



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BIJAN BALAHAN v. SWEDEN

(Application no. 9839/22)

JUDGMENT

Art 3 • Extradition • No evidence showing a real risk of a life imprisonment sentence without parole or with a 61-year minimum term before parole eligibility, if applicant extradited to, and convicted in, the USA • Real risk *de jure* or *de facto* of life imprisonment sentence without parole not demonstrated • Length of potential minimum term depending on a number of unknown factors and might possibly be significantly shorter • First stage of the test set out in *Sanchez-Sanchez v. the United Kingdom* [GC] not fulfilled • Strict test for “gross disproportionality” only met on rare and unique occasions • A sentence not to be deemed grossly disproportionate simply by virtue of being more severe than one that would be imposed in another State

STRASBOURG

29 June 2023

FINAL

06/11/2023

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Bijan Balahan v. Sweden,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,

Alena Poláčková,

Krzysztof Wojtyczek,

Lətif Hüseynov,

Ivana Jelić,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 9839/22) against the Kingdom of Sweden lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Iran and of the United States of America, Mr Patrick Bijan Balahan (“the applicant”), on 17 February 2022;

the decision to give notice to the Swedish Government (“the Government”) of the complaint concerning Article 3 of the Convention and to declare the remainder of the application inadmissible;

the decision to indicate an interim measure to the Government under Rule 39 of the Rules of Court which was subsequently prolonged;

the decision to give priority to the application under Rule 41;

the parties’ observations;

Having deliberated in private on 30 May 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the Swedish Government’s decision to extradite the applicant to the United States of America (“the US”). The applicant complained, in particular, that his extradition would violate Article 3 of the Convention because, if convicted on the charges against him, he would risk receiving either an irreducible sentence of life imprisonment without parole, or a minimum term of imprisonment of sixty-one years, which would amount to a *de facto* irreducible sentence of life imprisonment without parole. He also argued that such a sentence would be grossly disproportionate.

THE FACTS

2. The applicant was born in 1993 and is at present detained in Sweden. The applicant was represented by Mr R. Sahota and Mr B. Keith, lawyers practising in London.

3. The Government were represented by their Agent, Ms E. Hammarskjöld, of the Ministry for Foreign Affairs.

4. The facts of the case may be summarised as follows.

5. In May 2020 the applicant was arrested in the US. He was alleged to have inflicted around thirty knife cuts on a person. In addition to requiring more than forty stitches, the alleged victim also had chemical burns. It was further alleged that the applicant had transferred 2,500 United States dollars from the victim's account without the victim's knowledge and that he had offered a security guard who came to the scene money in exchange for not notifying the emergency services. The applicant was released on bail pending trial, after which he left the US and did not appear in court on the trial date.

6. On 10 June 2021 the US Department of Justice requested the applicant's extradition from Sweden for the purposes of prosecution. In support of the request, an arrest warrant issued by the Superior Court of the State of California for Los Angeles County of 5 May 2021 was submitted to the Swedish authorities. According to the arrest warrant, the applicant was charged with five counts, namely (1) aggravated mayhem, (2) torture, (3) inducing false testimony, (4) dissuading a witness after a prior conviction, and (5) grand theft, all of which had allegedly been committed on 18 May 2020 in Los Angeles, California.

7. On 23 December 2021 the Swedish Supreme Court (*Högsta domstolen*) delivered a decision pertaining to the permissibility of the applicant's extradition. Pursuant to the Criminal Offences Extradition Act (*Lag om utlämning för brott*, 1957:668 – “the Extradition Act”), the Supreme Court found no obstacles to the applicant's extradition with respect to the second and fifth counts. With respect to the first count, the Supreme Court found there to be obstacles to extradition in so far as the charge alleged the infliction of permanent disability and loss of limb or organ, as it considered there to be no support for that element of the charge in the material provided. However, in so far as the charge alleged causing disfigurement, there was no obstacle to extradition. With respect to the third and fourth counts, the Supreme Court found there to be obstacles to extradition as the alleged acts did not constitute criminal offences under Swedish law. Furthermore, the Supreme Court found that extraditing the applicant would not be contrary to the Convention.

8. On 3 February 2022 the Government decided to extradite the applicant to the US on the second and fifth counts, as well as part of the first count, in line with the Supreme Court's decision.

9. On 24 February 2022 the Government decided to suspend the enforcement of the extradition decision until further notice, on account of the Court's decision to indicate an interim measure in that respect.

