Neutral Citation Number: [2024] EWHC 1141 (Admin)

Case No: AC-2024-LON-001340

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

Tuesday, 21st May 2024

Before:
FORDHAM J

- -

Between:

MICHAEL LOMAS	**Appellant**
- and -	
REPUBLIC OF SOUTH AFRICA	**Respondent**
(No.3)	

- -
- -

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

- -

Hearing date: 14.5.24
Draft judgment: 16.5.24

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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. In Lomas v South Africa (No.1) [2024] EWHC 388 (Admin) ("First Judgment") I gave judgment on 23.2.24 after an oral hearing on 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 four headline points identified by Mr Keith and Ms Thomas (§5). They were: (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). I raised the question of fitness to fly as a question for the Court, and recorded that all Counsel had agreed 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 (§15). In Lomas v South Africa (No.2) [2024] EWHC 637 (Admin) ("Second Judgment") and [2024] EWHC 731 (Admin) ("Third Judgment"), I gave two judgments after oral hearings on 20.3.24 and 26.3.24. I gave permission to reopen the appeal, because it transpired that fitness to fly was a question for the Court. But I decided that – viewed through the legal prism of Article 3 and s.91 – the points raised in relation to fitness to fly raised no arguable ground of appeal.

2. I am now dealing with Lomas v South Africa (No.3). This has been filed as a subsequent human rights appeal by reference to s.108(5)-(8) (Third Judgment §15(5)). The issue of s.91 has also been raised and – although not a human rights ground – no objection has been taken to my considering that too. It could have been raised under Crim PR 50.27 (Third Judgment §13). This was a rolled-up hearing on 14.5.24, directed by Swift J on 1.5.24. I am asked to consider whether there are now viable Article 3 or s.91 grounds, based on a change in circumstances and the latest evidence.

Latest Events

3. The Appellant underwent an operation six weeks ago, on 2.4.24. It was the operation identified by Mr Nader-Sepahi (consultant spinal neurosurgeon) (First Judgment §13), to take the pressure off his spinal cord and his C7 nerve root, in the context of his multi-level degenerative disc disease. Its purpose was to prevent or slow down deterioration. I previously explained that there was no legal basis for deferring extradition to allow the operation to take place (First Judgment §14; Third Judgment §38), but in the event the circumstances allowed for it to happen. The operation has been described as successful and Mr Nader-Sepahi recorded (9.4.24) that he was pleased to record that it had been uneventful. The level of success in impeding deterioration of the pre-existing spinal condition remains to be seen.

4. After the operation, the Appellant was discharged on 4.4.24 to a care home for convalescence. On 11.4.24 the Appellant had received notification that he was to be removed on 22.4.24 by means of a seven-hour flight to Doha are transferring to a nine-hour flight to Johannesburg. That was cancelled after the latest appeal was filed (18.4.24). The Appellant's legal representatives have been in touch on a daily basis by phone, and with several video conferences. Mr Nader-Sepahi saw him on 23.4.24. Dr Alan Mitchell visited on 17.4.24 and wrote a report dated the same day ("Mitchell 1"). Dr Mitchell visited again on 10.5.24 writing a second report on 13.5.24 ("Mitchell 2"). Dr Mitchell's previous report was dated 4.12.23.

5. Dr Mitchell's opinion, for reasons which he has explained, is that the Appellant is not currently fit to fly. My function is to apply the "rigorous yet pragmatic and circumspect approach to the evaluation of the evidence", not as a "freestanding evaluation of fitness to fly", but as a disciplined application looking through the legal prism to see whether the evidence satisfies the test for s.91 or Article 3 (Third Judgment §§34, 36).

