TRANSLATION

AN ORDER OF THE SUPREME COURT
made on Wednesday, 6 November 2013

Case 105/2013
(1st Division)

The Director of Public Prosecutions
vs.
T
(Attorney Bjørn Elmquist, appointed)

In the lower courts, Orders were made by the Court of Roskilde on 19 November 2012 and the 8th Division of the Eastern High Court on 22 March 2013.

Five judges participated in the decision: Børge Dahl, Poul Søgaard, Jytte Scharling, Lars Hjortnæs and Oliver Talevski.

The appeal was heard in oral proceedings.

Requests etc.
The Appellant, T, has requested reversal of the Order, so that extradition cannot be carried through.

The Respondent, the Director of Public Prosecutions, has requested that the Order be upheld.

In his Notice of Appeal of 28 May 2013, T filed a request primarily to have the Order of the High Court set aside and for remission of the case, referring to the claim that he had not been given permission to present a number of witnesses during the High Court's oral hearing of the Appeal. T requested in the alternative that the Order be reversed so that extradition could not take place.

By the Supreme Court's Order of 27 June 2013, T's primary request to have the High Court's Order set aside and the case remitted was not allowed, as the Supreme Court found

no proof of any errors in the High Court's hearing of the case that might constitute grounds to make such a decision.

By the same Order, T's request for permission to produce a number of persons as witnesses for the Supreme Court's hearing of the Appeal was not allowed. The Supreme Court did not find any basis on which to presume that it would not be possible to illustrate the relevant conditions in Rwanda adequately through documentary evidence, including reports from recognised organisations, declarations by authorities and other material that the parties had produced or would produce during the Supreme Court's hearing of the case.

Supplementary statement of facts

New legislation in Rwanda

The Rwandan Director of Prosecutions has reported in a letter of 14 October 2013 to the Danish Director of Public Prosecutions that since its request for extradition of 29 February 2012 to the Danish authorities, Rwanda has introduced new transfer legislation (Transfer Law No. 47/2013 of 16 June 2013), new criminal procedure legislation (Criminal Code of Procedure Law No. 20/2013 of 24 May 2013) and a new penal code (Organic Law No. 01/2012/OL of 2 May 2012 instituting the Penal Code). The new legislation will be applied in case T is extradited to Rwanda. The new Transfer Law does not contain any amendments to the substantive or procedural provisions on which the request for extradition of 29 February 2012 was founded. The Indictment against T will be updated with a reference to the provisions of the new Penal Code that correspond to the provisions according to which he was previously charged. However, there will be no substantive alterations of the charges or the factual description of the elements of the crime as a consequence of Rwanda's new Penal Code.

The extradition decision made by the Ministry of Justice

The concluding paragraph of the decision to extradite T made by the Ministry of Justice on 29 June 2012, states inter alia:

> "5. Conclusion
>
> 5.1 In conclusion, the Ministry of Justice finds that T may be extradited in accordance with section 2A, first sentence, of the Extradition Act, for prosecution in Rwanda for the offences referred to in the request for extradition from the authorities of Rwanda …

5.2 The extradition of T for prosecution in Rwanda will be carried through on the following terms, as provided by section 10 of the Extradition Act

1) T may not be convicted in Rwanda – or be transferred further to a third country – for other crimes committed before the extradition than those for which he is extradited, unless:
   a) The Ministry of Justice permits so under section 20 of the Extradition Act,
   b) He has abstained from leaving Rwanda even if he has been able to do so without any hindrance for 45 days, or
   c) After having left Rwanda he has returned voluntarily to Rwanda.
2) T may not without permission from the Ministry of Justice be subjected to prosecution before a special tribunal, i.e. a tribunal with judiciary powers established exclusively for the purpose of the trial of T.
3) A death penalty may not be enforced for the crimes in question.

…"

Decision of the Refugee Appeals Board of 21 December 2012
By a decision of 21 December 2012, the Refugee Appeals Board upheld the decision made by the Immigration Service on 1 June 2012, withdrawing T's residence permit granted under section 7(1) of the Aliens Act, which he had obtained using the name of T-T. The Board found it proved that he had obtained his residence permit by deceit.