10. The applicant has been in detention pending extradition since 24 May 2021.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. SWEDISH LAW AND PRACTICE

A. Extradition treaties between Sweden and the US

11. Extradition between Sweden and the US is governed by the Convention on Extradition between the United States of America and Sweden, signed on 24 October 1961; the Supplementary Convention on Extradition between the United States of America and the Kingdom of Sweden, signed on 14 March 1983; and the Instrument as contemplated by Article 3(2) of the Agreement on Extradition between the European Union and the United States of America, signed on 25 June 2003.

B. The Extradition Act

12. In addition to the bilateral and multilateral treaties, the procedure and conditions for extradition are governed by the Swedish Extradition Act.

13. Under sections 1 and 4 of the Extradition Act, a person who in a foreign State is suspected or accused of or sentenced for an act that is punishable there may be extradited to that State following a decision by the Government of Sweden, if the act for which extradition is requested corresponds to an offence for which imprisonment for one year or more is prescribed by Swedish law.

14. The Extradition Act prescribes certain grounds for refusal of extradition. Pursuant to sections 5-8, an extradition request cannot be granted if, among other things, the person concerned, on account of his origin, membership of a particular social group or religious or political views, or otherwise on account of political circumstances, risks being subjected to persecution directed against his life or liberty or otherwise of a serious nature in the receiving State. Extradition is also not permitted if, having regard to the person's youth, state of health or other personal circumstances, the extradition would run manifestly counter to the demands of humanity. In the latter case, regard should also be had to the nature of the offence in question and the interests of the requesting State.

15. Sections 14-22 of the Extradition Act govern procedure. An extradition request must be submitted to the Ministry of Justice, accompanied by the documentation on which the request is based. The Prosecutor-General conducts an investigation and gives an opinion in the extradition matter before the Government takes a decision. If the person concerned does not consent to being extradited, the case is also examined by the Supreme Court, which decides whether the extradition request may lawfully be granted. If the Supreme Court finds that there is a legal impediment to the extradition, the request cannot be granted.

16. The Swedish Supreme Court has examined several cases regarding extradition. According to its case-law (see *Nytt Juridiskt Arkiv* (“*NJA*”) 2002 s. 624, *NJA* 2007 s. 574 and *NJA* 2019 s. 611), the scope of the Supreme Court’s examination is not limited to an assessment of whether there are impediments to an extradition as prescribed in the Extradition Act, but also includes an evaluation of the compliance of the extradition with the Convention.

II. LAW AND PRACTICE OF THE STATE OF CALIFORNIA

A. Relevant legislation

1. Sentencing

17. Only certain crimes such as murder carry a possible sentence of life imprisonment without the possibility of parole under sections 190 and 190.2 of the California Penal Code.

18. Under sections 489 and 1170(h) of the California Penal Code, grand theft is punishable by a term of imprisonment of sixteen months, or two or three years. Aggravated mayhem and torture are both punishable by life imprisonment under sections 205 and 206.1. A person sentenced to life imprisonment under those provisions is eligible for parole after serving a certain minimum term.

19. Section 3046 of the California Penal Code sets the minimum term that an inmate imprisoned under a life sentence must serve at either seven years or a longer term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole. If two or more life sentences are ordered to run consecutively to each other, an inmate so imprisoned is not eligible for parole until he or she has served the minimum term on each of the life sentences, consecutively.

20. The California Penal Code provides special sentencing rules for defendants who have one or more prior serious or violent felony convictions. This is often referred to as California’s Three Strikes Law.

21. If a defendant has one prior serious or violent felony conviction, sections 667(e)(1) and 1170.12(c)(1) of the California Penal Code specify that the determinate term of imprisonment, or the minimum term before parole where the inmate has been sentenced to an indeterminate term, is twice the term otherwise provided as punishment for the current felony conviction.

22. If a defendant has two or more prior serious or violent felony convictions, the term of imprisonment for the current felony conviction, pursuant to sections 667(e)(2)(A) and 1170.12(c)(2)(A) of the California Penal Code, is an indeterminate term of life imprisonment with a minimum term of twenty-five years, or – if it is longer – a minimum term calculated as three times the term otherwise provided as punishment for each current felony

conviction, or the term determined by the court pursuant to certain other rules. However, pursuant to sections 667(e)(2)(C) and 1170.12(c)(2)(C), if the current conviction is not for a serious or violent felony the defendant will, subject to certain exceptions, not be sentenced according to the third-strike enhancement in sections 667(e)(2)(A) and 1170.12(c)(2)(A), but will instead receive the double-sentence enhancement provided for in sections 667(e)(1) and 1170.12(c)(1).

