Neutral Citation Number: [2024] EWHC 3071 (Admin)

Case No: AC-2024-LON-000828

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2024

Before :

MRS JUSTICE THORNTON DBE

- -

Between :

PAUL NICHOLLS	**Applicant**
- and -	
GOVERNMENT OF THE UNITED STATES OF AMERICA	**Respondent**

- -
- -

Edward Fitzgerald KC and Natasha Draycott (instructed by **Karen Todner Ltd**) for the **Applicant**
Catherine Brown and Hannah Burton (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 21 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THORNTON DBE

Mrs Justice Thornton DBE :

Introduction

1. The Applicant renews his application for permission to appeal the decision of the District Judge in a judgment delivered on 09/01/2024, to send the case to the Secretary of State pursuant to an extradition request issued by the United States of America. Extradition was ordered by the Secretary of State on 26/02/2024. The Applicant is sought for the purposes of prosecution in the Southern District of Georgia in the United States in relation to an alleged drug trafficking and money laundering operation based in Canada between 2017 to 2018.

2. The three counts on which prosecution is sought are:

   i. Count One: Conspiracy to Import Controlled Substances and aiding and abetting the same, in violation of Title 21, United States Code, Sections 813, 952, 960 and 963, and Title 18, United States Code, Section 2, which carries a maximum term of life imprisonment;

   ii. Count Two: Conspiracy to Distribute Controlled Substances and aiding and abetting the same, in violation of Title 21, United States Code, Sections 841 and 846, and Title 18, United States Code, Section 2, which carries a maximum term of life imprisonment; and

   iii. Count Three: Money Laundering Conspiracy, and aiding and abetting the same, in violation of Title 18, United States Code, Sections 1956(a), 1956(h), and 2, which carries a maximum term of imprisonment of twenty years.

3. The conduct alleged against the Applicant is set out in the ruling of the District Judge at ¶7-9. In summary, it is alleged against the Applicant that between at least April 2017 and February 20, 2018, he and a co-defendant (Thomas Federuik) operated a drug trafficking and money laundering organisation in Canada and conspired to import, and possess with intent to distribute, controlled substances into the United States. The co-defendants also conspired to collect fiat currency and cryptocurrency which they knew to be the proceeds from a variety of illegal activities. In October 2017, the co-defendants distributed controlled substances to two United States Navy Sailors in Georgia, United States, and both men died of a fatal overdose due to the toxic effects of U-49900, methoxyacetyl fentanyl, and cyclopropyl fentanyl. Both sailors had received a package from a Dark Web vendor using packaging postmarked from Canada and labelled “East Van ECO Tours” prior to their deaths. At the same time Canadian authorities were conducting investigations into a Dark Web vendor “Canada 1” which was found to be operated by the co-defendants. An undercover operation revealed the co-defendants were posting drugs delivered throughout Canada and the United States, including to the deceased sailors. 300 packages were identified as linked to the drug trafficking operation. Approximately 80 percent of the packages were directed to be shipped into the United States while the remaining packages were shipped to Canada and other countries around the world. Drugs seized equated to a street value of over $20 million.

GROUNDS OF APPEAL

4. The grounds of appeal are that:

The District Judge erred in ordering the Applicant's extradition on the grounds that:

i) There is a real risk that, if extradited, the Applicant will be subjected to inhuman and degrading punishment contrary to Article 3 of the European Convention on Human Rights. That is because there is a real risk that he will be sentenced to an irreducible sentence of Life Without Parole; and

ii) In reaching his decision, the District Judge erred in two particular ways:

a. He wrongly found that there was no real risk of a sentence of life imprisonment without parole being imposed; and

b. He wrongly ruled that it was not necessary in order to comply with Article 3 that a life sentence without parole should be reducible on grounds of a prisoner's progress in prison alone.

The hearing before the District Judge

5. Before the District Judge, the Applicant raised the ground of appeal now raised before this Court, namely that if extradited, the Applicant will be subjected to inhuman and degrading punishment contrary to Article 3 ECHR in the form of a penalty of an irreducible life sentence without parole or a minimum term of 20 years which is de facto an irreducible life sentence without parole.

6. The District Judge considered evidence as to the likely sentence on conviction. The evidence before him included reports from Assistant Attorney Pennington who will prosecute the Applicant in the event of extradition. His evidence before the judge was that the risk of a life sentence on any conviction is remote [¶72i)&ii) of the judge's ruling].

