McKinnon v USA and Secretary of State for Home Dpt

Press Release

Gary McKinnon will apply for leave to appeal to the House of Lords within 14 days.

The High Court has expressed its disapproval of the deliberately coercive plea bargaining tactics deployed by the US in the strongest possible terms.

See paragraph 54 of the judgment of the High Court:

"We-make no secret of the fact that we view with a degree of distaste the way in which the American authorities are alleged to have approached the plea bargain negotiations Viewed from the perspective of an English court the notion that a prosecutor may seek to induce a plea of guilty on the basis that substantial benefits will be withdrawn if one is not forthcoming is anathema. We refer in particular to the providing and withdrawal of support towards repatriation." [Paragraph 54 of the judgment]

We regret that the Court has not expressed its clear disapproval of the US Government's arbitrary interference with due process by halting Gary McKinnon's extradition as an abuse of the process of the English courts

In order to coerce his voluntary surrender, Mr McKinnon was subjected to threats by the US authorities during the course of plea bargain negotiations The US sought to coerce the appellant into consenting to his extradition without a fomial request being made to the UK authorities and thereafter pleading guilty in the US. The threats made included relaying to McKinnon that New Jersey prosecutors expressed an intention to see Mr McKinnon "**FRY**" The evidence of Mr Dratel is that this is a reference to capital punishment by the electric chair. This was a chilling and intimidating threat. Further the US threatened that Mr McKinnon would receive a significantly and disproportionately longer sentence if he refused to cooperate with the deal being tabled. Furthermore, it was made clear that the appellant would be forced to serve the entirety of that sentence in the US, with no prospect of repatriation. The US authorities stated that the appellants refusal to cooperate would result in his repatriation to the UK being blocked.

In the course of these discussions the US made it clear that it would be looking for an extremely lengthy sentence and that it would not allow Mr McKinnon to be tried in England because the English courts' sentencing powers was not of sufficient severity It is submitted that this does not constitute a valid reason for extraditing a British citizen from his homeland where he has never visited the US and the conduct alleged took place in the UK It is submitted that a desire to make an example out of the appellant by ensuring that he receives a much longer sentence than his own courts would consider to be adequate punishment constitutes an improper and vexatious motive for making an extradition request.

Mr McKinnon complains that the conduct of the US, the threats it made to the appellant and its motive for requesting his extradition was each oppressive and abusive, engaging the appellant's article 5 (4) right. Further, the appellant submits that the bid by the US to ensure that their tactical deployment of coercive plea bargaining in this case would remain a secret from the court in itself demonstrates that such an extra-judicial process should have no part to play in the legal process. There is express statutory provision for a defendant to consent to extradition if he chooses to do so. No one should be punished for exercising his statutory right to contest extradition. In USA v Cobb 2001 SCC 19 (CanLII) the Supreme Court found that there was an attempt to "influence the unfolding of the Canadian judicial proceedings by putting undue pressure on the appellants to desist from their objections to the extradition request." The Supreme Court stated:

> "52. By placing undue pressure on Canadian citizens to forego due legal process in Canada, the foreign State had disentitled itself from pursuing its recourse before the courts and attempting to show why extradition should legally proceed....
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> 53. [The judge] was also correct in concluding as he did that this was one of the clearest cases where to proceed further with the extradition hearing would violate "those fundamental principles of justice which underlie the community's sense of fair play and decency" (Keyowski, supra, at pp.658 59)..."

It is submitted that the US placed undue pressure on Mr McKinnon and made clear its intent to punish him for failing to succumb to that pressure. It is submitted that the conduct of the US in this case can be properly characterised as oppressive and vexatious such that the House of Lords should allow Mr McKinnon's appeal.

Furthermore, the appellant contends that the US threat to impose an extremely lengthy sentence as punishment for not cooperating with an inherently coercive plea bargain amounts to a flagrant denial of justice such that his article 6 fair trial rights would be violated and that the severity of the consequences in terms of sentence reach the high standard imposed in *Soering v. U.K*. [1989] 11 EHRR 439. It should be noted that these threats were relayed and terms of me "bargain" were offered by Ed Gibson, the assistant legal attache of the US Embassy in London and therefore the threats derived from the Requesting State itself as well as the prosecution lawyers. The prosecution plays an enhanced role in the US sentencing process by recommending the length of sentence to the court. The role and influence of the prosecution is therefore of great significance in respect of the sentence ultimately passed,

The threat to refuse the appellant repatriation clearly engages article 8 ECHR. Article 8 cannot lawfully be interfered with in an arbitrary and punitive fashion as promised by the US. Mr McKinnon has a right under the Convention on the Transfer of Sentenced Persons not to have his eligibility for repatriation determined unfairly or arbitrarily. He has a right to have his application considered fairly. The US has made plain its intention to prevent his repatriation on arbitrary grounds, namely to punish him for exercising his statutory rights to contest extradition. This constitutes an invalid and improper reason for preventing a fair determination of the merits of his application and would therefore violate article 8.

The US originally attempted to coerce Mr McKinnon into pleading Guilty by offering him 6 months (12 months at worst) in a US prison and the remainder of a short sentence would be served in the UK, mostly on parole. The US now intends to prosecute Mr McKinnon as a cyber-terrorist, which could lead to him spending the rest of his life in prison in the US with repatriation to serve his sentence in his home country denied as punishment for contesting his extradition.

Mr McKinnon will now be punished for exercising his statutory rights to contest his extradition under the Extradition Act. His punishment could not be more severe. It amounts to a life sentence in a foreign country.