Act 04/2012 on the termination of the Gacaca Courts
The Rwandan Organic Law No. 04/2012/OL terminating Gacaca Courts and determining mechanisms for solving issues which were under their jurisdiction of 15 June 012 include the following provisions:

"Article 2: Termination of the Gacaca Courts
Gacaca Courts charged with prosecuting and trying persons accused of the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between October 1, 1990 and December 31, 1994, are hereby terminated.
…

Article 8: Trial of an extradited person sentenced by Gacaca Courts
A person extradited to be tried in Rwanda who has been sentenced by Gacaca Courts shall be tried by a competent court as provided by the Organic Law. However, the decision of the Gacaca Court shall first be nullified by that court."

Transfer for prosecution in Rwanda and monitoring reports, etc.
The Referral Chamber of the International Criminal Tribunal for Rwanda decided on 28 June 2011 in the case against Jean Uwinkindi for the first time to transfer an accused for prosecution in Rwanda. As part of this decision it was determined that the trial of Uwinkindi and his conditions in prison had to be monitored continuously and the observations from this monitoring had to be reported to the International Criminal Tribunal for Rwanda. The Appeals Chamber of the International Criminal Tribunal for Rwanda upheld the decision to transfer Uwinkindi to Rwanda on 16 December 2011. Uwinkindi was transferred to Rwanda on 19 April 2012 and the monitoring reports for the period 4

July 2012 to 12 September 2013 filed to the International Criminal Tribunal for Rwanda about Uwinkindi's trial and conditions in prison have been submitted to the Supreme Court for its consideration of this present case. By a letter of 13 September 2013, Uwinkindi requested that his case be transferred back to the International Criminal Tribunal for Rwanda. The Prosecutors of International Criminal Tribunal for Rwanda have protested against this request by a submission of 25 September 2013. The Tribunal has not yet presented its decision.

The International Criminal Tribunal for Rwanda has, in continuation of the Uwinkindi case, made a decision to transfer other cases to Rwanda for prosecution. Thus, Bernard Munyagishari was transferred to Rwanda for prosecution in July 2013. In respect of Munyagishari, a monitoring report for July-August 2013 about his trial and conditions in prison has been submitted to the Supreme Court.

On 10 March 2013, Norway extradited Charles Bandora to Rwanda for prosecution. On 19 June 2013 a Norwegian police officer visited Bandora in the Kigali Central Prison, in which he awaits his trial and the police officer's report on this visit has been submitted to the Supreme Court.

The situation in Rwanda has otherwise been illustrated to the Supreme Court inter alia through a number of reports from international human rights organisations, articles published by scientists and newspapers. The Supreme Court has for instance received the Amnesty International Annual Report 2013 – Rwanda, World Report 2013 – Rwanda drawn up by Human Rights Watch, Country Report on Human Rights Practices 2012 – Rwanda published by the US Department of State, Justice Compromised – The Legacy of Rwanda's Community Based Gacaca Courts published by Human Rights Watch in May 2011, Justice in Jeopardy – The First Instance Trial of Victoire Ingabire published by Amnesty International in 2013, the article "Rwanda-Belgium: Witnesses "trained and prepared" to give false testimonies in genocide cases" from www.jambonews.net of 12 April 2013 and the European Parliament's decision of 22 May 2013 on Rwanda: the case concerning Victoire Ingabire.

The Supreme Court's reasons and findings

1. The Extradition Act and the issue of the case

Under the provisions of the Extradition Act (Consolidation Act No. 833 of 15 August 2005, the Act on Extradition of Offenders as later amended) a person who has been charged with a criminal offence in a country outside the Nordic countries or the European Union may be extradited from Denmark to the country in question "if the crime is punishable under Danish law with imprisonment for not less than one year", see sections 1(1) and 2A, first sentence (dual criminality). Extradition for prosecution for several criminal offences may however take place even if the requirements of section 2A are satisfied in respect of only one of the crimes, as set out in section 3(3). Extradition may not take place if "due to special circumstances" it may be assumed that the charge "is without a sufficient evidentiary basis" as set out in section 3(4) (the basis of evidence). Extradition may moreover not take place in case there is a risk that due to his origin or political beliefs or due to political conditions otherwise the person concerned will be exposed to persecution aimed at his life or freedom or is of a serious nature otherwise, as set out in section 6(1) and it may not take place either if there is a risk that, after the extradition, the person concerned will be exposed to torture or other inhuman or degrading treatment as set out in section 6(2) (risk of persecution or torture). Extradition may not take place if the criminal liability for the crime in question would be time barred according to Danish law (section 9).

The case at hand is concerned with charges in Rwanda against T for genocide etc. and Rwanda has requested with reference to these charges that T be extradited for prosecution in accordance with these charges. On 29 June 2012, the Ministry of Justice decided on extradition for prosecution in Rwanda for the crimes comprised by the request for extradition.

This case is concerned with the legality of this decision as set out in section 16(1) of the Extradition Act.

2. Dual criminality

T has been charged in Rwanda with genocide, complicity to genocide and conspiracy to commit genocide as set out in Clauses 1 – 3 of the Indictment. He has moreover been charged with murder as a crime against humanity and with extinction as a crime against humanity as set out in Clauses 4 – 5 of the Indictment. He has finally been charged with the formation, membership and leadership of and participation in an association of a

criminal group, which is aimed and exists to cause harm to persons or their property as described in Clause 6 of the Indictment.

The crimes comprised by Clauses 1 – 5 of the Indictment are punishable under Danish law, i.e. sections 1 – 2 of Act No. 132 of 9 April 1955 on Punishment for Genocide and section 237 of the Criminal Code on manslaughter compared to section 23 on complicity and possibly section 21 on attempt.

The requirement of a maximum penalty of at least one year of imprisonment is satisfied in respect of genocide and manslaughter, as both crimes are punishable with imprisonment for any period up to life. The criminal liability for genocide and manslaughter cannot be time barred under Danish law, see section 93 of the Criminal Code e contrario.

Neither section 2A of the Extradition Act on dual criminality or section 9 of the same Act on the running of time will therefore prevent extradition for prosecution in Rwanda for the crimes referred to above.

T has claimed that the requirements for conviction of genocide and crimes against humanity in Rwanda were not satisfied at the time of the crimes in 1994 but have only been so through subsequent legislation. Since provisions on punishment cannot be given effect retroactively, in his opinion extradition for prosecution in Rwanda is not possible.

It has not been contested that authority to punish for genocide and crimes against humanity committed in 1994 exists in Rwanda today. Rwanda acceded to the 1948 Genocide Convention of the United Nations in 1975.

By an order of 26 April 2012 (Weekly Law Reports 2012 p. 2399) the Supreme Court established that according to generally recognised international standards the criminality of genocide is universal. In accordance with generally recognised international standards the principle that no one should be punished with retroactive effect will not prevent punishment of a person for genocide or a crime against humanity according to subsequent legislation if it was a crime according to the recognised general principles of civilised nations already at the time it was committed, see Article 7(2) of the European Human Rights Convention.

Against this background, T's objection referring to the lack of authority for extradition due to the principle that no one should be punished with retroactive effect cannot be taken into account.

3. Evidentiary basis

T has claimed that the charges raised in Rwanda are without a sufficient evidentiary basis as prescribed in section 3(4) of the Extradition Act.

The request for extradition from Rwanda was accompanied by several witness statements that corroborate the charges raised. In addition, the State Prosecutor for Special Economic and International Crime has raised charges against T in this country for genocide, alternatively manslaughter, on the basis of independent investigations. The information procured in that connection is consistent with the charges raised in Rwanda.

Against this background the Supreme Court finds – even if it has received reports and assessments according to which the police and legal service do not always live up to the standards prescribed by Rwanda's criminal and administration of justice legislation, and errors are contained in the Indictment – that it cannot be presumed that the charges are without a sufficient evidentiary basis.

It appears from the factual basis of Clauses 1 – 5 of the Indictment that T should have killed his brother, A, alias A-A. As stated in the High Court's Order the Prosecution has reported that the brother concerned was alive after the time of the crime referred to in the Indictment and that he has served a sentence in Rwanda after he had allegedly been killed. In connection with the hearing of the Appeal before the Supreme Court, no information has been provided as to why the brother has been indicated to have been killed. Like the High Court, the Supreme Court therefore takes into account that this is an error that will be corrected so that T will not be prosecuted for having killed A, alias A-A.

4. Risk of persecution or torture

As stated, a person may not be extradited if there is a risk of persecution or treatment as stated in section 6(1) and (2) of the Extradition Act. The provision in section 6(2) should be read in conjunction with Article 3 of the European Human Rights Convention,

according to which no one may be subjected to torture or inhuman or degrading treatment or punishment. In the judgment passed by the European Court of Human Rights on 27 October 2011 in the case Ahorugeze vs. Sweden concerning extradition for prosecution in Rwanda, it is stated inter alia that in the extradition for prosecution the issue of violation of Article 3 may be raised when substantial grounds supported by appropriate evidence give grounds to assume that the person whose extradition is requested will face a genuine risk of being treated in contravention of Article 3, see paragraphs 84 and 87 of the judgment. The transfer of a person who suffers from a serious physical or mental illness to a country in which the treatment facilities are inferior may raise the question of contravention of Article 3 but only in "a very exceptional case, where the humanitarian grounds against the removal are compelling", as set out in paragraph 88.
As stated in the Justice Ministry's decision on extradition, it appears from the reports from the authorities of Rwanda that upon extradition to Rwanda, T will be placed in a special unit of the Mpanga Prison and possibly transferred provisionally to a special unit of the Kigali Central Prison in connection with the trial before the High Court of Rwanda. It may moreover be taken into account that he will also serve a possible sentence in the Mpanga Prison. The above-mentioned prisons may be presumed to live up to internationally recognised standards, see for instance paragraph 92 of the judgment of 27 October 2011 in the case Ahorugeze vs. Sweden.

This assessment is underpinned by the information about the treatment of persons who have been transferred by the International Criminal Tribunal for Rwanda for prosecution in Rwanda, as well as the information about the treatment of the person Norway has extradited for prosecution in Rwanda. This information provides no basis for assuming that the persons concerned have been subjected to treatment that is contrary to section 6(1) or (2) of the Extradition Act or Article 3 of the Human Rights Convention.

In the case Ahorugeze vs. Sweden, the European Court of Human Rights stated that "Nor has any evidence been submitted or found which gives reason to conclude that there is a general situation of persecution or ill-treatment of the Hutu population in Rwanda". The Supreme Court has no information that provides a basis for any other assessment. There is moreover no information about special conditions concerning T according to which he should be at risk of persecution or inhuman treatment contrary to section 6(1) or (2) of the Extradition Act or Article 3 of the Human Rights Convention. That T has diabetes 2 cannot

lead to any other assessment, see paragraphs 88 – 89 of the judgment in Ahorugeze vs. Sweden. The circumstance that the Justice Ministry has not made it a condition for extradition that T's situation must be monitored by or on behalf of the Danish Government can also not lead to any other assessment; see in this connection paragraph 94 in the case Ahorugeze vs. Sweden.

As stated in the Justice Ministry's decision to extradite, the death penalty was abolished in Rwanda by a legislative amendment in 2007, for which reason T will not be at risk of any death sentence. Following a legislative amendment in 2008, it is moreover no longer possible to order imprisonment for life on special terms that previously meant for example that a convict had to be subjected to life-long solitary confinement, see in this connection paragraph 93 in the case Ahorugeze vs. Sweden.

Against the background described, the Supreme Court finds that extradition of T will not be contrary to section 6(1) or (2) of the Extradition Act or Article 3 of the European Human Rights Convention.

5. A fair trial

It follows from the precedents of the European Court of Human Rights that the issue of violation of Article 6 of the European Human Rights Convention on a fair trial can only be raised exceptionally in connection with a decision to extradite, namely in cases where the subject "would risk suffering a flagrant denial of a fair trial in the requesting country", see paragraph 113 in the judgment of 27 October 2011 in the case Ahorugeze vs. Sweden. In order to find that there may be a risk of flagrant denial of justice, there must be a violation of the fair trial principles of such a fundamental character that it equates a "nullification, or destruction of the very essence, of the right guaranteed by that article", as stated in paragraph 115 of the judgment. The person who is to be extradited bears the burden of proving it and must – in line with the requirement set out in Article 3 - submit evidence that means that there will be substantial grounds to assume that he "would be exposed to a real risk of being subjected to a flagrant denial of justice", see paragraph 116 of the judgment.

In its judgment, the Court of Human Right stated – with reference to the assessment made by the International Criminal Tribunal for Rwanda in the Uwinkindi case – that "there is no sufficient indication that the Rwandan judiciary lacks the requisite independence and

impartiality", see paragraph 125 of the judgment. Also this assessment is underpinned by the available monitoring reports on the treatment of persons transferred to Rwanda for prosecution for genocide. In respect of Ahorugeze's personal conditions, the Court found that "it has not been substantiated that his trial would be conducted unfairly", see paragraph 126 of the judgment. The Court concluded that Ahorugeze "if extradited to stand trial in Rwanda would not face a real risk of a flagrant denial of justice", see paragraph 129 of the judgment.

This conclusion is underpinned by the decisions on transfer for prosecution in Rwanda that the International Criminal Tribunal for Rwanda has made subsequently, including in the case concerning Bernard Munyagishari.

Against this background – and because the information about T's personal conditions, including his political activity in Denmark in support of the opposition in Rwanda cannot lead to any other result – the Supreme Court has no grounds to assume that if extradited to Rwanda, T would receive treatment that would constitute a flagrant denial of his right to a fair trial. The circumstance that he was convicted by a Gacaca tribunal in absentia in 2008 cannot lead to any other assessment; see moreover the statements in section 7 below.

6. Political offences

Under the provisions of section 5(1) of the Extradition Act, no one may be extradited for a political offence.

As stated above, this case is concerned with genocide, crimes against humanity and manslaughter aimed at the civilian population. Even if T's motive for committing the charged acts might be considered of a political nature there is no basis for assuming that the acts are political offences in the sense of section 5(1) of the Extradition Act.

7. Cause of action estoppel – the ne bis in idem principle

Under the provisions of section 8(1) third sentence of the Extradition Act as amended by Act No. 428 of 1 May 2013, extradition may be denied if the person requested for extradition has been convicted or acquitted of the same criminal offence in a country outside the Nordic countries and the European Union.

By a judgment of 18 September 2008 passed by a Gacaca court in Rwanda, T was found guilty in absentia on a charge for genocide and sentenced to imprisonment for life. It follows from Rwandan legislation, however, that the criminal trial in Rwanda against T must be retried by the High Court, whose sentence may be appealed to the Supreme Court of Rwanda. In addition, it follows from the legislation that the above-mentioned sentence from 2008 passed by the Gacaca court must be cancelled in advance.

The Supreme Court therefore finds that the extradition of T will not be contrary to the ne bis in idem principle as prescribed by section 8(1) third sentence, of the Extradition Act.

8. Humanitarian circumstances

Under the provisions of section 7 of the Extradition Act, no one may be extradited if "in special circumstances, particularly taking account of the subject's age, health state or other personal conditions, it may be believed that extradition will be incompatible with humanitarian considerations". This provision should be seen in conjunction with Article 8 of the European Human Rights Convention.

T entered Denmark on 10 April 2001 and has lived in this country since that date. On 26 July 2002 he was granted a residence permit under section 7(1) of the Aliens Act (as a convention refugee). However, by a decision of 1 June 2012, the Immigration Service withdrew his residence permit, one reason being that he had committed fraud. The Refugee Appeals Board upheld this decision on 21 December 2012. Before his arrest, T lived with his wife and two under-age children, who still live in this country. In addition, his two grown children of a previous marriage live in Denmark too. Before his arrest, he worked in this country as a social and health assistant. As stated, T has diabetes 2 but does not require any medication for it.

The Supreme Court finds that the extradition of T to Rwanda for prosecution will mean a serious intervention into his personal and social conditions. Notwithstanding this circumstance, the Court must however attach decisive weight to the fact that the offences for which extradition has been requested for his prosecution in Rwanda are extremely serious crimes. Consequently, and even though the crimes were committed in 1994, the

Supreme Court has no foundation on which to determine that extradition would be contrary to section 7 of the Extradition Act or the requirement of proportionality set out in Article 8 of the Human Rights Convention.

9. Conclusion

For these reasons, the Supreme Court upholds the Order made by the High Court, ordering that the decision of the Ministry of Justice of 29 June 2012 on extradition of T for prosecution in Rwanda is lawful.

It is ordered that:

The High Court's Order shall be upheld.

The Treasury shall pay the costs of the hearing of the Appeal before the Supreme Court.