Neutral Citation Number: [2009] EWHC 3233 (Admin)

CO/9465/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2

Friday, 20 November 2009

B E F O R E:

**LORD JUSTICE MOSES**

**MR JUSTICE HICKINBOTTOM**

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**SANCHEZ (Aka Zachary Tracey)**

Claimant

-v-

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Defendant

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**Mr R Drabble QC** and **Mr B Cooper** (instructed by Birnberg Pierce) appeared on behalf of the Claimant

**Mr Sarabjit Singh** (instructed by Treasury Solicitor) appeared on behalf of the Defendant

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J U D G M E N T

1. LORD JUSTICE MOSES: This is an application to move by way of judicial review following permission given by Mr Justice Ouseley in relation to a decision made by the Secretary of State refusing to revoke a deportation order.

2. The application is made on the basis that the refusal to revoke the order exposes this applicant to the risk of inhuman or degrading treatment in California. There, he faces trial for an offence of what is described as robbery which amounts to theft from a shop where the allegation is that whilst escaping he made a gesture towards his waistband which put the shopkeeper in fear that he had a weapon. It is not alleged that he was in fact carrying a weapon. For that, it is said he faces either an indeterminate sentence of life with a minimum of 25 years, and on some accounts of Californian penal legislation a maximum of 38 years or a determinate sentence of between 17 to 25 years.

3. The Secretary of State says that as a matter of fact he is at no risk of a sentence of life imprisonment since the district attorney must prove previous offences and the district attorney has assured this Government that he will not seek to do so. Accordingly it is said that there is no more than a theoretical possibility that the district attorney will renege on such an assurance.

4. The decision to refuse to revoke the deportation order was accompanied by the reasons for the refusal, amongst which it was accepted that there could be situations where the sentence a man faces could be regarded as excessively disproportionate and thus engage Article 3 as being an inhuman punishment. The Secretary of State said that even were this claimant to face a sentence of life with a minimum of 25 years' imprisonment that would not engage Article 3.

5. The principles which govern this court's approach to the question, in my judgment, are identified in R (Wellington) v Secretary of State for the Home Department [2009] 1 AC 335. That was an extradition case. This is not an extradition case. Accordingly Mr Drabble QC, on behalf of the claimant, submitted that the same principles should not apply. I note however that the majority of their Lordships' House, in considering whether the question was relative or absolute, regarded the principles they were expressing as governing not only extradition but also that which Lord Hoffmann described as "other forms of removal" (see the opening sentence, paragraph 28 page 346).

6. The issue arises because this country proposes to deport this claimant in circumstances where he will face trial - since he has not yet been convicted - in California and were he not to be deported he would avoid facing justice altogether. The majority of their Lordships' House took the view that the question as to whether the claimant faced the risk of exposure to an inhuman or degrading punishment, contrary to his rights enshrined in Article 3, was a relative and not an absolute question. Lord Hoffmann indicated that a relativist approach was essential if extradition is to continue to function (see paragraph 27). By "relativist" he explained -

> "Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account."

7. The issue in that case was whether a life sentence - which may or may not have been reducible - risked a breach of rights enshrined in Article 3. The question as posed by Lord Hoffmann and effectively adopted by all their Lordships, including those who dissented on the issue as to whether it was an absolute or relative question, was whether the sentence would be grossly disproportionate (see Lord Hoffmann, paragraph 35 page 348B). By "grossly disproportionate" he meant obviously or clearly disproportionate.

8. That question has to be answered in the light of two features of such cases, namely the desirability that one who asserts that his rights under Article 3 will be breached should not avoid justice (see in particular the citation from Soering v United Kingdom [1989] 11 EHRR 439, paragraphs 21 and 23 of Lord Hoffmann's speech), and in the light of the need to take into account the democratic views of the legislature of the state where it is proposed to try the claimant (see in particular Baroness Hale, paragraph 52 and Lord Carswell at paragraph 6).

9. It is important that courts in this country experienced in a different criminal justice system should not comment, save when compelled to do so by the terms of Article 3, upon different systems of criminal justice reached as a result of the express decisions and appreciation of local conditions by different legislatures. That aspect was expressed by the European Court of Human Rights in C v Federal Republic of Germany (Application No 11017/84) (page 181) in which the fact that a Yugoslav national faced a 10-year sentence for refusing to undertake military service (the claim in respect of which) was held to be manifestly unfounded. The Commission commented that -

> "The mere fact that an offence is punished more severely in one country than in another does not suffice to establish that the punishment is inhuman or degrading." (See page 181)

10. In the instant application those considerations are particularly important where the concern as to the heavy sentence this man may face, should he be convicted, arises out of a scheme of sentencing designed by the Californian authorities to deter recidivism.

