Republic of Trinidad and Tobago

In The High Court Of Justice

Claim No**. CV** 2011-01865

In the matter of Keron Pierre in an application

for a writ of *habeas corpus ad subjiciendum*

Between

KERON PIERRE

Applicant

-And-

THE COMMISSIONER OF PRISONS

Respondent

Before the Honourable Mr Justice James C. Aboud

Dated: 28 September 2012

Representation:

- Mr Keith C. Scotland instructed by Ms Asha A. Watkins for the applicant
- Mr Jagdeo Singh, with Ms Sunita Harrikissoon and Mr Michael Rooplal instructed by Ms. Zelica Haynes of the Chief State Solicitor's Department for the respondent.

JUDGMENT

1. This is an application for a writ of *habeas corpus ad subjiciendum* challenging the committal order made against the applicant by the Chief Magistrate on 4 May 2011 pursuant to the Extradition (Commonwealth and Foreign Territories) Act Chapter 12:04 ('the Extradition Act').

2. On 11 November 2010 the Office of the Attorney General of Trinidad and Tobago received a bundle of documents from the Government of the United States of America requesting the extradition of the applicant to stand trial in Boston, Massachusetts. He is

alleged to have brutally murdered three persons and attempted to murder a fourth person. The allegations of fact are contained in the Record of the Case dated 4 November 2010 and the Supplemental Record of the case dated 4 February 2011.

3. The Record of the Case and the Supplemental Record of the Case sets out the evidence proposed to be led against the applicant at the proposed criminal trial in Boston. They contain summaries of the evidence of nine witnesses. It is alleged that on 29 March 2009 the four victims, Anthony Peoples, Shakora Gaines, Chantal Palmer, and Sharon Headley, together with a friend, arrived in a white Nissan Sentra at a party at 41 Mt. Ida Road in the Dorchester section of Boston, Massachusetts. Also allegedly present at the party were Keron Pierre and a number of his friends. A short time before 4:00 am the four victims left the party in the white Sentra, but having realized that their friend was still inside the party, they returned to pick him up.

4. It is alleged that when the white Sentra arrived at the location, they encountered the applicant and his friends, who were were standing on the sidewalk in front of the house. It is further alleged that as the four victims awaited the arrival of their friend, a number of persons, among them the applicant, approached and started speaking with the female victims inside the white Sentra. A member of the applicant's group had an exchange of words with Anthony Peoples who was seated in the rear of the vehicle behind the driver. Anthony Peoples is said to have told one of the men "This is my car; why you looking in my car?" At this point, it is alleged, a young man with a grey hoodie displayed a gun in his waistline allegedly saying "Yo man, we're strapped out here". Seconds later, it is alleged, the applicant, wearing a white "wife-beater" vest, suddenly pulled out a semiautomatic handgun and began firing into the cabin of the vehicle, killing Anthony Peoples, Shakora Gaines and Chantal Palmer. Bullets passed through Sharon Headley's clothing, but she escaped the fate of the other occupants of the car.

5. One of the witnesses (the applicant's girlfriend and mother of his child) alleges that two days after the shooting the applicant approached her mother requesting an airline ticket to Trinidad and Tobago for a 21-day return trip. He flew to Trinidad and Tobago and never returned.

6. On 12 January 2010 a grand jury sitting in Suffolk County, after examining the evidence of the witnesses, and being satisfied that there was probable cause to believe that crimes were committed and that the applicant had committed the crimes, returned and filed with the Commonwealth of Massachusetts an Indictment charging the applicant with three counts of Murder in the First Degree in violation of Massachusetts General Laws, Chapter 265, Section 1; one count of Armed Assault with intent to murder in violation of Massachusetts General Laws, Chapter 265, Section 18(b), and one count of possession of an unlicensed firearm in violation of Massachusetts General Laws, Chapter 269, Section 10(a). On that same day a warrant for the arrest of the applicant was issued. The Record and the Supplemental Record of the case reveals that the Requesting State will be relying on eyewitness and expert testimony, ballistic evidence and circumstantial evidence to prove that the applicant is guilty of the offences outlined in the Grand Jury Indictment.