23. If a defendant is convicted under the above-mentioned provisions for more than one serious or violent felony, the sentences for those convictions will run consecutively, pursuant to sections 667(c)(7) and 1170.12(a)(7) of the California Penal Code. Sections 667(e)(2)(B) 1170.12(c)(2)(B) also provide that an indeterminate term prescribed under the provisions regarding third-strike enhancement must be served consecutive to any other term of imprisonment for which a consecutive term may be imposed by law.

24. Furthermore, section 667(a)(1) of the California Penal Code provides that a defendant convicted of a serious felony who has previously been convicted of a serious felony should be given an additional five-year enhancement for each such prior conviction on charges brought and tried separately.

25. Under section 1385 of the California Penal Code, a court may dismiss allegations of previous convictions, and thus the applicable sentencing enhancements, if it finds that there are reasons to do so in the furtherance of justice. Under section 1170.12(d)(2) of the California Penal Code, a prosecuting attorney may also move to dismiss or strike out an allegation of a prior conviction in the furtherance of justice.

26. A person who is convicted may seek review of his or her sentence by the Appellate Court of the State of California and thereafter by the California Supreme Court.

2. Parole Board

27. A person who is sentenced to life imprisonment with the possibility of parole will, once the minimum term of imprisonment is met, be entitled to a hearing before the California Board of Parole Hearings (“the Parole Board”) to determine whether he or she is suitable for release from prison. Rules concerning the parole proceedings can be found in the California Penal Code and in Title 15 of the California Code of Regulations.

28. Section 3041(b)(1) of the California Penal Code provides that the Parole Board “shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual”.

29. Title 15, section 2281, of the California Code of Regulations provides guidelines for the determination of suitability for parole. It states, among

other things, that the following circumstances of the prisoner are to be taken into account: social history; past and present mental state; past criminal history; the base and other commitment offences, including behaviour before, during and after the crime; past and present attitude towards the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. The same provision also provides examples of circumstances tending to show suitability and unsuitability for parole.

30. Sections 3041.5 and 3041.7 of the California Penal Code permit the inmate to be present and speak on his own behalf at the parole hearing, and to be represented by a lawyer. The inmate also has a right to review relevant documents. Pursuant to the same provisions, a decision not to grant parole must be accompanied by reasons. Furthermore, if parole is denied a future hearing must be scheduled and this date may also, at the discretion of the board, be brought forward when a change in circumstances or new information establishes a reasonable likelihood that the safety of the public and any victim does not require the additional period of incarceration of the inmate.

31. The Governor of California may, under section 3041.1, request review of a decision by a parole authority concerning the grant or denial of parole. With regard to inmates convicted for murder, the Governor may also, pursuant to Article V, section 8 of the California Constitution, modify or reverse the decision of the parole authority.

3. Executive clemency

32. Article V, section 8, of the California Constitution gives the Governor the power to grant clemency in criminal cases in the form of reprieves, commutations and pardons.

B. Other materials

1. Letters from the Los Angeles County District Attorney's Office, upon request of the US Department of Justice, dated 25 February 2022 and 30 August 2022

33. In these letters, which were provided to the Swedish Government for the purposes of the present proceedings, the US authorities provided information including the following.

(a) If convicted of the charges for which his extradition has been granted, the applicant does not risk the imposition of a life sentence without the possibility of parole. If sentenced to life imprisonment for the charges against him, he will be eligible for parole.

(b) The court has discretion to dismiss the allegations about the two prior convictions if it finds there are reasons to do so “in the furtherance of justice”.

(c) If the applicant were convicted on all charges and the Three Strikes Law did not apply, he would be sentenced to life imprisonment, of which he would have to serve a minimum term of seven years, for each of the charges of aggravated mayhem and torture. In addition, he would be sentenced to three years’ imprisonment on the charge of grand theft. Those sentences would run consecutively. In total, his sentence would therefore be life imprisonment with eligibility for parole after seventeen years.

(d) If the applicant were convicted of all charges and sentenced under the Three Strikes Law he would face a sentence of life imprisonment, of which he would have to serve a minimum term of twenty-five years, for each of the charges of aggravated mayhem and torture. In addition, he would be sentenced to six years’ imprisonment on the charge of grand theft. The court could also impose an additional five-year prison sentence for the prior convictions alleged. Those sentences would run consecutively. Therefore, under this scenario the applicant would face a potential sentence of life imprisonment with eligibility for parole after sixty-one years.

(e) Once the minimum term of imprisonment is met, the applicant will be entitled to a hearing before a neutral body called the California Board of Parole Hearings (Parole Board) to determine if he is suitable for release.

2. Declaration from Mr P. Comiskey, attorney at law practising in California, dated 16 December 2022

34. In this declaration, which was provided to the applicant for the purposes of the present proceedings, Mr P. Comiskey provided information including the following.

