Neutral Citation Number: [2024] EWHC 388 (Admin)

Case No: AC-2023-LON-000711

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 23rd February 2024

Before:
FORDHAM J

- -

Between:

MICHAEL LOMAS	**Appellant**
- and -	
REPUBLIC OF SOUTH AFRICA	**Respondent**

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- -

Ben Keith and **Rebecca Thomas** (instructed by Mullenders Solicitors) for the Appellant
Adam Payter (instructed by CPS) for the **Respondent**

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Hearing date: 20.2.24
Draft judgment: 21.2.24

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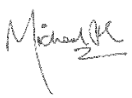
Approved Judgment

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. The Appellant is aged 76 and is wanted for extradition to South Africa to stand trial on 41 corruption charges relating to alleged payment of bribes to officials between February 2015 and July 2017. After a two-day oral hearing in October 2022 on 15 December 2022, District Judge Sternberg ("the Judge") sent the case to the Home Secretary who ordered extradition on 30 January 2023. The Extradition Request had been issued on 23 February 2021 and certified on 16 March 2021 and the Appellant had been arrested on it on 15 April 2021, then released on bail.

2. The Judge had a vast volume of documentation, much of which is also before me. There is a lot of expert evidence. There were reports and oral evidence from Vania Costa Ramos (specialist attorney), Dr Picchioni (forensic psychiatrist), Dr Poole (consultant neuropsychiatrist) and Dr Wright (medical practitioner). There were reports from Mr Ameen (consultant neurosurgeon) and Dr Krljes (consultant clinical psychologist). The putative fresh evidence before me includes reports from Mr Ameen, Dr Mitchell (medical practitioner) and Mr Nader-Sepahi (consultant spinal neurosurgeon).

3. The three issues addressed by the Judge were Article 3 ECHR (real risk of torture, inhuman or degrading treatment or punishment), Article 8 ECHR (disproportionate interference with private and family life) and section 91 of the Extradition Act 2003 (injustice or oppression by reason of physical and/or mental condition). All grounds are maintained on this appeal. Permission to appeal was refused on the papers on 1 December 2023 by Heather Williams J, on the basis that none of the grounds of appeal were reasonably arguable. That is a question which I have needed to address afresh, with the benefit of all of the materials and the written and oral submissions. Everyone agrees that I should consider all of the putative fresh evidence provisionally, to see whether it is capable of making a difference.

4. The Judge's 58-page and 92-paragraph judgment is a detailed and comprehensive discussion of all of the topics in the case, in the light of all of the evidence which had been adduced. Judgments of extradition judges are not available in the public domain, so let me give this indication. The judgment has an introduction and summary (§§1-8); describes the Request and Further Information (§§9-25) including 3-pages setting out "assurances" (§§17-25); then the formal requirements and matters not in dispute (§§26-28); then 25 pages discussing the evidence of all the witnesses and report-writers (§§29-47) with 3 pages of findings (§48); then a 13 page discussion of Articles 3 and section 91 (§§50-77), starting with the law (§§51-54) including leading authorities like Magiera v Poland [2017] EWHC 2757 (Admin) and Turner v USA [2012] EWHC 2426 (Admin) then 5 pages setting out the arguments (§§56-57) and 6 pages setting out the Judge's analysis and conclusions (§§58-77); and finally Article 8 (§§78-90). I will use some cross-references below to the judgment, not because these can be seen in the public domain, but to illustrate where points were addressed within the anatomy of the judgment, and to assist the parties.

Headline Points

5. Mr Keith and Ms Thomas appear for the Appellant and sensibly adopted a focused position in their skeleton argument. They identified four headline points – as I shall call

them – for the purposes of establishing the arguability of this appeal. There are many other points being made in this case, but if these headline points are incapable, individually or cumulatively, of constituting a reasonably arguable basis of appeal – on any of the three issues – it is right and realistic to have recognised that the further and additional points were not going to get the case across the line of arguability. I am grateful to all Counsel for the assistance they gave me, at an extended 90-minute oral renewal hearing which finished late afternoon and at the end of which I decided to put my ruling into writing. I will start by addressing the three headline points which arise out of the Judges analysis and reasoning, in the light of the materials and arguments which were ventilated before him. I will then deal with the evidence of new medical conditions.

Interrelationship Between Physical and Mental Health Conditions

6. This headline point is that the Judge failed adequately to address the interrelationship between the Appellant's physical conditions and his mental conditions. The argument came to this. The Judge's analysis and conclusions addressed physical health (§§71-72) and then gave "separate consideration" to mental health (§§73-75), before looking overall (§§76-77). But the Judge arguably failed adequately to address the overlap and interrelationship between mental and physical health. By way of an example, the assurances given by the South African authorities and relied on by the Judge spoke of the possibility of certain needs being met by a cell companion, but this conflicted with the Appellant's other needs being for a single cell. A proper, integrated assessment would have exposed this and other problems.