7. The District Judge also considered reports and heard oral evidence from a US Attorney, Mr Sabelli on behalf of the Applicant. Until August 2022, Mr Sabelli served as President of the National Association of Criminal Defence Lawyers. Over 30 years he has represented more than 1,000 federal criminal defendants at sentencing hearings [¶59a of the ruling]. Mr Sabelli assessed the Applicant to be at risk of a sentence ranging from 40 years to life imprisonment. On the basis of his experience, he concluded that any sentence is likely to be a life sentence [¶59b].

The decision of the District Judge

The caselaw on Article 3 ECHR

8. The Judge addressed the case-law on Article 3 ECHR. His analysis may be summarised as follows:

i) The test is whether there are substantial grounds for believing the requested person faces a real risk of being subjected to torture, inhumane or degrading treatment in the receiving country. The test is a stringent one with strong evidence required (Hafeez v Government of the United States of America [2020] EWCA 155 (Admin) [¶28 of the judge's ruling];

ii) Imposition of a life sentence is not in itself incompatible with Article 3 providing it is not grossly disproportionate [¶29];

iii) In Hafeez the Divisional Court found that extradition to the US would be compatible with Article 3 on the basis that US law affords the possibility of review of life sentence either via way of applying for compassionate release or a petition for executive clemency [¶31];

iv) Subsequent to the decision in Hafeez, the European Court of Justice has provided guidance on the applicable legal test in cases where the complaint against extradition is that an applicant will be sentenced to life imprisonment. The Court in Sanchez-Sanchez v United Kingdom (22854/20), (2023) 76 E.H.R.R. 16 (2022) set out a two-limb test to be applied in the extradition context:

> 1) Are there substantial grounds for believing there is a real risk of a sentence of life without parole?; and
>
> 2) If an applicant has satisfied the real risk test, the sending state must ascertain prior to authorising extradition that a mechanism of sentence review exists in the requesting state that would allow domestic authorities to consider the prisoner's progress towards rehabilitation or any other ground for release based on his or her behaviour or other circumstances.

v) In the extradition context there is a distinction between the substantive obligation (which, broadly speaking, is that the sentence must not be irreducible de jure or de facto) and related procedural safeguards (eg requiring a review mechanism of a particular type) which do not apply in the extradition context (McCallum v Italy (2023) 76 ERR SE3/ Rae v USA [2022] EWHC 3095 (Admin)[¶36-37].

The applicability of Hafeez

9. Having set out the law the judge accepted the submission on behalf of the US Requesting Authority that he was bound by the Divisional Court decision in Hafeez v Government of United States of America. If he found an inconsistency between the cases of Sanchez and Hafeez he could record it but not depart from binding authority. He concluded that on this basis the challenge failed [¶47].

10. Nonetheless, the District Judge went onto consider the submission on behalf of the Applicant that the jurisprudence had moved on from Hafeez as a consequence of Sanchez such that extradition will be incompatible with Article 3 if a defendant faces

a real risk of a life sentence and a requesting state does not have a mechanism of review of that sentence on the basis of the prisoner's progress towards rehabilitation alone. In this respect, the judge considered that Sanchez was ambiguous at particular points of the judgment but the Court had cited Hafeez without suggesting it was wrong. Read as a whole, the focus of the judgment is to require a mechanism of sentence review on penological grounds [¶53]. It was not the intention of the ECtHR to require as a procedural step the review of life sentence on the basis of progress towards rehabilitation alone (which is only one of a number of penological factors) [¶54]. He concluded therefore that the ruling in Sanchez is consistent with Hafeez.

Substantial grounds for believing there is a real risk of life imprisonment without parole?

11. In case he was wrong in his view of the jurisprudence, he went on to apply the first limb of the two-stage approach in Sanchez, i.e whether there are substantial grounds for considering there to be a real risk that the Applicant will be sentenced to life imprisonment without parole in the event of conviction.

