Neutral Citation Number: [2021] EWHC 983 (Admin)

Case No: CO/3585/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th April 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

ROGER MONTGOMERIE	**Appellant**
- and -	
GOVERNMENT OF AUSTRALIA	**Respondent**

- -
- -

Malcolm Hawkes (instructed by National Legal Service) for the **Appellant**
Daniel Sternberg (instructed by the Crown Prosecution Service) for the **Respondent**

Hearing date: 20.4.21

Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM:

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 60 and is wanted for extradition to Australia. That is in conjunction with an accusation Extradition Request issued on 9 January 2019 and certified by the Home Secretary on 2 May 2019. The index offences are 9 alleged sexual offences against children who were 3 siblings (then aged between 5 and 13) alleged to have taken place between 1984 and 1986 in Australia, a time at which the Appellant (then aged 23 to 25) is said to have been in a 'live-in' relationship with their mother, so that the children were – as Mr Hawkes has put it today – effectively his stepchildren. The Appellant was born in New Zealand in 1961. He accepts that he was in Australia from 1983. He accepts that he had a relationship with the children's mother, which did involve living with her and the three children for a time. He accepted at the oral hearing before SDJ Arbuthnot (which took place 20 July 2020) that he was living with the mother and the 3 children as at July 1986. He left Australia in 1987 and came to the United Kingdom aged 26 where he has now been for 34 years. Extradition was ordered on 21 September 2020 by the Home Secretary. SDJ Arbuthnot ("the SDJ") had sent the case to the Home Secretary on 3 August 2020, delivering a judgment rejecting the Appellant's arguments: that extradition would be unjust and/or oppressive having regard to the passage of time (section 82 of the Extradition Act 2003) or that it would be a disproportionate interference with Article 8 ECHR private life (section 87). All of those grounds are renewed before me as grounds of appeal, having been rejected on the papers by Saini J on 9 February 2021.

2. I have had the benefit of sustained submissions made at today's oral hearing and both Counsel have assisted me, in particular, by addressing questions which I have raised with them. The mode of hearing was by BT conference call. Mr Hawkes for the Appellant and Mr Sternberg for the Respondent were satisfied, as am I, that this mode of hearing involved no prejudice to the interests of their clients. A remote hearing in the context of the remaining restrictions and concerns relating to the pandemic was in my judgment fully justified and a BT conference call was an entirely satisfactory mode. The open justice principle was secured. The case and its start time together with an email address usable by any member of the press or public who wished to observe the hearing were published in the Court's cause list. The hearing was recorded. This ruling will be issued in the public domain. A potential issue relating to anonymity and what Mr Sternberg says would be a statutory right to anonymity on the part of the 3 children arose briefly but subsided in circumstances where there was no need to refer to the children or their mother by name. In those circumstances no application for an anonymity order was made by Mr Sternberg and neither Counsel invited me to make such an order by reference to that statutory entitlement.

3. The conduct alleged against the Appellant is as follows, that: he forced the children to touch his genitals; he touched their genitals; he masturbated them; he masturbated in their presence; he sucked a child's penis; and he introduced his own penis into a child's mouth. It is not necessary to set out in further detail which of those allegations is raised in relation to which of the children. The alleged conduct was reported for the first time to the Australian police in February 2011, and Mr Hawkes submits that at that time it was clear that 'all 3 children were on the radar'. An investigation ensued, culminating eventually in the Extradition Request in January 2019, 8 years later. Mr Hawkes that

the Australian authorities had a known United Kingdom address (the house number was not quite correct but the postcode was correct) for the Appellant as at May 2011.

The passage of time

4. Delay, culpability for it, and the passage of time are at the heart of the case. The SDJ identified three relevant passages of time. (1) The first was the period from the alleged offences (1984 to 1986) through to the report to the police in February 2011. (2) The second was the period between 2011 and 2015 when the Australian police were in particular seeking to locate the third child and secure a statement from that child, and did not proceed in the absence of such a statement with extradition, as they could have done, and Mr Hawkes submits clearly should have done. In answer to a question posed today by me Mr Hawkes submitted that the Extradition Request should really have been made in 2013. He characterises as 'inexcusably dilatory' or 'culpable' the delay from 2013 to January 2019. (3) The third was the period between 2015 and 2019, during various things are said to have happened, examined by the SDJ: the Appellant's location was confirmed, extradition was considered and approved and checks made, culminating in the Extradition Request. The SDJ characterised the first and second periods as not being inexcusable delay, but characterised the third period as being "egregious". Mr Hawkes criticises the SDJ's conclusion in relation to the second period, and the approach taken by the Australian authorities to await a statement from the third child. The documents before the court also emphasise, as does Mr Hawkes, the importance of taking account of the overall lapse of time and the whole period back to 1984-86 when the sexual offences are alleged to have taken place.

Delay, in and of itself

5. Mr Hawkes submits that this is a case of 'culpable, extraordinary and unexplained' delay; and of 'inexcusably dilatory' action. Mr Hawkes submits – as a first point of law – that "delay, in and of itself, can give rise to injustice or oppression for the purposes of section 82", without it being necessary also to examine any particular prejudicial effects or specific impacts. He submits that the SDJ went wrong in law in this regard when she recorded: "Mere effluxion of time does not give rise to the suggestion of injustice or oppression. Even if there is culpable delay it is insufficient to tip the balance in establishing oppression …" Mr Hawkes relies on the statement in the short judgment of Lord Edmund-Davies concurring in Kakis v Government of the Republic of Cyprus (a case which I was given in [1978] 2 All ER 634). There, Lord Edmund Davies said: "the answer to the question of where responsibility lies for the delay may well have a direct bearing on the issues of injustice and oppression. Thus, 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, whereas the issue might be left in some doubt, if the only known fact related to the extent of the passage of time". Mr Sternberg, in response, relies on the statement of Lord Diplock in the same case: "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 prompt promptitude". Reference has been made to some of the subsequent authorities in which these passages have been considered. For the purposes of today I am prepared to proceed on the basis that 'inexcusably dilatory' action could, in principle, in an appropriate case be taken to 'establish' injustice or

oppressiveness of extradition. What is clear is that there are various features which are relevant in the analysis. One of which is whether the delay is to be characterised as 'culpable' or 'inexcusably dilatory'. Another is the lapse of time. Other features will relate to the implications and the impacts.

The period 2013-2015

6. I do not accept that it is reasonably arguable that this Court on a substantive appeal hearing would overturn as "wrong" the SDJ's characterisation of the period 2011 to 2015, or a part of it namely 2013 to 2015, as "not inexcusable". On the evidence, as the SDJ found, the Australian police were acting under advice – albeit probably wrong and based on a misunderstanding of the law, as the SDJ observed – that they should not make a request for extradition without having obtained the evidence from the third child. Ongoing and repeated attempts were clearly being made which in the end came to fruition. Those steps were undertaken for what was perceived to be a good and legitimate reason, and in good faith. The authorities were not required to immediately notify the Appellant about the investigation. Some lapse of time was plainly reasonable and is beyond castigation as 'culpable' or 'egregious'. However, I will proceed for the purposes of today on the basis that I am wrong about all of that and that Mr Hawkes may be able to persuade a Court on a substantive appeal that the period of 'culpable' delay was not 2015 to 2019, but rather 2013 to 2019.

Injustice and ' whether a fair trial is still possible'

7. Mr Hawkes had a second point of law which he advanced at this hearing, as follows. In considering whether extradition is rendered unjust by the passage of time, it is important not to fall into the trap of treating as determinative this question: 'whether a fair trial remains possible', having regard to appropriate fair trial safeguards within the courts of the requesting state. If a fair trial is now impossible that will be *sufficient* to render extradition unjust; but that feature is not *necessary* in order for extradition to be unjust having regard to the consequences of the passage of time in terms of the Appellant now having to defend themselves (or, as Mr Hawkes would put it based on his first point of law, having regard to inexcusably dilatory in action as itself capable of establishing injustice or oppression. Mr Sternberg in his submissions today came close to the submission that 'whether a fair trial remains possible' notwithstanding the lapse of time is, in effect, the determinative question. He so submitted, or alluded to such a position, by holding to this observation in Gomez and Goodyer v Government of Trinidad and Tobago (which I was given in [2009] 3 All ER 549) at paragraph 33: "whether, in any particular case, 'a fair trial is impossible'… we regard as the essential question underlying any application for a section 82 bar on the ground that the passage of time has made it unjust to extradite the accused". I am not satisfied that there is any clean and clear basis for treating that passage as rendering determinative, for the purposes of whether extradition would be unjust in light of the passage of time, the question 'whether a fair trial is now possible'. I proceed on the basis that Mr Hawkes is right and the law is as set out in Eason [2020] EWHC 604 (Admin) at paragraph 27iii. On this basis, Mr Hawkes submits that the SDJ fell into that very trap in describing whether a fair trial as impossible as "the essential question" and "the crucial question" and in saying: "I must decide in the particular circumstances of this case whether a fair trial is impossible by reason of passage of time", before going on to consider the fair trial safeguards in Australia. Mr Sternberg points out that the SDJ went on to deal separately with *oppression*. But I cannot see how that point assists him, or me, since the critical

question is whether the SDJ materially erred in law in her approach to whether extradition would be *unjust* by treating as determinative the possibility of a fair trial.

The three grounds

8. Alongside submitting that the SDJ made two material errors of law, relating to each of the two issues of law to which I have referred, Mr Hawkes in writing and orally emphasises a number of the features of this case in support of his contentions: (i) that extradition would be unjust in light of the passage of time; or (ii) that extradition would be oppressive in light of the passage of time; or (iii) that extradition would violate Article 8 ECHR in light of the passage of time. I must keep in mind that this Court as the appeal court has the role of considering whether the SDJ's approach involved a material error, but also of stepping back in considering the outcome and the overall evaluative assessment on all three of these grounds (i) to (iii). Mr Hawkes also, rightly, reminds me that for the purposes of today the threshold is reasonable arguability.

Features of the case

9. Mr Hawkes emphasises that the Appellant was not found to be a fugitive. He emphasises that there is an overall passage of time of 37 years in this case. In relation to 'injustice' through passage of time he submits that there is an inevitable disadvantage so far as the fading of memories, the unavailability of witnesses, and the unavailability of documents, are concerned.

10. He also emphasises the personal circumstances of the Appellant: who has been settled in the United Kingdom for 34 years since coming here aged 26 in 1987; who bought a house here in 2004 and continues to pay the mortgage by renting it out and himself renting a property; who moved in with his landlady in 2013; and who became an ambulance driver in that same year. Mr Hawkes emphasises that 2013 is the trigger point at which he says any non-culpable approach by the Australian authorities would have led to an extradition request being issued. He emphasises that the Appellant's work as an ambulance driver, and the role in relation to the landlady, are changes in circumstances from that time onwards. Mr Hawkes characterises the Appellant as the sole carer for his disabled landlady, since 2013. He reminds me not only of the Appellant's personal circumstances but of the landlady's personal circumstances, and the impact of extradition on them both. He took me through the evidence of the Appellant and of the landlady herself which describes: that the Appellant provides for the landlady emotionally practically and financially; that he acts as a voluntary carer for her; that she is disabled and a blue badge holder; that her health has really deteriorated; and that she relies on him day-to-day; that he is concerned that her mobility is getting worse; and that he is very worried that she would have to be put in a care home were he extradited. The landlady had herself given evidence in this case: describing herself as partially disabled; with trouble moving around; and describing the Appellant's daily help with cooking and cleaning driving her to appointments, and doing her shopping and providing emotional and financial support, without which she would struggle. Mr Hawkes relies on all of these factors, both through the prism of section 82 passage of time (oppression) and section 87 (Article 8 ECHR proportionality), from the perspective of both affected individuals.

11. On the issue of Article 8 and private life, Mr Hawkes also relies on the lapse of time, his characterisation of it as 'culpable delay' (Lady Hale in HH [2012] UKSC 25 is

generally cited in relation to two of these): (i) its tendency to reduce the seriousness; (ii) its tendency to reduce public interest considerations in favour of extradition; and (iii) its tendency to strengthen and compound Article 8 ties. Overall, he emphasises the impact on the Appellant, being uprooted from the United Kingdom after all this time, losing his property ownership, and his job; and the serious impact on the landlady. Finally, he reminds me that Article 8 should be approached by a Court broadly.

Discussion

12. In my judgment, there is no realistic prospect that this Court at a substantive appeal would overturn the decision of the SDJ on any of the three grounds put forward. That is true, moreover, even if the Court were to treat as 'egregious' or 'culpable' or 'inexcusably dilatory' the period of 6 years between 2013 and 2019 rather than the period of 4 years between 2015 and 2019 which the SDJ characterised as "egregious". There is in my judgment no material error of law - even arguably - in the approach taken in this case by the SDJ. The alleged offences are serious. No complaint can be made about the lapse of time to February 2011 when they were first reported to the police. As the SDJ observed, that is a not unusual scenario, and in the present case there is evidence that the children's mother had not believed them when they raised with her in 1986 the sexual allegations made to the police in February 2011. Although the entirety of the period of time is relevant in considering injustice, oppression and private life interference, no characterisation of 'culpability' can apply outside the 8 year period 2011 to 2019; indeed as Mr Hawkes has accepted it could not apply outside the bracket 2013 to 2019.

13. It is not, in my judgment, reasonably arguable - even revisiting the evaluative exercise afresh - that it would be "unjust" having regard to the passage of time for the Appellant to be extradited. In my judgment, beyond argument, this is not a case in which the passage of time – even if 2013 to 2019 were characterised as inexcusably dilatory – would 'in and of itself establish' injustice or oppressiveness of extradition. This is a case, in my judgment and beyond argument, where it is necessary to consider impacts and implications, and where effects are significant. Whether 'a fair trial is possible', and the applicable safeguards including those identified by the SDJ as applied in Australian courts in the case of historic allegations, is not - I have accepted - the sole and determinative question. But it is an extremely important question. The SDJ was entitled indeed – in my judgment beyond argument – was right to ask that question and answer it as she did. Reading the judgment as a whole, I do not accept even arguably that the SDJ fell into the 'trap' of treating that question as determinative. In the same paragraph in which she said: "I must decide in the particular circumstances of this case whether a fair trial is impossible by reason of passage of time", she went on in the next sentence to say: "I must consider the prejudice to the [Appellant] in the conduct of his defence at the trial". Putting all of that one side, and positing this Court revisiting the evaluative exercise afresh, it is relevant in my judgment that this is not a case in which any specific or concrete 'injustice' effect has been identified. References to alibi witnesses having died and documentary evidence as no longer being available, and points made as to evidencing "whereabouts", all have to be put in the context in which the central issue is what happened in children's bedrooms at a time where, on the face of it, the Appellant accepts that he was in a relationship with the mother which included living together with the family under the same roof.

14. In my judgment – however the overall lapse of time and delay are characterised, and however the period 2013 to 2019 is characterised – there is no realistic prospect of this Court concluding that extradition would be oppressive either through passage of time; nor a disproportionate interference with anybody's Article 8 rights. The Appellant is a single man who faces serious allegations. The relationship of support relied on is one with his landlady. Her rights are important, and it is important to consider impacts on her. But it is also right to record that she has two sons in London. The impact – whether viewed through the prism of oppression by reference to personal circumstances, or viewed through the prism of Article 8 and private life impacts – does not in my judgment come close to a viable ground of appeal, in light of the nature of the alleged wrongdoing; notwithstanding the lapse of time attributable to non-reporting by the complainants (1984 to 2011) and to actions of the Australian authorities (2011 to 2019).

15. For those reasons the application for permission to appeal is refused.

20.4.21