7. On the 15th November, 2010 the Attorney General issued the Authority to Proceed pursuant to Section 9 (1) of the Extradition Act. The applicant was arrested on 13 September 2010 at Four Roads Police Station, while he was being detained in relation to other criminal charges in Trinidad and Tobago.

8. The Record of the Case explains the laws of the State of Massachusetts in relation to the three charges of murder and the firearm offence. Massachusetts General Laws, Chapter 265, section 2, states that a person convicted of Murder in the First Degree may suffer the punishment of death. However, the Massachusetts Supreme Judicial Court has held that the death penalty language is unconstitutional, and although the statute has not been repealed, the penalty that the applicant faces in Massachusetts is life imprisonment without the possibility of parole. The Record of the case indicates that the Commonwealth of Massachusetts will not seek the death penalty.

PROCEEDINGS IN THE MAGISTRATE COURT

9. It is important to note, for the purposes of one of the arguments of the applicant, that the Record of the Case and the Supplemental Record of the case were not filed on the same day. In fact, the Supplemental Record was filed after the applicant's counsel had made a no-case submission, contesting, among other things, that there was no direct identification evidence from any of the witnesses in the Record of the Case that the applicant was the shooter. The matter was adjourned to allow the State to reply to the no-case submission (as the narrative below will explain in greater detail). On one of the adjourned days, before such submission in reply was made, the State sought leave to re-open their case, obtained the leave, and tendered the Supplemental Record of the Case.

   (a) The matter commenced before the Chief Magistrate on 12 January 2011. The State called two witnesses: Corporal Herman Narace, the arresting officer, and Mr. Simeon Yearwood, Permanent Secretary at the Ministry of the Attorney General.

   (b) Mr. Yearwood identified The Record of the Case dated 4 November 2010, which he received on the 11 November 2010 from the Government of the United States through the Ministry of Foreign Affairs. He tendered The Record of the Case and the Attorney General's Certificate. In effect, these documents constituted the case for the State. At the close of the State's case the applicant's attorney sought an adjournment to make a no-case submission and the matter was adjourned to 19 January 2011.

   (c) On 19 January 2011 the no-case submission was made by the applicant's attorney and the matter was adjourned to 31 January 2011 to allow the State's attorney, Ms. Harrikissoon, to reply. The no-case submission was mostly concerned with whether there was sufficient identification evidence.

   (d) On 31 January 2011 the matter was adjourned to 10 February 2011 and then again adjourned to 24 February 2011.

(e) On 24 February Ms. Harrikissoon made an application to re-open the case to adduce further evidence that was obtained by the Permanent Secretary at the Ministry of the Attorney General on 11 February 2011. The matter was then adjourned to the 14 March, 2011.

(f) On 14 March 2011 the application to re-open the case was heard and the matter was adjourned to 21 March 2011 for the court to give its decision on the application.

(g) On 21 March 2011 the Chief Magistrate ruled in favour of the Requesting State. The Permanent Secretary then tendered the Supplemental Record of the Case. It notably supplied evidence from an additional witness, one of the applicant's friends. He will allegedly provide positive identification of the applicant as being the person who discharged his firearm into the cabin of the white Nissan Sentra.

(h) The matter was called and adjourned on two further occasions and on 14 April 2011 the applicant's attorney made a further no-case submission based on the contents of the Supplemental Record of the Case. He submitted that the evidence of the friend should be regarded as untrustworthy since there was a possibility that some sort of plea bargain might have been offered to him to obtain this evidence.

(i) The State replied to the applicant's no-case submission and the matter was adjourned to 4 May 2011 for decision. On that day the Chief Magistrate committed the applicant to custody pursuant to Section 12 of the Extradition Act to await the Warrant of the Attorney General for his extradition to the United States of America.

PROCEEDINGS IN THE HIGH COURT:

10. There was some preliminary argument as to the procedure used to move the court, but these were resolved after the filing of the applicant's written submissions on that point. The applicant eventually amended the notice of application to include a constitutional

ground. Directions were given for the exchange of written submissions using time frames requested by counsel but both sides sought several consensual extensions of time for the filings of their written submissions.

