

**District Court, Amsterdam
General Administrative Law Division
Multiple-Judge Chamber**

JUDGMENT

in the action, case reference number AWB 04/4576 BESLU

of

Ch. F. Koenigs, residing in Amsterdam,
Plaintiff,
represented by G.J.M. Cartigny,

against

The Secretary of State for Education, Culture and Science, based in The Hague,
Defendant,
represented by A.B. van Rijn / H.C. Grootveld.

1. HISTORY OF THE ACTION

On 26 September 2004, the District Court received a writ of appeal against the Decision by the Defendant dated 18 August 2004 (hereafter ‘the challenged Decision’).

The investigation was concluded at the hearing of 20 January 2006.

2. LEGAL CONSIDERATIONS

2.1

In a letter of 18 March 2002, the Plaintiff asked the Defendant for return of paintings and drawings formerly owned by her grandfather, Frans W. Koenigs. The Defendant submitted this request to the Advisory Committee on Restitution Requests for Cultural Items and the Second World War (hereafter ‘the Restitution Committee’) for its advice. In a letter of 26 November 2002, the Defendant also asked the Restitution Committee to include in its consideration the request by the Plaintiff, dated 15 October 2002, for return of the painting *Cadmus zaait Drakentanden*, by P.P. Rubens, held in the collection of the Rijksmuseum in Amsterdam. On 3 November 2003, the Restitution Committee advised the Defendant to reject both of the Plaintiff’s requests submitted to the Committee. In a letter of 10 December 2003, the Defendant decided to follow this advice and not to comply with the request for return of the items. For the reasoning underlying the decision, the Defendant referred to the considerations in the opinion from the Committee dated 3 November 2003.

2.2

In the challenged Decision, the Defendant stated that the objection lodged against it by the Plaintiff was clearly inadmissible. In so doing, the Defendant expressed the view that the letter of 10 December 2003 could not be regarded as a public law transaction, so that there was no decision in the sense of Section 1:3 of the Dutch General Administrative Law Act ('GALA'). The Defendant considered that, with requests such as the present one, what was involved was an issue of property rights and therefore a private law matter.

2.3

The Plaintiff submitted the following allegations in the appeal:

- the mere involvement of the Advisory Committee on restitution requests for cultural items and the Second World War brought the Defendant's Decision within the ambit of State law and administrative law;
- The Defendant's opinion implied that protection of the rights of the citizen in relation to the government would fall away if ownership was at issue;
- the Secretary of State had amended the State policy on restitution requests; this confirmed that the dispute was within the ambit of public law;
- the work of the Restitution Committee was of a public law nature.

2.4

The Defendant maintains the position that he had not been using a public law power in order to take decisions that were susceptible to objection and appeal, within the meaning of the GALA, when deciding on the return of these cultural items. In his view, the State was appearing here in its private law capacity as possessor/owner of the relevant cultural items. The return of cultural items in cases other than that of the Plaintiff had been decided on the basis of this private law power.

The Court's findings are as follows.

2.5

After the war, the *Stichting Nederlandsch Kunstbezit* (SNK) gave back cultural items, which had ended up in Germany through looting or confiscation, and had then been brought back here, to their owners. The SNK, set up by the Department of Education, Arts and Sciences and the Department of Finances in 1945, managed the recovered artworks as a special department of the *Nederlands Beheers Instituut* (NBI), and arranged for any returns to the lawful owners. The SNK was disbanded officially on 1 November 1952. The remainder of the artworks recovered, particularly from Germany, after the Second World War, formed the *Nederlands Kunstbezitcollectie* (NK Collection). Since then, this collection has been under the management of the State government and is presently housed at the *Instituut Collectie Nederland* (ICN). This Institute is a part of the Ministry of Education, Culture and Science ('ECS').

2.6

In 1997, the Secretary of State for ECS instructed the Origins Committee - also known as the Ekkart Committee - to carry out a sample investigation into the origins of a selection of artworks. Thereafter, under the responsibility of the Secretary of State, the project bureau 'Origins Sought' was set up on 1 September 1998, with the task of tracing the original owners, as far as this was possible nearly 50 years after the

end of the war. In April 2000, the Ekkart Committee issued a report 'Origins Sought', which included a number of recommendations. In response to these recommendations, the Secretary of State indicated, in a letter of 29 June 2001 (Lower House papers, 2000-2001, 25839, no. 26), that the government was opting not for a purely legal approach but rather for a policy-based approach to the issue of restitution. What seemed appropriate in this context was the setting up of an advisory committee to consider individual requests for restitution, partly also in the light of international developments in this area, as set out in the results of the conference which took place in Washington, debating the Second World War holdings (the 'Washington Principles').