11. The claimant arrived in the United Kingdom as a visitor from the United States of America - where he is a national - in November 2006. Less than a year later, in March 2007, adopting an assumed name, he was convicted of offences of burglary, handling stolen goods, obtaining property by deception, possessing prohibited weapons and ammunition. He was sentenced to 3 years' imprisonment and recommended for deportation. That was the trigger for the Secretary of State's decision in the instant case. He claimed asylum whilst in Belmarsh [Prison]. At first he sought voluntary return when his claim for asylum was refused. Then - when he was due to be returned - he complained to the Secretary of State in June 2008 that return to the United States would expose him to prosecution for the offence of second degree robbery, allegedly committed in California on 30 September 2006, and to an indeterminate sentence of imprisonment of 25 years to life since this was a third offence or he was, in the parlance of the criminal justice system in California, "a third-strike offender".

12. Following the application for judicial review and the hearing before Mr Justice Ouseley, at his instigation the Treasury Solicitor wrote to the Los Angeles County District Attorney's Office which confirmed that he would not be prosecuted as a third-strike offender notwithstanding the offence in the United Kingdom.

13. The first basis upon which this application is brought relates to the fact that he would be a third-strike offender in California were the district attorney to seek to prove two previous felonies. The Californian penal code places - so the claimant alleged - a mandatory requirement on a judge sentencing for a third felony the obligation to pass an indeterminate life sentence with a minimum of 25 years that he would have to serve before he was eligible for parole. Subsequent inquiries, particularly at the offices of Californian attorneys, and the careful analysis by Mr Leskin (a partner in Birnberg Pierce & Partners instructed in this case) demonstrate that the minimum sentence could be as much as 38 years.

14. It was in those circumstances that the Secretary of State sought assurances in relation to the question as to whether this claimant would be prosecuted as a third-strike offender. The deputy district attorney (the assistant head deputy) in a letter dated 25 September 2008, on behalf of the Los Angeles County District Attorney Mr Steve Cooley, wrote that the case file had been reviewed and continued:

> "I have determined that the Los Angeles District County Attorney's Office will not be proceeding in this case against Mr Sanchez as a three-strikes case. In other words, we will not be seeking an indeterminate sentence of 25 years to life, nor will we be seeking any other indeterminate sentence in this case."

This was repeated when the inquiries to which I have already referred in relation to the offences committed in the United Kingdom were made in a letter from the Los Angeles District County Attorney's Office dated 29 June 2009 when, again, it was said:

> "I can only assure you that we will not proceed against Mr Sanchez as a third-strike defendant and that Mr Sanchez will not be subjected to any indeterminate sentence."

15. Fears have been expressed by the law offices of Stephen Rodriguez in a report dated 7 October 2009 that the regime may change and that which has been given as an assurance to the Government here may not be relied upon.

16. In my judgment, there is no real risk that the assurances that have been given will not be acted upon. Mr Drabble rightly points out that this is not an extradition case where the Treaty would demand reliance upon such an assurance. But I see no reason for making any distinction, particularly having regard to the fact that the dealings have been with the United States of America, described by the President, Sir Igor Judge, in Mustapha v Government of United States of America [2008] EWHC 1357, paragraph 61, as a major democracy, one of the repositories of the common law, on whose assurances this Government and this Court may rely (see paragraphs 61 and 62).

17. It was in those circumstances that this application focussed upon the contention that this claimant will face a sentence of anything between 17 and 23 years as a determinate sentence but in the light of his two previous convictions for felony, were he to be convicted of the felony alleged in this case. There was material advanced on behalf of the Secretary of State to suggest lower determinate sentences of anything between two and 15 years.

18. As a result of Mr Leskin's careful analysis and being shown the Californian penal code, for the purposes of this application I am happy to accept that analysis of the Californian penal code - for which I am indebted to Mr Leskin - which requires the courts to double the sentence for the offence of, say, five years and then add two further periods of five years for each of the two previous convictions for felony and then add another three years because of the offence of robbery and the previous felonies, making a total in theory of up to 23 years.

19. If anyone is surprised at the condign punishment in the Californian judicial system they need look no further than People v Delbert Meeks 123 Cal App 4th 695. That was a case of a man who had committed a sexual offence nine years previously and was required to register should he have a fixed address. He failed to register. He was homeless, suffering from AIDS, but had just gone to live - where he could, no doubt, die - with his sister-in-law for several months, triggering the obligation to register. The dissenting judgment of the President of the Californian Court of Appeal, Third Appellate District, described the case as "pathetic" and dissented from the suggestion that this was not a cruel an unusual punishment when he was, for that failure to register, sentenced to life imprisonment with a minimum period of at least 30 years. The majority regarded that as not being grossly disproportionate.