ISSUES TO BE DECIDED

11. The amended notice of application sets out three grounds. They are, in effect, the issues to be decided in this case:

    (a) Whether the Requesting State failed in its duty of candour by failing to disclose all relevant facts upon which they would rely at the extradition hearing thereby amounting to an abuse of the court's processes;

    (b) Whether the sentences that may be imposed by the Requesting State in relation to three of the charges is unknown to the laws of the Requested State and amounts to cruel and unusual punishment; and

    (c) Whether the sentence that may be imposed by the Requesting State in relation to the charges of murder for which the applicant was committed is unconstitutional.

    The first ground is concerned with alleged breaches of the duty of candour in the manner in which the Supplemental Record of the Case was introduced after the close of the case for the Requesting State, and after the applicant's no-case submission. The second and third grounds (which can be taken together) relate to the status and constitutionality of the sentences that may be imposed on the applicant, namely, that the sentence of life imprisonment without the possibility of parole is unknown to the laws of Trinidad and Tobago, and is unconstitutional.

THE LEGAL FRAMEWORK FOR EXTRADITION IN TRINIDAD AND TOBAGO

12. The proceedings governing the committal and return of an accused person to a Requesting State (insofar as they are relevant to the issues in this case) are set out in sections 8, 9, 12, 13 and 16 of the Extradition Act. Section 8 sets out general restrictions on extradition that bind, among others, the Attorney General prior to initiating the

extradition, the magistrate hearing the committal proceedings, and the High Court hearing any *habeas corpus* proceedings. These include cases where the person is accused of political crimes, or the charges are intended to prosecute him on account of his race, religion, sexual preference or suchlike. Section 9 provides that before a person may be returned the Attorney General shall sign an "authority to proceed". Section 12(2) provides that the magistrate hearing the evidence shall have the like jurisdiction as when the magistrate is conducting a preliminary enquiry.

13. Section 12(4) gives the magistrate power to commit the accused person to custody to await the Warrant of the Attorney General for his return to the Requesting State, if satisfied (a) that the evidence relates to an extraditable offence, and (b) that there is evidence admissible under the Extradition Act of conduct that, had it occurred in Trinidad and Tobago, would justify committal for trial in Trinidad and Tobago (section 12(4)(a)).

14. Section 13 makes provision for the committed person to make an application to the High Court for *habeas corpus*. Section 13(3) provides as follows:

> (3) On any such application made under this section the High Court may, without prejudice to any other jurisdiction of the High Court, order the person committed to be discharged from custody if it appears to the High Court that by reason of –
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> (a) in the case of a declared Commonwealth territory, the trivial nature of the extraditable offence of which he is accused or was convicted; and
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> (b) in the case of a declared Commonwealth or foreign territory-
>
> (i) the passage of time since he is alleged to have committed the extraditable offence or to have become unlawfully at large, as the case may be;
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> (ii) the accusation against him not having been made in good faith in the interests of justice; or
>
> (iii) any other sufficient cause,
>
> it would, have regard to all the circumstances, be unjust or oppressive to return the person.

Section 13 sets out the parameters governing the discharge from custody of the committed person in the *habeas corpus* proceedings. It is to be noted that section 13 (4)

allows the court hearing the *habeas corpus* application, or an application under section 8, to receive additional evidence.

15. Section 16 gives a discretion to the Attorney General, in cases where the High Court does not discharge the accused person, to sign a Warrant for Return of the accused person to the Requesting State. This is a unique executive act, and the Attorney General may refuse to sign the Warrant of Return although the Court has dismissed every application to block an extradition. Insofar as he decides to sign the Warrant of Return, the discretionary power must be exercised reasonably and lawfully, and its exercise is reviewable.

16. The process of extradition involves the exercise of two powers by two separate arms of Government. Firstly, during the judicial phase, the magistrate examines the evidence to determine whether the offence is an extraditable offence and whether it would justify committal for trial in Trinidad and Tobago. If the magistrate so decides the committed person may apply to the High Court to be discharged on the grounds set out in section 13 (3). The final determination of the *habeas corpus* proceedings concludes the judicial oversight phase of the statutory process. The next phase is purely executive and the Attorney General may choose to order or not to order the return of the committed person in exercise of his statutory discretion.

