

CASE – MOOT COURT COMPETITION 2007

X SAM WING V X-LAND

X-land is a recent member of the European Union and a member of the Council of Europe since 1993. It ratified the European Convention on the protection of human rights and fundamental freedoms in 1995 and its Optional Protocol number 11 in 1997. It has also ratified Optional protocol number 6 and signed, but not yet ratified Optional protocol number 7.

X-land is also a state party to a number of UN Human Rights Conventions and among some of the major European human rights conventions it has ratified in particular the Convention on the prevention of torture and the revised version of the European Social Charter could be mentioned.

X-land underwent a democratic and economic transformation after the end of the cold war. From having suffered under a totalitarian regime the people were now allowed to choose its own government. The former People's Republic Party, PRP, to which all citizens had been members, lost almost all of its former power in 1991 after the peaceful introduction of a multi-party parliament. In 2000, however, the old leaders of PRP gained influence and popularity again, allegedly because of discontent with increasing differences in income and wealth. During the election in 2000, the former PRP, now called The Conservative Party, CP, gained 15 seats in the parliament. In 2004, the number of seats had increased to 32 (out of 195) Due to the fragmented political picture in the country, placed them in a power position towards the ruling party, The Christian Democratic Party, CDP, which had not gain majority on its own. The Conservative Party has, since 2004, been able to hinder a number of reforms concerning individual rights but has also supported initiatives that concern State sovereignty and national security.

X-land borders to Y-land which only to a limited extent has changed its governance. Free elections have been introduced in municipalities but not yet for parliament, which is run by a former sister party to the PRP, the Socialist Party. The two states share a similar history and were, during the early 1600, part of a larger commonwealth.

The indigenous people of Wiaza live in the mountains, cities and plains of the southwest of X-land, and northeast of Y-land. During the late 90's they gained some independence in X-land when the National Wiaza council was established. The Wiaza is a recognized minority but has not been afforded status as an indigenous people. In early 2000 the Wiaza however started to experience indifference from the ruling party and open racism from the majority population in X-land. This development has affected the educational system as well as the economic and social welfare of the Wiaza negatively.

On the other hand, the Wiaza population in Y-land has historically had a strong position. Even if they do not have regular independence they have controlled and governed the territories in the northeast where some important national resource, including diamond mines are situated. Attempts to confiscate land from the Wiaza has historically been unsuccessful, to some, or perhaps a large extent this has had to do with the liaison and support it has had from Z-land, a powerful neighbor in the North which has made huge profits through its dealing with the

Wiaza. The majority population of Y-land has lived in peace with the Wiaza and many of them work and live in the northeast.

For a long time, living standards were particularly high in the region. During the last few years economy in the country as a whole has however deteriorated, something that the government of Y-land attributed Z-land. Only a full governmental control of the national resources could change things so that wealth can be evenly distributed. The growing antagonism towards Z-land resulted in violent racist attacks against the Wiaza, who were considered as traitors. The attacks grew stronger and more violent and included rapes and torture. The government however denied any knowledge or occurrence of such acts. International Human Rights organizations called on the government to stop the violence while national humanitarian organizations accused the government of supporting the brutalities. Some reports even alleged that members of the police force in fact participated in the raids. In 2001 the Special Rapporteur on Indigenous People reported on Y-land in a report presented to the UN Human Rights Commission. The Commission welcomed the report but did however not agree on a country resolution. The government again denied the accusations in the report, which they argued were a result of a biased investigation, mainly or even solely based on information from NGOs.

