UNITED NATIONS
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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

4974/A

ICTR-99-52-A
15-09-2005
(4974/A - 4968/A)

Before: Judge Erik Møse, President

Registrar: Adama Dieng

Date: 14 September 2005

HASSAN NGEZE

v.

THE PROSECUTOR

Case No: ICTR-1999-52-A

DECISION ON HASSAN NGEZE'S APPLICATION FOR REVIEW OF THE REGISTRAR'S DECISION OF 12 JANUARY 2005

For the Applicant:

Bharat B. Chadha

THE PRESIDENT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA;

BEING SEIZED OF "Appellant Hassan Ngeze's Application for Review of the Registrar's Decision of 12.01.05 Denying Permission to Get Married at the ICTR Premises Pending the Determination of his Appeal", filed on 28 January 2005 ("Application");

CONSIDERING the "Registrar's Decision Pursuant to Article 8(3)(C) on the Request for Marriage and Other Reliefs ", filed on 12 January 2005;

HEREBY DECIDES the Application.

INTRODUCTION

1. Hassan Ngeze was convicted on 3 December 2003 for, amongst other crimes, genocide.[1] His conviction and sentence are presently under appeal. He seeks review of the Registrar's decision of 12 January 2005. This decision did not oppose Ngeze's request to get married while in the United Nations Detention Facility ("UNDF") in Arusha. However, his request for consummation of marriage and subsequent conjugal visits after the wedding was far-reaching and beyond the scope of the Registrar's authority as described by the applicable ICTR provisions. While the right to marry is recognized by international human rights instruments, elements that ordinarily form part of married life may be subject to limitation due to incarceration. No uniform national practice exists concerning the right of inmates to consummate marriages while they are under incarceration, and no such right exists under the domestic law of the host country, Tanzania.

SUBMISSIONS

2. In his Application, Ngeze maintains that the Registrar's decision contravenes human rights instruments and national laws. In particular, he submits that the law of the host nation recognizes that a marriage is only complete upon consummation. He further argues that as the Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal ("the Detention Rules") allow visits by a spouse, by implication, they empower the Registrar to permit inmates to marry.

3. Ngeze also submits that the Registrar erred in finding that he lacked the legal authority to ensure conjugal visits absent an amendment to the Rules. The Registrar ought to have adopted a liberal rather than restrictive interpretation of the Detention Rules. The Registrar's decision was discriminatory as it denied ICTR detainees access to detention facilities which are provided to detainees before the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). Alternatively, it is contended that the Registrar wrongly held that he lacked the power to transfer Ngeze to the United Nations Detention Unit in The Hague. The Registrar is also alleged to have failed to pay adequate regard to Ngeze's status as an incarcerated person pending appeal.

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[1] *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52T, Judgement and Sentence (TC), 3 December 2003.

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DELIBERATIONS

Admissibility

4. Pursuant to Rules 19 and 33 (A) of the Tribunal's Rules of Procedure and Evidence ("the Rules"), the President exercises authority and supervision over the Registrar. As the Registrar enjoys a margin of discretion in conducting the day to day administration of the Registry without undue interference by presidential review, a threshold condition must be satisfied before an administrative decision may be impugned by supervisory review. The Tribunal case law has established that an application for review by the President of a Registry decision on the basis that it is unfair procedurally or substantively is admissible if the Applicant has a protectable right or interest, or if it is otherwise in the interests of justice. In this regard, the decision sought to be challenged must involve a substantive right that should be protected as a matter of human rights jurisprudence or public policy.[2]

5. The present request is found to be admissible, given the widespread recognition of the right to marry and to family life in several international human rights instruments and case law. The salient issue in this case is not the existence of these rights but their scope of application. The question whether ICTR detainees are entitled to marry, to consummate such marriages, and to conjugal visits while in the custody of the Tribunal has not to date been subject to presidential review.

ICTR Provisions

6. The constituent instruments of the Tribunal do not contain any provisions relating to family life. For instance, Articles 16 (1), 20 (1) and (3) of the Statute, Rules 58, 61, 63 and 66 of the Detention Rules, and Article 8 (3)(C) of the Directive for the Registry are silent on the right to marry, to consummate such marriages, and to conjugal visits. More specifically, the provisions relating to prison visits do not regulate these matters.[3] This lack of an explicit legal basis led the Registrar to hold that he was not empowered to grant Ngeze's requests.[4] In my view, the silence of the ICTR provisions does not exclude the possibility that these rights be recognized. The fact that conjugal visits are allowed under the similar provisions of the ICTY confirms this interpretation.[5] Consequently, the Application raises the question whether other legal provisions confer these rights.