Mitchell 1

6. In Mitchell 1, Dr Mitchell answered the question: **"**What are the risks of removing Mr Lomas from the care home in which he is currently recuperating?" as follows:

> ***Currently Mr Lomas requires residential care in order to assist with his activities of daily living such as dressing and washing. He is seen on a weekly basis by a physiotherapist who has recommended that he does not maintain the same position for longer than 45 minutes, except when lying in bed. He is also currently being attended by the district nurses in respect of the care of the wound on his neck (while he has had his sutures removed, the district nurses are due to visit again tomorrow to review and re-dress his surgical wound). If Mr Lomas were in a setting other than where he could receive the care that he currently requires, he would not be able to dress/undress or maintain a level of personal hygiene. Without access to physiotherapy services Mr Lomas' physical recovery from his operation would be at risk and his mobility even more so restricted given that the physiotherapist assists on devising a programme for improving as far as possible the functioning of his right arm and hand, maintaining his balance and maximising his mobility. Currently he has carers available at hand 24 hours each day. If he were to fall again and he were not in a residential care setting, this would not be the case.***

7. Dr Mitchell also answered these questions: whether the Appellant was fit to fly, if not why not, whether he would ever be fit to fly and whether there are arrangements that could be put in place that would make it safe for him to fly. In response, Mitchell 1 said this:

> ***It is my opinion that at present Mr Lomas is not fit to fly. He has been advised not to stay in the same position for more than 45 minutes at a time, except when lying in bed. In a commercial aircraft this would simply not be possible, particularly given that it is planned that Mr Lomas be extradited to South Africa via a flight from Heathrow to Doha of approximately 7 hours duration and thereafter a flight to Johannesburg of approximately 9 hours duration. In addition, if an inflight emergency were to occur and passengers were required to adopt the brace position, Mr Lomas would be unable to do so. Mr Lomas requires the use of a Zimmer to mobilise. He would be unable to use such on an aeroplane including being able to get to the toilet. Even if he were to be accompanied by a doctor as is planned, on account of the above issues I do not believe that a commercial airline would accept Mr Lomas as being fit to fly. Mr Lomas, depending on his recovery, may in future be fit to fly, but at the moment I am of the opinion that he requires the 24 hour residential care as provided by nursing and care staff that he is currently receiving… If provision were made for Mr Lomas to be transferred to South Africa in an air ambulance then he could in my opinion be flown to South Africa.***

Assurance

8. On 9.5.24 the Respondent filed its written submissions together with an application to adduce as putative fresh evidence: (a) confirmation from NCA that all aircraft carry on board a narrow wheelchair able to be used to facilitate toilet functions for passengers unable to walk, but the user must be able to lift themselves from it onto the seat and have an escort who can assist with toilet functions; (b) confirmation from the South African Police Service that having discussed the position with the accompanying doctor, it would be possible to ensure that the Appellant could move his body position as and when required; and (c) confirmation that arrangements would be made for a direct flight.

Mitchell 2

9. In Mitchell 2, Dr Mitchell records (§7.6) that:

> ***Assurance has been given that if extradited Mr Lomas would be accompanied by a medical doctor on a direct flight to Johannesburg, that he would have the use of an onboard wheelchair and would be able to move position as often as would be required.***

10. The rest of a section entitled "Summary and Opinion" in Mitchell 2 says this:

> ***7.1 Mr Lomas remains at present in Springfield Care Home where I visited him on both 17th April and 10th May. As compared with when I saw him initially, Mr Lomas has not improved at all in his level of functioning. His state of health has worsened as compared with when I saw him in April. He still requires the use of a Zimmer to assist with his walking and in relation to his activities of daily living, is still not able to shower or dress/undress himself without the assistance of care home staff. As such, it is my opinion that at present, Mr Lomas continues to require to be cared for full-time in a residential care home facility.***
>
> ***7.2 He has now fallen a third time on account of continuing to be unsteady on his feet and sustaining injury to the left side if his face.***
>
> ***7.3 Recently he has had a loss of appetite, has lost 4.2kg in weight and has developed bloody diarrhoea thought to be due to a flare of diverticulitis which is at present being treated with antibiotics, although will require monitoring over the next few days in case it does not abate and review at the emergency department of the local hospital is required.***
>
> ***7.4 In respect of his mental health Mr Lomas told me that if extradited he would take his own life and knew how he would do so. Given this, I would recommend that an urgent psychiatric review be appropriate.***
>
> ***7.5 While Springfield Care Home have provided an updated report on Mr Lomas' care needs, I believe it would be helpful to the Court for a report to be requested of his physiotherapist in relation to her up to date assessment of his mobility and unsteadiness in particular in view of the history of recent falls. It would also be appropriate for a report to be requested of Mr Lomas' spinal surgeon regarding his prognosis from a neuro-rehabilitative perspective. With regard to his current suicidal ideation if he were to be extradited, I would recommend a psychiatric review.***
>
> …
>
> ***7.7 Mr Lomas' current care needs in respect of the assistance he requires with showering and dressing/undressing together with his mobility problems, unsteadiness on his feet and tendency to falls is as set out above… He also in my opinion requires an urgent psychiatric review on account of his suicidal ideation. Additionally at present on account of a probable flare of diverticulitis he presents with bloody diarrhoea, loss of appetite and weight loss, which will need further investigation if these symptoms don't quickly settle. As such, despite the practical provisions as are currently proposed by the South African authorities I believe that at present Mr Lomas is not fit to travel to South Africa. If his state of health improves and he is no longer dependent on residential care, thereafter Mr Lomas may be fit to travel within the next few weeks.***
>
> ***7.8 I would suggest that a copy of this report be made available to Mr Lomas' treating clinicians including his GP in order that they may be advised of my concerns re Mr Lomas current state of health.***