The attacks on the Wiaza did however not stop and with the unofficial support by Z-land, some Wiaza organized and armed themselves. In late 2002 there were regular fights between paramilitary groups from the majority population and armed groups of the Wiaza. The conflict culminated in the town of Kingmen, only 25 kilometers from the border to X-land. The government of Y-land did not manage to stop the violence and hundreds of people were killed. According to unofficial figures, more than 90 percent of the deaths were of Wiaza families, most of them unarmed women and children. The international community called for action from the government. After this serious incident the government of Y-land promised to capture and punish those responsible for acts of violence and for insurgency but up until October 2006, only Wiaza rebels were caught, indicted and convicted for having taken up arms. Three members of Wiaza were in August 2005, held responsible for military rebellion and sentenced to death. The sentences have not yet been enforced and the men are held in solitary confinement. National NGOs accuse the government of allowing or even ordering interrogation of them with the use of illegal methods with the purpose of giving up names of other leaders of the Wiaza who have supported the rebellion. As the men have no contact with the outside world, these accusations have not been supported and are refuted by the government who claim that the men have been treated well. In March 2005, the government allowed for an interview with the three men by a journalist from the International Herald Tribune. Upon a question from the reporter one of the men assured that none of them had been tortured.

In 2004, after having provided the Wiaza with weapons, Z-land decided to support the government instead, officially in order to stop the violence. Unofficially in order to secure good relations since the full control of the national resources seemed to soon be in the hands of the government. In secret Z-land still however provided the Wiaza with weapons and guerilla training something that fueled the conflict and violence. As a tragic result the Wiaza population decreased heavily on account of the insurgency and they eventually lost control of most of their resources. Some decided to seek refuge in neighboring countries, others went underground or tried to deny their inheritance in order to survive. For some time, a group of Wiaza managed to keep control of a small area where one of the more profitable diamond mines was situated. The group was accused of having placed bombs and landmines on roads leading to the area. An unknown number of civilians had been killed when mines or car bombs

had detonated in neighboring villages. In public statements the president of Y-land called for the help of the public to catch and try the Wiaza terrorists.

In January 2006 the Wiaza were accused of a number of assassinations of high political leaders and officials such as the minister for Justice. Following the killings, the Y-land government declared a State of Emergency and made it possible to limit a number rights, such as e.g. habeas corpus. In its Emergency laws a section was included which opened up for proceedings before a Special Emergency Court where individuals accused of insurgent and rebellious acts could be tried if the President so decided. These courts would not open to the public and they allow for restrictions in the disclosing of evidence if the government argued that it could affect national security. Such restrictions can be appealed against if the defendant believed they inhibited a fair trial. In such circumstances the law allows for executive detention instead of a trial until evidence could be disclosed or until the person is not considered to pose a threat anymore. The Minister of Defence can renew the detention every four weeks. Up until present day the laws on Special courts or executive detention have not been used.

During the insurgence a vast number of Wiaza people had sought asylum and refuge in X-land and up until May 2006 all of them had gained refugee status. In August 2006, Sam Wing, a former tribe leader from Kingmen whose family had been killed in the 2002 confrontation arrived at the border of X-land and asked for protection. After he was interviewed by the police at the border, he was moved to one of the refugee centers, was afforded counsel and applied for asylum and refugee status. Sam Wing had gone underground after the massacre in Kingmen but had managed to perform as a tribe leader e.g. through a website. His influence on the Wiaza continued to be very strong and since no rivalry exist between the Wiaza in the two countries, his arrival in X-land was welcomed also among the Wiaza community there. Soon after arrival to the Refugee Center he was thus able to move out and live with a Wiaza family.

The acceptance of Sam Wing in X-land upset the government of Y-land who argued that Wing was not a refugee but a terrorist who should be returned to Y-land for trial. Informal discussions also took place with the sister party of the ruling SP in Y-land, CP in X-land.

In September Sam Wing was summoned to a in interview with the Security police. He was e.g. asked questions about the assassination of the Minister of Justice and of his view on the confrontations and bombings in Wiazaland. He was also asked if he had contacts with members of the Wiaza from Y-land and about the relations with Wiaza in X-land. At the same time Y-land had started negotiations with Z-land, a member of the UN Security Council, to label the Wiaza as international terrorists and argued that the disturbance was most likely to spread into other states where there were there were Wiaza communities. It pointed out that also in X-land the Wiaza had started to rebel and it would only be a matter of time before similar attacks such as those in Y-land would spread.

