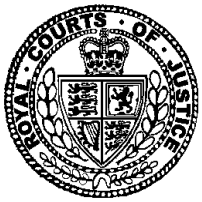

Neutral Citation Number: [2020] EWHC 2924 (Admin)

Case No: CO/140/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2020

Before :

LORD JUSTICE BEAN AND MR JUSTICE DOVE

- -

Between :

ROBERT SCOTT	**Appellant**
- and -	
THE GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA	**Respondent**

- -
- -

Joel Smith (instructed by **Tuckers**) for the **Appellant**
Daniel Sternberg (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 20 October 2020

- -

Approved Judgment

Lord Justice Bean :

1. The Government of Australia seeks the extradition of the appellant, Mr. Robert Scott, now aged 88, to stand trial for five sexual offences allegedly committed against his stepdaughter, whom I will call A, between 1972 and 1978. A first complained to the police in Australia in 2000. No action was taken until she complained again in 2013, and even then a further five years elapsed before the authorities sought Mr Scott's extradition. It is now nearly half a century since the earliest offences, more than 40 years since the latest. The appellant is a very elderly man and not in the best of health. The principal issue on this appeal is whether the Chief Magistrate, Senior District Judge Arbuthnot, was wrong to hold that his extradition is not barred as being unjust or oppressive by reason of the passage of time.

2. The Appellant was represented by Mr Joel Smith and the Respondent by Mr Daniel Sternberg, both of whom also appeared before SDJ Arbuthnot. I am grateful to both of them for their concise, realistic and persuasive oral and written submissions.

3. There are no technical issues about the documents or the procedure in this case; it is also common ground that the requirements of dual criminality are satisfied, and that each alleged offence is an extradition offence.

4. The request was certified on behalf of the Secretary of State under section 70 of the Extradition Act 2003 ('the 2003 Act') on 9 January 2019. Mr. Scott, who has lived in this country since 1985, was arrested on the certified request on 12 February 2019 and taken to Carlisle Police Station. He appeared at an initial hearing at Westminster Magistrates' Court on 13 February 2019. No preliminary issues were raised by the Appellant but he did not consent to extradition. He was granted conditional bail.

5. The matter came on for full hearing before the Senior District Judge on 29 October 2019. She heard oral evidence from the Appellant who was cross-examined. Both sides made closing submissions. Judgment was reserved to 13 November 2019 when the judge handed down a written judgment which rejected the arguments raised by the defence and sent the case to the Secretary of State. Mr. Scott was further remanded on bail. A Minister of State at the Home Office ordered Mr. Scott's extradition on 7 January 2020.

6. The application for permission to appeal was lodged in time on 15 January 2020. The Perfected Grounds of Appeal raise the following issues, which were both raised below:

    i) Whether the District Judge was correct to find that extradition was not barred by the passage of time under s 82 of the 2003 Act;

    ii) Whether the District Judge was correct to find that the requested person's extradition was neither unjust nor oppressive due to his condition of physical and/or mental health under s 91 of the 2003 Act.

7. Saini J granted permission to appeal by an order dated 20 March 2020, observing that both grounds were reasonably arguable. He added:

> "The grounds are related but the point which is striking on the facts is the period of accepted culpable delay (of some 20 years) by the Australian authorities. In the light of an overall delay of 45 or so years, the applicant's age, as well as his medical

> condition (dementia), this is a case where the Senior District Judge's approach to s 82 and s 91 should be considered by a Divisional Court."

Facts, background & proceedings in Australia

8. From 1965 the Appellant was a police officer serving in the state of Victoria. He lived with his wife and her daughter, the complainant. He and his wife had another child, the complainant's half-sister, JS, who was born in 1973.

9. The conduct charged against him is described in the investigator's affidavit is as follows:

   i) Between 25 July 1974 and 25 July 1976, the requested person made the complainant suck his nipple whilst he was having sex with her mother, she was 6 years old at the time;

   ii) Between 25 July 1974 and 25 July 1976, the requested person rubbed his penis on the complainant's legs near her genitals, she was 6 years old at the time;

   iii) Between 25 July 1976 and 25 July 1978, the requested person placed his hand on the complainant's genitals and touched her vagina. She was between 6 and 8 years old at the time;

   iv) Between 1 January 1972 and 31 December 1978, the requested person placed his penis in the complainant's mouth without her consent. She was aged between 3 and 9 at the time.

10. This conduct amounts to offences of indecent assault on a girl contrary to Australian law, namely section 55 of The Crimes Act, in force at the relevant time. The fourth incident is charged in the alternative as an offence of gross indecency contrary to section 69 of The Crimes Act in force at the relevant time. As the Senior District Judge observed, these are serious allegations, although "sadly there are more serious allegations of this type that are seen by the courts".

11. In August 2000 the Victoria police began an investigation following a complaint by A. It appears that the reason why they did not proceed with the investigation was that the Appellant was living abroad. The case was not reopened until A contacted the police again in July 2013.

12. A warrant for the Appellant's arrest was issued by the Magistrates' Court of Victoria on 19 December 2017.

13. The Australian authorities provided further information in this case which was before the Court below. Its contents can be briefly summarised as follows:

   i) An affidavit from the investigator, Mr. Barton, explaining the chronology of the investigation, the decision not to seek Mr. Scott's extradition when A first complained to the police in 2000 and the decision to re-open the investigation in 2013 as well as commenting on practical arrangements that can be made to ensure Mr. Scott is flown to Australia in accordance with his medical needs in the event of his surrender;

ii) An affidavit sworn by the prosecutor, Ms. Martin, providing additional details of the substantive and procedural law of Victoria relating to fitness to stand trial and the disposals available to the Court in the event that a finding of unfitness is made. Ms. Martin also provides further evidence on the abuse of process jurisdiction of the Australian criminal courts and how an application for a stay on those grounds will be considered. She also provides details of the adjustments that may be made to the trial process to accommodate the medical and cognitive needs of the requested person and how his age and condition of health will be taken into account during the sentencing process in Australia if he is convicted;

iii) An affidavit of Mr. Money, the Assistant Commissioner of the sentence management division of Corrections Victoria, provides full details of the way in which Mr. Scott will be treated in the Victorian prison system in the event of his surrender and incarceration. This includes details of the initial assessment of his health, the health services available to him in custody, the provision of protected status to vulnerable prisoners including the elderly, and the facilities available in each institution in which Mr. Scott might be held.

The 2003 Act

14. Section 79(1)(c) of the 2003 Act requires the judge at the extradition hearing to decide whether extradition is barred by the passage of time. Section 82 provides:

> "A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

15. Section 91 of the 2003 Act requires the judge at the extradition hearing to determine whether the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.

The test on appeal

16. In *Celinski v Polish Judicial Authority* [2016] 1 WLR 551 Lord Thomas of Cwmgiedd CJ giving the judgment of the court, said at paragraph 24, "The single question …. for the appellate court is whether or not the district judge made the wrong decision."

17. In *Lauri Love v USA* [2018] 1 WLR 2889 a Divisional Court comprised of Lord Burnett of Maldon CJ and Ouseley J held:

> "25. The statutory appeal power in section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have

> decided a question differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge ought to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function……..
>
> 26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong…….The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

18. It is common ground that this is the test to be applied. We must decide whether, on the facts found by the Senior District Judge (which are not disputed on this appeal), her decision was wrong.

The judgment of SDJ Arbuthnot

19. The Senior District Judge considered the issue of the passage of time in detail in her judgment. She found that the delay between 1978 and 2000 did not cause injustice or oppression to the Appellant. However, she found that delay between 2000 and 2013 was the fault of the police and was to be characterised as culpable delay on the part of the Requesting State.

20. The judge made a number of findings relevant to whether the Appellant's physical conditions rendered his extradition oppressive or unjust. She found that he did not suffer from any particular physical conditions which would prevent a carefully managed return to Australia. She further found that the Australian authorities had given a great deal of thought to how the Appellant's medical problems would be managed if he were to be surrendered including obtaining airline approval and medical clearance for him to fly, in stages. She further found that in Australia the Appellant would receive the relevant assistance that an elderly prisoner needs including appropriate healthcare, aids and equipment.

21. The judge then set out her findings in relation to the Appellant's mental health. She recorded that after his arrest there was no mention of any memory problems at an early hearing. Nothing was said about any memory loss in his statement of issues of 21 March 2019. His proof of evidence provided for the final hearing includes details of his career and army service and an operation he had when he was 60. The judge recorded that the Appellant remembered an accident in which he had been involved in 1976, at the time

that the alleged offences were committed. He did not say he could not remember the events of that time.

22. The diagnoses of mild to moderate dementia were reached by professionals following one interview with him. The Appellant had had a CT scan which revealed nothing of relevance. The Appellant refused to take medication prescribed to help his memory. The Judge found this was significant and doubted the Appellant's evidence that he did not take this medication because he was worried that this would affect his brain. His evidence on suffering from claustrophobia was inconsistent with the medical evidence. The judge concluded that it would be unfair to find that his memory loss is a construct to avoid extradition, however, she did find that his symptoms were not as bad as he claimed. They were not mentioned during 61 medical appointments between 2016 and his arrest. In any case, there was no evidence that he had no memory of what occurred in the 1970s.

23. The judge noted the findings of the Australian Royal Commission on child sexual abuse that the average delay which occurs in relation to reports of non-recent sexual offences is 20 years. She observed that such non-recent offences are dealt with regularly in this jurisdiction, including cases involving very old defendants. The judge accepted that delay between 2000 and 2013 and from 2013 to 2019 was the fault of the police who did not pursue the investigation with alacrity: she said that they had investigated the allegations "at a snail's pace".

24. In considering injustice and oppression the judge was satisfied that the Appellant would receive a fair trial in Australia. He could argue that proceedings against him are unfair or that he is unfit to be tried. He could seek the exclusion of admissions he made in the past. She held that notwithstanding the passage of time a fair trial could still take place.

25. The judge further found that there is no evidence that the Appellant's mental condition would prevent him from receiving a fair trial in Australia with appropriate adjustments. He would be prosecuted on the same facts in the UK and the Australian authorities approach their cases in a similar way.

26. In relation to oppression, the offences were serious. The Judge took into account the Appellant's state of health and his diagnosis of mild to moderate dementia. The Appellant has not said he cannot recall the events for which he is sought to stand trial. His mental condition is not such that it will prevent him from defending the allegations made against him. As far as his physical fitness is concerned, he has had a number of issues for decades, but there has been no obvious change since 2000 other than having a pacemaker fitted in 2015 [102]. The medical treatment the Appellant is receiving will not prevent him from travelling. His travel to Australia will be carefully managed and if remanded in custody he will have the same support as any other elderly prisoner [103].

27. The judge said at [104] that "I accept that leaving this country aged 87 in poor health, for somewhere he left in 1985, being held in custody and being tried for offences which are alleged to have happened over 40 years ago will be difficult for ZZ [ie the Appellant]". She found that there would be hardship but not oppression. She concluded that extradition would be neither unjust nor oppressive whether by reason of the passage of time (s 82) or by reason of the Appellant's state of health (s 91) [104]-[105].

Recent developments

28. Shortly before the hearing in this court the Appellant's solicitors served some medical evidence which shows that Mr Scott has recently had a fall and been admitted to a care home for rehabilitation: it is not expected that he will become permanently resident there. Mr Sternberg very properly did not object to our considering this material.

The Appellant's submissions

29. Mr Smith accepts that the test for whether it would be unjust to extradite a person by reason of the passage of time is whether a fair trial would be *impossible* because of the passage of time: *Gomes v Government of Trinidad and Tobago* [2009] 1 WLR 1038; and that the test of establishing the likelihood of injustice will not be easily satisfied. However, he submits, injustice need not be extreme or exceptional for extradition to be barred, since this would be to put an unnecessary gloss on the statute: *Campbell v France* [2013] EWHC 1288 (Admin) at [27]. Further, prejudice to the defence at trial may be a factor in considering that extradition would be oppressive, even if it falls short of rendering extradition unjust: *Loncar v Croatia* [2015] EWHC 548 (Admin) at [29].

30. The length of time is itself an important consideration in whether a return would be oppressive: *Wenting v High Court of Valenciennes* [2009] EWHC 3528 (Admin) at [23], *Loncar* at [29]. If the requesting authority is culpable for a delay in making an extradition request, this may contribute to establishing oppression: *Kakis v Government of the United States of America* [2007] 1 WLR 47 at p. 785, *La Torre v Republic of Italy* [2007] EWHC 1370 at [37], *Gomes* at [27], *Loncar* at [29].

31. The Appellant's health is poor. During the period of delay, in particular during the culpable period, the Appellant has begun to suffer, and continues to suffer, from a range of mental and physical health conditions. These include dementia and memory loss, anxiety, depression, atrial fibrillation, hypertension, osteoarthritis and prostate problems. These ailments are relevant to establishing oppression or injustice arising from the passage of time, and not, as the judge appeared to consider, to establishing whether the Appellant is at all capable of giving evidence. The fact that there was no evidence before the judge that the Appellant had no memory of what happened in the 1970s does not settle the question whether to extradite him would be unjust or oppressive. The judge applied too high a standard. The effect of the Appellant's health problems, cumulative with the other effects of the passage of time since the alleged offences, is that he would struggle to participate effectively in a trial in Australia, rendering his extradition unjust.

32. The judge erred in considering that admissions purportedly made by the Appellant demonstrated a lack of injustice. The Appellant does not argue that there is no evidence against him. The Appellant's argument in relation to injustice is that, at his present age and in his present state of health, he could not adequately address the evidence against him.

33. The delay in this case is extreme. A delay of twenty years was described as "unheard of" by the Divisional Court (Hamblen LJ and Sweeney J) in *Pillar-Neumann v Germany* [2017] EWHC 3371 (Admin) and led to the defendant's discharge based on oppression. The period of time to be considered in this case is that between the date of each alleged offence and the present day, which is between 42 and 45 years. The judge erred in

dividing the delay into the culpable and non-culpable periods, because it must be taken as a whole: *Gomes* at [38]. Taken as a whole, the delay in this case must be considered exceptionally grave. To extradite under these circumstances would be oppressive.

34. Although the offences are serious, the Appellant might, if extradited and found guilty, be subject to a community order or other nominal sentence, according to the affidavit of Ms Anna Martin, the Australian prosecutor responsible for the Appellant's case. This makes his extradition more likely to be oppressive. For these reasons, it would be unjust and oppressive to extradite the Appellant both by virtue of the passage of time and by virtue of his physical and mental condition. The judge was wrong to find otherwise.

Respondent's submissions

35. Mr Sternberg submits that it has been established by the Privy Council and the House of Lords that the length of a delay itself cannot be determinative of injustice or oppression: *Woodcock v Government of New Zealand* [2004] 1 WLR 1979, *Knowles v Government of the United States of America* [2007] 1 WLR 47, *Gomes* at [32]. Furthermore, although culpability is relevant to oppression, the cause of delay is not as important as its effect: *Kakis* at p. 783. With respect to both injustice and oppression, what must be considered is the impact on the Appellant of extradition.

36. The test for injustice is whether a fair trial would be impossible: *Gomes* at [33]. This is a high bar, which the Appellant "did not come close" to reaching before the judge and does not reach now. Although the Appellant has served medical evidence in support of his case, he has served no expert evidence that he is not fit to plead or to stand trial. The prosecutor, Ms Martin, has confirmed that witnesses are available, that safeguards exist in Australia specifically to prevent unfair trials for historic offences, and that Australian courts are well equipped to deal with questions of fitness to plead and to stand trial and are able to adopt a flexible approach to meet the Appellant's needs so that he can effectively participate in the trial**.**

37. The judge did not consider that the Appellant's admissions demonstrated a lack of injustice. Rather, she took them into account when measuring the extent of his memory of the period in which the offences are alleged to have taken place, which is relevant to the question whether a fair trial would still be possible. She was entitled to find that they tended to show that his memory of that period had not faded. Similarly, she did not determine that there would be no injustice in extraditing the Appellant simply because he could remember the events of the 1970s. It was one of a number of factors properly taken into account.

38. As regards oppression, Mr Sternberg accepted that the Appellant's medical conditions would cause him hardship if extradited. However, as was noted in *Kakis* at p. 784, this is a common phenomenon and not equal to oppression. The Appellant would have his medical conditions assessed and treated as a defendant in Australia.

39. Against hardship must be weighed the gravity of the offences, which in this case is great. The judge's finding that the Appellant might receive a non-custodial sentence such as a community order, based on evidence provided by Australian authorities that he might receive a nominal sentence because of his age and the historic nature of the offences, is far from a finding that the Appellant *would* receive such a sentence. That a

non-custodial sentence is a possibility is a "flimsy basis" for an assertion that the Appellant's extradition would be oppressive. The offences remain serious.

40. The judge was entitled to find that the first period of delay, between the 1970s and 2000, did not cause injustice or oppression to the Appellant. She did not arbitrarily divide the period of delay, but rather analysed it in order to measure the effect of it on the Appellant. It was quintessentially a matter for the Judge to consider what weight to give to this period if any, having heard live evidence from the appellant on oath, and having considered the totality of the material before her. She was entitled to come to the conclusion that the passage of time before 2000 did not give rise to injustice or oppression in this case. That conclusion is not wrong.

41. As to the admissions made by the Appellant in recent years, the judge carefully assessed the claim that the Appellant was suffering from memory loss and considered his repeated admissions made to a number of different individuals as part of her analysis of whether injustice or oppression could be found in this case. The judge did not find that because there is evidence of the commission of the offences alleged, no injustice or oppression arises in this case. She was correct to go on to consider the safeguards that exist in Australia when considering whether the passage of time rendered extradition unjust. That was the correct question for her to consider and her approach is not open to any real criticism, still less a finding that it was wrong. As far as the severity of the Appellant's symptoms is concerned, the judge, who had heard the Appellant's live evidence and had the benefit of observing him, including during cross-examination, correctly noted that memory loss had not been raised until a relatively late stage in the extradition proceedings. The evidential basis for his diagnoses of memory loss was limited: medical professionals based their conclusions on a single interview. Drawing the threads of the live and written evidence together, it was plainly open to the Judge to find that the Appellant had exaggerated his symptoms. That was an entirely proper conclusion and one that is not wrong.

42. The Judge did not find that simply because the Appellant could remember the events of the 1970s there was no injustice or oppression. That is too blunt an analysis of the Judge's findings. She took into account the evidence of the Appellant's memory loss including that he was able to remember events from his military service and, importantly when considering whether a fair trial is possible, that he was able to remember events from the mid-1970s when the alleged offences occurred. That was plainly relevant to the question of whether there would be injustice or oppression if extradition took place.

43. The Appellant is wrong to assert that discharge should have been ordered because the Appellant is suffering from dementia. The Appellant's diagnosis is of mild to moderate dementia. He does not assert that he cannot remember the events of the 1970s. He had refused until recently to take medication that would aid and improve his memory, and the judge doubted the reasons the Appellant gave for not taking it. His physical conditions can be properly treated in Australia. The Court process there is well-equipped to assess his fitness to stand trial. The key question, applying the judgment of the House of Lords in *Gomes* at [32]-[33] is whether a fair trial is impossible. In this case it is plain that a fair trial is possible.

44. While it is correct that there is an overlap between injustice and oppression, that overlap does not assist the Appellant in showing that his extradition would be oppressive.

45. As to the likely sentence in the event of conviction, the affidavit of Ms Martin does no more than say that the sentencing court might consider imposing a nominal sentence on an offender of the Appellant's age charged with offences occurring in the 1970s. There is insufficient material to show that the Appellant *would* receive a non-custodial sentence. In those circumstances, this assertion that such a sentence is likely, as opposed to being a mere possibility, is a flimsy basis on which to assert that oppression or injustice arises.

46. Whilst both section 82 and section 91 require consideration of whether there will be injustice or oppression if extradition takes place, section 91 requires a focus solely on the Appellant's condition of health, rather than delay or the time that has passed since the alleged offences occurred. In this case, notwithstanding the Appellant's age and the fact that he has a number of physical and mental health conditions, there is nothing to make out either injustice or oppression if he is surrendered.

47. Accordingly, the Respondent submits that the Senior District Judge was not wrong in her conclusion that the Appellant's extradition would not be unjust or oppressive by reason of his state of health.

Discussion

48. It is convenient to begin by summarising the Appellant's medical condition. He remains fit to plead and stand trial, and to fly to Australia, both mentally and physically as matters stand (or at any rate after a short period of rehabilitation following his recent fall), although it is right to say that in neither case is this benchmark achieved by a very great margin. In other words, if either his physical state or his mental state were to deteriorate further to any significant extent he might no longer be fit to plead or to stand trial, or indeed to make a long plane journey. But we have to deal with matters as they are now.

49. This means that the ground of appeal under s 91 can be dealt with very briefly. Mr Scott's physical and mental condition are not currently such that it would be unjust or oppressive to extradite him for that reason alone (that is to say, without regard to the passage of time since the alleged offences). Mr Smith effectively conceded as much. The Appellant's state of health is part of the picture which has to be considered under s 82. But Mr Smith accepted that if he cannot succeed under s 82, s 91 does not come to the rescue; whereas if the appeal does succeed under s 82, s 91 becomes academic. I turn therefore to s 82.

50. Although in some of the reported cases the words "unjust or oppressive" are treated as a portmanteau phrase, there is a distinction between the two. Injustice relates to the risk of unfairness in the trial itself, whereas oppression relates to hardship inflicted by the accused on the extradition process as a result of changes in circumstances that have occurred during the passage of time. The authoritative statement of this is the speech of Lord Diplock in *Kakis* at 782. He added that there is room for overlapping between the two concepts, and between them they cover "all cases where to return [the accused] would not be fair".

51. Lord Diplock turned to the issue of delay:

> "Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to

> be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them [This paragraph was described in *Gomes* as "Diplock 1"].
>
> As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8 (3) is based upon the "passage of time" under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case." [This was described in *Gomes* as "Diplock 2"].

52. Diplock 1 was agreed by all members of the House of Lords. Diplock 2 was more controversial. Lord Edmund-Davies expressly disagreed with the proposition that "the question of where responsibility lies for the delay is not generally relevant" and that "what matters is not so much the cause of such delay as its effect". He said that "the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return". Lord Keith of Kinkel, who dissented on the facts, agreed with Lord Edmund-Davies on this point. Lord Russell of Killowen and Lord Scarman each agreed with Lord Diplock, although they did not address the controversial issue of culpable delay specifically.

53. At 784G Lord Diplock went on to say:-

> "The gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand his trial oppressive; but it is not, in my view, a matter which should affect the court's decision under section 8(3)(b) [of the Fugitive Offenders 1967, the equivalent of section 82 of the 2003 Act] where the relevant event which happened in that period is one which involves the risk of prejudice to the accused in the conduct of the trial itself."

The last point was aptly summarised by Mr Smith as follows. Everyone is entitled to a fair trial, whether the charge is murder or shoplifting, and if the passage of time has made a fair trial impossible extradition is barred on the ground of injustice. But on the issue of oppression the gravity of the offence is relevant.

Injustice and the passage of time

54. In cases where it is argued that it is unjust or oppressive to extradite because of the passage of time the leading case is the decision of the House of Lords in *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038, in which the five members of the Appellate Committee gave a single "considered opinion" delivered by Lord Brown of Eaton-under-Heywood. In that case the House of Lords endorsed a judgment of the Judicial Committee of the Privy Council given by Lord Bingham of Cornhill in *Knowles*, which in turn had approved a series of propositions concerning s 82 set out by the Divisional Court in *Woodcock*:-

> "First, the question is not whether it would be unjust or oppressive to try the accused but whether . . . it would be unjust or oppressive to extradite him (para 20). Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him (para 21). But, thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect the defendant against a trial rendered unjust or oppressive by the passage of time (paras 21-22). Fourthly, no rule of thumb can be applied to determine whether the passage of time has rendered a fair trial no longer possible: much will turn on the particular case (paras 14-16, 23-25). Fifthly, 'there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive'."

55. In the next paragraph of *Gomes* Lord Brown continued:-

> "The second of those propositions, it will be noted, invites consideration of whether, in any particular case, "a fair trial is impossible", and that indeed we regard as the essential question underlying any application for a s 82 bar on the ground that the passage of time has made it unjust to extradite the accused. As was pointed out in *Woodcock* (para 17), a stay on the ground of delay in our domestic courts is only properly granted when "there really is evidence of prejudice to the extent that a fair trial could not be held"."

56. Finally, at paragraph 34 of *Gomes,* Lord Brown said:-

> "The third of the *Knowles* propositions requires a requesting state to have regard to the domestic law safeguards in the requesting state. As *Woodcock* observed (para 21), the domestic court of the requested state has obvious advantages in deciding whether or not a fair trial is now possible: "That court will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise". The Divisional Court added, however, that "We would have no alternative but to reach our own conclusion on whether a fair trial would now be possible in the requesting state if we were not

> persuaded that the courts of that state have what we regard as satisfactory procedures of their own akin to our (and the New Zealand courts') abuse of process jurisdiction"."

57. Lord Brown went on to consider cases of extradition to countries which are not known to have satisfactory procedures in their criminal courts akin to our abuse of process jurisdiction. Even then, he emphasised, "the test of establishing the likelihood of injustice will not be easily satisfied". But Mr Smith rightly does not suggest that Australia is in that category.

58. In this case the Australian court would not in my view be bound to reach the conclusion that a fair trial is not possible. This is not a case in which the complainant is unavailable for cross-examination or where witnesses obviously vital to the Appellant's defence have died or become unavailable; nor where the Appellant is, as matters stand, unfit to plead or stand trial. If when the defendant is brought before the courts in Australia he applies to stay the proceedings, for example on the grounds that he is by then unfit to plead or to stand trial, it will be for that court to rule on any such application.

59. I would therefore reject the ground of appeal under s 82 based on injustice.

Culpable delay

60. In an impassioned judgment in the Divisional Court in *R v Secretary of State ex p Patel* (1995) 7 Admin LR 56 Henry LJ said:-

> "Wherever law is practised, justice is reproached by delay. There is a real danger that those of us who have spent a lifetime in the law become enured to delay. So too laymen associate the law with delay, and their expectation of it may harden them to the fact of it."

61. After most of a lifetime in the law I emphatically agree with what Henry LJ said, but the leading authorities on delay in extradition cases indicate a more hardened approach.

62. It has been trite law since *Kakis* that an accused person who is a classic fugitive, that is to say, someone who fled the requesting state in order to avoid trial of imprisonment, cannot rely on any period of delay for which he is to blame to establish injustice or oppression by reason of the passage of time. This is not, however, such a case. Mr Scott left Australia and came to this country in 1985. It is not suggested that he did so as a fugitive. He can, therefore, rely on the long delay in this case under s 82.

63. The period of delay from the 1970s when the offences were allegedly committed and the year 2000 when A first complained to the police is not culpable delay. From that point onwards, as the Senior District Judge found, there was culpable delay on the part of the Requesting State for nearly 20 years.

64. In *Osman (No 4)* [1992] 1 AER 579 Woolf LJ considered Lord Diplock's reasoning in *Kakis* and concluded that he had not intended to exclude culpability on the part of the requesting State as a material matter:

> "Lord Diplock was not suggesting that, in a case which was close to the borderline as to whether or not the applicant was entitled to be discharged, the fact that the requesting state had been guilty of culpable delay was not a matter which the court was entitled to take into consideration."

65. Similarly, in *La Torre v Italy* [2007] EWHC 1370, Laws LJ observed as follows at [37]:

> "….All the circumstances must be considered in order to judge whether the unjust / oppressive test is met. Culpable delay on the part of the State may certainly colour that judgment and may sometimes be decisive, not least in what is otherwise a marginal case (as Lord Woolf indicated in *Osman (No.4*)). And such delay will often be associated with other factors, such as the possibility of a false sense of security on the extraditee's part…. An overall judgment on the merits is required, unshackled by rules with too sharp edges."

66. In *Gomes* Lord Brown held that "neither what Laws LJ said in *La Torre v Italy* nor other cases to like effect seeks to qualify in any way the clear ruling contained in Diplock para 1 (nor of course could they properly have done so). Rather they are directed at Diplock para 2." Lord Brown went on to hold that culpable delay cannot, save in the most exceptional circumstances, be relevant to a decision under section 82 in the case of a fugitive. At the end of paragraph 27 he said:-

> "It is one thing to say… that in borderline cases, where the accused himself is not to blame, culpable delay by the requesting state can tip the balance; quite another to say that it can be relevant, and needs to be explored, even in cases where the accused is to blame. "

67. I read this as being at least grudging approval of what Laws LJ said in *La Torre v Italy.*

Oppression

68. There is a valuable summary of the present state of the law, though it is not to be read as a statute, in the judgment of the Divisional Court (Aikens LJ and Popplewell J) in *Loncar v Croatia* [2015] EWHC (Admin) 548 at paragraph 29 (3)-(8):

> "(3) Where the delay is not brought about by the requested person himself, the essential question underlying the ground that the passage of time has made it unjust to extradite him is whether, by reason of that passage of time, a fair trial is impossible: *Gomes* at paragraphs [32-33]. Nevertheless prejudice in the conduct of his defence at a trial or retrial may be a factor contributing to a conclusion that a return would be oppressive, notwithstanding that it will not of itself satisfy the injustice criterion.
>
> (4) The test of oppression "by reason of the passage of time" will not easily be satisfied; hardship, a comparatively commonplace

> consequence of an order for extradition, is not enough: *Gomes* at paragraph [31].
>
> (5) The gravity of the offence is relevant to whether changes in the circumstances of the accused which have occurred during the relevant period are such as would render his return to stand trial oppressive. The more serious the offence, the less easy it will be to satisfy the test of oppression: *Kakis* per Lord Diplock at page 784; *Gomes* at paragraphs [31].
>
> (6) The length of time is itself an important consideration in whether a return would be oppressive: *Wenting v High Court of Valenciennes* [2009] EWHC 3528 (Admin).
>
> (7) Where the delay is not brought about by the requested person himself, it is a relevant factor if the delay has engendered in the requested person a legitimate sense of security from prosecution or punishment: *Gomes* at [26]; *La Torre* per Laws LJ at [37].
>
> (8) Where the delay is not brought about by the requested person himself, the culpability of the delay by the judicial authority may contribute to establishing the oppressiveness of making an order for his return, and may be decisive in what is otherwise a marginal case: *Kakis* per Lord Edmund Davies at page 7855, *La Torre* per Laws LJ at paragraph [37]; *Gomes* at paragraph [27]."

69. In *Kila v Governor of HMP Brixton* [2004] EWHC 2824 (Admin) Collins J said that "the mere fact of delay is unlikely in most cases, indeed the vast majority of cases, to justify a decision that to return would be oppressive. There must be something more than mere delay." In this case the "something more" can be summarised as being: (a) the enormous delay, now 48 years since the first of these and 44 years since the last, a period which includes nearly 20 years which the judge found to be culpable delay; (b) the fact that the Appellant is now 88 years old and in less than robust physical or mental health.

70. On the other hand, although this is a case where the defendant's personal circumstances have changed greatly during the relevant period, it is not a case where he has shown that there would be real prejudice to his ability to mount a defence. It is not said that witnesses which could have assisted his defence have died or are now unavailable. I also note that the Appellant did not suggest in evidence before the Senior District Judge, and therefore Mr Smith has not argued, that he was lulled into a false sense of security by the long delay before any prosecution was initiated.

71. I should mention some other criticisms of the judgment below raised by Mr Smith. The first is that the judge wrongly "split the delay" into the non-culpable and culpable periods and ignored the former, whereas *Gomes* requires the whole period of delay to be taken into account. I do not accept that this is what SDJ Arbuthnot did: her conclusion at paragraph 104 rightly summarises the case against extradition as being that the accused was aged 87, in poor health, has lived in this country since 1985 and that the delay in the case is over 40 years.

72. Next Mr Smith argues that the judge treated the Appellant's alleged admissions as strengthening the case against him. I do not agree. The issue to which she treated them as being relevant was the question of whether Mr Scott has sufficient memory of his interaction with A in the 1970s to be able to defend himself at a trial.

73. Mr Smith argued that it would be plainly oppressive for an 88 year old man in failing health to be extradited "to the other side of the world" when he may not even be sent to prison if convicted. Dealing first with the geographical point, I do not think it can make any difference that the Requesting State is Australia as opposed to, say, Ireland or France. It might if the Appellant were too frail to make a long journey by plane even in stages, but the evidence does not support that contention.

74. As to the non-custodial sentence, this is by no means certain. In this jurisdiction defendants even older than Mr Scott have been sent to prison on conviction for serious non-recent sexual offences: see *R v Clarke and another* [2017] EWCA Crim 393 where the appellants were respectively aged 101 and 96 when sentenced.

75. Even if a community penalty were certain or highly probable, that would not render Mr Scott's extradition oppressive. There are of course many cases in our courts in which extradition is refused, even where no s 82 bar can be argued, where it would be disproportionate to order it having regard to the relative lack of gravity of the offence balanced against the ECHR Article 8 rights of the offender (see for example the Supreme Court's decision in the case of *F-K v Polish Judicial Authority,* reported with *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* at [2013] 1 AC 338); and if the offence is not serious enough to warrant immediate custody on the facts of the case that is often a good indicator of lack of gravity. But here the Senior District Judge's assessment that these alleged offences against a very young child were serious, though not of the very worst type of sexual offences which come before the courts, was plainly correct. If it were not for the Appellant's age and state of health a significant custodial sentence in the event of conviction would, at least in a Crown Court in England and Wales, be inevitable. There is a clear public interest in the complainant having her day in court, as well as in extradition requests being honoured. In those circumstances I do not consider that the possibility of a merciful course being taken in the Appellant's case should carry much weight in the balancing exercise.

76. Although Sir John Thomas P said in *Government of the Republic of South Africa v Dewani (No. 1)* [2013] 1 WLR 82 that it is not generally helpful to be referred to the facts of other cases, I have looked at four of the leading authorities in the bundle provided to us, in each of which extradition for serious offences was held to be barred by the passage of time: *Kakis*; *Loncar; Wenting;* and *Pillar-Neumann.* In three of these – *Kakis*, *Loncar* and *Pillar-Neumann* – the passage of time had led to significant weakening in the evidence available to the defence (in *Kakis* itself, a murder case, the fact that two alibi witnesses were unwilling to travel to Cyprus to testify). The exception is *Wenting*. The appellant had been arrested in 1989 on charges of supplying drugs and remanded in custody. In 1991 he was granted bail and allowed to leave the country. In 1992 a trial took place of which he was not notified until after it had taken place; he was convicted *in absentia* and sentenced to five years imprisonment. No steps were taken to secure his return to France until a European Arrest Warrant was issued in 2006; he was arrested in 2009. He had led a blameless life in England for many years and his partner was seriously ill with lung cancer. There was no question of defence evidence having become unavailable, since this was a conviction case. The Divisional Court

(Maurice Kay LJ and Lloyd-Jones J), reversing the decision of a district judge to order extradition, held that extradition would be oppressive and was barred by the passage of time. *Wenting* demonstrates that, even in a conviction case involving serious offences, it is open to a court to hold that a long period of culpable delay has made extradition oppressive.

Conclusion

77. This case is in my view close to the borderline: so much so that there is not a single right answer. SDJ Arbuthnot conducted a careful balancing exercise and properly set out the factors for and against extradition before reaching her decision. If her conclusion had been, as the Divisional Court's was in *Wenting*, that, having regard to the passage of time, extradition would be oppressive, I would not have held that such a decision was "wrong". But equally I do not consider that her decision that the test of oppression is *not* satisfied can be said to be "wrong" either, or that the case *ought* to have been decided differently. I would accordingly dismiss this appeal.

Footnote

78. Both counsel invited us to consider whether this judgment should be anonymised (that is to say, with Mr Scott's name withheld as well as that of the complainant) in order to protect the complainant from being identified. In *Short v Falkland Islands* [2020] EWHC 439 (Admin) this court stated that reporting restrictions prohibiting publication of the Appellant's identity in an extradition case should, as in criminal cases, only be imposed in very exceptional circumstances. Counsel drew to our attention *LMN v Government of Turkey* [2018] EWHC 210 (Admin) in which a reporting restriction order was made: the judgment referred to sensitive matters concerning the appellant's mental health, and to his allegation that he was the victim of anal rape. In *BM v Republic of Ireland (No. 2)* [2020] EWHC 648 (Admin) Lane J said that where the issue is not an application for reporting restrictions but only whether the Appellant's name should be withheld in the judgment the exceptionality test does not apply, but "as a general matter, a very good case indeed will need to be made" for an extradition appellant's name to be withheld in a judgment (though he was dealing with a conviction case, not an accusation case).

79. It is not necessary to decide whether the test is one of exceptional circumstances or simply of "a very good case". Whichever it is, the test is not met here. The Appellant is to be extradited to Australia where, we are told, he will be tried in public under his own name, with the complainant entitled to anonymity as she would be in this jurisdiction. Her surname is not Scott. The alleged offences occurred over 40 years ago. The risk of jigsaw identification must be less than in almost any other case of familial sexual offences. In those circumstances we have in the usual way named the Appellant in this judgment.

Mr Justice Dove:

80. I agree.