7. I can see no substance in this first point. The Judge recorded as a core submission (§56vii) that Mr Keith and Ms Thomas relied on "the combination of the requested person's mental and physical health needs", and the "unique combination" of conditions. The whole point of the overall section (§§76-77) was to "step back and consider the totality of the evidence and submissions relating to the requested person's conditions of health in the round and in their totality" (§76). The Judge found that, individually and collectively, all conditions "can be properly treated and managed in a custodial setting" (§77). There was no clash or inconsistency. The Judge recorded Dr Wright's evidence that a cell carer was not appropriate (§36v), found that the Appellant "will not have a cell mate" (§63), and at no stage in the judgment relied on a cell mate as necessary or appropriate to meet a need. I can see no arguable error of approach so far as the interrelationship between mental and physical conditions is concerned. I have not been enabled to see any clash or inconsistency or missing key element in the Judges analysis.

Mental Health and Suicide Risk

8. This headline point is that the Judge was wrong about the mental health implications of extradition and did not properly have regard to the guidance in Turner at §28. What is said is this. The Judge failed to recognise that two incidents described by the Respondent's own expert (Dr Picchioni) as suicide attempts evidenced the existence of a mental health condition so severe as to remove the capacity to resist the impulse not to commit suicide. The Judge was also wrong to find appropriate arrangements in place, in the light of gaps in provision identified in the expert evidence.

9. In my judgment there is no viable ground of appeal on this aspect of the case. In discussing "the law", the Judge specifically recorded (§53) having reminded himself the approach taken at Turner at §28 which he said he would go on to apply. That is clearly what he did in a careful and comprehensive two-page passage (§73). That passage included recognition of the incidents which Dr Picchioni had seen as suicide attempts (while Dr Poole saw them as reckless behaviour: §41vi). The Judge unassailably found that there was no evidence that the Appellant's condition was so severe at present as to remove the impulse not to commit suicide. The Judge separately found that appropriate monitoring and preventative measures would be put in place to properly manage any risk of suicide in the event of the Appellant's surrender to South Africa. That included appropriate treatment for mental health including in hospital if required, so as to reduce the risk of self-harm and suicide. The Judge explained that the defence evidence did not, in his judgment, undermine or negate the assurances that had been given; nor were the conditions in prison or hospital such as to render extradition oppressive.

Light and Ventilation

10. Pausing there, in addition to the four headline points, reliance was placed by Mr Keith and Ms Thomas at the hearing before me on an illustration of an unfulfilled assurance. They point to the assurance that: "To improve the natural light and ventilation in Mr Lomas's cell the plates on the windows can and will be removed to allow the windows to open and allow fresh air to circulate in the cell". They point to Dr Mitchell's new report, which describes a visit and depicts cells "designed to include metal grills over the window to be opened to allow for natural light and ventilation" which had been "welded shut". The assurances were prospective. And the Respondent's fresh evidence includes photos clearly showing three metal doors in place of the previously welded metal panels. I was unable to see how that photo was – even arguably – incompatible with that assurance. In my judgment, there is no evidence to undermine the assurances or the Judge's acceptance of them.

De Facto Solitary Confinement

11. The next headline point is that the Judge was wrong about an Article 3 ECHR argument relating to the real risk of de facto solitary confinement. In the section on the law, the Judge cited Vernon v South Africa [2014] EWHC 4417 (Admin) is a case which had featured argument that the regime for the requested persons would amount to solitary confinement. All Counsel invited my attention to Ahmad v UK (ECtHR, 10.4.12) at §§205-212). Mr Keith and Ms Thomas submit as follows. The Judge's assessment on this topic (§§65-66) was, arguably, unsustainable. The Appellant is to be held in the front corridor "Special Care Unit" at the Medium C Correctional Facility in Johannesburg. On the evidence, the Appellant faces the prospect of being the sole detainee in that corridor. Even if his door is unlocked for 7 or 8 hours per day, he would be able to access an empty corridor, an exercise yard (for up to an hour a day) which he is too immobile to use, and a library which only has a drop-off and pick-up service. This is arguably confinement "without meaningful human contact" for 22 or more hours per day, in breach of Rule 44 of the Mandela Rules. The Judge, arguably, did not grapple with this and reached an unsustainable conclusion. The concern is fortified by the new report of Dr Mitchell.

12. I have been unable to see any arguable point. The joint report of Dr Wright and Vania Costa Ramos raised a concern about conditions "de facto akin to solitary confinement", but their assessment was not that the Appellant would be the sole detainee. Rather, they referred to "low number of inmates". The reported there having been "three persons" being held there on the day of their visit. Dr Mitchell reports being told that the Special Care Unit has "on average … around 10 prisoners there at any one time". Dr Mitchell speaks of absence of "meaningful human contact for at least 18 hours each day", premised on the Appellant being "the only remand prisoner there". The evidence addressed the picture as to other prisoners, staff, staff ratios, outdoor exercise, the library, talking therapies, and so on. In addressing this topic, the Judge recorded (§§65-66) that the Appellant would be permitted to spend up to 7 hours per day outside of his cell; that he would have access to the exercise yard; that he would be able to make use of the library if he wished; that he would have access to talking therapies in health treatment is an important part of any regime available to him; that the Appellant would be permitted to spend a substantial period of the day outside of his cell; that he would be permitted to make contact with the outside world by telephone calls; that he would have other contact within the prison including health treatment. I see no reasonably arguable basis for impugning the Judge's finding that conditions would not constitute solitary confinement.