12. After summarising the evidence from Mr Sabelli and Mr Pennington, the judge set out his analysis as follows:

> *80 Turning to the evidence in this case …*
> *81. Mr Sabelli stated in his first report that:*
> > *"…Judges, not juries, decide the 'relevant conduct' for the purposes of determining the amount of controlled substances and laundered funds at issue. Judges, not juries, determine what other provisions of the USSG apply; for example, whether Mr Nicholls acted as an organizer, manager, or leader or obstructed justice in some way.*
> >
> > *88. For this reason, I cannot yet determine the applicable guidelines because I do not know what the court will decide at sentencing based on proof and litigation by the parties as well as the analysis of the Probation Office.*
> >
> > *89. Similarly, I am not in a position to evaluate potential variances for Mr. Nicholls. Doing so would require investigation of his life and of the nature and circumstances of the offense based on an attorney-client relationship of trust and, potentially, reliance on expert analysis.*
> >
> > *90. As stated above, without having the complete discovery in my hand, having investigated mitigation, and knowing the government's proof, I cannot determine the application of the USSG to the three counts in this matter".*
>
> *82. This part of his report reflected his evidence before me which was that he had not had access to the full investigation file which limited his ability to comment.*
>
> *83. Nonetheless he concluded that it was likely that the USG would result*

in an offence level of at least 43. This would attract a life sentence.

84. Mr Sabelli reached that conclusion on an agreed base line starting score of 38 but aggravated by the factors that I have identified when summarising his evidence above.

85. I was concerned that it became apparent that Mr Sabelli had formed his opinion in part on material that he had not referenced in his reports (the reference to the Department of Justice press release asserting the importation of drugs from China).

86. I was also concerned that the some of the identified aggravating features were speculative- the mass marketing of the drugs; possible involvement of others and the use of premises inside the USA.

87. He has also failed to identify a single case where a life sentence without parole has been imposed in comparable circumstances in the district and/or state where the defendant would be sentenced if convicted.

88. The Government's evidence has been provided by the prosecution attorney who will have conduct of the defendant's trial and who does have access to the file. There is no suggestion that he has acted in bad faith.

89. He has identified the federal judge who will hear the case. Judge Wood has not imposed life sentences in any comparable case. Mr Pennington has fairly brought to my attention that the defendants sentenced in the cited cases all pleaded guilty. He has cited a case involving death which was dealt with by a different judge in the same district who sentenced the defendant in a case involving death to 130 months in prison.

90. Mr Pennington and his colleagues have reviewed drug trafficking cases for the past five years in their jurisdiction and have been unable to identify any instances where a life sentence was involved.

91. I reject Mr Sabelli's criticism's of Mr Pennington's approach. I remind the defence that the burden is on the defendant to satisfy the stage 1 test. Mr Pennington has in any event undertaken an objective assessment of sentencing practices in similar cases within the district in which this case will be tried.

92. I do not accept that Mr Pennington's analysis assumes cooperation by the defendant or a guilty plea.

93. I accept that discretionary life sentences for drugs sentences are extremely rare in the USA and that they are very rarely imposed in cases involving death.

94. In the light of his knowledge of the case and the district in which the case will be tried, I accept his evidence that the offence level, including enhancements, will not be higher than 40.

95. I accept that any sentences that are imposed are likely to run concurrently.

…

97. I attach no weight to the two reports produced by Mr Sabelli.

98. The Patterson study relates to New York State administrative data from between 1989-2003. The data relates to the effect of short custodial sentences on life expectancy. The report is 10 years old…

99. It does not amount to cogent evidence .

100. The Wiseman report relates to a comparative study from data taken from 21 democracies between 1981-2005. It is also not recent. I do not find it to be cogent evidence.

Evidential findings

101. The allegations do not attract a mandatory life sentence if proved.

102. The defendant will be sentenced by an independent judge. Sentencing is a complex process which depends on many variables and will take into account the history and characteristics of the defendant. The defendant will have the opportunity to present mitigating factors to the judge, including evidence of his physical well-being. In other words the sentence will be passed with due consideration of all the relevant aggravating and mitigating factors.

103. The judge will take into account sentencing guidelines which are advisory, the judge my pass sentences above or below the guideline range.

104. The defendant will have the right to appeal against the sentence imposed upon him.

105. I accept Mr Pennington's evidence that at its' highest the defendant will score 42 on the guidelines and that in the light of the defendant's history and characteristics he is likely to be sentenced at the lower end of the scale. I accept that a sentence of life imprisonment without parle is no more than a theoretical possibility.