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[2] While the circumstances in which the President may exercise that authority and supervision are not expressly set out in the Rules, the Tribunal's jurisprudence has articulated the power vested in the President to review the Registrar's decisions. *See Prosecutor v. Joseph Nzirorera*, "The President's Decision on review of the decision of the Registrar withdrawing Mr. Andrew McCartan as lead counsel of the accused Joseph Nzirorera", Case No. ICTR-98-44-T, 13 May 2002, p. 3; *Prosecutor v. Pauline Nyiramusuhuko and Arsène Shalom Ntahobali*, "The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decisions pertaining to the Assignment of an Investigator", Case No. ICTR-97-21-T, 13 November 2002, para. 5 (authority based on inherent power of judicial bodies to ensure fairness when individual rights or protected interests are at issue). *See also Nahimana, Barayagwiza and Ngeze v. The Prosecutor*, "Decision on Hassan Ngeze's Motion Appealing the Registrar's Denial of Marriage Facilities", Appeals Chamber, Case No. ICTR-99-52-A, 20 January 2005 (declaring Applicant's motion before the Appeals Chamber to be improper and that appropriate recourse was instead presidential review of the Registrar's decision).

[3] Ngeze has not cited any authority to support the view that visitation rights and conjugal rights are synonymous. International and national law suggest otherwise: *see* text below (paras. 7 to 13).

[4] Registrar's decision, paras. 4, 5, 18.

[5] The ICTY Statute, the Rules of Procedure and Evidence, the Detention Rules, the Regulations to Govern the Supervision of Visits to and Communication with the Detainees, and the House Rules for Detainees are all silent on the issue of conjugal visits.

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7. Human rights declarations and conventions adopted at the universal and regional level establish the right to family life, to marry and to found a family. Article 16 (1) of the Universal Declaration of Human Rights states that men and women of full age have the right to marry and to found a family. However, this right is not absolute and may be limited under the general provision in Article 29 (2).[6] More precise rules concerning these rights are found in Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR), Articles 8 and 12 of the European Convention of Human Rights (ECHR), and Article 17 (2) of the American Convention on Human Rights. In the African Charter on Human and Peoples Rights, family life is protected in Article 18.[7] None of these provisions contain any formulations concerning consummation of marriage or conjugal visits.

8. As the Registrar's decision correctly noted, the jurisprudence concerning these rights in relation to detainees is still evolving. The case law of the Human Rights Committee concerning the ICCPR does not seem to have addressed the issues raised by the present Application. The European Commission and Court of Human Rights have generally not been receptive to expanding the scope of ECHR Article 12. In *Hamer v. UK* and *Draper v. UK*, referred to in the Registrar's decision, the Commission found that this provision gives prisoners the right to marry, and required the State to mitigate or eliminate any obstacles which would prevent parties from entering into an otherwise lawful marriage. However, on the question of whether inmates marrying in prison would enjoy any right to consummation, the Commission's approach was less facilitative. It noted that "[t]he essence of the right to marry ... is the formation of a legally binding association between a man and a woman. It is for them to decide whether or not they wish to enter a marriage in which they cannot cohabit."[8]

9. Of particular interest is a judgment rendered by the European Court of Human Rights in 2003 relating to ECHR Article 8. In *Aliev v. Ukraine,* which related to a prisoner denied sexual contact with his wife during her visits, the Court stated:

> [W]hile detention is by its very nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members ... At the same time, the Court recognises that some measure of control of prisoners' contacts with the outside world is called for and is not of itself incompatible with the Convention ... Whilst noting with approval the reform movements in several European countries to improve prison conditions by facilitating conjugal visits, the Court considers that the refusal of such visits may for the present time be regarded as justified for the prevention of disorder and crime within the meaning of ... [Article 8 (2)] of the Convention. ... In the circumstances of the present case the Court thus finds that the restriction of the applicant's wife's visits was proportionate to the legitimate aim pursued. ... There has accordingly been no violation of Article 8 of the Convention.[9]

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[6] Article 29 (2) provides that limitations on the rights and freedoms recognised "must be determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

[7] Ngeze has also invoked Article 19 of the Charter. This provision establishes the general principle of equality and does not provide any guidance in the present context.

[8] *Hamer v. UK, No 7144/75,* 24 DR 5 at 16 (1979) Com Rep; CM Res DH (81) 5; *Draper v. UK, No 8186/78,* 24 DR 72 at 81 (1980) Com Rep; CM Res DH (81) 4.