Health Deterioration

13. This is the final headline point, and it was the principal line of argument before me at the oral hearing. Mr Keith and Ms Thomas argue as follows. As at October 2022 when the hearing before the Judge took place, the Appellant had complex physical conditions, was suffering from blackouts and had sustained injuries in a fall. In 2023, however, after an MRI there has been the diagnosis of a multilevel degenerative spine disease and an advanced right sided cervical myelopathy. Dr Mitchell sets out the medical conditions, and that the Appellant is particularly frail, with a balance which is poor and a tendency to falls. Mr Nader-Sepahi (Spinal Neurosurgeon) describes the spinal condition and identifies an operation which would help and may be appropriate. Mr Ameen (Consultant Neurosurgeon) who first reported in October 2021, describes the unsteady gait, poor balance, inability to walk confidently without a walking stick, and the objective abnormal neurological sign of the right upper limb muscle wasting and says: "I believe that Mr Lomas is not fit to fly because of his current neurological disabilities particularly the loss of balance and the right arm and hand weakness making him very accident prone and has a moderately high risk of sustaining serious head and spinal injuries in case he falls". This is arguably transformative evidence, at least absence further concrete assurances to address the newly diagnosed conditions, which provides an arguable basis for resisting extradition.

14. I cannot accept those submissions. Nor do I accept the fallback invitation to adjourn to allow time for a further operation. The current evidenced position as to physical health conditions does not arguably undermine the Judge's conclusions as wrong. Blackouts, frailty and falls were all features of the case considered by the witnesses and the Judge. The Judge described the Appellant's physical health needs as being subject to management and review, with conditions requiring proper health monitoring. All of this was reflective of assurances – which are dynamic and not static in nature – that health conditions would be properly monitored and addressed. The Judge specifically explained that he accepted the evidence provided by the South African authorities as to

appropriate medical treatment, to deal with all of the issues that had been raised. In describing the assurances, the Judge had explained that in relation to healthcare insurance is guaranteed that primary healthcare is available with qualified nurses, medical doctor and a dentist visiting the healthcare centre regularly; that inmates are treated at the hospital section or sent to the public hospital depending on the seriousness of the illness; and that should a detainee prefer to make use of their own medical practitioner or go to a private hospital that could be arranged at their own cost. There was then recorded by the Judge a sequence of key information about healthcare provision the local hospital, which is 4km away from where the Appellant would be held, where all prisoners requiring outpatient or emergency care referred, and his public website shows it's one of the largest hospitals in the world. As Mr Payter demonstrated, the list of services at the hospital includes neurosurgery and a spinal injury clinic. Moreover, so far as physical conditions are concerned, Dr Mitchell's most recent report – having discussed those physical conditions in detail – concludes: "In relation to the provision of medical care, I believe that the Johannesburg Medium C Correctional Centre does have adequate facilities, strategies and staff to care for Mr Lomas's physical health care needs in respect of his multilateral degenerative disc disease, diverticular disease, palpitations and enlargement of the prostate gland in terms of the availability of onsite medical staff and the ability to refer to the nearby university teaching hospital."

Fitness to Fly

15. There is, as I have mentioned, one statement by one clinician (Mr Ameen) which describes an unfitness to fly. I do not accept that this feature of the evidence, alongside the other evidence in the case, can support an arguable appeal. I raised with Counsel the approach illustrated by Arezina v Bosnia [2023] EWHC 1980 (Admin) at §§22-23 where, having rejected health-based grounds of appeal, the discrete issue of fitness to fly was adjourned to allow for further evidence. Mr Keith and Ms Thomas did not invite an adjournment for this purpose, and all Counsel recognised that fitness to fly would need to be assessed, prior to any act of extradition, as would any necessary adjustments. I am satisfied, in these circumstances, that there is no need for an adjournment or further direction on this appeal.

Conclusion

16. None of the four headline points, individually or collectively, have persuaded me that there is any reasonably arguable ground on which this Court could conclude that the Judge's findings involved a wrong outcome. I can see no arguable ground of appeal from any of the materials which have been relied on. In those circumstances, agreeing with the conclusion of Heather Williams J who refused permission to appeal on the papers as they stood in December 2023, I will dismiss the application for permission to appeal. Since the Appellant's putative fresh evidence is, in my judgment, incapable of being decisive, I will formally refuse permission to adduce it. The parties are agreed that I should make no order as to costs.