



SUPREME COURT OF NORWAY

On 6 February 2015, the Supreme Court delivered the following decision in

HR-2015-00289-A, (case no. 2014/1787), criminal case, appeal against decision,

A

(Counsel John Christian Elden)

v.

The public prosecution

(Public Prosecutor Carl Fredrik Fari)

V O T I N G :

- (1) Justice **Matheson**: The case concerns whether the conditions for extradition in a criminal case have been met.
- (2) Defendant A, was born and raised in Rwanda. In Rwanda, charges have been brought against him for having participated in genocide and crimes against humanity in 1994. A request for his extradition from Norway has been made.
- (3) For decades, Rwanda was marked by conflict between the two largest ethnic groups; Hutus and Tutsis. From 1990, civil war like conditions raged in the country after Rwanda's Patriotic Front - RPF - composed mainly of exiled Tutsis, launched an attack.
- (4) President Juvel Habyarimana, who was Hutu, was killed on 6 April 1994. The murder triggered acts of genocide. The killings began on 7 April 1994 and lasted for 100 days until 17 July, when RPF gained control of the capital Kigali. It is estimated that 800,000 to 1,000,000 people were killed during this short period. The victims were Tutsis and oppositional Hutus.
- (5) On 8 November 1994, the UN Security Council established an international tribunal for prosecution of the gravest violations of international humanitarian law.

The tribunal - the United Nations International Criminal Tribunal for Rwanda (ICTR) - was set up in Arusha in Tanzania.

- (6) The internal criminal proceedings for the genocide are held by Rwanda's ordinary courts. In the period 2002 to 2010, such cases were also processed by local community courts, called "Gacaca courts". Criminal proceedings are also held in countries that have received refugees from Rwanda, including Norway.
- (7) The defendant, who is Hutu, fled from Rwanda in the autumn of 1994. In 1999, he arrived in Norway as a refugee, after staying, inter alia, in Congo and Kenya. In 2001, he married B, a female who also originates from Rwanda, and who had political asylum in Belgium. Since 2007, the couple have been living in X. A is permanently employed at Y. His wife is employed as a nurse in X municipality.
- (8) The couple have three children; two girls and a boy. They are currently between the ages of 8 and 13. All the children were born in Norway; C in 2002, D in 2004 and E in 2007.
- (9) In 2004, Interpol Oslo received information from Interpol Kigali that the defendant was suspected of having participated in the genocide in 1994.
- (10) A applied for Norwegian citizenship on 15 September 2005. Since 12 September 2002, he has had a residence permit in Norway, and at the time of application, he met the conditions in Section 7 e) of the Citizenship Act relating to seven years residence in the last ten years. However, the application was held in abeyance due to the suspicion against him. His wife and children were granted Norwegian citizenship in 2010.
- (11) On 28 August 2012, Kripos (the National Crime Investigation Service) issued an indictment against A for violation of section 233 sub-section (1) and (2) of the Penal Code. The grounds for the indictment were the suspicion that in 1994 he had killed and / or had attended meetings encouraging the killing of a large number of people from the ethnic Tutsi group. The indictment was based on an extensive investigation by the Norwegian prosecuting authority involving, inter alia, a number of visits and witness interviews in Rwanda. Since 30 May 2013, the defendant has been held in custody with screening of letters and visits.
- (12) In a letter, dated 26 August 2013, the Ministry of Foreign Affairs in Rwanda requested the Norwegian authorities to arrest and extradite A - who was then already in custody – from Norway. The offences that form the basis for this request have been described in more detail in an indictment prepared by the prosecuting authority in Rwanda, dated 19 August 2013. According to the indictment, the suspicion includes
 - genocide,
 - complicity to genocide,
 - extermination as a crime against humanity, and
 - murder as a crime against humanity.
- (13) On 5 December 2013, Kripos requested a court ruling that the conditions for extradition was fulfilled, cf. section 17 of the Extradition Act.
- (14) In the Court of Appeal's ruling, the offences the indictment concerns are stated as follows:

"The first three charges relating to genocide have a common factual basis:

"A, in league with [name] (former Mayor of Nyakizu), [21 names] and many others that were not identified, among them leaders of the government administration and military officers in the area, has persecuted and killed Tutsis.