20. The chances therefore of this claimant persuading any court in California that the sentence feared is unconstitutional vanished, it seems to me, to nothing. However that such a sentence as that which is regarded by the Californian legislature as necessary to protect the public and deter repeated offences cannot be doubted.

21. During the course of argument in this claim reference was made to the decision of the Supreme Court of the United States of America in Ewing v California 538 US 11 2003 in which that court considered whether the punishment of between 25 years to life for the theft of golf clubs under (to use an unfortunate metaphor) the three-strikes law in California was cruel and unusual. The Supreme Court underlined the deference that the federal courts will have to the domestic legislature of the different states and ruled that it was not unconstitutional, being contrary to the Eighth Amendment. The Court - and particularly in the judgment of Justice Sandra Day O'Connor - cited the proposition that there is nothing in the constitution which mandates the adoption of any one penalogical theory. The sentence which the appellant Ewing faced was, in her view, justifiable both to incapacitate him and to deter him and others, justifiable, as she put it, as "rationales for recidivism". The statute was the primary goal to deter repeat offences. She cited, with approval, the previous decision of the court in Rummel (see page 9).

22. It is worth noting that the three-strikes law was originally not adopted and defeated as a bill by the Assembly Committee on Public Safety but, as she records -

> "Public outrage over the defeat sparked a voter initiative to add Proposition 184 [the Proposition which re-introduced the three-strikes rule] - based loosely on the bill - to the ballot in the November 1994 general election."

It was then passed, becoming, as she put it, the fastest qualifying initiative in California history. If ever there was an example of the legislature reflecting the wishes of the people and maintaining the respect and confidence of the people in the local criminal justice system, Ewing affords that example.

23. There is therefore no prospect of showing in the United States that the sentence which Mr Sanchez fears is unconstitutional. Those authorities demonstrate that but also show that within the United States, and particularly within California, the reasons for what might be regarded as so condign a punishment are regarded there as justified. That is, as it seems to me, a powerful indication that this court should not too readily condemn the prospect of facing such offences as engaging rights enshrined in Article 3.

24. In looking at the rationale for a sentence, the Constitutional Court of South Africa in Buzani Dodo v The State 2001 3 SAR CC 303 identified a clear justification for punishment. Mr Justice Ackermann (at paragraph 37) identified the right under the South African constitution as a right not to be deprived of freedom without just cause and continued -

> "The 'cause' justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed ..... In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence."

25. It is this concentration and focus upon justification that seems to me to give the clue to resolution of this case. If there is no possible justification for a severe sentence, even taking into account the democratic views of a foreign legislature, that might be a powerful indication that the sentence is inhuman or, even worse, being imposed for a different motive other than the conventional reasons for sentences in a criminal justice system.

26. No such absence of justification can be discerned, in my view, in this case. A democratic, friendly state has decided that those who repeat offences run the risk of sentences in which the proof of previous offending will radically increase the term of imprisonment to be spent. It is, in my view, impossible to say that to send this man back to face trial would, in those circumstances, be exposing him to the risk of a breach of Article 3.

27. In those circumstances I would dismiss this application to move by way of judicial review.

28. MR JUSTICE HICKINBOTTOM: I agree.

29. MR SINGH: The claimant is legally aided. I would ask for the usual order.

30. LORD JUSTICE MOSES: Can you tell me what the usual order is?

31. MR SINGH: The claimant pays the defendant's costs, such order not to be enforced without leave of the court.

32. MR DRABBLE: My Lord, I cannot be sure that that is the correct order nowadays. (Pause) Whatever the form is, we apply for permission to appeal to the Court of Appeal. My understanding is that despite the criminal background, this is not a criminal cause or matter. In English terms it is simply a challenge to the deportation order, therefore the court is the Court of Appeal.

33. We seek permission on two bases. First, this case does raise an issue of real importance as to the approach the court should take in deciding whether or not to defer to the democratic wishes of the legislature in California despite the references to the paragraphs in Wellington. That issue has not been thoroughly explored. We say it is crucial to your Lordship's judgment and raises an issue worthy of appraisal by the Court of Appeal.

34. The second issue is whether or not the unity of the majority in Wellington carries over into the different circumstances of this case. They are very different offences and it is not extradition. Fundamentally on the first issue we apply for permission to appeal.

35. LORD JUSTICE MOSES: You must ask their Lordships.

36. MR DRABBLE: We need an order for detailed legal aid assessment.

37. LORD JUSTICE MOSES: Yes, certainly.

(Mr Cooper asked for expedited preparation of transcript of judgment which was not granted)