Neutral Citation Number: [2024] EWHC 1642 (Admin)

Case No: AC-2024-LON-001933

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LONDON

Thursday, 27th June 2024

Before:
FORDHAM J

- -

Between:

MICHAEL LOMAS	**Appellant**
- and -	
REPUBLIC OF SOUTH AFRICA (No.4)	**Respondent**

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- -

David Josse KC and **Rebecca Thomas** (instructed by Mullenders Solicitors) for the Appellant
Adam Payter for the Respondent

- -

Hearing date: 13.6.24
Draft judgment: 24.6.24

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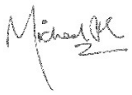
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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FORDHAM J

FORDHAM J:

Introduction

1. There have been three previous applications in this case. In Lomas v South Africa (No.1) [2024] EWHC 388 (Admin) (First Judgment 23.2.24), I dealt with an application for permission to appeal (First Application) from the Judgment of the Judge (DJ Sternberg) (15.12.22) after an oral hearing (13/14.10.22). Permission to appeal to the High Court had been refused by Heather Williams J (1.12.23). I heard submissions at an oral hearing (20.2.24). I decided that the Appellant's extradition to South Africa did not arguably cross the thresholds of Article 3 (inhuman or degrading treatment) or Extradition Act 2003 s.91 (oppression), by reference to any of the four headline points identified by Mr Keith and Ms Thomas (First Judgment §5): (1) the interrelationship between the Appellant's physical and mental health conditions (§§6-7); (2) mental health and suicide risk (§§8-9); (3) de facto solitary confinement (§§11-12); and (4) health deterioration (§§13-14).

2. In Lomas v South Africa (No.2) [2024] EWHC 637 (Admin) (Second Judgment) and [2024] EWHC 731 (Admin) (Third Judgment), I dealt with an application to reopen the appeal (Second Application) pursuant to CrimPR 50.27. The context was this. At the first hearing (20.2.24), I had raised the question of fitness to fly and was told (First Judgment §15) by everyone that this was not a question for the Court, and would need to be assessed and necessary adjustments made prior to any act of extradition. After an oral hearing (20.3.24), in the Second Judgment I gave permission to reopen the appeal, because it transpired that fitness to fly was a question for the Court. After a further oral hearing (26.3.24), in the Third Judgment I decided that – viewed through the legal prism of Article 3 and s.91 – the points raised in relation to physical health condition and fitness to fly raised no arguable ground of appeal.

3. In Lomas v South Africa (No.3) [2024] EWHC 1141 (Admin) (Fourth Judgment), I dealt with an application for permission for appeal (18.4.24) (Third Application), filed as a subsequent human rights appeal by reference to s.108(5)-(8) of the 2003 Act (as to which, see Third Judgment §15(5)). The issues related to physical health condition and again included fitness to fly. A rolled-up hearing was directed by Swift J (1.5.24). There was an oral hearing (14.5.24). In the Fourth Judgment (21.5.24) I decided that – viewed through the legal prism of Article 3 and s.91 – the further points raised in relation to physical health condition and fitness to fly raised no arguable ground of appeal based on a change in circumstances and the latest evidence.

4. In Lomas (No.4), the Court is now dealing with an application for permission for appeal (7.6.24), filed as a subsequent human rights appeal by reference to s.108(5)-(8). I convened a short oral hearing (13.6.24). I received further materials, at and after that hearing. Two topics are raised, asking the Court to revisit Article 3 (inhuman or degrading treatment) and s.91 (oppression) based on a change in circumstances and the latest evidence. (1) In the Grounds of Appeal (7.6.24) what is raised is mental health and suicide risk. (2) Added in a Skeleton Argument (11.6.24) is physical health condition and fitness to fly.