In October 2006 the Security Police of X-land intervened in the case and informed the Migration authorities that it believed that Sam Wing was a threat to national security and that he should thus not be afforded refugee status or any other protection in X-land.

The content of the assessment was not communicated with Sam Wing or his lawyer but they were informed that the Security Police had recommended the migration authorities to expel him as a security risk. At the same time the prosecutor's office started an investigation into accusations of terrorism. Sam Wing was informed of the initiation of investigation.

In its Alien's Act, X-land has implemented the 1951 UN Convention on the status of refugees, including article 32 and 33. According to the Act, the Alien's Court decides as first instance on all asylum cases. In all hearings, except those where national security is concerned, there is an oral hearing before the court where the asylum-seeker is allowed to be present. In security cases however, the court takes the decision after a hearing that only partially is oral and immediate and it can exclude the asylum-seeker from the hearing. The court is also allowed to decide on the case on material that is not disclosed in full to the asylum seeker or his or her counsel.

According to national law, however, no decision or judgement can be made with the use of evidence that derives from torture or in any other way is obtained in a manner that would shock the conscience of the court. As this law is fairly recent it has never been applied. According to national human rights organization, the law is unclear about whether evidence can be used if the prohibited material has been obtained abroad, that is if another state's agents are responsible for the illegal treatment.

In normal asylum cases an applicant is allowed to appeal a decision by the Alien's Court to the Supreme Alien's Court, if it is not evident that such an appeal will not be successful. A case that involves national security or that would be of importance to international relations, on the other hand, can be appealed to the Government but only by the Security police, not the individual. In such cases the decision by the Alien's Court is stayed until the Government has finally decided in the case. In most cases this would mean that a decision for temporary or permanent residence permit would not be granted until the government has decided in the case. The law also allows for the detention of an asylum-seeker for national security reasons, which also means that an appeal by the Security police against a decision on residence permission generally is followed by a request for detention.

In his application for asylum Sam Wing alleged that due to the situation in the country he would be subjected to different forms of persecution if he were returned to Y-land. He argued that because of the accusations from the government of Y-land (that the Wiaza were responsible for the killing of members of the cabinet) he would risk being tried in an unfair trial in an Emergency court and sentenced to capital punishment.

According to Sam Wing, the Wiaza were wrongfully accused of the violence. The Wiaza is a very peaceful people and had only taken up arms because they were threatened. He argued that as an indigenous people, they had the right to self-determination and to decide over its natural resources. Any violence that the Wiaza was accused of was an act of self-defence; it could not be labelled terrorism. In contrast to the paramilitary groups the Wiaza had never attacked any civilians. He also claimed that the criminal investigations into the alleged war crimes that had happened from 2002 were heavily politicised. Only Wiaza had been convicted, all investigations concerning crimes committed by the paramilitary group had been dropped or at least not rendered any prosecution. He couldn't say if there were any ongoing investigations, but he doubted it. In conclusion, he would not receive a fair trial and there was a real risk that he would be sentenced to death if found guilty of any crime.

He also argued that even if any member of the Wiaza community has committed a crime during the insurgence or after, he personally could not be held responsible for these actions. He is aware of the fact that at least two members of his tribe are in custody accused of the assassination of the Minister of Justice and he acknowledge having been in contact with them. It is however his duty as a tribe leader to never refuse to see or talk to any member of the community.

Sam Wing also argued that there was also a real risk that he would be subjected to torture and degrading and humiliating treatment if he was returned to Y-land. It was a well-known fact, he alleged, that members of Wiaza were interrogated and forced to confess to crimes or to give information about other individuals in prisons run by the security police. It is also known, he argued that Wiaza often are beaten when taken into custody by the police. He argued that even if individual members of the police forces who were connected to the paramilitary committed these crimes, they were acts that were approved of by the government. At any rate the state was not able to control the torture going on in prisons and detention centres. In conclusion Sam Wing argued that according to the Aliens Act and the UN Convention on the Status of Refugees, he should be afforded protection and refugee status in X-land.