(a) If the applicant were convicted of the offences he is charged with, he would receive an enhanced sentence because of the operation of the Three Strikes Law in California. Consequently, if convicted on all charges, he would receive a sentence of sixty-one years to life imprisonment, consisting of two indeterminate sentences of twenty-five years to life for the charges of aggravated mayhem and torture, a determinate sentence of six years for the charge of grand theft and an additional five years for the previous convictions.

(b) Since the offences the applicant is charged with involve “violent strikes”, he would be required to serve at least 85% of his sentence, which would amount to almost fifty-two years, before being eligible for parole. Given that he is currently 29 years old, the earliest he would be eligible for parole would be at the age of 81. The average life expectancy of men in the US is 73 years.

(c) It is very difficult to predict what the outcome of a prosecution of the applicant would be.

(d) Parole suitability hearings are conducted after a prisoner has served the minimum time required. A prisoner must demonstrate that he is no longer

a danger to society, which is difficult to do. 16% of hearings result in a recommendation for parole.

3. *Report by the California Policy Lab entitled “Three Strikes Law in California” (August 2022)*

35. This report includes the following information.

(a) Pursuant to the Three Strikes Law, individuals with one prior conviction for a serious or violent offence who are convicted of any new felony receive double the sentence that they would otherwise have received for the new offence. Individuals with two prior serious or violent convictions who are convicted of a new, non-serious, non-violent felony offence also receive a double sentence. Individuals with two prior serious or violent offences who are convicted of a third serious or violent offence receive a third-strike enhancement, which means that they are sentenced to an indeterminate sentence with a minimum term of twenty-five years.

(b) An individual’s length of stay in prison is also determined by sentencing credits. Eligible individuals can earn time off their sentence through good behaviour or participation in rehabilitative and educational programming. Since a change in legislation in 2016, credit earning no longer depends on the individual’s strike status. As of March 2022, the credit-earning rate is 33% for individuals serving a sentence for a violent offence and 50% for individuals serving a sentence for a non-violent offence.

(c) There are several mechanisms through which judges and prosecutors can exercise discretion in the application of a strike-enhanced sentence. For example, the law includes provisions for prosecutors to dismiss prior strikes “in the furtherance of justice,” and a State Supreme Court ruling has granted similar discretion to judges.

(d) Approximately 36% of all people currently incarcerated in California in January 2022 were serving a sentence enhanced by the Three Strikes Law, with 28.4% serving a term enhanced by the doubling of the sentence and 7.7% serving a term enhanced by a “third strike”. As to people admitted to prison from January 2015 to January 2022, 26.4% had their sentence enhanced by the Three Strikes Law, with 26% given a double-sentence enhancement and 0.4% carrying a third-strike enhancement. Of the persons with third-strike enhancement currently incarcerated in January 2022, 79% had received a third-strike sentence for a third serious or violent offence and 21% had received the third-strike sentence for a non-serious, non-violent offence.

4. *The California Prison and Parole Law Handbook, by H. MacKay and the Prison Law Office (2019)*

36. This publication includes the following information.

(a) A person serving an indeterminate life term with eligibility for parole must serve a minimum number of years before he or she can be considered

for release on parole. The date when the person becomes eligible for parole is calculated on the basis of three factors: the length of the minimum statutory term for the offence, minus any pre-sentence credits, minus any in-prison good conduct credits.

(b) At sentencing the court will specify the length of the minimum term, for example as “twenty-five years to life”. If the statute under which the person has been convicted does not state a minimum term, the minimum term is seven years.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

37. The applicant complained that his extradition to the US would be in breach of Article 3 of the Convention, because he risked receiving a sentence of life imprisonment without parole and a grossly disproportionate sentence. He further complained that his extradition would be in breach of Article 3 of the Convention since he would be at risk of harm from other inmates in the US detention facilities.

38. Article 3 of the Convention reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. Admissibility

39. The Government argued that the complaint should be declared inadmissible as manifestly ill-founded.

40. The applicant contested the Government’s arguments.

41. With regard to the applicant’s claim that, if extradited, he would risk treatment contrary to Article 3 of the Convention on account of the risk of being harmed by other inmates, the Court notes that the applicant has not adduced any relevant evidence in support of his claim. This complaint is therefore manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and must be rejected pursuant to Article 35 § 4.

42. The Court notes that the remainder of the complaint under Article 3 of the Convention is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits*1. The parties' submissions***(a) The applicant**

43. With reference to the first limb of the test set out in *Sanchez-Sanchez v. the United Kingdom* ([GC], no. 22854/20, §§ 95-97, 3 November 2022), the applicant argued that he had demonstrated that there was a real risk that he would receive either a sentence of life imprisonment without parole or a *de facto* sentence of life imprisonment without parole, consisting of a minimum term of sixty-one years in prison. He had prior convictions for two crimes which fell into the category of serious felonies. The Three Strikes Law would therefore apply. While prosecutors had a statutory discretion to disapply the Three Strikes Law, this discretion was not used in practice. Statistics in a report by the California Policy Lab entitled “Three Strikes in California” (see paragraph 35 above) also indicated that there was a high risk that the Three Strikes Law would be applied. As concluded in both the written declaration from Mr P. Comiskey and the information provided by the US authorities (see paragraphs 33-34 above), under the Three Strikes Law the applicant would receive a minimum term of sixty-one years’ imprisonment. He would be required to serve at least 85% of this sentence, which would amount to almost fifty-two years, before being eligible for parole. Given that he was currently 29 years old and the life expectancy of men in the US was 73 years, that would be longer than he was expected to live. Such a sentence therefore amounted to a *de facto* life sentence without parole.

44. The applicant further argued, with reference to the second limb of the test set out in *Sanchez-Sanchez* (cited above, §§ 96-97), that there was no relevant mechanism of review. He submitted that a petition for a pardon and commutation of sentence were mechanisms that were so limited in application or arbitrarily granted that they did not amount to proper or realistic protection in this context.

45. As to the gross disproportionality of the sentence, the applicant argued that while the allegations against him were serious, they were not comparable to the most serious offences, such as murder or terrorism. It was only because of the functioning of the Three Strikes Law that he risked such a severe sentence. A mandatory term of sixty-one years to life without the possibility of parole for the offences that he was charged with had to be considered to be grossly disproportionate. In addition, the maximum penalty in Sweden for the corresponding crimes was ten years’ imprisonment.

(b) The Government

46. The Government argued that the first limb of the test set out in *Sanchez-Sanchez* (cited above, §§ 95-97) was not fulfilled. With reference to the information provided by the US authorities (see paragraph 33 above), the

Government submitted that the applicant was not at risk of being sentenced to life imprisonment without the possibility of parole. There was considerable uncertainty as to what punishment would be imposed if the applicant were to be convicted. The potential sentence would depend on a variety of factors that were hard to predict. In any event, he did not risk receiving a life sentence without the possibility of parole. A potential life sentence would be subject to review through a parole procedure which clearly fulfilled the relevant criteria from the Court's case-law. The period of imprisonment before eligibility for parole would depend on a number of factors. At the time of sentencing, it would be clear to the applicant when he would become eligible for parole.

47. The Government further argued that, under the second limb of the test set out in *Sanchez-Sanchez* (cited above, §§ 96-97), both the parole proceedings and the possibility of commutation were relevant mechanisms of sentence review.

48. The Government also submitted that, in the light of the Court's case-law and having regard to the fact that the applicant was suspected of serious and exceptionally violent criminality and that he did not risk being sentenced to life imprisonment without parole, he was not at risk of receiving a sentence that could be considered grossly disproportionate. The Government further emphasised the risk of impunity should the extradition not be enforced.

2. *The Court's assessment*

(a) **General principles**

(i) *Removal of aliens*

49. The Court has repeatedly stated that as torture and inhuman and degrading treatment and punishment are prohibited in absolute terms, the extradition of a person by a Contracting State can raise problems under Article 3 of the Convention and therefore engage the responsibility of the sending State where there are serious grounds to believe that that person would run a real risk of being subjected to such ill-treatment in the requesting country (see, among other authorities, *Sanchez-Sanchez*, cited above, § 84, and *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161).

50. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the destination country. In doing so, it must inevitably assess the situation in the requesting country in terms of the requirements of Article 3. This does not, however, involve making the Convention an instrument governing the actions of States not Parties to it or requiring Contracting States to impose standards on such States. In so far as any liability under the Convention is or may be incurred, it is incurred by the extraditing Contracting State by reason of its having taken action which has the direct consequence of exposing an

individual to proscribed ill-treatment (see *Sanchez-Sanchez*, cited above, § 85, and the cases cited therein).

51. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence has been adduced, it is for the Government to dispel any doubts raised by it (see, for example, *Sanchez-Sanchez*, cited above, § 87, and *F.G. v. Sweden* [GC], no. 43611/11, § 120, 23 March 2016).

(ii) *Life imprisonment and grossly disproportionate sentences*

52. It is well established in the Court's case-law that the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention. The Court has, however, held that the imposition of a sentence of imprisonment may raise an issue under Article 3 if it is "grossly disproportionate" or if it is an irreducible life sentence (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 97, ECHR 2008; *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, §§ 102 and 107, ECHR 2013 (extracts); and *Sanchez-Sanchez*, cited above, §§ 79-80).

53. The Court reiterates that "gross disproportionality" is a strict test and it will only be on rare and unique occasions that this test will be met (see *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, § 133, 17 January 2012; *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07 and 4 others, § 237, 10 April 2012; and *Vinter and Others*, cited above, § 102). Furthermore, the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States. Due regard must be had to the fact that sentencing practices vary greatly between States and that there will often be legitimate and reasonable differences between States as to the length of sentences which are imposed, even for similar offences. It will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence he or she would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3 (see *Harkins and Edwards*, cited above § 134, and *Babar Ahmad and Others*, cited above, § 238).

54. As regards irreducible life sentences, the Court recently further developed its earlier case-law concerning life sentences without parole in the extradition context in *Sanchez-Sanchez* (cited above, §§ 78–99). The Court held that a distinction must be made between life sentences in the domestic context and in the extradition context. While the principles set out in *Vinter and Others* (cited above) must be applied in domestic cases, an adapted approach is called for in the extradition context. This adapted approach comprises two stages: at the first stage it must be established whether the applicant has adduced evidence capable of proving that there are substantial

grounds for believing that, if extradited, and in the event of his conviction, there is a real risk that a sentence of life imprisonment without parole would be imposed on him. At the second stage, which will only come into play if the applicant establishes such a risk, it must be ascertained whether, from the moment of sentencing, there is a review mechanism in place allowing the domestic authorities to consider the prisoner's progress towards rehabilitation or any other grounds for release based on his or her behaviour or other relevant personal circumstances. The availability of procedural safeguards in the requesting State is not a prerequisite for compliance by the sending Contracting State with Article 3 (see *Sanchez-Sanchez*, cited above, §§ 91-95; see also *McCallum v. Italy* (dec.) [GC], no. 20863/21, § 53, 21 September 2022, and *Hafeez v. the United Kingdom* (dec.), no. 14198/20, § 37, 28 March 2023).

(b) Application of the principles to the present case

(i) Life imprisonment without parole

55. In the present case, having regard to all the material available (see notably paragraphs 17-18 above), the Court is satisfied that there is no real risk that the applicant will receive a sentence of life imprisonment without parole. At most, he may face the prospect of life imprisonment with eligibility for parole. On the face of it, the applicant has therefore not fulfilled the first stage of the test recently set out in *Sanchez-Sanchez* (see paragraph 54 above).

56. He has submitted, however, that a life sentence with eligibility for parole would in his case amount to a *de facto* life sentence without parole because he would have to serve a minimum term of up to sixty-one years before being eligible for parole, which would exceed his life expectancy (see paragraph 43 above).

57. In the domestic context, although it is not for the Court to determine when a review of a life sentence should take place (see, for example, *Vinter and Others*, cited above, § 120), it has found that when whole-life prisoners could only be considered for release on parole after they had served forty years of their life sentences, those life sentences could not be regarded as reducible for the purposes of Article 3 of the Convention (see, for example, *T.P. and A.T. v. Hungary*, nos. 37871/14 and 73986/14, §§ 45 and 48, 4 October 2016; *Sándor Varga and Others v. Hungary*, nos. 39734/15 and 2 others, §§ 48 and 49, 17 June 2021; and *Bancsók and László Magyar v. Hungary* (no. 2), nos. 52374/15 and 53364/15, §§ 45 and 47, 28 October 2021).

58. In the extradition context, however, in order to comply with Article 3, the sending Contracting State is not required to examine the availability of procedural safeguards in the requesting State (see paragraph 54 above) because, among other reasons, scrutinising the relevant law and practice of the requesting State with a view to assessing its degree of compliance with

those procedural safeguards may prove unduly difficult for the domestic authorities deciding on extradition requests, and this would be an over-extensive interpretation of the responsibility of a Contracting State (see *Sanchez-Sanchez*, cited above, §§ 92-93).

59. Thus, for example, in *McCallum* (cited above, § 53) the Court dismissed the applicant's argument that her life sentence with eligibility for parole could be regarded as *de facto* life imprisonment without parole on account of the Governor of Michigan's role in the parole system, since that argument related to a matter that was more in the nature of a procedural guarantee as opposed to a substantive guarantee.

60. In the present case, the applicant did not as such dispute that there was a parole system in place in California (see paragraphs 27-31 and 43 above). Rather, he submitted that that parole system would not be relevant to him on account of the length of the minimum term – up to sixty-one years – that he would have to serve before being eligible for parole. The Court finds that it is not necessary to determine whether the applicant's argument in this respect relates to a matter that should be regarded as a substantive guarantee or is more in the nature of a procedural guarantee, since he has in any event not adduced evidence capable of showing that there is a real risk that he will receive such a lengthy minimum term. In the Court's view, for the reasons set out below, the applicant's argument as to the length of the minimum term is subject to significant uncertainty.

61. At the outset, the Court notes that the applicant has not yet been tried or convicted and that it is difficult to speculate as to whether he will be convicted on any or all charges, and what the possible consequences may be of certain elements being removed from the charge of aggravated mayhem (see paragraph 7 above). Further, as the Court recognised in *Sanchez-Sanchez*, there are many factors which can contribute to the imposition of a sentence and, prior to extradition, it is impossible to address every conceivable permutation that could occur or every possible scenario that might arise (see *Sanchez-Sanchez*, cited above, § 108). The Court accepts the applicant's claim, which has not been expressly disputed by the Government, that he has previous convictions for two crimes which may cause the Three Strikes Law to be applicable. The Court also notes that – in accordance with the relevant provisions of the California Penal Code, and on the basis of the information provided by both the US authorities and Mr P. Comiskey – if the applicant is convicted on all charges and the Three Strikes Law is applied to its full extent with reference to his previous convictions, he faces a potential sentence of life imprisonment with a minimum term of sixty-one years. However, the relevant provisions of the California Penal Code and other materials in the case also show that prosecutors and judges in California can exercise discretion in the application of the Three Strikes Law (see paragraphs 25, 33(b) and 35(c) above). If the prosecutors or judges decide not to apply the Three Strikes Law in the

applicant's case, the potential minimum term will be significantly shorter, namely seventeen years (see paragraphs 17-19 and 33(c) above).

62. The applicant has not provided any relevant evidence in support of his assertion that this discretion is rarely exercised, and the statistics that he has referred to do not convincingly support his claim that there is a high risk that the Three Strikes Law would be applied in his case. Moreover, he has not adduced evidence of any defendants with similar records to his who were found guilty of similar conduct and were sentenced to life imprisonment with such a lengthy minimum term. The declaration from Mr P. Comiskey also states that it is very difficult to predict what the outcome of a prosecution of the applicant would be. Furthermore, the applicant would have the right to appeal against any sentence imposed. In addition, the minimum term that he would be required to serve before being eligible for parole can be reduced by credits earned during imprisonment, regardless of whether the Three Strikes Law is applied or not (see paragraph 35(b) above).

63. Having regard to the aforementioned factors, the Court considers that the applicant has failed to show that there is a real risk that if he is extradited and convicted, he will receive a sentence of life imprisonment with a minimum term of up to sixty-one years. The length of the minimum term will depend on a number of unknown factors and may be significantly shorter.

64. In the light of all of the foregoing, the applicant cannot be said to have adduced evidence capable of showing that his extradition to the US would expose him to a real risk of treatment reaching the Article 3 threshold on account of the risk that he would be sentenced to, *de jure* or *de facto*, life imprisonment without parole. That being so, it is unnecessary for the Court to proceed in this case to the second stage of the analysis (see paragraph 54 above; see also *Sanchez-Sanchez*, cited above, § 109, and *Hafeez*, cited above, § 55).

(ii) *Grossly disproportionate sentence*

65. The applicant also argued that, in the event of his conviction for the offences with which he is charged, he would receive a grossly disproportionate sentence.

66. As already stated above (see paragraph 53 above, with references to the Court's case-law), "gross disproportionality" is a strict test that will only be met on rare and unique occasions and it will only be in very exceptional cases that an applicant will be able to demonstrate that the sentence he or she would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3. A sentence cannot be deemed grossly disproportionate simply because it is more severe than the sentence which would be imposed in another State (see *Čalovskis v. Latvia*, no. 22205/13, § 141, 24 July 2014).

67. The Court notes that the applicant is charged with crimes of a serious nature. He is alleged to have carried out a very serious physical assault (see

paragraph 5 above). Furthermore, he will only be sentenced after a court in California has heard the case, taken into account all relevant factors, and decided whether to dismiss or maintain any sentencing enhancements resulting from previous convictions. In addition, as concluded above, the applicant has not adduced evidence capable of showing that there is a real risk that he will be sentenced to life imprisonment without parole.

68. In the light of the above, the Court considers that the applicant has not substantiated his claim that, if extradited to the US, he would risk receiving a grossly disproportionate sentence.

(iii) Conclusion

69. The foregoing considerations are sufficient to enable the Court to conclude that if the applicant were to be extradited there would be no violation of Article 3 of the Convention.

II. RULE 39 OF THE RULES OF COURT

70. The Court reiterates that, in accordance with Article 44 § 2 of the Convention, the present judgment will not become final until (a) the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if referral of the case to the Grand Chamber has not been requested; or (c) the Panel of the Grand Chamber rejects any request to refer under Article 43 of the Convention.

71. The Court considers that the indication made to the Government under Rule 39 of the Rules of Court should remain in force until the present judgment becomes final or until the Court takes a further decision in this connection (see operative part).

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint under Article 3 of the Convention concerning the risk of an irreducible life sentence or a grossly disproportionate sentence admissible and the remainder of the application inadmissible;
2. *Holds*, by six votes to one, that the applicant's extradition to the United States of America would not be in violation of Article 3 of the Convention;
3. *Decides*, unanimously, to continue to indicate to the Government under Rule 39 of the Rules of Court that it is desirable in the interests of the proper conduct of the proceedings not to extradite the applicant until such time as the present judgment becomes final or until further notice.

BIJAN BALAHAN v. SWEDEN JUDGMENT

Done in English, and notified in writing on 29 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Marko Bošnjak
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

M.B.
L.T.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the view that that the applicant’s extradition to the United States of America would not be in violation of Article 3 of the Convention.

2. I note, in particular, the following information provided by the US authorities (Letters from the Los Angeles County District Attorney’s Office, upon request of the US Department of Justice, dated 25 February 2022 and 30 August 2022 – see paragraph 33, emphasis added):

“(b) The court has discretion to dismiss the allegations about the two prior convictions if it finds there are reasons to do so ‘in the furtherance of justice’.

...

(d) If the applicant were convicted of all charges and sentenced under the Three Strikes Law he would face a sentence of life imprisonment, of which he would have to serve a minimum term of twenty-five years, for each of the charges of aggravated mayhem and torture. In addition, he would be sentenced to six years’ imprisonment on the charge of grand theft. The court could also impose an additional five-year prison sentence for the prior convictions alleged. Those sentences would run consecutively. **Therefore, under this scenario the applicant would face a potential sentence of life imprisonment with eligibility for parole after sixty-one years.**

(e) Once the minimum term of imprisonment is met, the applicant will be entitled to a hearing before a neutral body called the California Board of Parole Hearings (Parole Board) to determine if he is suitable for release.”

3. The evidence concerning the Californian legal system, relied on by the majority, clearly shows that the applicant faces a potential sentence of life imprisonment with eligibility for parole after sixty-one years. The applicant faces therefore a potential sentence of life imprisonment which is *de facto* irreducible. Moreover, the review mechanism after sentencing (the second stage of the test established in *Sanchez-Sanchez v. the United Kingdom* [GC], no. 22854/20, 3 November 2022), even if it provides for a system of sentencing credits for good behaviour (see paragraphs 35(b) and 62), appears practically meaningless in the circumstances of the case.

4. The majority rely, in particular (see paragraph 61), on the argument that

“...the relevant provisions of the California Penal Code and other materials in the case also show that prosecutors and judges in California can exercise discretion in the application of the Three Strikes Law (see paragraphs 25, 33(b) and 35(c) above).”

Discretion is seen here as an advantage not as a threat. In my view, it is the discretionary nature of the decisions in this respect which makes the risk for the applicant real.

5. The majority further underline several times the high level of uncertainty concerning the outcome of the criminal proceedings against the applicant in the United States (see paragraphs 61, 62 and 63). This uncertainty means precisely that the risk is real. Real risk begins at a relatively low level of probability of an unfavourable outcome.

I note that the argument invoked fits almost any extradition case as there is necessarily uncertainty about the possible evolution and outcome of criminal proceedings.

6. To establish the content of the law of a State which is not party to the Convention is always a very perilous exercise. It would be preferable to invite systematically the third States to submit their own observations and to allow them to effectively defend their legitimate interests in the proceedings before the Court. Moreover, the possible doubts concerning the operation of their legal system should, in principle, be interpreted in their favour.

I cannot exclude that the factual findings concerning the Californian legal system, made by the Court in the instant case, are incomplete or partly inaccurate and that there may be additional factors, not referred to by the Court, which would tip the balance in favour of allowing the extradition. However, in my view, the evidence concerning the legal system under consideration, gathered by the Court in the instant case, does not support the conclusions drawn by the majority.

7. To sum up: I fully understand the endeavour of the majority not to hinder the smooth functioning of extradition treaties with other Western States. The problem with the approach adopted in the instant case is that under this methodology the guarantees of Article 3 will lose any practical effect in the context of extradition proceedings.