106. There are no substantial grounds for believing that in the event of conviction there is a real risk of a sentence of life imprisonment without parole.

107. The defendant has not established that there is a real risk that sentences for more than one offence will run consecutively.

13. Drawing together his analysis he concluded as follows:

> *110….The defendant's case fails at stage 1. If I am found to be wrong in my finding then it fails at stage 2 as the court held in Hafeez that the ability to apply for compassionate release and executive clemency were a sufficient review mechanism ….*
> *114 I reject the challenge.*

The alleged errors on the part of the District Judge

14. On behalf of the Applicant, Mr Fitzgerald KC focussed his criticisms of the judge on paragraphs 85, 86, 87 and 92, 93 and 97 of his ruling. The paragraphs in question are set out above. He submitted the analysis in those paragraphs reveals significant errors of the reasoning process of the judge in reaching his conclusions.

15. In relation to ¶85 Mr Fitzgerald submitted the judge's stated 'concern' about Mr Sabelli's reliance on material indicating drugs were imported from China was misplaced. He took the Court to the indictment issued by the United States District Court (Southern District of Georgia Brunswick Division) and pointed to reference to the drugs being imported from China. In relation to ¶86 he submitted that the judge was wrong to consider the aggravating features identified by Mr Sabelli were speculative. In particular, the aggravating feature of mass marketing is grounded in the evidence, including the use of the dark web and the value of the drugs seized (£20 million). Mr Fitzgerald also took the Court to the indictment and to Mr Pennington's report and a reference to "where the controlled substance is distributed through mass marketing by use of a computer, the Guidelines provide an increase by 2 levels". The judge's finding at ¶87 that Mr Sabelli had failed to identify a single case where a life sentence without parole has been imposed in comparable circumstances was to ignore the thrust of Mr Sabelli's submissions which were that the present case is wholly exceptional, involving in particular the deaths of two servicemen. At ¶92 the judge's rejection of Mr Sabelli's view that Mr Pennington's analysis assumed co-operation by the defendant or a guilty plea was undermined by the judge's reference at ¶89 to Mr Pennington's concession that the cases he relied on all concerned Guilty pleas. The judge's finding that discretionary life sentences are extremely rare [¶93] is contradicted by Mr Sabelli's citation of the data as to the percentage of life sentences for drugs offending. It was, he submitted irrational of the judge to conclude at ¶97 that he attached no weight to Mr Sabelli's reports given Mr Sabelli's role as a former president of the Bar Association in the US and his 30 years' experience at the defence bar.

The test on appeal

16. The test on appeal was common ground. Mr Fitzgerald took the Court to paragraph 26 of Love v USA [2018] EWHC 172 (Admin) as to which there was no dispute.

> 26. *The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in Celinski and Re B (A Child) are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed.*

Analysis

17. Mr Fitzgerald's criticisms of the District Judge focused on five paragraphs of his ruling. Before turning to address the specific criticisms, it is appropriate to set out the wider context.

18. At the start of the hearing, the judge had before him two reports (declarations) from Mr Pennington (dated 19 April 2023 and 5 November 2023). He also had two reports from Mr Sabelli (dated 8 September 2023 and 19 October 2023). Mr Sabelli had produced a third report dated 18 November 2023 which was served on 20 November 2023, the day before the hearing opened on the 21 November 2023. On behalf of the US Requesting Authority, Ms Brown, who appeared before the District Judge (as did Mr Fitzgerald) explained that Mr Sabelli also gave additional oral evidence. In particular he identified what he considered would be additional enhancements to any sentence, in the course of which he referred to a press release dated 1 June 2022 issued by the US Attorney's Office, Southern District of Georgia which is headed "Two men indicted for international conspiracy to ship Fentanyl, other drugs into United Sates through Dark Web connections". The press release had not been mentioned in his report, a point Mr Fitzgerald did not dispute before this Court. Accordingly, the District Judge permitted Mr Pennington, who did not give oral evidence, to serve a third declaration prior to closing submissions. The judge explains in his ruling that he permitted the third report from Mr Pennington on the basis it was in the interests of justice to do so and he rejected an application from Mr Fitzgerald to adjourn the hearing to enable Mr Sabelli to respond further [¶69-71].