5. I indicated at the hearing (13.6.24) that I would direct that the Fifth Application be treated as a 'dual application', pursuant to both s.108 (late human rights appeal) and Crim PR 50.27 (application to reopen). The reason for that course is the one I have

previously identified previously (Fourth Judgment at §2): s.91 is not a s.108 "human rights" ground (see s.108(8)). It is helpful to keep in mind that there are three recognised Stages in extradition cases (Third Judgment §11). Stage 1 is pre-transfer; Stage 2 is transfer and Stage 3 is post-transfer. I record that it was disclosed by the Appellant's representatives that they made rule 39 interim measures applications to the European Court of Human Rights (on 19.3.24 and 24.5.24), and interim measures were declined by that Court (on 20.3.24 and 28.5.24).

Physical Health Condition and Fitness to Fly

6. So far as this topic is concerned, the context is this. In the Fourth Judgment I addressed the evidence regarding the Appellant's bloody diarrhoea, thought to be due to a flare of diverticulitis. I explained why – viewed through the legal prism of Article 3 and s.91 – this raised no arguable ground of appeal based on a change in circumstances and the latest evidence, whether at Stage 2 (§17) or Stage 3 (§21).

7. A further report from Dr Mitchell (4.6.24) says that the Appellant remains not fit to travel to South Africa. It says he has frequent unpredictable episodes of bloody diarrhoea requiring him to be in close proximity to a toilet at all times. It adds that sometimes he doesn't make it to the toilet on time, soiling himself as a result. A post-hearing email from Dr Mitchell (20.6.24) says the Appellant still suffers from diarrhoea which is unpredictable, and had told Dr Mitchell that on two occasions last week he soiled himself, not being able to make it to the toilet on time. Based on this evidence, Mr Josse KC and Ms Thomas submit that the Appellant's physical health condition is such that he is unfit to fly; that removing him from the jurisdiction whilst he is unable to control his bowels and is in severe pain would be extremely degrading; that extradition would be in breach of his Article 3 rights. They say there is a high – and extremely high – risk of his publicly soiling himself on a commercial airline, which is explicitly degrading; there being times (during take-off and landing and periods of unexpected turbulence) when passengers are unable to access the toilet; it being unclear how or where he would be able to be cleaned; given that the plane will lack mobility aids, and the space is necessarily compact.

8. On this topic, I will dismiss the Fourth Application based on Article 3 and s.91. In my judgment, this is in substance an attempt to re-run the point which I addressed in the Fourth Judgment. I have described the position as to the on-board wheelchair and accompanying clinician including to assist with toilet-related needs. I explained (§17) that there was no evidence to support the diverticulitis as a condition which would cause "severe pain, or would stand to cause an unmanageable emergency, during a 9 hour flight; still less as being a high risk of serious injury for the length of the transfer". I have explained that the Court has to apply the legal prism of Article 3 and s.91, with their high thresholds. The evidence was not – and is not – in my judgment, even arguably, capable of crossing those thresholds. The same is true of another point about cancer referrals and medical services available at Stage 3, in the prison and linked hospital environment in South Africa.

Mental Health and Suicide Risk

9. So far as concerns mental health and suicide risk, the context is this. This topic was a 'headline point' raised at the first hearing and addressed in the First Judgment (§§8-9). In the Fourth Judgment (§10) I recorded that Dr Mitchell's report (13.5.24) had said "Mr Lomas told me that if extradited he would take his own life and knew how he would do

so"; and Dr Mitchell was recommending "an urgent psychiatric review." I asked at the fourth hearing (14.5.24) whether suicide risk was being relied on. The answer was no. I recorded (Fourth Judgment §24) that I had "addressed the points that were emphasised in the submissions" and that "other points – for example suicidal ideation – were not relied on, rightly recognising the specific legal framework which is applicable to such issues (First Judgment §9)". The latest Grounds of Appeal (7.6.24) record that the Court was "not invited to consider the Appellant's mental health, on the basis that the evidence did not at the time meet the high threshold derived from the caselaw".

10. As explained in Dr Mitchell's further report (3.6.24), the urgent psychiatric review involved a visit by Dr Bradley Hillier, a consultant forensic psychiatrist who wrote a three-page letter (5.6.24) and then a 36-page report (6.6.24). The Court has received updates in the form of post-hearing emails (20.6.24) written by Dr Mitchell and Dr Hillier. The argument is that the evidence can, and does, now meet the high threshold derived from the caselaw.