In his endeavour to kill Tutsis, A, in collaboration with the people mentioned in this indictment, set up a road block on the path down to the river Akanyaru on the border between Rwanda and Burundi. They did this to identify Tutsis fleeing to Burundi. When the suspect, who lived near the river, saw that many Tutsis had gathered by the river, he led members of the Interahamwe militia there to attack and kill the Tutsis who tried to cross the river to reach Burundi. Eye witnesses have informed that many were killed, but as they came from different communities in Butare prefecture, it was almost impossible to know the names of all of them. The few that have been identified are: [4 names], among many others.

On 15 April 1994, A attended a meeting he was summoned to by [name]. This meeting took place in the municipality building in Nyakizu. The participants discussed ways of attacking the Tutsis, who had sought refuge in the Catholic Church in Cyahinda. After the meeting, the suspect and other Interahamwe members went there, armed in the traditional way and together with soldiers in the area, attacked and killed thousands of Tutsis who were gathered there. Despite very many Tutsis being killed, surviving eye witnesses only managed to identify the following persons among them: [20 names], among many others.

The suspect and his criminal group continued to devise a plan of how to find and kill Tutsis. On 21 April 1994, A and his criminal group went to the home of [name]. They entered the house and murdered her children. The victims were known as: [4 names]."

The fourth charge relating to extermination as a crime against humanity has the following factual basis:

"The defendant has led or given orders in numerous murderous assaults in the commune of Nyakizu, which was formerly known as Butare prefecture, and together with people from the Interahamwe militia or others under his command, and the local administration and the genocide friendly regime of Kambanda Jean and Sindikubwabo, wiped out thousands of Tutsis in a well-organised attack.

Hundreds of Tutsis were massacred through the suspect's direct or indirect participation, but only a few of the names of the many people killed are known. They are: [29 names], among many others.

He continued to participate in the extensive killing under the command of the then genocide friendly government, led by Sindikubwabo Theodore and Kambanda Jean. He promoted a genocidal ideology by convincing Hutus that the Tutsis were their common enemy and that the Tutsis collaborated with RPF. This justified that they had to die. This ideology incited the masses to commit genocide on their Tutsi neighbours in the whole of Rwanda and especially in the area from which he operated. Training of the Interahamwe militia and the subsequent massacres took place with his full knowledge following his direct or indirect orders and in accordance with his ideology, demonstrating his role in the genocide-friendly regime, in that he funded and contributed to the killings as such."

The basis for the fifth charge relating to murder as a crime against humanity is:

"In consultation with the political and military leadership in the interim government and Interahamwe in various areas in the commune of Nyakizu in what was formerly known as

Butare prefecture, A persecuted and murdered many Tutsis. The known names of the victims are: [29 names].

The management of and participation in meetings that planned and urged the genocide that led to the killing of thousands of Tutsis in various parts of the commune of Nyakizu in Butare prefecture during an ongoing genocide, demonstrates his criminal responsibility.

The murders were carried out by the Interahamwe militia with his full knowledge or following direct or indirect orders from him and in accordance with his ideology and demonstrates his role as being closely linked to the murderous regime in that he contributed to the murder as such." "

- (15) The other charges in the indictment - set out in charges 3, 6 and 7 - have according to the Court of Appeal ruling been withdrawn by the prosecuting authority as grounds for extradition.
- (16) On 6 December 2013, the Norwegian indictment was amended through a "mirroring" of the description of the offence in the indictment from Rwanda insofar as the prosecuting authority believes the offences are punishable under Norwegian law. If the defendant is not extradited, the indictment will form the basis for a possible prosecution decision to institute criminal proceedings in Norway. However, the review on whether the conditions for extradition have been met will be made on the basis of the indictment. Therefore, I will not go into detail on the content of the Norwegian indictment.
- (17) The petition for the court ruling on whether the conditions for extradition have been met was processed by Stavanger District Court. Following an oral hearing, the district court concluded in a ruling on 8 April 2014 that the conditions for extradition had been met. The defendant appealed to Gulating Court of Appeal, which also held an oral hearing. The appeal was dismissed in a ruling of 2 September 2014.
- (18) A has appealed to the Supreme Court. The appeal relates to a number of aspects of the Court of Appeal's interpretation of the law and procedures.
- (19) On 14 November 2014, Supreme Court Appeals Selection Committee came to a unanimous decision and ruling:

"The appeal will be decided by a division of the Supreme Court with five justices as regards the interpretation of the law, application of the provisions of the convention and the reasons for the ruling related to section 7 of the Extradition Act, section 104 of the Constitution of Norway, Article 8 of the European Convention on Human Rights (ECHR) and Articles 3, 7 and 16 of the UN Convention on the rights of the child, cf. section 5 subsection 1 second sentence of the Courts Act.