19. The judge summarised the evidence of Mr Sabelli and Mr Pennington as the evidence developed over the course of the written reports and in oral evidence from ¶59 – 72 of his ruling. He did so in detail before turning to his analysis of the evidence at ¶73 – 100 and his findings on the evidence at ¶101- 107.

20. The judge first assessed the evidence of Mr Sabelli starting with Mr Sabelli's evidence that his ability to comment on the likely sentence is limited because he did not have access to the case files [¶80]. At ¶85 – 87 he sets out his criticisms of the evidence, which formed the focus of Mr Fitzgerald's submissions to which I will return.

21. The judge then turned to consider the evidence of Mr Pennington, observing that he will be the prosecution attorney who will have conduct of the Applicant's trial in the US and who has access to the investigation file. There is no suggestion that Mr Pennington has acted in bad faith [¶88]. Mr Pennington and colleagues had reviewed drug cases for the past 5 years in their jurisdiction and had not identified the imposition of any life sentences [¶90]. Mr Pennington had undertaken an objective assessment of sentencing practices in similar case within the district in which the Applicant's case will be tried [¶91]. Mr Fitzgerald did not challenge these findings about Mr Pennington's evidence.

22. As Mr Fitzgerald conceded in reply, his criticism of the judge for placing no weight on Mr Sabelli's reports does not bear scrutiny. Read fairly, the paragraph in question [¶97] refers to two particular reports relied on by Mr Sabelli and not to Mr Sabelli's reports. It is readily apparent from the detailed summary of his evidence that the judge gave Mr Sabelli's evidence careful consideration.

23. As Mr Fitzgerald also conceded during the course of his submissions, the press release relied on by Mr Sabelli during the course of his oral evidence was not referred to in Mr Sabelli's written reports. There was therefore no error in the judge's observation to this effect at ¶85.

24. I do not accept Mr Fitzgerald's wider submission that in criticising Mr Sabelli's focus on particular aggravating features at ¶85 and 86 the judge was ignoring the underlying evidence. I accept Ms Brown's cogent submissions in response. The indictment represents the height of the case against the Applicant and must be considered in the context of the analysis of prosecuting counsel (Mr Pennington) who, unlike Mr Sabelli, has access to the investigation files. In this regard Mr Pennington's report explains that the Applicant's co-defendant is likely to be regarded as having a leadership role rather than the Applicant. Any mass marketing found would not take the sentence into the realm of life imprisonment. Significantly, given there is no challenge to the good faith of Mr Pennington, his report records that it is very unlikely for a sentence enhancement to be applied for if not sought by a prosecutor. Ms Brown took the Court to Mr Pennington's analysis that even if the Applicant were to be sentenced to every possible enhancement it would take him to level 42 in the relevant sentencing guidelines which does not attract a life sentence. Mr Pennington's view is that the Applicant's case is much more likely to be nearer the lower end of level 40 than 42 given his good character [¶ 5 & 9 - 12 of Mr Pennington's third declaration].

25. Mr Fitzgerald's submissions about the exceptionality of the present case amount to an attempt to reargue submissions which failed before the District Judge. Ms Brown explained that in her submissions before the District Judge she had invited him to contrast Mr Pennington's knowledge of the case gained from his role as prosecuting counsel and access to the investigation file with Mr Sabelli's concession that his ability to comment was limited. Mr Sabelli's limited ability to comment is the first point made by the judge in his analysis of the evidence [see ¶ 80-81]. When the ruling is read as a whole it is apparent that the Judge preferred Mr Pennington's evidence to that of Mr Sabelli's. Having been taken to some of the evidence in question, I consider there was abundant evidence before the judge which entitled him to prefer the view of Mr Pennington to Mr Sabelli. The judge gave clear and cogent reasons for his preference.

26. Accordingly, it is not reasonably arguable that the Judge erred in his view that there are no substantial grounds for believing there is a real risk that the Applicant will receive a sentence of life imprisonment on conviction.

Limb 2

27. Both parties were agreed that it was not necessary for the Court to consider the second limb of the Sanchez test in the event that I found against the Applicant on the first limb. Accordingly, I do not address the Applicant's submission in relation to the development of the jurisprudence of Article 3 ECHR post Hafeez in the extradition context.

Conclusion

28. For the reasons given above the renewed application for permission to appeal is refused.