[9] *Aliev v. Ukraine, No 41220/98,* Judgment of 29 April 2003, paras. 187-190. *See* also, to the same effect, *E.L.H. and P.B.H. v. the United Kingdom*, nos. 32094/96 and 32568/96, Commission decision of 22 October

10. According to this judgment, which was not mentioned in the Registrar's decision, it may be laudable to facilitate conjugal visits where this is practicable. However, there is not at present a general obligation to do so under the ECHR.

11. No case law suggests a different interpretation of the other human rights conventions. This is supported by two further considerations. First, even those international legal instruments which specifically address the rights of prisoners are silent on consummation and conjugal visits. For instance, the Standard Minimum Rules for the Treatment of Prisoners refers to the right of prisoners to communicate with their family at regular intervals, both by correspondence and by receiving visitors, but not to conjugal visits as such (Article 37). Similarly, mention is made of the benefits of prisoners' maintaining all desirable relations with family, again without referring to conjugal visits (Articles 51 and 79).[10]

12. Second, national practice on the issue of conjugal visits is far from uniform. There is considerable diversity according to factors such as the level of resources available to the national prison authorities in question, differing national perspectives on penal policy and security imperatives, as well as budgetary and administrative constraints. It is not possible to discern a general practice in this area. The Registrar's decision noted a number of decisions issued by courts in the United States of America which recognise that although an inmate retains those rights that are not inconsistent with his status as a prisoner or with legitimate criminological objectives, the right to conjugal visits may be circumscribed.[11] A similar balancing process is also evident in the practice of other States.[12]

13. The legal conclusion is therefore that international instruments and practice has not attained sufficient specificity to compel the conclusion that the Tribunal is obliged to facilitate the consummation of marriages and conjugal relationships of persons serving sentences for international crimes. Consequently, refusal to grant conjugal visits does not amount to a departure from internationally recognized minimum standards in this area.

Other Submissions (Host Country, Equal Treatment, etc)

14. Hassan Ngeze's contention that the Registrar failed to take account of Tanzanian national law must also fail. His argument in this respect is understood to allege that as a

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1997, Decisions and Reports 91, p. 61; and *Kalashnikov v. Russia*, no. 47095/99, Court decision of 18 September 2001.

[10] Approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. *See also* UN GA Res. 45/111, 68th Plenary meeting, A/RES/45/111, 14 December 1990, Annex, Basic Principles for the Treatment of Prisoners.

[11] Registrar's decision, paras. 14-15 (citing *inter alia Hernandez v. Coughlin* 18 F.3d at 133 (2nd Cir) (finding that although an inmate's right to marriage is constitutionally protected, the constitution does not create any protected guarantee to conjugal visitation privileges while incarcerated, that a general right to procreate is not inconsistent with a holding that there is no right to conjugal visits in prison, and that the rights of marital privacy, like the right to marry and procreate are necessarily and substantially abridged in a prison setting)). *See also Lyons v. Gilligan*, 382 F. Supp. 198 (1974), at 201-202: "The absence of conjugal visiting in prison is not excessive punishment in itself or disproportional to plaintiff's crimes. It is merely a customary concomitant of the punishment of incarceration"; and *United States ex rel Wolfish v. Levi*, 439 F. Supp. at 143, *per* Frankel J and *Tarlton v. Clark*, 441 F.2d 384 (1971) at 203: "New approaches to family visiting incorporating conjugal visiting are being taken in an increasing number of state prisons in our nation. While this trend is one of the indicators of whether "evolving standards of decency" have yet made deprivation of conjugal visiting a constitutional violation, this evolving reform in penological practices is not translatable into a ... right."

[12] *See* eg *Haim Lewis Weil v. State of Israel and others*, High Court of Justice 114/86, PD 41(3), 477 (9 August 1987), and Israeli Supreme Court Decision in *Yigal Amir v. Prison Authorities*, Decision 4714/04 and Decision 5614/04, 7 March 2005, paras. 18-35 (dismissing an appeal from an administrative decision of the prison authorities' denial of a request for conjugal visits with fiancée).

marriage, under Tanzanian law, requires consummation in order to be valid, the UNDF is, as part of its obligation to allow this marriage, therefore also by implication obliged to allow its consummation.[13] As noted in the Registrar's decision, there are no provisions for consummation of marriages and conjugal visits for prisoners in Tanzania.[14]

15. Hassan Ngeze contends that the Registrar's refusal to permit consummation of his marriage and conjugal visits thereafter denies him rights to which similarly-placed detainees in The Hague are entitled. This aspect of the Application is understood to allege, in substance, a breach by the Registrar of Article 20 (1) of the Tribunal Statute, which provides that all persons shall be equal before the Tribunal.