Sam Wing, who never was taken into custody, had his case decided by the Alien's Court on November 11, 2006. The court decided that it was not necessary to hear Sam Wing and that it could decide on the case on the written information put before it. The court afforded Sam Wing temporary residence permission. In its decision the Court argued that although it was convinced that Sam Wing would be subjected to persecution if returned to Y-land, there were still national security concerns why he could not be afforded refugee status. On the other hand, the court decided that Sam Wing could not be expelled since this would expose him to a serious risk of grave human rights violations. The security police appealed to the government and asked that it would expel Sam Wing.

On November 15 the prosecutor's office announced that its initial investigations on Sam Wing did not provide enough evidence that he would be involved in terrorism, or the killing of cabinet ministers in Y-land and the investigation was thus dropped.

On November 9 the Minister for Foreign Affairs had met with the Ambassador of Y-land to discuss the case of Sam Wing. At the meeting, the Ambassador of Z-land was also present as was the leader of the CP-party, who also presided the Parliamentary Committee on International Relations. As the government of X-land had previously been contacted by Y-land on the events in the country, it was concerned about the content of the report from the Security police and about Sam Wing's presence in the country. It was also afraid that the disturbance in Y-land would spread to the northeast and into X-land.

The government of Y-land informed X-land that it believed that a return of Sam Wing to Y-land would be important for the peace process. As it could not provide any clear evidence yet as to his involvement in the killing of the Minister of justice or the bombings, the Ambassador argued that this was only a matter of time. Y-land could thus, at the present time, not file a formal complaint for extradition but reminded the Minister of Justice that X-land could, according to national law, expel an individual as a security risk without such a request.

The Minister of Justice extended his concerns about the risk for Sam Wing being ill-treated upon return. The Ambassador answered that his government could ensure that no harm would come to him, and that he would receive a treatment that the law would allow for. As the death penalty is not prohibited by international law and since X-land only had ratified optional protocol 6 but only signed protocol number 13 of the European Convention, it would not be in violation of its obligations even if Sam Wing were executed after trial. The Ambassador refuted all allegations of unfair trials and referred to other state reports on the subject, such as that of Z-land, on the human rights situation and the fact that there had not yet been any trial in an Emergency Court. At any event, he argued, these courts provide for a fair trial.

The Ambassador from Z-land, who up until now had remained silent, handed over a document with a draft of its human rights report on Y-land for 2006. From it, the Foreign Minister could e.g. read that “improvement in the ordinary legal system had been made during the last years and that former problems of biased courts were now mended.” The minister argued that this was contrary to information from international and national human rights organizations concerning 2005, who had revealed serious problems in the justice system. The ambassadors answered that most of the improvements had not really been effectuated until 2006 and it was sure that this change for the better would be recognized also by NGOs in their upcoming reports. As the minister for justice was not completely convinced he asked if Y-land was prepared to give any kind of guarantee that Sam Wing would not be ill treated if returned to Y-land. The Ambassador said that he would have to contact the capital but that he was sure that they would be able to come to some kind of understanding.

Three days later, on November 12, the Foreign Minister was invited back to the Embassy and handed over a document containing the following text:

MEMORANDUM OF UNDERSTANDING

MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE X-LAND AND GOVERNMENT OF Y-LAND REGULATING THE PROVISION OF UNDERTAKINGS IN RESPECT OF SAM WING, NATIONAL OF Y-LAND, PRIOR TO DEPORTATION

Understandings

It is understood that the authorities of X-land and of Y-land will comply with their human rights obligations under international law regarding the person returned under this arrangement, Sam Wing, national of X-land, born in Kingmen on October 19, 1954.

The conditions set out in the following paragraphs (numbered 1-8) will apply.

If arrested, detained or imprisoned following his return, Sam Wing, will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.

If Sam Wing is arrested or detained, he will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.

Upon arrest or detention, Sam Wing, will be informed promptly, in a language that is understood by him, by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.

If Sam Wing is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by X-land and the authorities of Y-land. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending state.

