SUPREME COURT OF NORWAY

On 26 June 2014, the Supreme Court gave an order in

HR-2014-01357-A, (case no. 2014/417), criminal case, appeal against order,

A (Counsel Anders Brosveet)

v.

The public prosecution authority (Public prosecutor Håvard Kampen)

(1) Justice **Bårdsen:** The case concerns a judicial review of the conditions for extradition to the USA, see section 17 of the Extradition Act. The appeal mainly raises two issues on the dual criminality requirement in section 3 subsection 1 of the Extradition Act. The first question is whether extradition can be executed if the indictment is based on alternative factual grounds that would not entail criminal liability under Norwegian law. The second question is whether extradition can be executed if conviction in the USA requires an extraterritorial jurisdiction that exceeds that which the Norwegian rules on jurisdiction would have warranted in a similar situation.

(2) A was born on 00.00.1970. He is both a US and a Peruvian citizen, but has lived in Norway with his family since April 2013. Charges were raised against him and a number of other persons in the USA on 13 June 2013. Count 1 of the indictment concerned *Racketeering Conspiracy to Conduct Enterprise Affairs (RICO Conspiracy)* – which is a combined offence associated with business activities. Count 2 concerned *Illegal Gambling Business.* Later, a third count was added to the indictment concerning *Money Laundering Conspiracy*. A committed most of the acts while staying in Peru, but the business activity that the charges concerned had connections with the USA. I will revert to a few of the counts later, but further details are without relevance for the Supreme Court's ruling.

(3) US authorities have requested extradition of A in order to bring him for trial in the USA. The National Authority for Investigation and Prosecution of Economic and Environmental Crime in Norway (*Økokrim*) handed the petition to Oslo District Court for a judicial review under section 17 of the Extradition Act. By an order of 4 December 2013, the court

concluded that the conditions for extradition were met. A's appeal to Borgarting Court of Appeal was dismissed by an order of 27 February 2014. The order has been appealed to the Supreme Court with reference to a number of issues concerning the interpretation of the law and the procedure by the court of appeal.

(4) On 10 April 2014, the Supreme Court's Appeals Selection Committee granted leave to appeal as to the two main issues pointed out in the introduction, whereas the rest of the appeal was dismissed without a hearing. The case exclusively refers to the interpretation of the Extradition Act, and not to Norway's Extradition Treaty with the USA of 1977, see section 26 subsection 3 of the Extradition Act. Outside of the formal grounds of appeal, A has claimed in the alternative that the question whether he must be considered a Norwegian national according to the version of the so-called mothers' notice (*mødremelding*) effective at the time of A's arrival in Norway with his Norwegian mother in 1981, should have been clarified prior to the proceedings in the court of appeal. If considered a Norwegian national, he cannot be extradited according to section 2 of the Extradition Act.

(5) *I have concluded* that the appeal must succeed.

(6) The appeal is directed against the court of appeal's ruling in an appeal against an order. In case of a further appeal, the jurisdiction of the Supreme Court is, under section 388 subsections 2 and 3 of the Criminal Procedure Act, limited to a review of only the procedure and the court of appeal's general interpretation of the law. As the case has been presented to the Supreme Court, the core issue is whether the court of appeal has based its ruling on a correct interpretation of section 3 subsection 1 first sentence of the Extradition Act:

> **"Extradition can only be executed if the act, or a similar act, is punishable under Norwegian law by imprisonment for more than one year."**

(7) To elucidate the interpretation issues raised in the case, I will add some considerations of a more general nature.

(8) Under section 3 of the Extradition Act subsection 1 first sentence, it is a precondition for extradition that the act to which the extradition request refers – in addition to being punishable under the law of the requesting country – must also be punishable under *Norwegian* law if the act was committed in this country, see Supreme Court ruling Rt. 2009 page 594 paragraph 41. The same dual criminality requirement applies to any accessory acts, see section 3 subsection 3 of the Extradition Act. Several reasons can be given for this requirement; I have noted in particular the following statement in Proposition to the Storting No. 137 (bill and draft resolution) (2010–2011) page 21:

> **"The Extradition Act's dual criminality requirement makes it clear beforehand for which acts a person can expect to be extradited. In addition, it can be held that it is unreasonable for Norway to execute such a deeply intrusive measure as extradition … if the act is not considered sufficiently severe for being made criminal in Norway".**

(9) The dual criminality requirement is, when it comes to legal policy reasons, also related to the legality principle. At the same time, it ensures that the framework for extradition from Norway is in accordance with the general crime policy basis for Norwegian penal legislation.