11. I have decided to direct a one-day rolled-up hearing to consider the dual application being made based on mental health and suicide risk. This is equivalent to the direction which Swift J made in relation to the Third Application. What I am envisaging is that the Court will be able to consider, particularly with reference to Stages 1 and 2 and the latest evidence, questions as to: whether and to what extent the suicide risk arises by reason of extradition or independently of it; whether suicide would be a voluntary act; whether appropriate steps have been identified; and whether the risk is so high, whatever steps are taken, as to constitute oppression. The parties will want to ensure that all questions have, promptly and fully, been addressed.

12. Since I am directing a rolled-up hearing, I will not discuss the current position with the new evidence. But I will record briefly some of the points relevant to two aspects of the law. I do so by reference to the following encapsulation derived from Turner v USA [2012] EWHC 2426 (Admin) §28 (endorsed in Fletcher v India [2021] EWHC 610 (Admin) at §39 and discussed in Modi v India [2022] EWHC 2829 (Admin) at §118):

> ***The question is whether, on the evidence, whatever steps are taken – and even if the Court is satisfied that appropriate arrangements are in place in the prison system of the country to which extradition is sought so that those authorities will discharge their responsibilities to prevent the requested person committing suicide – the risk of the requested person succeeding in committing suicide, by reason of a mental condition removing the capacity to resist the impulse to commit suicide, is sufficiently great to result in a finding of oppression.***

13. One aspect of this involves asking whether suicide would be "by reason of a mental condition removing the capacity to resist the impulse to commit suicide". Modi explains the difficulties with "impulse" (§125), "capacity" (§126) and "voluntary acts" (§127), in the context of what clinicians would mean and recognise. In the present case, the Judge recorded the evidence of Dr Poole that the legal test of resisting the impulse to act is not a clinical one. Modi has identified a common sense broad-brush approach (§129), asking whether the decision to commit suicide is "voluntary, in the sense of being rational and thought-through" (§128); "the person's voluntary act" (§129). This is notwithstanding that "many psychiatrists would have difficulty with the notion of 'voluntary acts'" (Modi §127). Dr Hillier (6.6.24) says that suicidality as a 'rational' or 'capacitous' decision responding to adversity "is not current thinking within mental health circles, particularly when there is evidence of mental disorder known to predispose to suicidality as part of the

psychopathological manifestation of the illness". The Courts's view in Turner (§§43 and 70) and evidently also Modi (§140) was that suicide would be a voluntary act.

14. Another aspect involves asking about suicide risk "whatever steps are taken", where the Court is "satisfied that appropriate arrangements are in place". This must include consideration of steps and arrangements in the UK (Stage 1) and for transfer (Stage 2). That makes the encapsulation:

> ***The question is whether, on the evidence, whatever steps are taken – and even if the Court is satisfied that appropriate arrangements are in place including in the prison system of the country to which extradition is sought so that those authorities will discharge their responsibilities to prevent the requested person committing suicide – the risk of the requested person succeeding in committing suicide, by reason of a mental condition removing the capacity to resist the impulse to commit suicide, is sufficiently great to result in a finding of oppression.***

In the present case, as Dr Hillier points out, Dr Picchioni told the Judge that the risk of suicide in the event of deterioration in the Appellant's mental state "can potentially be managed but will likely require intensive and potentially restrictive intervention by prison and mental health services in order to successfully manage that risk". As to the present position in the UK, Dr Hillier has identified appropriate arrangements. Steps and arrangements are described. In Turner, there was a "danger period" which was "between the dismissal of the appeal and the appellant's removal to the UK" (§14). The requested person was on bail, and recent events included admission to hospital (§17) and to a psychiatric facility (§24). The Court ensured that it had information about what steps could be taken (§10), and was thus satisfied as to appropriate measures (§§39, 72).

15. These and the other aspects, and all points relating to all questions can now – insofar as considered relevant and appropriate – be further addressed and considered. I intend as the next step for this case that there be a one-day rolled-up hearing, to take place in the near future. Having circulated this short judgment as a confidential draft, I will be able to deal here with any further appropriate directions.