Except where Sam Wing is arrested, detained or imprisoned, the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates.

Sam Wing will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

If Sam Wing is charged with an offence following his return, he will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

If Sam Wing is charged with an offence following his return, he will be allowed adequate time and facilities to prepare his defense, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Signature

This Memorandum of Understanding represents the understandings reached between the Government of X-land and the Government Y-land referred to therein.

For the Government of X-land

For the Government of Y-land

When discussing the content of the memorandum, the Minister for Foreign Affairs of X-land and the Ambassador of Y-land also decided the constellation of the independent body. After having contacted the suggested and security approved members of the body, the following was added to the memorandum of understanding:

"Independent body"

In order to allow for full and effective respect of this agreement, the government of X-land and of Y-land has agreed to set up a review body consisting of former General Prosecutor William Soepke, of X-land, previously also assisting prosecutor in the Ad Hoc Tribunal of Rwanda, former Appeal's Court judge Amina Liliav of Y-land and current Ambassador of Z-land to Y-land, Theodor Rake, former member of Z-land's parliament.

On the same day, the Foreign Minister of X-land signed the agreement and it was sent by courier to the Government of Y-land, whose Minister for Foreign Affairs signed it on behalf of his government the following day, November 13.

On November 10, the counsel of Sam Wing had found out that some kind of discussions concerning her clients was conducted between the governments of X-land and Y-land. As she feared that this would mean that the case would be handed over to the government, she immediately contacted the cabinet secretary to hear if any such meeting had taken place and if any decision concerning her client had been taken. She also asked, in writing, to take part of any documents that the government might be in possession of, including records from the meeting, and to be promptly informed of any further developments in the case. The letter was written and faxed to the Government on the evening of November 10. On November 11 her request was answered by the registrar who replied that a meeting between the Ambassador of Y-land and the Foreign Minister had taken place but due to the Secrecy Act, section IIB on international relations, he could not reveal the content of their discussion.

The counsel responded on email the same day that it was of outmost importance that she be informed of any decision or discussions concerning her client in due time so that, should the government decide to expel him, she would be given time to refer the case to the European Court for Human Rights.

On November 14 the government decided to expel Sam Wing and that he is to be expelled immediately. The police of X-land were to enforce the decision.

The decision was sent *Recommandé* to the counsel the same day and arrived the following day on November 15. In the decision the government refers to an agreement between X-land and Y-land that Sam Wing's rights will not be violated upon return. No copy of the agreement is attached. The counsel immediately tried to contact her client and calls his home and his mobile. She is however unable to find Sam Wing, who had been detained by the police on November 14, the day of the decision, and was now held in a center close to the airport.

During her search for her client, the counsel sends a request to the European Court for Human Rights for an interim measure according to rule 29 which arrives in the afternoon of November 14. As the court notices the urgency of the case, it immediately sends a request to the government of X-land to stay the expulsion of Sam Wing until the Court has been able to examine the case. Despite this request, the police of X-land enforce the expulsion order in the morning of November 15. They escort Sam Wing out of the country on a chartered plane owned by Z-land, and turns Sam Wing over to the Security police of Y-land. The government replies to the European Court at noon November 15 and informs it of the Memorandum of Understanding, which only first now reaches the counsel.

Upon return Sam Wing is immediately brought to a detention center outside Kingmen, his whereabouts is however not known to either his relatives, friends or to the counsel in X-land. For two weeks the security police of X-land holds him incommunicado. On December 2 the Review body established through the Memorandum of Understanding visits him. According to the members of the body Sam Wing seems to be in good physical shape considering the circumstances but is very quiet and appears passive to any questions concerning his first two weeks in prison. When asked of he has been tortured he gives no answer but adds that he "has been treated as can be expected".

