responsibilities for such activities that it can be held that there are serious reasons to suppose that appellant in the sense of the abovementioned article parts have carried out those mentioned crimes. Hereby the Afdeling has emphatically taken the view that similarly as the Afdeling has already carefully weighed in the abovementioned decision of 17 December 1992, article 1(F) of the Treaty must be restrictively taken.

Therefore, the Afdeling is of the judgment that defendant on the basis of the abovementioned pieces cannot suppose that appellant can be denied the protection of the Treaty. From here follows that the primary motivation produced by the defendant to deny on the basis of article 15, second part, of the Aliens Law admission as refugee is insufficient.

Considering the foregoing, the Afdeling is of the judgment that the contested decision on this point cannot be maintained.

It turns out that in the contested decision the defendant further is of the standpoint that even in case it would be supposed that the treaty is applicable to the appellant and the appellant becomes considered as a refugee, then still on the basis of article 15, second part of the Aliens Law the appellant can be refused admission here as a refugee. Upon this the defendant in the contested decision subsidiarily supposed that the activities that by and on the authority of the appellant have and have been launched shall damage a serious interest of the Dutch state, to wit the integrity and credibility of Nederland as sovereign state, in particular in relation to its responsibilities to other states.

The Afdeling sees here the occasion first to find out if appellant has serious reasons to fear persecution in the Philippines.

The Afdeling judges the foregoing as follows.

Following article 1(A), under 2 of the Treaty it is valid to apply the Treaty in so far as it is here of importance to every person who because of valid fears of persecution because of his race finds himself outside of the land of which he is a national and who cannot or will not because of the above fears, calls on its protection.

In the earlier mentioned decision of 17 December 1992, No. R02.90.4934, the Afdeling has already stated that, partly considering the standpoint of the Representative in the Netherlands of the UN High Commissioner for Refugees reported in this decision, it considers that the defendant has not sufficiently taken into account that appellant aside from what is considered as normal legal prosecution and punishment will not undergo discriminatory persecution as well as unjustly heavy punishment, because the prosecuting as well as the punishing organ is of the opinion that appellant has committed the punishable acts from political motives. That the appellant is (internationally) well-known would offer

sufficient guarantee for an honest process and the protection of the Filipino authorities is considered by the Afdeling as not convincing in any way.

The Representative of the UN High Commissioner for Refugees has in writing dated 11 January 1994 made use of the opportunity for him to make his viewpoint known regarding this case.

The Representative has made it known that he sees no reason to change the standpoint he had earlier taken, considering that the appellant has serious grounds to fear persecution in the Philippines.

Amnesty International in a letter dated 30 June 1993 in reaction to the contested decision of 26 March 1993 made it known that there is in the meantime no change in the standpoint it had already taken in the letter of 17 October 1990 to the Ministry of Justice. Amnesty International therefore declared the standpoint that still think that the appellant, in case he would be forced to return to the Philippines would definitely risk becoming a victim of torture, extrajudicial execution or disappearance.

On the basis of the facts made known to the Afdeling, it determines that the appellant has valid reasons to fear persecution and therefore must be considered a refugee in the sense of article 1(a), under 2 of the Treaty.

It does not detract from the decision of the Afdeling that, as shown by a report of the Ministry of Foreign Affairs of 4 March 1993, with the withdrawal of the so-called Anti-Subversion Law on 22 September 1992, the CPP has been legalized and membership in the CPP is no longer punishable. Even less can it lead to another judgment when the Filipino authorities say repeatedly that they are ready to take every security measure that the appellant considers necessary when he lives in the Philippines. Additionally in this, the Afdeling thinks that it considers it not assumable assume that the authorities, despite their stated preparedness for this, considering the confused situation in the Philippines are in a position to offer complete protection to the appellant, in case there is a plan by the armed civilian groups or paramilitary groups to execute the appellant.

Considering the foregoing, the Afdeling shall consequently examine if the (secondary) justification given by the defendant to refuse the appellant admission as refugee on grounds of article 15, second part of the Aliens Law, is sufficient.

Although the Afdeling recognizes the interests stated by the defendant, with attention to the proofs it offers for personal contacts between the appellant and representatives of terrorist organizations, this cannot lead--in case it is not guaranteed that appellant can be admitted to a land other than the Philippines--to the justified appeal to article 15, second part, of the Aliens Law. What stands in the way of this is that a similar refusal to admit the appellant must be judged as contrary to article 3 of the European Treaty for the protection of human rights and the fundamental rights, hereon called: the EVRM.

Following article 3 of EVRM no one may be made to suffer torture nor inhuman or humiliating treatment or punishment.

The Afdeling thinks that the appellant, on grounds of the above considerations, namely in connection with the refugee status of the appellant, upon his return to the Philippines faces the real danger of having to undergo treatment contrary to article 3 of EVRM.

The Afdeling comes to the conclusion that the real danger of which the appellant fears, regarding inhuman or humiliating treatment or punishment on grounds of a "fair balance" as stated by the European Court for Human Rights in its judgment of 7 July 1989, RV 1989, 94 in the Soering case. Once there exists, according to the conclusion reached, real danger of inhuman or humiliating treatment or punishment exists, there is no space for a further balancing of interest between the interest of the appellant and the interest of the Dutch state stated by the defendant by non-admission, taking note of the absolute character of the prohibition in article 3 of the EVRM, which is stressed in the same decision in the Soering case.

From here follows that the contested decision on this point cannot also be maintained.

Considering all the foregoing the Afdeling is of the opinion that the contested decision, regarding this part, is contrary to the generally justice-conscious (rechtsbewustzijn) principle of proper administration that a decision must be based on and for the concerned recognizable justifications.

II. Regarding the appeal of the appellant in so far as that it is directed against the refusal of his request for review of the refusal to grant him a permit to stay.

Considering that this part of the contested decision can be first properly judged after it has been made known which decision in the end has been taken on the request of the appellant to be admitted as refugee and on what ground this decision rests, the Afdeling sees the sufficient occasion in the nullification of the refusal to admit the appellant as refugee--on the same grounds--to proceed to the nullification of the refusal to grant a permit to stay to the appellant.

Further the Afdeling considers that there are grounds present to apply article 8:75 of the General Administrative Law.

Decision:

The Afdeling bestuursrecht of the Raad van State;

Dispensing justice in the name of the Queen:

1. Nullifies the decision of the defendant of 26 March 1993, nr. 8702.160027, with which the request for reconsideration of the refusal to be admitted as refugee and a permit to stay is rejected;

2. Orders the State Secretary of Justice to pay the costs incurred by the appellant in connection with the handling of the case... The total amount must be paid to the Secretary of the Raad van State (girorekening 507590), under mention of case number R02.93.2274, by the State of the Netherlands (the Ministry of Justice).

So decided in Den Haag on 21 February 1995,
By mr. P.J. Boukema, chairman, mr. P. van Dijk and mr. L. Dorhout, members, in the presence of mr. H.J.C. van Geel, official of state.

w.g. Van Geel
State official

w.g. Boukema
Chairman

for a true copy,

the Secretary of the Raad van State,
for this,

No. R02.93.2274/61-125
Sent: