



Neutral Citation Number: [2009] EWHC 571 (Admin)

Case No: CO/4241/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2009

Before :

LORD JUSTICE THOMAS
and
MR JUSTICE LLOYD JONES

Between :

The Queen on the Application of Binyam Mohamed	<u>Claimant</u>
- and -	
Secretary of State for Foreign and Commonwealth Affairs	<u>Defendant</u>

Dinah Rose QC and Ben Jaffey (instructed by Leigh Day) for the Claimant

Thomas de la Mare and Martin Goudie (instructed by The Treasury Solicitor's Special Advocates Support Office) as Special Advocates for the Claimant

Pushpinder Saini QC, Max Hill QC and Karen Steyn (instructed by The Treasury Solicitor) for the Respondent

Hearing dates: 13, 14, 15, 16, 17 October 2008

Annex to Judgment 3

This is the annex referred to at paragraph 27 of our third judgment handed down on 22 October 2008. It was provided to the parties at that time and is now being made public.

Lord Justice Thomas:

Plea Bargaining

(i) The facts

1. Although we had been told that there was a possibility of a plea bargain at the stage before matters were referred by the Convening Authority to trial before a Military Commission, the issue of plea bargaining did not feature in our first judgment.
2. However, in a witness statement dated 26 August 2008 made by Mr Stafford Smith, he exhibited a letter dated 25 August 2008 which he and Lt Col Bradley had written as counsel for BM in the proceedings before the Military Commissions to Lieutenant Colonel Vandeveld in response to a request made by Lieutenant Colonel Vandeveld as to whether BM was still open to a plea agreement. The terms upon which BM's lawyers were prepared to agree to a plea included terms that BM was willing to enter a *nolo contendere* plea to the charges on the charge sheet of 28 May 2008, that the sentence imposed upon him on his plea should not exceed three years, and that he be given credit for the time served since he was originally charged on 4 November 2005. It was also requested that it be guaranteed that BM would be repatriated to the United Kingdom and that he would not remain in Guantanamo Bay to be a witness against others.
3. We were told that that offer was made in the context which we have set out where the United States Government had not indicated whether it would seek the death penalty, but had made it clear that they would seek at least a term of imprisonment of 30 years. It was also in the context that even if he were acquitted he would still be detained as an enemy combatant until the "war on terror" is over. It is uncertain to us when the "war on terror" will be over, but we note in the dissenting opinion of Justice Scalia in *Boudmediene v Bush*, that Justice Scalia considers the war began when "the enemy began by killing Americans and American allies abroad". The first event he recites is the death of 241 at the Marine barracks in Lebanon. That was over 20 years ago.
4. Lieutenant Colonel Vandeveld replied in the following terms:

"No: I have been asked to convey, in a "totally nonbinding way" (only the [Convening Authority] can accept offers to plead) that we are open to a plea that will have Mr. Mohamed receive a sentence of three years, no credit for time already served, and his agreement to testify against

This agreement will give [BM] a date certain for his release of course, and he avoids the possibility of an even harsher sentence with no guarantee that at the end of which, he will not continue to be held until the end of hostilities."

Lieutenant Colonel Vandeveld added some comments which it is not necessary to set out in relation to the United States Government being able to disprove BM's claims of torture. After further communications Lieutenant Colonel Vandeveld sent an e-mail on the 5 September 2008. He stated that an additional year would be supported by the Chief Prosecutor, but the United Kingdom would not accept that BM could serve out

the balance of his sentence in the United Kingdom if a plea agreement was reached. The e-mail concluded by stating that the claims BM made about torture could be disproved and that BM knew his claims were demonstrably false.

5. On 20 October 2008, at the same time as the Convening Authority dismissed the charges, a draft plea agreement was sent with the invitation that BM sign it. It is important, we think, to set out some of the provisions of the agreement:
 - i) Clause 2 provided that BM agree to plead guilty to charge 1 and charge 2.
 - ii) Clause 5 provided that BM understood that the maximum statutory penalty, should his pleas of guilty be accepted for each charge, was confinement for life.
 - iii) Clause 7 provided as follows:

“The accused agrees not to participate in or support in any manner any litigation or challenge, in any forum, against the United States or any other nation or any official of any nation, whether military or civilian, in their personal or official capacity with regard to the accused’s capture, detention, prosecution, post conviction confinement and detainee combatant status. The accused further agrees to move to dismiss with prejudice any presently pending direct or collateral attack challenging the accused’s capture, detention, prosecution and detainee combatant status. The accused assigns to the United States all legal rights to sign and submit any necessary documents, motions or pleadings to implement this provision on behalf of the accused.”
 - iv) By Clause 10 BM agree to submit to interviews and to appear before courts or Military Commissions to testify if requested by the Government. By Clause 14, BM was to agree and accept as true an attachment setting out the facts supporting the charges. A copy of that was not provided to us.
 - v) By clause 16, the maximum period of confinement that would be adjudged and approved would be 10 years, but the Convening Authority would order the suspension of the balance of the sentence over one year. A condition was imposed that the Convening Authority could decide that if BM failed to comply with the provisions of Clause 10 (assisting the prosecution) the Convening Authority could vacate the suspended portion of the sentence and order it be served in full.
6. It was submitted to us that the effect of Clause 7 of the proposed agreement is that BM is being asked by the US military prosecutors to abandon his claim before this Court to obtain disclosure and not to bring any further claims in respect of his rendition and torture. It is also submitted that BM is being asked to agree this plea in circumstances where there are no pending charges against him, where he has no idea how any new charges against him will be framed and where he is not to receive sight of the 42 documents.