In its first report to X-land the Review body states that it could see no apparent signs of torture or ill treatment but that they could not exclude that no ill treatment had taken place. They also write that the somewhat resigned attitude of Sam Wing not necessarily is a sign of ill-treatment but could be an effect of depression stemming from the fact that Sam Wing was expelled and in confinement. As Sam Wing also had been held in isolation during the first ten

days of his confinement, this could also affect his condition. As regards to the privacy of the meeting, the Review body writes that no one else than the members of the body were present in the room when the interview took place. According to the prison warden and the security police, the conversation was not monitored in secret. In conclusion, the review body states that the information at hand, however insufficient, shows that the agreement between the two states is being respected.

On November 15, when the counsel of Sam Wing in X-land is informed about the Memorandum of Understanding and the enforcement of the expulsion order, she proceeds with the case to the European Court. On behalf of her client she argues that the expulsion was a violation of article 3. She also argues that the memorandum of understanding is not sufficient to protect Sam Wing from torture or ill-treatment. She argues that torture is not only physical but mental ill-treatment and questions if the assigned body has the competence to detect either kind of treatment.

The counsel also argues that there is a real risk that Sam Wing will be subjected to an unfair trial, despite the agreement and that he also will be sentenced to capital punishment.

She further argues that X-land violated the rights of Sam Wing by expelling him without the right to effectively present his case before the decision making body and before having the right to appeal the decision.

The fact that the government of X-land considered him to be a threat to national security could be refuted by the fact that neither Sam Wing nor his counsel or anyone outside the government and the security police, which in this case has a vested interest in the outcome of the case, were allowed to scrutinize all the available information. Not even the court. For all she knew these accusations were completely unwarranted, in particular since Sam Wing was not under surveillance and had been allowed to live with friends without any obligation to report to the police. She argues that Sam Wing is an innocent man and stresses that the allegations against him had never lead to any prosecution in X-land.

The Counsel also argued that X-land had violated its obligation to cooperate with the court by expelling Sam Wing despite the fact that the Court had demanded that the expulsion would be withheld.

On December 4 the counsel added the first report from the review body to the application, arguing that this was further evidence of the insufficiency of the agreement between the two states and that the government of X-land should have anticipated this development.

The government answered that Sam Wing was a threat to national security and that due to UN Security Council resolution 1373 it was obligated to make sure that it did not give safe haven to suspected terrorists.

As the government did have concerns about a transfer of Sam Wing to Y-land and if this could mean that it would act in a manner that is contrary to its international obligations, it decided to enter an agreement with Y-land that would protect Sam Wing against human rights violations, in particular torture. The government considers the agreement to be sufficient enough to protect Sam Wing, it even entails a follow-up mechanism that is effective and functioning. The review body was able to meet Sam Wing in private and during that first meeting there was nothing that indicated that he had been torture. On the contrary Sam Wing had denied that he had been torture.

As far as the government is concerned this agreement has been honored. It had done all that can be expected of a member of the Council of Europe under these circumstances – it had combined the demands for cooperation against terrorism with a respect for human rights.

Concerning the treatment the government recognizes that the review body had some concerns about the possibility that Sam Wing had been held in isolation. The government argued that even if this was the case, this could not amount to torture and thus not a violation of article 3.

The government also replied since it had yet not ratified Optional protocol number 7 the fact that Sam Wing did not have a right to appeal against a decision on expulsion, was not a violation of his rights according to the Convention. X-land did not violate its international obligations when expelling him even if there existed a risk of him being sentenced to death. As a whole the government of X-land argued that the allegations were manifestly ill-founded and should not be admissible.

On January 2, 2007, the European Court on Human Rights declared the case admissible.

On January 7, 2006 the General prosecutor of Y-land decides to prosecute Sam Wing for involvement in terrorist activities including for aiding and abetting the killing of minister of Justice Laurent Fischer. In a public statement the prosecutor says that "there is no doubt about Sam Wing's involvement in the criminal acts" and adds that "Sam Wing now understands that liberation does not justify killing of civilians and has acknowledged his responsibility". The prosecutor declares that he will seek the death penalty. On the same day Sam Wing is afforded a public defender, he has not had any representation during the pre-trial investigation.

ATTACHMENTS

UN Convention on the status of Refugees

Security Council Resolution 1373

UN Charter