17. It is to be noted that in *habeas corpus* proceedings the High Court is not exercising an appellate function nor is it charged with the responsibility of rehearing the case before the magistrate. It is immaterial whether or not the court agrees with the decision of the magistrate. It is not the function of the High Court to substitute its own discretion for that of the magistrate. An authoritative pronouncement on this issue is set out in *Ex Parte Osman No. 1 [1989] 3 All ER 701* at page 722, per Lloyd LJ:

> "The question we have to ask ourselves is ... whether the Chief Magistrate erred in law, not whether he reached the right conclusion on the facts or a conclusion with which we would have necessarily agreed ourselves. The question for us is not whether there was sufficient evidence to send Mr. Blair for trial if these offences had been committed in England. That was a question for the Chief

> Magistrate not for us. The question for us is whether there was any evidence on which the Chief Magistrate could so find. The discretion in the matter was his not ours."

18. In the case at bar no ground has been raised questioning whether the Chief Magistrate reached the wrong conclusion on the evidence before her. No objection has been taken as to whether delay will negatively impact the applicant's trial or whether the accusations are not made in good faith or in the interests of justice. Instead, the grounds of objection go towards breaches of the duty of candour of those who presented the extradition request (which is another way of saying that their openness or transparency is being questioned), and, additionally, the issue of the constitutionality of the sentence that the applicant might face if the Attorney General signs the Warrant for Return. The applicant's grounds of objection are incorporated in the application for *habeas corpus*. Such applications are specifically provided for in section 13 of the Extradition Act.

19. In my view, section 13(3) operates in this way: the High Court (in non-trivial extraditable cases) may discharge a committed person if, by reason of (a) the passage of time between the commission of the offence and the extradition proceedings, or (b) the accusation not having been made in good faith or in the interests of justice, or (c) "or any other sufficient cause", it would, having regard to all the circumstances, be unjust or oppressive to return the person. In *Kakis v. Government of the Republic of Cyprus [1978] 2 All ER 634* Lord Diplock defined "unjust" and "oppressive" in this way:

> 'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. (p 637)

20. The House of Lords in *Kakis,* and also in *Gomes v Government of Trinidad and Tobago [2009] UKHL 21*, were considering legislation that was different from the provisions of section 13 of the Extradition Act. In England the legislation restricts itself to cases

infringing the committed person's right to a fair trial, whether due to delay or improper motives for the prosecution of the charge. In Trinidad and Tobago, Parliament included the words (in section 13 (3) (b) (iii)) "or any other sufficient cause" which would, having regard to all the circumstances make it "unjust" or "oppressive" to return the committed person. Neither Mr Scotland for the applicant nor Mr Singh for the respondent addressed me on that issue and the effect that the statutory difference would have on the ratio of *Kakis* or *Gomes* and the cases cited in those judgments.

21. Mr Singh sought to persuade me that the complaint about a breach of the duty of candour and the constitutional complaint was premature in that a proper reading of *Kakis* (in particular the speech of Lord Diplock quoted above) and *Gomes* reveals an overriding interest in the infringement of rights to a fair trial and not the types of complaints in the amended notice of application. It seems to me that section 13 (3) (b) (iii) provides an avenue for wider forms of complaint that is not available in England. However, I do not believe that the avenue is wide enough to accommodate the constitutional grounds of objection raised in the amended notice of application. In my view section 13 governs the process by which the High Court assesses the evidence upon which the magistrate makes a finding of committal to determine whether the process leading to the applicant's continued detention is flawed. In addition, the court is empowered to enquire into any issues that adversely affect the committed person's right to a fair trial in the Requesting State. The introduction of the words "or any other sufficient cause" must be taken to refer to the concerns of the two previous sub sections (abuse of the right to a fair trial in the Receiving State), or issues that concern the fairness of the process used to detain and commit the applicant. The constitutionality of the possible sentence does not arise for consideration at this stage.