16. Article 20 focuses on procedural equality.[15] It is diffcult to see how it can form a basis for comparing conditions of detention in Arusha and The Hague, respectively. Human rights provisions prohibiting discrimination do not mandate identical treatment between all individuals in the exercise of protected rights where objective and reasonable conditions exist to justify differential treatment.[16] In this regard, there are observable differences between the detention regimes in The Hague and Arusha. One such difference is that there are no facilities for conjugal visits at the UNDF in Arusha. The construction of such facilities would have budgetary and administrative implications. Another difference is that conjugal visits are permitted in Dutch prisons but not in Tanzanian prisons. The Tribunal's treatment of Ngeze therefore cannot be said to be discriminatory.

17. The ECHR case law has established that even if a State has an obligation to assist serving prisoners to maintain contact with their families,[17] only in exceptional circumstances will that duty extend to transferring a prisoner from one jail to another.[18] The Registrar was accordingly under no duty to facilitate consummation or conjugal visits by acceding to

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[13] The validity of a marriage has historically been judged by the place where it is celebrated. (*See eg* Cheshire and North's *Private International Law,* 12th edn., Butterworths, 1992, at p. 572). However, it does not follow that the Tribunal must allow Ngeze to carry out all requirements of Tanzanian law to the letter. Lawful incarceration inevitably limits the exercise of certain rights. Concerning conjugal visits, the ECHR case law has established that detainees will be unable to exercise their right to marry in an identical fashion to other citizens. *See X and Y v. Switzerland, No 8166/78,* 13 DR 241 (1978), noting that there is no right of prisoners to conjugal relations with their spouse, even if the trend in certain countries may be in this direction. Where consummation and cohabitation are impracticable, it is for the parties to decide whether or not they wish to marry in such circumstances, rather than there being any particular obligation on the part of the relevant authorities to render the right to marry more meaningful. (*See eg* the *Hamer* and *Draper* cases, above, footnote 8).

[14] Registrar's decision, para. 16; Application, Annex V, 1991/A. As previously noted, conjugal visits are not part of internationally recognized minimum standards in this area (see paras. 7 to 13, above). Accordingly, Tanzania is in no way obliged by international law to change its national practice in this area.

[15] *See e.g. Prosecutor v. Duško Tadić,* Judgement, Appeal Chamber, Case No. IT-94-1-A, 15 July 1999, paras. 43-56.

[16] For the purposes of ECHR Article 14, a difference in treatment is discriminatory if it "has no objective and reasonable justification, that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised." (*See inter alia Camp and Bourimi v. The Netherlands,* Judgment of 3 October 2000, para. 37. *See also Thlimmenos v. Greece* [GC], Judgment of 6 April 2000, para. 44 ("The right under Article 14 ... is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification"). As for the ICCPR, *see B.d.B. v. Netherlands,* Human Rights Committee, Doc. A/44/40, p. 286 ("Article 14 of the Covenant guarantees procedural equality but cannot be interpreted as guaranteeing equality of results"). The relevant authorities enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*see eg Karlheinz Schmidt v. Germany,* Judgment of 18 July 1994, Series A, no. 291-B, pp. 32-33).

[17] *See e.g. X v. UK No 9054/80,* 30 DR 113 (1982) and *McCotter v UK No 18632/91,* 15 EHRR CD 98 (1993).

[18] *Campbell v. UK Nos 7819/77,* Decision, 6 May 1978, paras. 30-32, unreported.

Ngeze's request that he be transferred to The Hague. Such a transfer would also not be without budgetary implications for the Tribunal.

18. Nor did the Registrar commit any error by not according particular significance to the fact that Hassan Ngeze is currently at the UNDF pending appeal. The possibility that his conviction or sentence may in future be revised on appeal does not, as such, require a modification of the conditions of his detention.

Conclusion

19. Detainees at the UNDF have the right to marry. However, neither the ICTR legal provisions, human rights conventions nor other international instruments require consummation of marriage and conjugal visits during detention. Therefore, the Registrar's decision was not in violation of any international legal norms. The Registrar's decision does not amount to any unfairness which calls for presidential intervention.

FOR THE ABOVE REASONS, THE PRESIDENT

DENIES the Application.

Arusha, 14 September 2005

Erik Møse
President

[Seal of the Tribunal]