The appeal is otherwise dismissed."

- (20) A has submitted to the Supreme Court that extradition to Rwanda would conflict with fundamental humanitarian considerations under section 7 of the Extradition Act. The provision must be interpreted and applied within the framework of section 102 of the Constitution of Norway and EHCR Article 8 on the right to family life, and section 104 of the Constitution of Norway and Article 3 of the UN Convention on the rights of the child relating to the best interests of the child as a fundamental consideration.
- (21) The aspects relating to the individual shall be weighed against the legitimate societal objective of extradition. According to both constitutional provisions, the decision depends on a proportionality assessment. It is key to the assessment that it is possible to

prosecute A in Norway, cf. the Norwegian indictment and the fact that similar cases have been brought to trial here previously.

- (22) In view of this, extradition is not "necessary" under Section 102 of the Constitution of Norway and ECHR Article 8 no. 2. Extradition is incompatible with the best interests of the child as a fundamental consideration under section 104 of the Constitution of Norway and Article 3 of the UN Convention on the rights of the Child with associated convention practice. cf. section 92 of the Constitution of Norway that the authorities of the state shall respect and secure human rights.
- (23) As the defendant applied for Norwegian citizenship at a time when he met the residence requirement, and has also resided lawfully in Norway for many years, in the final assessment, he must be treated as if he is a Norwegian citizen and therefore not be extradited.
- (24) Under any circumstances, it would be in contradiction with the conventions to extradite the defendant to Rwanda where it has not been established beyond any reasonable doubt that he will be convicted there.
- (25) The Court of Appeal's specific application of the provisions of the UN Convention on the Rights of the Child has also not been sufficiently justified. Therefore, it is not possible to re-examine the ruling on this point. It must then be set aside.
- (26) A has submitted to the Supreme Court as his primary claim that the conditions for extradition to Rwanda are not fulfilled, and alternatively that the Court of Appeal ruling is set aside.
- (27) The prosecuting authority has requested that the appeal is dismissed.
- (28) *I have concluded* that the appeal is dismissed.
- (29) The appeal concerns the Court of Appeal's decision regarding an appeal against a ruling. In a subsequent appeal, the Supreme Court's authority is limited under section 388 no. 2 and 3 of the Criminal Procedure Act to a review of the Court of Appeal's proceedings and general jurisprudence. In cases that concern application of the Constitution of Norway and ECHR, cf. section 2 no. 1 of the Human Rights Act, the Supreme Court may also examine the Court of Appeal's application of the law, cf. Rt. 2007 page 404, paragraph 40. The same applies to the other conventions incorporated through the Human Rights Act, cf. Rt. 2009 page 1025, paragraph 10. As far as the ECHR issue is concerned, this is subsequently followed up in a number of rulings, see most recently Rt. 2014 page 297, paragraph 13.
- (30) Thus, the Supreme Court can decide whether the Constitution of Norway, ECHR or the UN Convention on the rights of the child prevent extradition of the defendant to Rwanda.
- (31) In this review, the Court of Appeal's assessment of evidence must be used. However, in its assessment, the Supreme Court must be able to use the facts on which the parties agree and that the court finds no reason to doubt the accuracy of, even though this is not discussed in the Court of Appeal's premises.
- (32) I would briefly like to mention the following concerning the system of the Extradition Act:
- (33) Pursuant to section 1 of the Act relating to extradition of criminals, etc. - the Extradition Act - a person in a foreign state who is accused, charged or convicted of a criminal offence and who is living here in Norway, may be extradited in accordance with the provisions of this Act.

(34) The Extradition Act's arrangement is that, following a request from the prosecuting authority, the courts decide on whether the conditions for extradition are met, cf. section 17. If it has been decided in a final ruling that the conditions for extradition have been met, the case documents are sent as soon as possible by the prosecuting authority to the Ministry, who decides whether the request for extradition shall be granted, cf. section 18.

(35) Pursuant to the law, there are a number of conditions for extradition. Inter alia, it has been decided that Norwegian citizens cannot be extradited. As the case stands before the Supreme Court, the condition under section 7 of the Extradition Act is crucial. The provision states:

"Extradition cannot take place if it conflicts with fundamental humanitarian considerations, especially due to the person in question's age, state of health or other personal circumstances."

(36) The preparatory works state the following on how to interpret the provision, cf. Proposition to the Norwegian Odelsting no. 30 for 1974–75 page 33:

"When assessing the scope of the provision, one must be aware that extradition is a serious encroachment which in general would have significant consequences for the person in question. If the extradition institute is not to lose its value in the cooperation on international criminal justice, it should only be a question of refusing extradition on humanitarian grounds in very special cases. This is expressed in the draft law through the condition that the case must concern fundamental humanitarian considerations. Age and health condition are among the specific factors that should be emphasised, but no exhaustive enumeration of factors has been aimed at. This will hardly be possible. The phrase "other personal circumstances" includes the offender's whole social situation. Inter alia, it will be possible to take into consideration whether the person in question has family here in Norway, how long he has lived here and whether he has his own business or permanent employment in Norway. It will also be possible to take into consideration penal sanctions in the requesting state. Furthermore, the personal circumstances that argue against extradition, must to some extent be weighed against the interest the foreign state has in extradition, including taking into consideration the seriousness of the offence and the time that has elapsed since it was committed."

(37) Section 7 of the Extradition Act and its preparatory works must be read in light of the individual rights that have now been included in section 102 and 104 of the Constitution of Norway and of the rights in ECHR, especially Article 8 and the UN Convention on the rights of the child, especially Article 3.

(38) Section 102 (1) first sentence of the Constitution of Norway states that:

"Everyone is entitled to respect for his or her private and family life, his or her home and communication."

(39) Section 104 of the Constitution of Norway reads as follows:

"Children are entitled to respect for their human dignity. They are entitled to be heard in issues regarding themselves. and their opinion should be given due weight in accordance with their age and development."

In actions and decisions concerning children, the best interests of the child shall be a fundamental consideration.

Children are entitled to protection of their personal integrity. The government authorities shall create conditions enabling the child's development, including ensuring that the child receives

- (40) The two provisions were included in Constitution through an amendment in 2014. Therefore, there is currently little practice relating to them as constitutional provisions. It has recently been established that corresponding convention provisions which are already applicable Norwegian law pursuant to section 2 of the Human Rights Act, shall form the basis – naturally enough, of the constitutional interpretation, cf. HR-2015-00206-A, (case no. 2014/1583) paragraphs 57 and 64.
- (41) ECHR Article 8 on the right to respect for private and family life reads as follows:
- "1. Everyone is entitled to respect for his or her private and family life, his or her home and communication.**
- 2. There shall be no interference by a public authority with the exercise of this right except when this is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."**
- (42) Article 3 no. 1 and 2 of the UN Convention on the rights of the child states that:
- "1. In all actions concerning children, whether undertaken by public or private social welfare organisations, courts, administrative authorities or legislative bodies, the best interests of the child shall be a fundamental consideration.**
- 2. States parties undertake to ensure the child such protection and care as necessary for his well-being, taking into account the rights and duties of his parents, legal guardians or other individuals legally responsible for him or her, and to this end shall take all appropriate legislative and administrative measures."**
- (43) Article 7 of the Convention states that state parties shall ensure implementation of these rights. Article 16 also states that no child shall be subjected to arbitrary or unlawful interference with his private life, family or his home.
- (44) When determining the content of "fundamental humanitarian considerations" under section 7 of the Extradition Act, the above-mentioned fundamental human rights, as enshrined in the Constitution and the conventions, will be crucial.
- (45) Extradition for prosecution will be an interference in the right to family life under section 102 of the Constitution and ECHR Article 8 no. 1. Under Article 8 no. 2, such interference may only take place when this is "necessary" in a democratic society, inter alia, for the prevention of disorder or crime.
- (46) A decision to extradite one of the parents of under age children will be an action "that affects the child" under section 104 of the Constitution and Article 3 no. 1 of the UN Convention on the rights of the child. In making such a decision "the best interests of the child shall be a fundamental consideration". This must apply irrespective of whether the child has a formal status as a party in the case.

- (47) The detailed content of Article 3 has been discussed in a number of rulings by the Supreme Court, most recently in HR-2015-00206-A (case no. 2014/1583). Paragraph 65 states that "the interests of the child are not the only nor always the deciding factor", cf. see also

the plenary ruling in Rt. 2012 page 1985, paragraphs 134-136. Paragraph 65 of the 2015 ruling also states that

"when considering against other interests, the child's best interests shall have high priority and are not just one of several considerations in an overall assessment: The child's best interests shall form the basis, be highlighted and brought to the fore."

- (48) The Supreme Court confirms here - in a somewhat different way - what has previously been expressed in Rt- 2009 page 1261, paragraph 85, Rt. 2010 page 1313, paragraph 13, Rt. 2012 page 1985, paragraph 187.
- (49) Based on the principles of interpretation and legal sources I have reviewed thus far, I will now discuss a more detailed interpretation of section 7 of the Extradition Act.
- (50) In the preparatory works, the legislator has stated that in the interest of cooperation on criminal justice, it would only be possible to refuse extradition under section 7 "in very special cases". The commentary also states, as already mentioned, that an assessment must be made between the personal circumstances and "the interests the foreign state has in extradition", including the "seriousness of the offence".
- (51) In Rt. 1995 page 1057, with reference to these comments on page 1062, the Supreme Court Appeals Selection Committee has stated that the question of whether extradition will be contrary to fundamental humanitarian considerations depends on an "overall assessment of the conflicting considerations". The ruling states that humanitarian considerations under section 7 must be weighed against the public interest in effective law enforcement and that less importance must be attached to the humanitarian considerations in cases where the grounds for extradition are an extremely serious criminal offence.
- (52) As regards the assessment generally made in issues relating to infringement of human rights, I refer to Rt. 2014 page 1105, paragraph 28. The Justice delivering the leading judgment stated that there is a general proportionality limitation "for lawful and objectively justified interference with the rights and freedoms set out in the Constitution's human rights provisions". This is further elaborated in HR-2015-00206-A (case no. 2014/1583) where in connection with section 102 of the Constitution and ECHR Article 8 the following is stated in paragraph 60:

"The assessment of proportionality must take into account the balance between the protected individual interests and the legitimate social needs that justify the measure."
- (53) What in Rt. 1995 page 1057 is referred to as an "overall assessment of conflicting considerations", must thereafter be conducted as a proportionality assessment. A proportionality principle is also used in ECtHR's practice in extradition cases. This practice also shows against which considerations the rights under the Convention must be weighed and the weight each consideration should have in the proportionality assessment.
- (54) As an example, I refer to *M.S. v. Germany* (20 January 2000). The case concerned extradition to the US on charges of rape. The accused risked a severe sentence. He was the father of two children aged 2 and 3 years respectively. Regarding the assessment under ECHR Article 8 no. 2, the court stated that

"a prisoner has no right, as such, under the Convention to choose the place of his confinement, and the separation of a detainee from his family constitutes an inevitable consequence of the detention."

(55) The court concluded that extradition would not be a violation of the convention "although it has an adverse effect on the applicant's family life".

(56) I also refer to the *King v. United Kingdom* (26 January 2010). This concerned the question of extradition to Australia for a serious drug crime. The accused had a wife and two small children aged 6 and 12 years respectively. Upon extradition, he risks a term of imprisonment of 15 years to life. As he believed the case could be taken to court in the UK "with no disruption to his private and family life", he submitted that extradition would be disproportionate in relation to what was necessary in the prevention of disorder or crime under ECHR Article 8 no. 2. He argued that extradition would be especially difficult for his 12 year old daughter.

(57) ECtHR repeated from *M.S. v. Germany* that the convention does not grant the right to be prosecuted in a particular jurisdiction, but also pointed out that prosecution as an alternative to extradition "may have a bearing on whether the extradition would be in violation of the one of the rights guaranteed by the Convention". However, in the case in question, the court concluded that there were good grounds for the accused to be extradited so that the criminal proceedings could take place in Australia. Inter alia, the cases against the co-defendants had been heard there. With reference to the Commission's ruling in *Launder v. the United Kingdom* (8 December 1997), the court pointed out that in their assessment, the authorities were also

"entitled to have regard to their international obligations to Australia. Mindful of the importance of extradition arrangements between States in the fight against crime (and in particular crime with an international or cross-border dimension), the Court considers that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition."

(58) Regarding the accused's right to a family life with his wife, two small children and sick mother, the court stated:

"This, in the Court's view, is not an exceptional circumstance which would militate in favour of the applicant's non-extradition. Although the long distance between the United Kingdom and Australia would mean the family would enjoy only limited contact if the applicant were extradited, convicted and sentenced to a term of imprisonment there, the Court cannot overlook the very serious charges he faces (see *Raidl v. Austria*, no. 25342/94, Commission decision of 4 September 1995). Given those charges, and the interest the United Kingdom has in honouring its obligations to Australia, the Court is satisfied that the applicant's extradition cannot be said to be disproportionate to the legitimate aim served. It follows that this part of the application must be also rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention."

(59) I also refer to *Babar Ahmad and others v. the United Kingdom* (10 April 2012). This case concerns extradition to the US for terrorism, or more precisely participation in attacks against the US embassies in Nairobi and Dar es Salaam in 1998. If extradited, the accused risked a life sentence, which would involve permanent separation from his wife, children and grandchildren. The accused argued that prosecution in the UK would be a good alternative, and therefore that extradition would be a disproportionate interference in their family and private life. ECtHR gave the following comment to this in paragraph 252:

"the Court reiterates that it will only be in exceptional circumstances that an applicant's private or family life in a Contracting State will outweigh the legitimate aim pursued by his or her extradition (see *King v. the United Kingdom* (dec.), no. 9742/07, 26 January 2010). There are no such exceptional circumstances in the fifth and sixth applicants' case, particularly given the gravity of the offences with which they are charged. This complaint is therefore manifestly ill founded."

- (60) For the sake of order, I would like to mention that in the ECtHR decisions to which I have referred the situation seems to have been that the states were bound by bilateral extradition treaties. However, I cannot see that the extradition being based on such an agreement was particularly more weighty in the proportionality assessment than when extradition otherwise takes place to safeguard international cooperation on combatting crime. The standard that extradition may only be refused in "exceptional circumstances", must apply as a general rule.
- (61) Sections 102 and 104 of the Norwegian Constitution are complementary in this area "so that the child's best interests are included as a weighty element in the proportionality assessment under Section 102 of the Norwegian Constitution", cf. HR-2015-00206-A (case no. 2014/1583) paragraph 66. The same method of assessment must be used in extradition cases.
- (62) A has argued that the interests of his children will be best served through criminal proceedings in Norway and that extradition would then be disproportionate compared with what is necessary under ECHR Article 8 and the best interests of the child under Article 3 of the UN Convention on the rights of the child. I would like to repeat that in the proportionality assessment there shall be a balance between the protective individual interests and the legitimate social needs that justify the measure, cf. HR-2015-00206-A (case no. 2014/1583) paragraph 60, which I have quoted earlier. See also *Babar v. the United Kingdom*, paragraph 252, which I recently referred to. Specifically, there will be a question of whether the right to family life and consideration for the best interests of the child weigh heavier than the requesting state's interest of being able to prosecute the accused in light of the seriousness of the crime and consideration for international criminal justice cooperation.
- (63) The indication in several ECtHR decisions that refusal to extradite criminals may only be considered in "exceptional circumstances", shows that the focal point of the assessment lies in the affected states' interest in ensuring that prosecution of serious crimes takes place in the country where the crime has been committed, and that it will take a lot for this focal point to be shifted. The more serious the offence, the more is required to refuse extradition. Conventional protection does not entitle the accused to choose where prosecution shall take place.
- (64) As concerns the focal point of the assessment in more detail, I would like to point out that in international agreements there is an expectation and assumption that genocide shall be prosecuted in the country where the offence has taken place. I refer here to the Convention on the Prevention and Punishment of the Crime of Genocide, cf. UN resolution 260 (III) from 9 December 1948. The Convention was ratified by Norway on 22 July 1949. Under Article 6, persons charged with genocide should "be tried by a competent tribunal of the State in the territory of which the act was committed". Article 7 also states the Convention states "pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force".

- (65) I would also like to point out that consideration for the purpose of the punishment, as expressed in the preparatory works on the Penal Code of 2005 justifies that the charge is prosecuted in Rwanda. The Proposition to the Norwegian Odelsting no. 90 for 2003–2004, pages 77–78 states that the object of the punishment must be

"to control behaviour in the future, and thereby contributing to a society and co-existence which according to applicable value priorities is deemed desirable. Therefore, the criminal institution has prevention as its purpose. The purpose of prevention is twofold: to prevent undesirable behaviour and social unrest in the wake of undesirable behaviour that still could take place."

- (66) I find there is little doubt that such purposes can only be addressed to a lesser extent through prosecution in Norway. This can best be achieved through proceedings in the society where the offences have taken place, and where future co-existence and prevention of unrest shall take place.
- (67) As concerns the opposing interests, i.e, the constitutional protection of individual rights - my review of ECtHR's practice shows that the right to family life under ECHR Article 8 has limited impact in preventing extradition in cases relating to serious crimes. This must basically also apply to section 102 of the Constitution. In the complementary assessment under section 104 of the Constitution and Article 3 of the UN Convention on the rights of the child, I find that the threshold for being able to give the interests of the child absolute priority will have to be correspondingly very high for serious crimes.
- (68) As I mentioned initially, in the case in question, the Supreme Court has both the authority and a foundation in the expert assessments of the children - which the parties agree to - to make the specific application of law. Therefore, it is not necessary for me to decide on whether there are flaws in the Court of Appeal's grounds for the decision on this point.
- (69) In the specific application of the law - which I will proceed to discuss now - a proportionality assessment must be made between the public interest of being able to extradite criminals and the importance of the interference this represents in the constitutional individual rights.
- (70) As far as the public interest is concerned, I refer to my previous review of the considerations that justify extradition. In the case in question, these general considerations are supplemented by the fact that we are facing an allegation of the gravest crimes known to national and international criminal law; genocide and crime against humanity.
- (71) These considerations are further confirmed by the fact that the evidence in the case in question supports that the allegations should be prosecuted in Rwanda. The Court of Appeal states the following regarding this:

"It concerns witness statements regarding circumstances that took place 20 years ago. The time aspect means that the level of accuracy of the statements will naturally be affected by this. This concerns a large number of perpetrators also in the commune of Nyakizu, several thousand people were murdered, the situation was chaotic and observations have been characterised by panic and the fear of death for many witnesses. Through various processes, several of the witnesses have been told and retold the experiences of others. It must be assumed that what happened during those days must have been a topic of conversation among the survivors in Nyakizu for a long time afterward. Many of the witnesses are considered to be illiterate and they have lived in a clock-free society where the concepts of time is linked to the position of the sun. Settlements have been scattered in a hilly terrain where the only means of transport for most people was to walk. These are factors that must be taken into consideration when assessing the evidence. It is also possible that witnesses may have been influenced by others, who are anti to or sympathise with or have a connection with the accused, which however will be the case in most criminal cases".

- (72) Regarding the individual circumstances, the Court of Appeal has stated the following relating to the children's situation in the event of extradition:

"An extradition with a possible subsequent conviction would mean that he is separated from his wife and children and that contact must be based to a great extent on telephone calls and communication via Skype or the like. Reestablishment in Rwanda is not realistic. Therefore, for the accused and his family, extradition will have significant consequences."

- (73) The Court of Appeal also stated that:

"The accused is in a normal life situation with a wife and children. His wife has a permanent job and it has been informed that the children are well-adjusted. The children have not taken well to separation from their father in connection with his arrest and remand in custody and the criminal case and the separation is a great strain on his wife and children. It has been informed that the children do not have special needs and no special assistance measures have been initiated for them. The accused's family situation is basically normal, and falls outside what can be characterised as a special case."