22. It seems to me that the ultimate decision to extradite or not to extradite rests with the Attorney General. At that stage, the executive decision is reviewable. Questions about the constitutionality of the possible sentence ought not to be duplicated during the two phases of the extradition process, especially when wholly different decisions (involving different considerations) are being taken by different and separate arms of government. It

might compromise the exercise of the executive power if opinions were prematurely expressed at a stage when a Warrant for Return has not, or may not, be signed. Further, how can the constitutionality of a decision be reviewed before the decision is taken? I also find support for this view in an examination of the cases of *R (on the Application of Wellington) v The Secretary of State for the Home Department [2008] All ER (D) 95* and *Soering v United Kingdom [1989] ECHR 14038/88* (which I will come to in greater detail below). In both cases, the constitutionality of the possible sentences was examined in the context of Article 3 of the European Convention of Human Rights (which involve the right not to be exposed to torture or inhuman or degrading treatment). Mr Scotland relied heavily on the learning in those cases, but neither of them arose within *habeas corpus* proceedings. In fact, the constitutionality of the possible sentences was being raised to contest the executive decision to extradite. In addition, the statements of Mr. Justice Mendonca in *Leon Nurse and Others v. The Commissioner of Prisons and the Attorney General C.A. Nos. 49, 50, 42, and 53 of 2007, judgment dated 12 May 2008 at Para 52* support the view that until the Attorney General has made a decision to surrender, questions about the proper forum for the trial were premature. This would apply *a fortiori* where the constitutionality of the possible sentence is raised in the section 13 *habeas corpus* application.

23. Therefore, it seems to me that I can rule on the breach of the duty of candour issue at this stage, but not the constitutionality of the possible sentence issue. However, if I am wrong about the latter, I will nonetheless examine and rule on both grounds of objection raised in these proceedings.

THE DUTY OF CANDOUR ISSUE

24. The complaint here is that when the defence counsel made his no-case submission and the matter was adjourned for the response of the prosecuting attorney, the Requesting State then improperly obtained the evidence (in the Supplemental Record of the Case) that "plugged the holes" ostensibly exposed in the no-case submission. That original no-case submission basically attacked the quality of the identification evidence, which was described as circumstantial. The narrative of the events at the magistrates court (set out

above) however demonstrates that the Chief Magistrate duly considered the application to re-open the prosecution case, allowed the supplemental evidence to be adduced, and gave leave for the defence counsel to make another no-case submission.

25. In *Leon Nurse and Others v. The Commissioner of Prisons and the Attorney General C.A. Nos. 49, 50, 42, and 53 of 2007, judgment dated 12 May 2008*), the issue of disclosure in extradition proceedings was considered. Mr Justice Mendonca J A reviewed the leading authorities on the issue of disclosure [1] and said this:

> "In extradition proceedings therefore it is for the Requesting State to determine the evidence upon which it relies to seek a committal. It is not under a general duty of disclosure similar to that of a criminal trial. The Requesting State is however under a duty of candour and good faith. In fulfilment of that duty the requesting State must disclose evidence that destroys or very severely undermines the evidence on which it relies. It is for the person whose extradition is sought to establish a breach of duty by the Requesting State."

26. I can find nothing in the evidence to suggest that the Requesting State has withheld any evidence that is inimical to the evidence presented in the Record or the Supplemental Record. Certainly, the evidence in the Supplemental Record does not undermine the evidence in the Record. It strengthens it. And there is no proof that the Supplemental Record was obtained on the basis of anything that undermines its accuracy or efficacy at this stage. Of course, should the Attorney General sign the Warrant of Return, and should the applicant be extradited, all of the applicant's rights to test the veracity of the evidence in the trial in Boston are preserved.

27. The burden of proof for this ground of objection has not been discharged. Further, the sequence in which the evidence was presented does not, to my mind, raise any disclosure issues. The Chief Magistrate was lawfully exercising powers akin to those in a

[1] *Ralston Wellington v. The Governor of HMP Belmarsh [2004] EWHC 418 (admin); Kindler v Canada (Minister of Justice) [1991] 2 SCR 779, 844; Knowles v. The Government of the United States, Privy Council Appeal 64 of 2004 and 70 of 2005*.

preliminary enquiry[2] and had the power to allow the prosecution to re-open the case and lead further evidence. The opportunity to cross examine the witness who adduced the Supplemental Record, and to make a further no-case submission was not denied to the applicant's counsel. In my view, the applicant has failed to establish any breach of the duty of candour.

THE CONSTITUTIONALITY OF THE POSSIBLE SENTENCE ISSUE

28. The argument here is that life imprisonment without a possibility for parole is, firstly, unknown to our law, and, secondly, amounts to the imposition of cruel and unusual punishment contrary to section 5 of the Constitution of Trinidad and Tobago.