(10) The dual criminality requirement is part of a broader context. The following is taken from

Supreme Court ruling Rt. 1998, page 1993:

> **"Regarding the general statutory requirements for allowing a request for extradition, I note that, both under the Extradition Act and under the Treaty with the USA, one condition for extradition is that the relevant act must not only be punishable under the law of the requesting country, but also under the law of the requested country if the act was committed there, see section 3 (1), cf. Article 2 (1), (a) and (b), of the Treaty. Thus, dual criminality must exist. Another requirement is that documentation of reasonable grounds for suspecting the person of the criminal act must be provided, see section 10 subsection 2, cf. Article 5 (1) of the Treaty. In addition, the Extradition Act requires that the possibility of criminal prosecution must not be time-barred under Norwegian law, see section 9, cf. Article 7 (1) (b) of the Treaty stating that the act must not be barred by lapse of time according to the laws of the requesting or requested state. These provisions imply that the Norwegian court that reviews whether the conditions for extradition are met must verify whether the act to which the extradition applies is punishable under Norwegian law. The dual criminality requirement thus calls for a parallel court's investigation of the objective criminality of the act. The person who is extradited can as a rule only be prosecuted in the requesting state for an act that, also in Norway, can be sanctioned by imprisonment of more than one year and that is not time-barred. Even if the court must review whether the act is punishable not only under Norwegian law but also under the law of the requesting country, I find that the court must exercise caution when reviewing the foreign authority's interpretation of its own legislation."**

(11) I interpret this quote – with the exception of the reservation the justice makes on interpreting the requesting country's own penal legislation – as a genuine and independent review on the Norwegian courts' part. Subsequent case law confirms that we are confronted with limitations in the possibility of extradition that the courts must verify sufficiently comprehensively to ensure that they become effective in practice, see for illustration purposes Supreme Court ruling Rt. 2009 page 594. On this point, I also refer to ruling Rt. 2010 page 40 paragraphs 22–24, concerning the control of the *evidence* that provides grounds for the extradition request:

> **"According to section 10 subsection 2 of the Extradition Act, it is, when no conviction exists, a condition for extradition that there are reasonable grounds for suspicion against the person charged. It is obvious that Norwegian courts must carry out an independent inquiry as to whether this requirement is fulfilled. It is not sufficient to refer to the fact that the foreign decision providing grounds for the extradition request has been based on such grounds. This is a consequence of the wording of the provision, but also of the system of the act and the different wording of the corresponding provisions in the specific acts on extradition assuming that the considerations of the other state are to be relied on as a matter of course… With regard to the system of the law, it is sufficient to refer to the provision that the request for extradition must include reasonable evidence for suspecting the charged person, see section 13 subsection 5. It is also clearly implied by the preparatory works that the law must be interpreted accordingly… This interpretation of the law has also represented the approach in case law, see Supreme Court rulings Rt. 1995 page 149, Rt. 1999 page 1138 and Rt. 2009 page 594 paragraph 31."**

(12) The limitation in the possibility of extradition that is immanent to the dual criminality requirement must be seen in correlation with the *speciality rule* in section 12 of the Extradition Act: Extradition can only be executed on the general condition that the extradited person is not prosecuted for a different offence than the offence for which the person has been extradited. In Proposition to the Storting No. 137 (bill and draft resolution) (2010–2011) page 27, it is pointed out that the *speciality rule* contributes to ensure that "the provisions that govern extradition are real". In addition, the Ministry, in the same context, underlines the intended effect:

> **"One avoids that a person is extradited for one act, but prosecuted for something entirely different or for more. Examination of whether the requirements are fulfilled regarding the**

specific offence provides protection of the person who is subjected to the extradition request."

(13) The wording in section 3 subsection 1 first sentence, stating that "the act, or a similar act" must be punishable under Norwegian law, is ambiguous. However, it is obvious that the dual criminality requirement does not mean that a parallel Norwegian penal provision must be established or that the act must be classified in the same manner in Norwegian law as in that of the requesting state. Furthermore, it is not relevant that the act may be classified as a specified act according to the law in the requesting country while pursuant to Norwegian legislation, it is considered an attempt or aiding and abetting, or that it represents one element of a combined offence. The question is – as far as I understand – whether the factual grounds for indictment would be criminal acts in Norway if the acts were reviewed under Norwegian law and the person charged was the perpetrator. I refer to Mathisen, *Utlevering for straffbare forhold* [Extradition for Criminal Acts] (2009) pages 219–224.

(14) Against this background, I turn to A's case where the issue is the interpretation of section 3 subsection 1 first sentence of the Extradition Act when the indictment is based on *alternative* facts, of which at least one would not be criminal under Norwegian law. The background is count 1 of the indictment on the complex act of *Racketeering Conspiracy to Conduct Enterprise Affairs (RICO Conspiracy)*, see Title 18, United States Code, and Section 1962 (c) and (d). The statute applies to collaboration with the purpose of collecting unlawful debt, or for more than twice having committed any one of the six "racketeering activities": Extortion, transmission of racing information, use of the phone or the internet in connection with illegal business activity, illegal gambling business, bookmaking and money laundering.

(15) I will refrain from assessing to which extent the grounds for indictment would have been criminal acts under Norwegian law. However, in the event of a further appeal, the Supreme Court has jurisdiction to review the general interpretation of the law also on this point, see ruling Rt. 2009 page 594 paragraphs 39 et seq. But the issue lies beyond the issues that the Supreme Court has heard. I will therefore base myself on the lower courts' assessment of the criminality under Norwegian law, which implies that the factual grounds for indictment include acts that may constitute independent violations of US law, but that are not considered independent criminal acts under Norwegian law. Regarding the interpretation of section 3 subsection 1 first sentence of the Extradition Act, the court of appeal states that "even if alternative acts have been committed that are sufficient for conviction according to the indictment under US law, but that – viewed in isolation – are not considered criminal in Norway, it does not necessarily follow that the dual criminality requirement is not fulfilled".

(16) In my opinion, this is a misinterpretation of section 3 subsection 1 first sentence of the Extradition Act. As mentioned, according to the relevant sources of law – legislation, case law, preparatory works and considerations connected to the purpose of the regulation – Norwegian courts, when discussing whether the preconditions for extradition are met, are to examine whether the *act to which the indictment applies* would be punishable under Norwegian law. Supreme Court ruling Rt. 1998 page 1993 shows that this also applies to the assessment of *elements* of what is regarded under the law of the requesting state as an interrelated or combined offence, if these elements were considered independent acts under Norwegian law. The same approach should be taken in cases where the indictment is based on *alternative grounds*, of which at least one would not be punishable under Norwegian law. In general, the solution must be that the dual criminality requirement is not met to the extent the factual grounds for indictment imply that the requesting state can convict

exclusively based on elements that would not be punishable in Norway. However, the fact that the foreign grounds for indictment also include acts that are not punishable *per se* under Norwegian law, but can be deemed as aggravating circumstances in relation to acts that are also punishable in Norway, does not necessarily prevent extradition. The crucial point is whether the additional factual grounds *per se* are sufficient for conviction.

(17) Consequently, the order of the court of appeal must be set aside. The misinterpretation of the law is primarily significant to count 1 of the indictment on *Racketeering Conspiracy to Conduct Enterprise Affairs (RICO Conspiracy)*. But I find, under the circumstances, that the entire order should be set aside so the court of appeal can consider the extradition issues – and any conditions for extradition pursuant to section 12 subsection 2 – coherently in a new hearing.

(18) As the matter thus stands, it is not necessary to decide on the other issue heard by the Supreme Court – whether extradition can be executed if conviction in the USA requires extraterritorial application of US law to a wider extent than what would have been warranted by Norwegian jurisdiction regulations, see primarily section 12 of the Penal Code. Nevertheless, I will point out the following:

(19) The dual criminality requirement in section 3 subsection 1 first sentence of the Extradition Act does not imply that the act on which the extradition request was based must be covered by Norwegian penal jurisdiction. The wording of the provision rather ties the consideration of criminality to "the act, or a similar act". The second option – "a similar act" – is meant to express that extradition can be executed although the very act cannot be sanctioned if a "similar act" committed in Norway or against Norwegian interests can be sanctioned here, see Proposition to the Odelsting No. 30 (1974 – 1975) page 27. Accordingly, Supreme Court ruling Rt. 1998 page 1993, states that "regulations on Norwegian penal jurisdiction… cannot apply to a case reviewing whether the prerequisites for extradition are present". In *Norsk Lovkommentar* [Norwegian Law Commentary], note 4 on the Extradition Act, Justice Bull expresses the same in a quite short comment.

(20) At the same time, the law requires that the "similar act" can be sanctioned "under Norwegian law". In legal theory, this extradition requirement has therefore been applied as a rule, that Norway – based on a hypothetical consideration – would have had penal jurisdiction if Norway had been in the situation of the requesting country, see Tønnesen, *Internasjonal strafferettspleie* [International penal judicature] (1975) page 2144 and Mathisen page 225. I also refer to Supreme Court ruling Rt. 1969 page 1465 that displays the reasoning in connection with an extradition treaty with Germany. In cases where extradition is requested in order to prosecute acts committed in the requesting state – as the situation was in Rt. 1998 page 1993 – this is normally not a problem as Norway would have had regular penal jurisdiction over a "similar act" if the act had been committed in Norway. If, however, the issue regards extraterritorial jurisdiction, the traditional opinion expressed in legal theory leads to non-fulfilment of the dual criminality requirement if prosecution in the requesting state requires a wider extraterritorial application of the law of this state than that allowed in Norwegian law in a similar situation. This view can be held to be in accordance with the basis for the dual criminality requirement, as it prevents extradition for acts that would not be punishable based on Norwegian criminal policy considerations if Norway had been in the requesting state’s situation.

(21) The court of appeal has referred to Supreme Court ruling Rt. 1998 page 1993, and concluded "there is no requirement of Norwegian penal jurisdiction for the acts committed in the USA and which form the basis for the US indictment". So far, this is correct. But A was in Peru during most of the time the acts were committed and asserts that Norway would not have penal jurisdiction if Norway were in the situation of the USA. It may seem as if the court of appeal has overlooked the particular issue that may arise if conviction of a similar act under Norwegian law would require extraterritorial penal jurisdiction, or the court of appeal has – without further arguments – based its ruling on a different interpretation of the law than that assumed in legal theory.

(22) The wording in section 3 subsection 1 first sentence of the Extradition Act is ambiguous. Furthermore, no Supreme Court case law gives clear guidance on how to interpret the law in this regard. This could give the Supreme Court reason to clarify the issue in the case at hand, which was also the purpose of agreeing to hear it. Nevertheless, I will not make a stand at this point: Both counsel for the defence and the prosecutor have referred to the doctrine of theory. Thus, the issue has not really been addressed during the proceedings in the Supreme Court. It is also not clear whether the issue will have prominence in the new proceedings in the court of appeal: This will only be the case to the extent the acts with which A is charged cannot be considered committed in the USA, and the court arrives at the conclusion that he would not be convicted of these acts under Norwegian law even if Norway had been in the situation of the USA.

(23) I do not find reason to comment on issues that A has addressed that are beyond the scope of the appeal.

(24) I vote for this

O R D E R:

The order of the court of appeal is set aside.

(25) Justice **Stabel:** I agree with the justice delivering the leading opinion in all material respects and with his conclusion.

(26) Justice **Endresen:** Likewise.

(27) Justice **Kallerud:** Likewise.

(28) Justice **Matningsdal:** Likewise.

(29) Following the voting, the Supreme Court gave this

O R D E R:

The order of the court of appeal is set aside.