2.7

The Restitution Committee was set up by a Decree of 16 November 2001 by the Secretary of State for ECS (State Bulletin of Acts and Decrees, 21 December 2001, no. 248 / page 4). Under Article 2.1, of the initiating Decree, the Committee's task is to advise the Minister of ECS, if he asks, on decisions to be taken in response to requests for return of artworks which were involuntarily removed from the possession of the original owner through circumstances directly associated with the Nazi regime and which are now in the possession of the Kingdom of the Netherlands. The Restitution Committee has been performing this advisory task since 1 January 2002. In response to positive opinions from the Restitution Committee, the Minister has decided to proceed with restitution of artworks to those entitled to them in a number of cases.

2.8

The Court's view as regards the issue of whether the decision for restitution of artworks belonging to the NK Collection is based on a private law or public law power is as follows. The return by SNK of goods looted or confiscated during the war was based on Royal Decrees pronounced during the Second World War, and particularly the RD of 17 September 1944, adopting the Decree on the restoration of legal system (SBAD E100), which set up the Council for the Restoration of the Legal System. While the 2002 Annual Report of the Restitution Committee (page 13) shows that the Ekkart Committee was of the view in 2001 that the SNK's decisions should not be classified as restoration of rights, because that power was entrusted by mandatory legislation to the Council for Restoration of the Legal System, the decisions for restoration by the (governmental) bodies concerned at that time must, in the view of this Court, be viewed as arising from the public duty of recovering and returning possessions that had been lost during the war to those who were entitled to them. It is established that the return of goods at that time was not based on any statutory provisions apart from those mentioned above and the other legislation during the war years, mentioned by the Plaintiff's counsel during the hearing.

2.9

In the view of the Court, it cannot readily be inferred that the return of works of art in the possession of the State - which, in a number of cases, were recovered from other countries sometimes well after the end of the war - has changed from being a public law power to a private law power merely through the passage of time.

Partly in the light of international developments, the results of investigation into looting and restoration of rights has since 1997 been the subject of exhaustive debate in parliament. In the context of these debates, the Prime Minister and the Ministers of

General Affairs, of Health, Welfare and Sport and of Finances stated on 21 March 2000 (Lower House, session 1999-2000, 25839, no. 13) that the State was again to take over dealing with claims from entitled parties (or their relatives), arising from the restoration of rights, subject to certain conditions. For reasons of courtesy, these cases would not be dismissed on appeal simply because of prescription through the passage of time. On 18 April 2000, the Lower House expressed its support for the government standpoint reflected in that letter. The Court infers from this that, even now, the public duty of restoration of rights is of prime importance in cases such as the one under consideration, since only claims for restoration of rights arising in this way are submitted to the Restitution Committee. Against this background, the challenged refusal to return the paintings and drawings formerly in the possession of F.W. Koenigs - even if, as alleged by the Defendant's counsel at the hearing, these cultural objects have in the meantime become the property of the Dutch State by operation of prescription - cannot be classified as including simply a refusal to enter into a civil law transaction. The refusal must be regarded as being covered by the principally public law nature of the way in which the Defendant nowadays has to deal with his power to offer restoration of rights, following international standards and the wishes of parliament. In the Court's opinion, this is not adversely affected by the fact that it is not set out in any statutory framework, unlike the institutional decisions of the Restitution Committee.

2.10

Nor does the Court share the allegation made by the Defendant's counsel during the hearing, that the consultation between the Secretary of State and the Lower House on 22 November 2001 (Lower House, session 2001-2002, 25839, no. 278, p. 8) shows that both the Defendant and parliament intended to place the restitution policy within a civil law framework. The Court finds the mere assertion by the Secretary of State - that requests for return are lodged with the State, which is deemed to be the owner - is not sufficient for a finding that the main consideration of government and parliament was not the public duty of the State to offer restitution once more.

2.11

The interpretation of the legal nature of the challenged decision, given above, is also reflected, in the view of the Court, in the way in which the Defendant takes decisions on requests for return of artworks. In this context, the Court would refer specifically to the advisory role of the Restitution Committee. Based on the initiating Decree, this Committee carries out its advisory role based on appropriate State policy, according to standards of reasonableness and fairness. The explanation accompanying the initiating Decree indicates that the government had opted for an approach to the restitution issue that was not purely legal but rather policy-oriented, with the policy parameters within which the Committee gave its opinions being defined as the relevant policy guidelines established by the government. This approach leads to the conclusion that the opinions given by the Restitution Committee are not confined to mere establishment of the situation on ownership of cultural items in a civil law sense. This opinion is also confirmed when one takes note of the reasoning used by the Restitution Committee in its assessments of requests for return. The test used, as to whether there was an involuntary loss of possession, is not thereby applied in strict civil law terms, and the Court infers from this reasoning that considerations of a moral and policy-oriented nature also clearly have a part to play in these assessments.

2.12

From the perspective of the protection of rights, the Court considers that it is desirable that the Court called on to decide these matters should take this testing framework into account. Bearing in mind the testing framework, as described, for the advisory and decision-making processes on requests for return, the Court has reached the conclusion that this appears to be readily comparable with an administrative law assessment within the context of the GALA. The assessment by the Administrative Court does, after all, have a broader scope for consideration than the mere issue of ownership under civil law. In addition, the Administrative Court is an easier forum for resolution of disputes for the citizen to approach, because of the absence of obligatory procedural representation and a procedural risk. This also fits in with the aims of the restitution policy, as expressed in the Washington principles, of not making it too difficult for the interested parties to realise their claims.

2.13

The Court does not agree with the comment, expressed in the challenged Decision, that by international standards what is involved here is also the regulation of the civil legal system. According to the Defendant, what is involved here is not an administrative law involvement by the government with citizens, but the restoration of citizens' property rights, even the relationship with the government which has taken on possession of these artworks after they have been recovered (in fact in the absence of any alternative). As shown in our earlier findings, the Court is however of the view that the State has recovered these artworks and that it is managing them for return to parties who may be entitled to them, and deciding on possible return, not acting principally from a civil law position of ownership/possession but by virtue of its public duty. To this extent, therefore, the position of the State is different from that of ordinary citizens. This interpretation also fits with the State and the Restitution Committee being able to fulfil a mediative role towards restoration of rights in the event of any disputes arising between private parties, if so desired, under Article 2.2 of the initiating Decree. The Court also finds support for its interpretation in the Resolution of the European Parliament on a legal framework for the free traffic within the internal market of goods whose ownership is likely to be contested (2002/2114(INI)) and the associated report of the Commission on Legal Affairs and the Internal Market of 17 December 2003. The explanation to the resolution in that report refers to the acknowledgment in numerous post-war treaties that states are obliged to recover their looted property, even if it has passed on to ostensibly innocent purchasers, and also to ensure that items in limbo are returned to their countries of origin, with a continuous effort being made to that end. Under international law, therefore, states are managers of the looted possessions and not owners, or so the explanation says. The Court considers the assertion, used in the defences, that return to the entitled parties is also often viewed internationally as the organisation of civil legal system, as being untenable in the light of this explanation.

2.14

The final conclusion from what has been said above is that the refusal by the Defendant to return the artworks is a public law transaction and is therefore a decision within the meaning of Section 1:3 of GALA, so that the Defendant was wrong to have considered the objections lodged against this as being clearly inadmissible.

The Court will declare the appeal to be well founded and will quash the decision on the objections, of 18 August 2004.

The Defendant will still, therefore, have to make a decision on the merits of the objections. The Court will impose a time limit for this.

There are grounds for ordering the Defendant to pay the procedural costs (1 point for the appearance at the hearing) and to refund the Court fees.

3. DECISION

The District Court:

- declares the appeal to be well founded;
- quashes the decision of 18 August 2004 and orders the Defendant to make a new decision on the writ of objections within 12 weeks;
- orders the Defendant to pay the costs of the case on the part of the Plaintiff, estimated at € 322.00 (three hundred and twenty-two euros);
- determines that the Defendant (the State of the Netherlands) should compensate the Court fees paid by the Plaintiff, amounting to € 136.00 (one hundred and thirty-six euros)

Issued by Judge M. de Roij, Chairman, and Judges J.J. Bade and B.J. Schueler, in the presence of P.J. van Vliet, Clerk of Court, and published on

[stamp, partly illegible: ?? June 2006]

Clerk of the Court
(not available for signing)

Chairman
[signature]

An interested party and the administrative body may lodge a higher appeal against this decision within six weeks after it is sent out, with the Administrative Justice Department of the Council of State in The Hague /The Central Council of Appeals in Utrecht.

Copy sent out on: 07 JUNE 2006

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