- (74) An expert assessment of 26 February 2014, which the parties agree to, addresses the children's situation in more detail. This assessment states that the children are "in a very difficult situation and that based on this, they face different challenges." A more recent expert assessment of 8 October 2014, which the parties also agree to, states that the 11 year old son now meets the criteria for ICD-10 diagnosis: F43.21 Adjustment disorder with persistent depressive reaction. Based on this diagnosis therapy has been offered to prevent development of more serious psychopathology. The purpose of this is to support the boy in living with a very difficult situation "given that this situation persists, it is assumed that the boy's symptoms will persist as long as this lasts."
- (75) The prosecuting authority agrees with the defence counsel that prosecution in Norway would put significantly less strain on the children than extradition of the father to Rwanda. If the father is extradited, it is not realistic to assume any reestablishment of family life. Based on the information presented in the case, I understand that if A is extradited the children will for all intents and purposes not be able to have contact of significance with their father. In this respect, I find there is no doubt that on their own the best interests of the children indicate that the accused should not be extradited.
- (76) However, in a proportionality assessment, I find it decisive that we, as mentioned, are faced with an allegation of a rare serious crime. In light of this and other circumstances justifying extradition, I cannot see that there are grounds for giving the best interests of the child absolute priority. In my view, the interests of international criminal judicial cooperation and a proper hearing of the serious charge require that the allegation of genocide is brought before the court in the country in which the crime has been committed and from where the accused has escaped. The individual burdens an extradition decision impose on A's children can therefore not outweigh the reasons that without a doubt support that the accused is extradited. Based on this, it is not necessary for me to discuss the meaning of Articles 7 and 16 of the UN Convention on the rights of the child.
- (77) Due to the nature of the offences, even when the human interests in the case are considered as a whole, I cannot see that there are such fundamental humanitarian interests that give grounds for refusing extradition.

- (78) Based on this, I have concluded that the conditions for extradition under section 7 of the Extradition Act have been met.
- (79) Finally, I would like to come back to the defence counsel's comment that the accused had applied for and had met the conditions for Norwegian citizenship, but that the application was held in abeyance with reference to the allegation in question. If I understand the defence counsel correctly, he believes that in the situation in question as regards extradition, the accused must be judged as if he was a Norwegian citizen, or that his long connection with Norway means that he cannot be extradited for humanitarian reasons.
- (80) I refer to the preparatory works of the Act, which states that there was no intention to introduce an absolute ban on extradition of persons who live - are domiciled - in Norway, either as an alternative or supplement to the ban that applies to own citizens, cf. Proposition to the Norwegian Odelsting no. 30 for 1974–75 page 26. Pursuant to section 30 subsection 2 of the Citizenship Act, an application for citizenship may be held in abeyance if the applicant is under investigation for a criminal offence that may have importance for the application. In my view, there is no doubt that there was a right to this here. Based on this, the basis of the assessment pursuant to section 7 of the Extradition Act - as the case otherwise stands - cannot be changed. In other respects, with reference to the seriousness of the allegation, I cannot see that the period of residence affects the outcome of the decision.
- (81) The defence counsel has also argued that the degree of suspicion is not strong enough for extradition to be proportionate. I do not agree with this. The Court of Appeal has made an extensive assessment of the evidence and has concluded as follows:
- "The overall evidence that links the defendant to MDR/JDR and the genocide at Akanyaruelsen and Cyahinda church is, regardless of any, lapses of memory, of such substance that it more likely than not that the defendant knowingly contributed to the actions as these have been described in Kripas' indictment, dated 6 December 2013, charges 1, 2, 4 and 5.**

(82) Based on this, the appeal is to be dismissed.

(83) I vote for this

RULING:

The appeal is dismissed.

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| (84) | Justice Ringnes: | I agree with the first-voting justice in all material respects and with his conclusion.. |
| (85) | Justice Bull: | Likewise. |
| (86) | Justice Endresen: | Likewise. |
| (87) | Chief Justice Schei: | Likewise. |

(88) After passing of votes, the Supreme Court pronounced the following

R U L I N G :

The appeal is dismissed.

True transcript confirmed: