



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

FIFTH SECTION

CASE OF LANG v. UKRAINE

(Application no. 49134/20)

JUDGMENT

Art 3 • Extradition • No evidence showing a real risk of a *de jure* or *de facto* irreducible sentence of life imprisonment in the event of the applicant's extradition to, and conviction in, the USA • As first stage of the test set out in *Sanchez-Sanchez v. the United Kingdom* [GC] not fulfilled, unnecessary to proceed to second stage

STRASBOURG

9 November 2023

FINAL

08/04/2024

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

In the case of Lang v. Ukraine,

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

Georges Ravarani, *President*,

Lado Chanturia,

Carlo Ranzoni,

Stéphanie Mourou-Vikström,

María Elósegui,

Kateřina Šimáčková,

Mykola Gnatovskyy, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 49134/20) against Ukraine 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 the United States of America, Mr Craig Austin Lang (“the applicant”), on 6 November 2020;

the decision to give notice to the Ukrainian Government (“the Government”) of the complaint under 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;

the parties’ observations;

Having deliberated in private on 10 October 2023,

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

INTRODUCTION

1. The case concerns the decision to extradite the applicant to the United States of America (“the US”). The applicant, who has US nationality, complained that his extradition would violate Article 3 of the Convention because, if convicted on the charges against him, he would risk receiving an irreducible sentence of life imprisonment.

THE FACTS

2. The applicant was born in 1990 and, according to the most recent information, lives in Kyiv. He was represented by Mr D. Morgun, a lawyer practising in Kyiv.

3. The Government were represented by their Agent, Ms M. Sokorenko.

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

5. The applicant is a former US Army serviceman. He travelled to Ukraine several times between 2015 and 2019 and served in Ukrainian armed formations fighting in the east of the country.

I. THE APPLICANT’S ARREST AND THE REQUEST FOR HIS EXTRADITION

6. On 21 August 2019 the applicant was arrested in Ukraine while re-entering the country from the Republic of Moldova. In the course of proceedings which followed, he was eventually released on his own recognisance.

7. On 25 September 2019 the US requested the extradition of the applicant from Ukraine under the United Nations Convention against Transnational Organized Crime. Subsequently, in February 2020 the US expanded the extradition request, adding additional charges brought against the applicant in the US. According to the amended extradition request, the applicant faced charges of federal offences with their respective potential sentences as follows below.

Charge ¹	Maximum potential sentence ²
<i>Charges in the US District Court for the Middle District of Florida</i>	
Conspiracy to Interfere with Commerce by Violence	Twenty years’ imprisonment
Interference with Commerce by Violence	Twenty years’ imprisonment
Conspiracy to Carry and Use a Firearm During and in Relation to a Crime of Violence	Twenty years’ imprisonment
Use and Discharge of a Firearm During and in Relation to a Crime of Violence Resulting in Murder	Death penalty, life imprisonment or at least ten years’ imprisonment and up to any maximum term of imprisonment
Conspiracy to Kill, Kidnap, Maim or Injure Persons in a Foreign Country (specifically the Bolivarian Republic of Venezuela)	Imprisonment for any term or life imprisonment (for conspiracy to murder or kidnap); Imprisonment for a term of up to thirty-five years (for conspiracy to maim)
Violation of the Neutrality Act	Three years’ imprisonment
<i>Charges in the US District Court for the District of Arizona</i>	
Misuse of a Passport	Ten years’ imprisonment
<i>Charges in the US District Court for the Eastern District of North Carolina</i>	
Conspiracy to Commit Passport Fraud and Aggravated Identify Theft	Five years’ imprisonment
Passport Fraud and Aiding and Abetting	Ten years’ imprisonment

¹ Relevant provisions in the United States Code for the charges are respectively: 18 U.S.C. § 1951(a); 18 U.S.C. § 1951(a) and 2; 18 U.S.C. § 924 (c)(1)(A)(iii) and (o); 18 U.S.C. § 924(c)(1), (j)(1) and (o); 18 U.S.C. § 956(a)(1); 18 U.S.C. § 960; 18 U.S.C. § 1544; 18 U.S.C. § 371; 18 U.S.C. § 1542 and 2; 18 U.S.C. § 1028A(a)(1) and 2; 18 U.S.C. § 1546(a) and 2; 42 U.S.C. § 408(a)(7)(B).

² Only imprisonment and the death penalty are mentioned; other additional punishments and measures, such as fines and supervised release, are not.

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Aggravated Identity Theft and Aiding and Abetting	Mandatory term of imprisonment of two years consecutive to any other term of imprisonment
Fraud and Misuse of Visas, Permits and Other Documents and Aiding and Abetting	Twenty-five years' imprisonment
False Representation of a Social Security Account Number	Five years' imprisonment

8. According to the charges brought in the US District Court in Florida, the applicant and his alleged co-conspirator had proposed to sell firearms to another man, thus luring him to attend a meeting and bring cash for the gun deal. They had then shot and killed him and another person who had accompanied him and had taken the money that the victim had brought. According to the charges, the accused had planned to use the acquired funds to go to Venezuela and fight the regime in power there.

9. In the indictments filed with the US District Courts in Arizona and North Carolina, the applicant was charged with, respectively, unlawfully using a US passport previously cancelled by the authorities and applying for a passport under a false identity.

10. On 15 October 2019 the US Embassy in Kyiv provided assurances to the General Prosecutor's Office of Ukraine ("the GPO") that the death penalty would not be sought or imposed on the applicant and that the applicant would not be prosecuted for any offence committed prior to his extradition other than those for which his extradition was granted.

11. On 17 October and 4 November 2019 the applicant asked the GPO to request assurances that he would not be sentenced to death for any offences and that he would have an opportunity to request a reduction of any life sentence, if imposed, for any offence. He also pointed out that in *Trabelsi v. Belgium* (no. 140/10, §§ 121-39, ECHR 2014 (extracts)) the Court had held that the exercise of the power of pardon by a US president did not satisfy the requirements imposed in this field by Article 3 of the Convention.

12. On 29 October 2019 the GPO responded that assurances in respect of the death penalty had been requested.

13. On 4 August 2020 the assurances in respect of the death penalty were reiterated by the US Department of Justice.

II. EXTRADITION DECISION AND OTHER PROCEEDINGS

14. On 28 August 2020 the GPO granted the extradition request, finding that there were legal grounds for extradition. It noted the assurances given in respect of the death penalty.

15. The applicant lodged an appeal with the courts against that decision. The applicant mainly relied on his requests for additional assurances in respect of the death penalty and life imprisonment (see paragraph 11 above) and argued that no adequate assurances had been provided in respect of the reducibility of any life sentence. He relied on *Trabelsi* (cited above).

16. On 15 March 2021 the Kyiv City Court of Appeal upheld the extradition decision, finding that there were no grounds to set it aside since the charges against the applicant were for extraditable offences which were not time-barred and his asylum applications had been rejected. Accordingly, the extradition decision became final.

III. INTERIM MEASURE

17. On 15 March 2021 the applicant applied for interim measures under Rule 39 of the Rules of Court.

18. On 22 March 2021, in the context of the examination of the applicant's request for interim measures under Rule 39, the GPO requested the US Department of Justice to provide additional information on safeguards available to the applicant under US law.

19. On 24 March 2021 the US Department of Justice sent to the GPO the following supplemental information on sentencing in relation to the applicant.

It pointed out that if the applicant were to be found guilty, the sentencing judge would consider relevant information concerning his background and various factors relevant to his sentencing, taking into account the evidence and arguments presented by the applicant and his lawyer before the judge. The United States Sentencing Guidelines were advisory and the judge had the discretion to impose a sentence, stating his or her reasons for doing so. The decision whether to sentence a person convicted on multiple counts concurrently or consecutively was left to the court's discretion.

The possibility of a plea agreement with the prosecution existed for the applicant, which could result in a reduction of his sentence. In the US, most criminal cases were resolved by guilty pleas. A defendant's cooperation in the investigation or prosecution of another person would also be taken into account. It was not atypical for a judge to impose a significantly lighter sentence than that recommended in the Sentencing Guidelines. In the event that the applicant entered a plea, the estimated low-end sentence range set out in the Guidelines could amount to 292 months' imprisonment and the high-end range could amount to 365 months' imprisonment.

Even if the applicant decided not to plead guilty and were to be convicted, he would be able to appeal against the conviction and the sentence (notably on the grounds that the sentence was unreasonable). He would also have at his disposal the following post-conviction review mechanisms: (i) collateral review (a request for a review of the sentence on the basis that, for example, the sentence was imposed in violation of the Constitution or the laws of the United States or that the court was without jurisdiction to impose such a sentence); (ii) a reduction of the sentence to reflect the substantial assistance provided by a convicted person after his or her conviction; (iii) compassionate release (a reduction of the defendant's term of imprisonment based on extraordinary and compelling reasons (the US Department of Justice

provided essentially the same information as that summarised in *Sanchez-Sanchez v. the United Kingdom* [GC], no. 22854/20, §§ 59-62, 3 November 2022)); and (iv) the exercise of executive clemency by the President.

On the latter point, the US Department of Justice provided detailed information on the rules and policies guiding the exercise of executive clemency, notably US Department of Justice regulations setting out the procedures to be followed in respect of clemency applications (most of this information is summarised in *Sanchez-Sanchez*, cited above, § 58, and *López Elorza v. Spain*, no. 30614/15, § 57, 12 December 2017). The US Department of Justice stated that US presidents have historically considered and granted executive clemency and there were no grounds to believe that future presidents would not continue to do so. The statistics revealed that in recent years there had been a significant increase in the number of commutations granted to prisoners serving long-term and life sentences. They emphasised statistics on pardons published on the site of the Office of the Pardon Attorney. According to that information, President Obama, for example, commuted the sentences of 1,715 individuals, including at least 504 life sentences. He also issued 212 pardons. President Trump pardoned 143 persons and granted clemency to 94 individuals.

20. On 19 April 2021 the Court decided to indicate to the Ukrainian Government, under Rule 39, that the applicant should not be extradited for the duration of the proceedings before the Court.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. UKRAINIAN LAW AND PRACTICE

Code of Criminal Procedure of 2012

21. Article 589 § 1 of the Code provides that a person cannot be extradited if Ukrainian law does not make the offence for which extradition is requested punishable by imprisonment or if extradition would be contrary to Ukraine's international obligations.

II. US LAW AND PRACTICE

22. The relevant provisions of US federal law can be found in *Sanchez-Sanchez v. the United Kingdom* ([GC], no. 22854/20, §§ 57-63, 3 November 2022) and *López Elorza v. Spain* (no. 30614/15, §§ 51-57, 12 December 2017).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

23. The applicant complained that his extradition to the US would be in breach of Article 3 of the Convention, which reads as follows:

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

A. Preliminary remark

24. The Court observes that the applicant used, unsuccessfully, an available domestic remedy with automatic suspensive effect, an appeal against the extradition decision (see paragraphs 14, 16 above and compare *Osmayev v. Ukraine* (dec.) no. 50609/12, §§ 56-59, 30 June 2015). As a result, the extradition decision in the applicant’s case became final and enforceable on 15 March 2021, once the Court of Appeal upheld it. Therefore, the applicant faces extradition to the United States of America and the Court must examine his complaint that there exists a real risk of him being subjected to treatment in breach of Article 3 in case of his extradition.

B. Admissibility

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

C. Merits

1. *The parties’ submissions*

(a) **The applicant**

26. The applicant submitted that the US was not a party to the Convention and the assurances provided by the US authorities had no legal force in the US judicial system since they had been issued by an entity unrelated to the judicial branch of government. The applicant also submitted that the death penalty had been used in the criminal justice system of the state of Florida. He contended that Ukrainian authorities had failed to request assurances from the US that no irreducible life sentence would be imposed on him. The applicant provided a report from The Sentencing Project, a US non-governmental organisation, indicating that sentences of life imprisonment in the US had increased by 8.6% from 2012 to 2016. The report indicated that the actual release of prisoners sentenced to long-term or life imprisonment had only been possible when prisoners had reached the age of 70.

(b) The Government

27. The Government referred to the Court's findings in *Sanchez-Sanchez v. the United Kingdom* ([GC], no. 22854/20, 3 November 2022) and submitted that the applicant had not adduced any evidence showing that his extradition to the US would expose him to a real risk of treatment which would fall within the ambit of Article 3.

28. The US had provided reliable assurances that the death penalty would not be sought or imposed. As to life imprisonment, the Government relied extensively on the information provided by the US Department of Justice (see paragraph 19 above), pointing out that, even though the applicant faced, in respect of some charges, a theoretical maximum penalty of life imprisonment, there was in fact a range of possible punishments lighter than a life sentence (see paragraph 7 above).

29. Even if the applicant were to be found guilty as charged, which was not certain, sentencing was discretionary and the court dealing with the case was not obliged to impose the maximum penalty under the law. There was a possibility of a plea bargain which would reduce the sentence. The sentencing judge also had to take into account the circumstances of the case and the applicant would be able to present his views. Moreover, even if a life sentence were to be imposed, there were a number of remedies available to oppose the conviction and the sentence. The US authorities had provided real examples of the commutation of sentences and the release of persons charged with particularly serious crimes.

30. The Government argued that, therefore, the US had an established legal framework within which life sentences were reducible and that that framework operated in a manner that resulted in the *de facto* commutation of long-term and life sentences imposed for a wide range of offences.

31. They further argued that a ruling by the Court in the applicant's favour risked that a fugitive criminal would remain unpunished and would also render extraditions to the US extremely difficult, regardless of the particular circumstances of each case.

2. The Court's assessment

32. The Court observes that the applicant's Article 3 complaints are based on two main alleged risks – the risk of death penalty and the risk of an irreducible life imprisonment sentence. With regard to the former, the applicant cast doubt on the validity of the assurances provided by the US authorities to the effect that the death penalty would not be sought or imposed on him. The Court already rejected the applicant's Article 2 complaint in that respect (see the preamble to this judgment). In similar cases, the Court found that there was no reason to doubt the validity of the assurances given by the US authorities (see *Babar Ahmad and Others v. the United Kingdom* (dec.), nos. 24027/07, 11949/08 and 36742/08, 6 July 2010; *Harkins and Edwards*

v. the United Kingdom, nos. 9146/07 and 32650/07, §§ 85 and 86, 17 January 2012; and *McCallum v. Italy* (dec.) [GC], no. 20863/21, § 55, 21 September 2022).

33. The only question before the Court, therefore, is whether the applicant faces a real risk of the imposition of an irreducible life sentence in the US in the event of his extradition.

34. The Court formulated the relevant principles in *Sanchez-Sanchez* (cited above):

“95. Therefore, while the principles set out in *Vinter and Others* must be applied in domestic cases, an adapted approach is called for in the extradition context. First of all, a preliminary question has to be asked: namely, whether the applicant has adduced evidence capable of proving that there are substantial grounds for believing that, in the event of conviction, there is a real risk of a sentence of life imprisonment without parole. In this regard, it is for the applicant to demonstrate that such a penalty would be imposed (see *López Elorza v. Spain*, no. 30614/15, § 107, 12 December 2017, and *Findikoglu v. Germany* (dec.), no. 20672/15, § 37, 7 June 2016). Such a risk will more readily be established if the applicant faces a mandatory sentence of life imprisonment.

96. If it is established under the first limb of the inquiry that the applicant runs a real risk of a sentence of life imprisonment (see paragraph 95 above), then the second limb of the inquiry, having regard to the principles set out in *Vinter and Others*, will focus on the substantive guarantee which is the essence of the *Vinter and Others* case-law and is readily transposable from the domestic to the extradition context; that is, it must be ascertained by the relevant authorities of the sending State prior to authorising extradition that there exists in the requesting State a mechanism of sentence review which allows the competent authorities there to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds (see *Vinter and Others*, cited above, § 119). As for the procedural safeguards afforded to serving ‘whole life prisoners’ (ibid., §§ 120-22), as stated above, the availability of these in the legal system of the requesting State is not a prerequisite for compliance by the sending Contracting State with Article 3.

97. It follows that in an extradition case the question is not whether, at the time of the prisoner’s extradition, sentences of life imprisonment in the requesting country are compatible with Article 3 of the Convention, by reference to all of the standards which apply to serving life prisoners in the Contracting States. Instead, the 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 (see paragraph 87 above). At the second stage it must be ascertained whether, as 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 ground for release based on his or her behaviour or other relevant personal circumstances.”

35. It follows from the above principles that, as the applicant has not yet been convicted and the offences with which he has been charged do not carry a mandatory sentence of life imprisonment, he must first demonstrate that, in the event of his conviction, there exists a real risk that a sentence of life

imprisonment without parole would be imposed without due consideration of all the relevant mitigating and aggravating factors (see *Sanchez-Sanchez*, cited above, § 100, and *Hafeez v. the United Kingdom* (dec.), no. 14198/20, § 49, 28 March 2023).

36. The Court observes that the applicant, a US citizen, despite being represented, failed to present any evidence, either before the Ukrainian authorities and courts or before the Court, to elucidate the level of likelihood that he would be sentenced to life imprisonment in the US. The fact that some of the charges against him may carry a life imprisonment sentence is only a starting element and cannot lead to any conclusion in itself. The applicant has not substantiated any concrete fact or argument to challenge the Government's submissions in this respect (see paragraphs 28 and 29 above).

37. In particular, the applicant, like the applicants in *Sanchez-Sanchez* (cited above, § 108) and *Hafeez* (cited above, § 54), has not adduced evidence of any defendants with records similar to his own who were found guilty of similar conduct and were sentenced to life imprisonment in the federal system. As in the above-cited cases, in the present case the Court must likewise take into account that his sentence may be affected by pre-trial factors, such as his agreeing to cooperate with the US government and the fact that he would enjoy procedural safeguards, such as the opportunity available to applicants to offer evidence regarding any mitigating factors relevant to sentencing and to appeal against any sentence imposed.

38. The applicant has not provided, either before the domestic courts or before the Court, any evidence which would elucidate any of those factors and circumstances.

39. The Court concludes that the applicant did not adduce 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* irreducible life imprisonment. That being so, it is unnecessary for the Court to proceed to the second limb of the test set out in *Sanchez-Sanchez* (cited above, § 109; see also *Hafeez*, cited above, § 55).

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

II. RULE 39 OF THE RULES OF COURT

41. 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.

42. The Court considers that the indication made to the Government under Rule 39 should remain in force until the present judgment becomes final or until the Court takes a further decision in this connection.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there would be no violation of Article 3 of the Convention if the applicant were to be extradited to the United States of America.

Done in English, and notified in writing on 9 November 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Georges Ravarani
President