29. The sentence of "life imprisonment without the possibility of parole" is semantically equivalent to "imprisonment for the rest of one's natural life", the latter of which is a sentence provided for in the Anti-Terrorism Act, No. 26 of 2005, the Dangerous Drugs Act, No. 44 of 2000, and the Sexual Offences (Amendment) Act, 2000. Section 2 (1) (l) of the Anti- terrorism Act defines "Imprisonment for life" as "imprisonment for the remainder of the natural life of the offender". In *Allan Henry and Others v. The Attorney General of Trinidad and Tobago and The Commissioner of Prisons, CV- 2007-03406 a judgment dated 1 December 2009,* Mr Justice Rajkumar examined a number of authorities and came to the conclusion that imprisonment for one's natural life is not unknown to our law. However, there is in Trinidad and Tobago an avenue to mitigate a whole life sentence, or make it reducible. Rule 281 of the Prison Rules of Trinidad and Tobago provides that "the case of every person serving a life sentence shall be reviewed by the Governor in Council at the 4th, 8th, 12th, 16th and 20th year of the sentence". The President of the Republic of Trinidad and Tobago also has jurisdiction under section 87 of the Constitution to pardon a prisoner. In this way a term of life imprisonment is reducible by executive intervention in Trinidad and Tobago.

[2] See section 24C, Indictable Offences (Preliminary Enquiry) Act, Chap 12:01: "A magistrate conducting a preliminary enquiry…may, if he thinks fit and although the case for the prosecution has been closed, take the evidence of further witnesses for the prosecution…"

30. The applicant's argument was that the sentence of "life imprisonment without the possibility of parole" in the State of Massachusetts admits of no escape valve for good behaviour or other mitigating factor and amounts to an irreducible life sentence.

31. Mr Singh however produced a copy of the Laws of Commonwealth of Massachusetts, General Laws, Chapter 265, section 2, which provides that the Governor of the State of Massachusetts may commute a life sentence without the possibility of parole. Section 152 of Chapter 127 sets out a procedure whereby a prisoner may petition the Governor (through the Parole Board) for a pardon and the Governor may grant it, subject to such conditions or restrictions that he considers proper and, if he issues such a warrant of pardon, it shall be obeyed "instead of the sentence originally awarded". A comprehensive system for commutation of a whole life sentence is provided for in the Massachusetts General Laws.

32. The applicant relied on the cases of *Soering* and *Wellington v Secretary of State for the Home Department*[3] as authorities for the proposition that a whole life sentence without the possibility of parole contravenes the applicant's constitutional rights. In *Soering* the applicant, who was being detained pending his extradition to the United States to face a charge of murder, applied to the European Court of Human Rights to prevent his extradition. He said that his Article 3 rights under the convention (which are akin to section 5 of our constitution and in particular the right no to be exposed to cruel and unusual punishment) would be violated. In the United States he would face the death penalty, and it was proven that he had severe psychological problems with a condition known as the "death row phenomenon". It was held that on a true reading of Article 3 of the Convention a contracting party could not be absolved from its treaty obligations for all and any foreseeable consequences of extradition suffered outside its jurisdiction. It would not be compatible with the underlying values of the convention were a fugitive to be surrendered where there were substantial grounds for believing that they would be in danger of being subjected to torture. It was further held that in the circumstances of that case, having regard to the length of time that an inmate spent in death row in extreme

[3] *Op. Cit.* Para 22 above

conditions of uncertainty and having regard to his age and mental state at the time of the offence and at the time of his application (he was on a suicide-watch list, dreading homosexuality and violence in death row in Virginia), there was a real risk that his Article 3 rights would be infringed. It must however be noted that the applicant had admitted to brutally murdering the parents of his girlfriend, and had formally petitioned to be tried in Germany, of which he was a citizen, instead of the United States. The court ruled that the legitimate purpose of the extradition could be achieved by the trial in Germany.