Oral Evidence?

11. Mr Keith and Ms Thomas wanted to tender Dr Mitchell for cross-examination and warned that they would submit – absent a challenge in cross-examination –that the expert opinions and conclusions expressed were bound to be accepted: see Fitzgerald v CPS [2024]

EWHC 869 (Admin) §31. The exceptional course of oral evidence on an extradition appeal did not prove necessary. Mr Payter confirmed that he was content for the evidence from Mitchell 1 and Mitchell 2 to be included in any judgment, as I have. He was content that I record – as I do – that this evidence was accepted by the Respondent. Mr Payter's position was that the Court needed to apply the legal prism, in light of the evidence, and decided whether Article 3 or s.91 thresholds were met.

12. Following exchanges with all Counsel, Mr Keith and Ms Thomas – by conferring with Dr Mitchell – were able to confirm two things about the language used by Dr Mitchell. First, that Mitchell 2 §7.6 was communicating Dr Mitchell's acceptance – so far as they went – of the recorded assurances as to "use of an onboard wheelchair" and being "able to move position as often as would be required". Second, that the phrase "as such" in Mitchell 2 §7.7 meant "based on the points made above in this report". In those circumstances, and having reviewed the position regarding oral evidence, it was unnecessary for Mr Keith and Ms Thomas to call Dr Mitchell to add to the contents of Mitchell 1 or Mitchell 2, or for Mr Payter to cross-examine Dr Mitchell on those contents. The evidence stands. Mr Keith and Ms Thomas were able to emphasise what they and Dr Mitchell saw as the important points arising out of it. The question is whether the points raised cross the legal thresholds for s.91 oppression or Article 3 inhuman or degrading treatment, and to that I now turn.

Core Submissions

13. In their skeleton argument adopted in oral submissions, Mr Keith and Ms Thomas encapsulated their Core Submissions on this new appeal, as to why extradition would violate Article 3 or constitute s.91 oppression, as follows:

> ***(i) He would be effectively prevented from recovery from a serious operation, and consequently would suffer long-term and irreversible harm. (ii) He would be unable to meet his own health and hygiene needs both during transfer and once imprisoned in RSA and this would amount to degrading treatment. (iii) For the length of the transfer he would be at high risk of further serious injury.***

Transfer

14. As has been seen, the Core Submissions in support of the appeal are that the Appellant "would be unable to meet his own health and hygiene needs … during transfer" and "for the length of the transfer he would be at high risk of further serious injury".

15. Mr Keith and Ms Thomas explained "unable to meet his own health and hygiene needs … during transfer", as follows. True, Mitchell 1 had described the Appellant's inability to use his Zimmer frame on the aeroplane including being able to get to the toilet; and true, there was the subsequent assurance that he would have the use of an onboard wheelchair. But Dr Mitchell elsewhere has described the Appellant as only able to use a toilet because of a "raised toilet seat", and it has not been said that a raised seat would be available on the aeroplane. This means the Appellant would not be able to use a toilet on the plane. This, for a 9 hour flight, was oppressive or inhuman or degrading. That was the argument, based on the evidence.