(ii) The role of the Convening Authority

7. It is clear from the provisions of the Rules of Military Commissions (some of which we refer to in our first judgment) that by rule 705 and following it is the Convening Authority that has to approve any plea bargain, although it is for the military judge to receive the plea and determine the sentence.

(iii) The provisions of United States Federal Law in relation to plea bargaining

8. Following our request, we were provided with some evidence about the procedure for plea bargaining in the United States by Mr Stafford Smith in his 8th witness statement dated 14 September and Mr Zachary P Katznelson in his statement of 8 October 2008. We were referred to the decisions of the Supreme Court of the United States in *Harris v Nelson* 394 US 286 (1969) and to the decision in *Santobello v New York* 404 US 257 (1971). In particular we were referred to paragraphs 4, 8 and 9 of the Opinion of Burger CJ.

“Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. See *Brady v. United States*, 397 U.S. 742, 751-752 (1970).

“However, all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor. It is now clear, for example, that the accused pleading guilty must be counselled, absent a waiver. *Moore v. Michigan*, 355 U.S. 155 (1957). Fed. Rule Crim. Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, *on the record*, the factual basis for the pleas, as, for example, by having the accused describe the conduct that gave rise to the charge.¹ The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known. There is, of course, no absolute right to have a guilty plea accepted. *Lynch v. Overholser*, 369 U.S. 705, 719 (1962); Fed. Rule Crim. Proc. 11. A court may reject a plea in exercise of sound judicial discretion.

1 Fed. Rule Crim. Proc. 11 provides:

“A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a

plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.”

[9] This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”

9. It was the evidence of Mr Stafford Smith, given on 14 September 2008 on the basis of *Santobello*, that there were rigorous standards that should apply to the plea bargain process, that the parties were meant to operate fairly towards one another and that the rules of fairness were being ignored in the United States Government’s approach in this case.
10. It was submitted that if BM applied to the Military Court for discovery and therefore gained access to the very materials at stake in the United Kingdom proceedings, the plea offer would be cancelled. It was also submitted that the strategy of the United States Government was to take advantage of the short period of time in which BM’s defence lawyers could not see the material to conclude a plea bargain that was to the benefit of the United States.
11. Mr Stafford Smith also stated that the United States Government were taking the position, as is evident from the documents that we have set out, that BM had not been tortured and was refusing to disclose where he was for the two missing years; that the United States Government was trying to make BM’s lawyers persuade him to accept a plea bargain on blind faith. He added:

“There are other conditions being imposed by the prosecution. Mr Mohamed must sign a statement saying he has not been tortured, which would be false. And he must agree not to make any public statement about what he has been through, which in my opinion would be an illegal restraint, contrary to public policy – how can anyone agree to remain silent about criminal offences committed against him, and how can any criminal prosecutor, acting properly seek to impose such a condition?”
12. It was common ground before us that in plea bargains before the United States Courts, it was not usual for the parties to be afforded disclosure. However it was nonetheless contended that it would be unfair, given the circumstances in which BM found himself, to require BM to make a decision of the magnitude which is evident from

what we have set out whilst being denied access to the information contained in the 42 documents.

13. This system of plea bargaining in the United States is different, in our view, from the way in which pleas are handled in England and Wales. One example will suffice. Under the procedure laid down in *Goodyear* [2005] 2 Cr. App. 20, the Court normally provides in open court an indication of the maximum sentence that a person will receive on the basis of the papers provided to the Court and to the defence which set out the prosecution case; see also: *Kulah* [2007] EWCA Crim 1701. That indication is given by the judge at the request of the defendant. In practice, it is not normally given on the basis of an agreement as to the facts. There is no understanding between the parties as to the length of sentence. The way the prosecutor can affect the length of the sentence is to increase or reduce the charge, as the charge sets out the statutory provision under which the charge is brought and Parliament provides for the maximum penalty. There are some recent statutory provisions, (ss.73-75 of the Serious and Organised Crime Act 2005) relating to the giving of assistance to the prosecution, but these do not affect the way in which pleas are made in England and Wales in other cases.

(iv) The desirability of Judge Sullivan considering the issue

14. As the legal context of plea bargaining in the United States is so different from that in England and Wales, the need for the 42 documents to be made available to BM's legal advisers in order to enable them to advise in relation to the proposed plea bargain is, in our view, another matter which we consider it would be much more appropriate for Judge Sullivan to consider.

(v) The making public of this annex

15. We have provided these paragraphs in this annex to the parties on the understanding that these are not to be made public at this time. We do so on the basis that we have been told that these negotiations are at this stage confidential.
16. However, in the light of the indications that the United States Government would require in any plea bargain a confidentiality statement by BM, we expressly enquired whether BM wished to pursue this argument. We did so as we could not, consistently with principles of open justice and the rule of law, entertain this argument, take it into account in our decision and then refuse to make it public at an appropriate time. We were told that, notwithstanding this consequence, BM wished this issue to be addressed by us. He wanted it to be made clear to the world what had happened and how he had been treated by the United States Government since April 2002.
17. Accordingly, at an appropriate time after the plea bargain discussions are finally resolved, one way or the other, we shall make public this annex. We should add no plea agreement will be effective to prevent the making public of this annex, even if the proceedings are subsequently discontinued on terms that include a provision similar to clause 7 (set out at paragraph 5 iii) above). This is because this annex is an integral part of our judgment given on 22 October 2008.