33. The European Court of Human Rights emphasised the importance of balance (para 89):

> "What amounts to 'inhuman or degrading treatment or punishment' depends on all the circumstances of the case. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

34. *Soering* was decided in light of the special circumstances of that case, namely, the applicant's proven unstable psychological profile and the fact that there was another forum in Germany to which he consented to be tried and sentenced. It is not a case containing any general principle or rule that supports a finding that the sentence faced in Massachusetts contravenes the applicant's constitutional rights. It must also be noted that all the contracting parties to the Convention have abolished the death penalty and that that society's intellectual and cultural approach to the surrender of a citizen to face such a penalty would naturally be toxic. The penalty in Trinidad and Tobago for murder is death by hanging and the penalty of life imprisonment in Massachusetts cannot, in my view, be considered as a punishment more physically debasing than death be hanging,

especially when a prisoner has a *de jure* right to apply to the Governor to commute the sentence.

35. In *Wellington v Secretary of State* a majority of the House of Lords held that the imposition of a whole life sentence without the possibility of parole should not in every case be regarded as *ipso facto* in breach of Article 3 of the Convention (enshrined in England under the provisions of the Human Rights Act 1998). The applicant in that case was accused of a brutal double murder in Missouri. The Court held that in determining whether an infringement of Article 3 had been established, several factors should be considered, including, the heinousness of the crime, the possibility of future release through executive clemency, and the context of extradition. Lord Hoffman, after considering *Kafkaris v. Cyprus (Application No 21906/04 12 February 2008),* which he described as the leading European authority, and noting that that court would not too closely inquire into the way in which *de jure* or *de facto* clemency in the Requesting State operated, said this at para 12:

> "The conclusion I draw from the Court's guarded statement [in *Kafkaris*] that an irreducible sentence 'may raise an issue' under Article 3 and that the existence of a system for release was 'a factor to be taken into account' in assessing the compatibility of a life sentence with Article 3 is that an irreducible sentence will not necessarily infringe. On the particular facts of the case, an offence may justify an irreducible sentence. Furthermore, provided that the sentence is reducible, its imposition will not even raise an issue under Article 3. And the bar for what counts as irreducible is set high. It must be shown that the national law does not afford a real possibility, *de jure* and *de facto*, of review with a view to commutation or release"

36. Lord Hoffman went on to examine the nature of the executive act of clemency, noting that there was evidence that the *de jure* executive clemency in Missouri was *de facto* sparingly used, and was applied in the past to benefit battered women convicted of murdering their tormentors, or where the conviction was proved to have been unsafe, or in return for co-operation in another prosecution. He said this (para 34): "It must be accepted that if the appellant is convicted of first degree murder in the circumstances

alleged against him, his prospects of release would be poor. But the requirement that the sentence must be reducible *de facto* cannot mean that the prisoner in question must have a real prospect of release. Otherwise the more horrendous the crime, the stronger would be the claim not to be extradited". Finally, Lord Hoffman discussed the concept of proportionality in the context of extradition (para 36):

> "In my opinion, on the facts of this case, it could not be said that a sentence of life without parole would be so grossly disproportionate to the offence as to meet the heightened standard for contravention of Article 3 in its application to extradition cases. Unlike *Soering*, there is no other jurisdiction in which the appellant can be tried. If he is not extradited to Missouri, he will be entitled to remain in this country as a fugitive from justice. The standard of what amounts to inhuman and degrading treatment for the purposes of Article 3 must therefore be a high one… The fact that a life sentence without parole is mandatory in Missouri is relevant only to enabling the English court to predict the punishment which the appellant will receive if he is convicted of first degree murder. The question then is whether such a sentence would be obviously disproportionate for the crime of which the appellant is accused."

37. The applicant in the instant case has not provided any evidence of the *de facto* exercise of executive clemency in the State of Massachusetts. In any event, the mere existence of the *de jure* power, would, it seems to me, on the facts of this case be sufficient to rebut an argument that such a sentence offends the constitution in the context of extradition. Whether an executive power is *de facto* exercised or not exercised at this point in time is not by itself predictive of how it will be exercised in the future. Finally, in Trinidad and Tobago, where the sentence for murder is death by hanging (and this being so by virtue of longstanding social and political consensus), questions about the proportionality of a whole life sentence in Massachusetts appear somewhat artificial.

38. I therefore dismiss the application for *habeas corpus* with costs to be assessed in default of agreement before a Registrar of the Supreme Court.

James Christopher Aboud
Judge