16. I cannot accept this argument. Mitchell 1 said that whereas the Appellant requires the assistance of staff in the care home to wash and get dressed or undressed, he can "attend to his toilet needs independently", there being a "raised toilet seat". The NCA Email (Third Judgment §28) explained that "a suitable medical practitioner" would "fly back with Mr

Lomas and cater for his medical condition". This is the accompanying clinician with whom the South African Police Service had discussed the position, confirming that it would be possible to ensure that the Appellant could move his body position as and when required. This was the accompanying "escort who can assist with toilet functions", to which the NCA confirmation referred. The escorting clinician will be on hand on the flight, to assist with getting the Appellant into and out of the narrow wheelchair, to assist with getting onto and off the toilet, and to assist with washing.

17. That leaves the Core Submission that "for the length of the transfer he would be at high risk of further serious injury". This submission had predated the assurance about the accompanying clinician confirming that it would be possible to ensure that the Appellant could move his body position as and when required. I have dealt previously with the evidence about risk of falling (Third Judgment §§24-27) and turbulence or unexpected movements (Third Judgment §§30-33). As has been seen, Mitchell 1 referred to inability to adopt a brace position. Dr Mitchell's December 2023 report had identified the Appellant as having "difficulty in bending his head forward" and wearing a cervical collar. The brace position point was not relied on previously. Nor was it relied on orally. That is for good reason. There is no evidence that a brace position is a prerequisite for all who fly. The premise of an emergency landing is not on substantial grounds a real risk. Vulnerability to injury would arise, alongside ability to brace. Mr Keith submitted that the bloody diarrhoea (§21 below) thought to be due to a flare of diverticulitis, presently treated with antibiotics, was analogous to a condition involving severe pain during a flight, as perhaps with a severe ear infection. But there is 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 transfer. It follows, as with the previous evidence (Third Judgment §§5, 10-11), there is no arguable ground of appeal in relation to transfer – the so-called "second stage" – applying the relevant legal prism.

Post-Transfer

18. As has been seen, the Core Submissions in support of the appeal include that the Appellant – if extradited now – would be "effectively prevented from recovery from a serious operation, and consequently would suffer long-term and irreversible harm" or "would be unable to meet his own health and hygiene needs … once imprisoned in RSA and this would amount to degrading treatment". Mr Keith and Ms Thomas explained their key points. (1) The Appellant needs time to recuperate from a major operation. (2) He has a serious infection which needs to be addressed and resolved. (3) He needs 24 hour nursing care and carers available at hand 24 hours a day. (4) He needs proper physiotherapy. (5) He needs medical treatment relating to his spine condition.

19. The Judge had a wealth of material and considered the adequacy of health care provision, at the prison and nearby hospital in South Africa. It is sufficient for present purposes to records the following. (1) March 2022 assurances explained that an initial health and physical risk assessment is conducted by a professional nurse within six to twelve hours of admission, to determine urgent health care needs for immediate intervention, with mandatory screening for (a) any health problems, either acute or chronic; (b) present treatment (medication); (c) any fresh wounds; (d) any previous operation; and so on. (2) The same assurances described the hospital staff at the prison as including four professional nurse operational managers; and three further professional nurses. (3) This is what was said by Dr Mitchell (December 2023 report):

> ***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 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.***

20. As I have recorded previously (Third Judgment §§28-29), there is also the fact that the Appellant would be taken on arrival to a medical facility, which is entirely apt as part of proper and adequate arrangements for the transfer, which will allow prompt medical assessment on arrival. And the Appellant would be accompanied on the plane by a medical doctor.

21. Turning to the infection, Dr Mitchell's December 2023 report referred to the "diverticular disease" for which the prison has adequate facilities, strategies and staff to care (§19 above). Within that report it was recorded that:

> ***Mr Lomas suffers from diverticular disease and associated flare-ups of diverticulitis which can cause pain and bloody diarrhoea.***
>
> …
>
> ***An added complication in respect of diverticular disease is that at times the diverticulae can become inflamed causing rectal bleeding and indeed on 26th July 2023, Mr Lomas attended the GP with such. A diagnosis of diverticulitis was made and treatment with antibiotics initiated.***

October 2022 assurances recorded that the hospital 4km from the prison has emergency access to colorectal surgery specialist services in the event of an acute flare-up of diverticulitis. Here is what is said about the infection in Mitchell 2:

> ***When I met with Mr Lomas on 10th May he told me that he felt fatigued and for the past couple of days he had been suffering from bloody diarrhoea and for the week prior had very little appetite. He had a telephone consultation with his GP on the 9th of May where his GP reportedly felt that the bloody diarrhoea may be a flare of diverticulitis (inflammation of small bulging pouches that have formed in the large intestine) which Mr Lomas has previously suffered from. A course of the antibiotic coamoxiclav 500/125mg three times a day for five days has been prescribed in order to treat this suspected flare. Mr Lomas told me that his GP had said that if the bloody diarrhoea continues for more than a few days despite the prescription of antibiotics, this would cause a review in the emergency department of the local hospital to be required as a matter of urgency. In my opinion such a plan is entirely in keeping with a presentation of such symptoms.***

On the evidence, I accept that on 9 May 2024 a five-day course of antibiotics was prescribed and that if the bloody diarrhoea continued for more than a few days, there would be an urgent review in the emergency department of the local hospital. In my judgment, this matter is in hand and there is a plan. The hearing before me was 14 May 2024. Extradition will not be immediate. The symptoms have been identified.

22. I turn to the points about 24 hour nursing care and carers available at hand 24 hours a day. Mitchell 1 recorded that the Appellant "requires the assistance of the staff in the care home to wash and get dressed/undressed"; that he was "being attended by the district nurses in respect of the care of the wound on his neck"; and, in the context of a fall, "he has carers available at hand 24 hours each day". There are references to "the 24 hour residential care". Mitchell 2 refers to a call bell to summon help, and three falls sustained (between 4.4.24 and 10.5.24); refers to the Appellant as not able to shower or dress/undress himself without the assistance of care home staff; and refers to being "cared for full-time". I accept that the Appellant is full time at the care home, where he is being

cared for. This evidence is not describing "nursing" care 24/7. It is describing care home staff assistance – with washing, showering and dressing – and responsiveness to falls. As I have explained, there are nurses and assurances dated October 2022 speak of the "nurse on call" with a response time of 30 minutes so that "sick inmates will be attended timeously". The same document responds as follows, regarding circumstances where 24 hour nursing were needed:

> ***JHB Correctional services is a primary health care facility and does not offer 24 hrs services. All inmates who require such services are referred to the Chris Hani Baragwanath hospital (Bara hospital) for further management.***

Mr Ameen (consultant neurosurgeon) has previously reported (11.2.24) that putting on clothes, especially on right arm is difficult and he sometimes needs help", and that the Appellant showers "with the support of handrails". The Judge concluded that physical health conditions could be properly treated and managed in a custodial setting, by reference to assurances which are dynamic and not static in nature (First Judgment §14).

23. So far as the Appellant's spine condition is concerned, Dr Mitchell's December 2023 report had referred to the "multilateral degenerative disc disease" for which the prison has adequate facilities, strategies and staff to care (§19 above). So far as physiotherapy is concerned , Mitchell 1 and Mitchell 2 refer to one hour per week which the Appellant currently receives. Physiotherapy is not relied on in Mitchell 2 §7.7. But in any event it is included in the assurances as one of the medical services available post-transfer, in South Africa. As for the general point about recuperating from a major operation, the specifics of this are included within the other points raised, with which I have dealt. And all of this falls squarely within the points I made, but do not repeat, in the First Judgment at §14. The evidence which has been adduced does not contain any opinion to the effect found in the core submission: that extradition would mean the Appellant "prevented from recovery from a serious operation"; or that "consequently [he] would suffer long-term and irreversible harm". There is, in my judgment, no reasonably arguable basis on which this characterisation of the evidence is sustainable.

Conclusion

24. I have addressed the points that were emphasised in the submissions. 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). In my judgment, the case does not cross the arguability threshold and there is no proper basis for a statutory s.91(2) adjournment, nor for seeking specific assurances. The evidence does not – reasonably arguably – provide a basis on which the transfer of the Appellant would reach the threshold of s.91 (oppression) or Article 3 (identifying, on substantial grounds, a real risk of inhuman or degrading treatment). The precautions available, beyond argument, are sufficient. The transfer, beyond argument, cannot be characterised as oppressive or resulting in a real risk of a significant and permanent worsening of the Appellant's state of health. Nor does a more immediate focus on the experience of flying, even arguably, give rise to oppression or a real risk of treatment which is inhuman or degrading. In these circumstances, I will dismiss the application for permission to appeal.