Neutral Citation Number: [2021] EWHC 2858 (Admin)

Case No: CO/2803/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2021

Before :

MR JUSTICE SWIFT

- -

Between

DENNIS BARBER **Appellant**

- and –

ADMINISTRATOR OF THE SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA, BRITISH OVERSEAS TERRITORY **Respondent**

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David Josse QC and Ben Keith (instructed by **Sonn MacMillan Walker**) for the **Appellant**
Stuart Allen (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 7 July 2021

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Approved Judgment

MR JUSTICE SWIFT:

A. Introduction

1. Mr Barber appeals against an order made at Westminster Magistrates' Court on 3 June 2020 under section 87 of the Extradition Act 2003 ("the 2003 Act") to send his case to the Secretary of State for her decision whether he should be extradited. Mr Barber's surrender is sought by the Sovereign Base Areas of Akrotiri and Dhekelia ("the SBA") pursuant to a request dated 7 May 2019. The material part of the request is as follows.

> "The Suspect is accused in SBA of the following offences:
>
> (1) three counts of rape, contrary to section 144 (read with section 145) of the SBA Criminal Code as enforce at the relevant time.
>
> (2) three counts of indecent assault on a female contrary to section 155 of the SBA Criminal Code, as enforce the relevant time.
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> …
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> The offences are alleged to have be committed by the Suspect between 1977 and 1980 (both dates inclusive) in the family home of the alleged victims on the Royal Air Force (RAF) Station at Akrotiri in the SBA. … The alleged victims are sisters, one born in 1967 (and so between 9 and 13 years of age at the time), and one in 1969 (and so between 7 and 11 years of age at the time). The Suspect was a friend of the family and was serving in the RAF at the time. Details of the circumstances relating to the offences are contained in the supporting evidence, a summary of which is attached to this request."

2. At the extradition hearing Mr Barber relied on a number of contentions: (a) that there was no sufficient evidence giving rise to any case for him to answer (section 84 of the 2003 Act); (b) that extradition would be in breach of this Convention rights under articles 5, 6 and 8 ECHR (section 87 of the 2003 Act); (c) that extradition was barred by section 82 of the 2003 Act because having regard to the passage of time since the allegations said to give rise to the extradition offence, it would unjust or oppressive to extradite him; and (d) that extradition would be an abuse of process. The District Judge rejected each of these contentions.

3. This appeal is pursued on two of the grounds argued below: that extradition would be unjust and oppressive and is therefore barred by section 82 of the 2003 Act; and that extradition would comprise an unjustified interference with Mr Barber's article 8 rights and the article 8 rights of his partner who I will refer to as CN, and therefore be contrary to section 87 of the 2003 Act. On this appeal the question for me is specified by section 104(3) of the 2003 Act: ought the Judge below have decided a question before him differently, and if he had he decided that question differently

would he have been required to order Mr Barber's discharge. In *Lauri Love v Government of the United States of America* [2018] 1 WLR 2889, the Divisional Court (Burnett CJ and Ouseley J) put the issue is this way:

> "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" (emphasis added) 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. That is not what *Shaw's* case or *Belbin's* case was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that the judge's decision was wrong, and the appeal should be allowed.
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> 26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in the *Celinski* case and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. 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."

B. Decision

(1) Extradition contrary to section 82 of the 2003: unjust or oppressive

4. The bar to extradition now contained in section 82 of the 2003 Act pre-dates that Act and is a long-standing feature of extradition law. In *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 the House of Lords considered the meaning of the power of the court, then contained in section 8 (3) of the Fugitive Offenders Act 1967, to order discharge of a person whose extradition was sought if extradition

would be unjust or oppressive by reason of the passage of time. Lord Diplock explained the scope of the provision as follows:

> "Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. 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.
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> 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."

Lord Scarman agreed with Lord Diplock. Lord Russell while agreeing with Lord Diplock, adding the following:

> "I would only add this comment on section 8(3)(b) of the statute. It is not merely a question whether the length of the time passed would make it unjust or oppressive to return the fugitive. Regard must be had to all the circumstances. Those circumstances are not restricted to circumstances from which the passage of time resulted. They include circumstances taking place during the passage of time which may (as I think here) give to the particular passage of time a quality or significance leading to a conclusion that return would be unjust or oppressive."

5. In *Gomes v Government of the Republic of Trinidad and Tobago* [2009] 1 WLR 1038, the House of Lords equated "unjust" as used in section 82 of the 2003 Act as extending only to a situation where the passage of time had rendered a fair trial impossible. Several authorities have considered the scope of what is "oppressive" for this purpose. One theme common to these judgments is that oppression is not synonymous with simple hardship. For example, delay without more will, in most instances, not justify a conclusion that surrender will be oppressive (see per Collins J in *Kila v Governor HMP Brixton* [2004] EWHC 2824 (Admin) at paragraph 18). There must be something more than mere delay. What the "something more" may be is not prescribed; whether it is present is a matter of evaluation based on the circumstances of the case in hand. While the category of matters which either alone or in combination may demonstrate that surrender would be oppressive is not closed, it is important to have well in mind that the standard required is demanding. That is the natural consequence of the statutory language. The conclusion that it would be oppressive to surrender a person when no other barrier to extradition is present will be a conclusion that will rarely be justified.

6. The factual basis for Mr Barber's submission that extradition would be unjust or oppressive and therefore barred by section 82 of the 2003 Act rests on the history of the investigation into the allegations that are now pursued. The allegations of rape and indecent assault were first made in May 1998 to police in England. By July 1998 the matters had been referred to the Ministry of Defence Police and an investigation commenced. By November 1998 the complainant and all relevant witnesses had been interviewed. On 13 November 1998 Detective Inspector Greig (who I assume had been the officer leading the investigation) wrote to Detective Chief Inspector Selby summarising the outcome of the investigation. His conclusions at that stage included the following:

> "27. The alleged offences occured over 20 years ago, and have only recently been reported. It has not been possible to collaborated the victims' statements outwith the family unit. Nor will any forensic evidence be available.
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> 28. An initial train of thought may well be "it's money orientated." However, with no Criminal Compensation, this is clearly not the case. It may be a "cry for help or attention". This again would be unrealistic for all 3 to make abuse allegations against one individual. It is the Reporting Officer's view that the only motive must be that of genuine complaint."

Detective Inspector Greig then suggested the possibility of a case conference to discuss further steps.

7. There is no evidence either way as to whether such a conference occurred. However, the investigation did continue, and on 28 March 2000 Mr Barber was interviewed under caution. Following that interview Detective Inspector Greig wrote again, this time to Superintendent Pantelio, on 10 April 2000 proposing a case conference at the end of May 2000. I have not seen any record of that conference. The only indication of what happened next is in the statement made by Detective Inspector Demetriou on 13 September 2019 in support of an application made to the Resident Judge's Court of

the SBA for a warrant for Mr Barber's arrest. He explains that the case was referred to the then Attorney General and Legal Advisor ("the AGLA") to the SBA for a decision on whether to prosecute Mr Barber. The AGLA decided in July 2001 not to prosecute. On 5 September 2001 Detective Inspector Greig wrote to Mr Barber's solicitors as follows:

> "In relation to the alleged offences against your client Mr BARBER, I am now in receipt of correspondence from the appropriate Authorities.
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> The Sovereign Base Area (Cyprus) Attorney General and Legal Advisor has reviewed the evidence in relation to this investigation. On his advice, he considers that there is no reasonable prospect of a conviction and therefore there will be no prosecution.
>
> Could you please inform your client that there will be no further Police action in relation to this matter."

8. The investigation that has resulted in the present extradition request commenced as a result of a further complaint by the complainant in January 2017. This investigation was conducted by the Royal Air Force Police. It appears, at least to start with, that the new investigation was conducted without reference to the material gathered in the first investigation and without knowledge of the AGLA's decision in 2001 that Mr Barber should not be prosecuted. Six of the thirteen people interviewed as part of the first investigation (including Mr Barber) were interviewed for the purposes of the second investigation. Those interviews were conducted from scratch. Others not interviewed in the first investigation were also interviewed. The investigation was complete by November 2017. At a second interview on 9 November 2017 Mr Barber was charged with offences of indecent assault and rape. On 22 November 2017 Corporal Lockwood of the RAF Police Special Investigations Branch sent an investigation report to his commanding officer. The section of the report headed "Investigator's Comments" was as follows:

> "(a) RAF SIB(S) have spoken to the MDP and attempted to recover all evidence gathered during the investigation which was commenced in 1998. Unfortunately the MDP have been unable to locate the full investigative material within their archive. The only information found was an intelligence file which has been provided to RAF Police. There was also a suggestion that the case may have been ceded to the Sovereign Base Area (SBA) Police due to jurisdictional matters. The intelligence file can be found in the disclosure form 6A at serial 100.
>
> (b) RAF SIB(S) made enquiries with SBA Police to establish if they had indeed investigated the allegations. SBA Police advised that they have no records relating to this investigation.

> (c) Mr Barber informed SIB(S) that the letter he received from Mairwen and the letter from the CPS had both been passed to this local solicitor Keogh and Dixon. It was established that this company is now "Dixon, Rigby, Keogh". SIB(S) contacted this company who stated that any records for Mr Barber would have only been archived for 6 years and then would have been destroyed so they no longer hold any material relating to Mr Barber's previous MDP investigation.
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> (d) At the conclusion of the second IAC Mr Barber's legal advisor informed SIB(S) that Mr Barber has an email from the CPS/Attorney General confirming that the case from 1998 would not be prosecuted. Mr Barber has now provided a copy of a letter from Ministry of Defence Police stating that the Sovereign Base Area (Cyprus) Attorney General and Legal Advisor had reviewed the evidence in the investigation and he considers that there is no reasonable prospect of a conviction and therefore there will be no prosecution. The letter can be found in the disclosure form 6A at serial 89."

9. What happened next is set out in Detective Inspector Demetriou's witness statement of 13 March 2019.

> "6. In 2018 the case was sent for a review of Mr Visagie's decision to Senior Crown Counsel at the ALGA's office, Mr Michael Hadjiconstantas, after further investigation took place by the RAF Police in 2017. The 2017 investigation did not initially involve the earlier witness statements from the 1998 investigation which were only received from office of AGLA who had kept a copy on file from the 2001 Visagie prosecution decision. Having reconsidered the prosecution decision, Mr Hadjiconstantas informed the current AGLA, Mr Stuart Howard, that having decided the original decision was wrong, he then found that there is sufficient evidence to provide a realistic prospect of conviction and that a prosecution is in the public interest.
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> 7. I have been informed by Mr Hadjiconstantas and I verily and truly believe that the AGLA Mr Stuart Howard after reviewing the totality of the investigation material, has decided that the decision of Mr Visagie not to prosecute was wrong. He then decided that there is a realistic prospect for conviction and that it is in the public interest to prosecute Mr Barber for the offences as set out in the charge sheet referred to in paragraph 8 below. Mr Howard also decided that the appropriate forum for criminal proceedings would be in the SBA(S) under SBA law, given that the United Kingdom service authorities do not intend to institute criminal proceedings."

10. Mr Barber's first submission is that his extradition would be unfair because even though some (possibly all) of the witness statements gathered in the first investigation survive, other material from that investigation has now been either lost or destroyed. The relevant passage of time relied on is that between 1998, and 2019 when the extradition request was made. There is no doubt that material from the 1998 investigation is missing, either lost or destroyed. The significance of this in terms of its qualitative impact on the fairness of extradition is very difficult to access since precisely what has been lost is unknown. The Requesting Authority has been unable to provide evidence that might explain the nature of the missing material. Mr Barber is unsighted on this matter because the investigation material from 1998 was not provided to him.

11. I must focus on whether this state of affairs is such as to render extradition unjust, either because it could reasonably be anticipated that the missing material would be relevant to one or other of the bars to extradition in Part 2 of the 2003 Act, or because I can be satisfied that without the material the requesting judicial authority would be bound to conclude that a fair trial of the charges against Mr Barber would be impossible.

12. I am not satisfied that the missing material is significant in either of these ways in this case. Given the passage of time between when it is said the offences alleged were committed and when the first investigation was conducted, whatever is missing will not include any forensic material. This much is clear from Detective Inspector Greig's investigation report dated 13 November 1998. Having regard to what is set out in that report it is likely that the statements taken in 1998 which do survive comprise much the greater part of the information gathered during that investigation. For this reason, I am not satisfied that the present case is one in which it can be said it is inevitable that a court considering the prosecution following Mr Barber's extradition would inevitably conclude that a fair trial was not possible. Charges based on allegations of historic sexual abuse are in principle capable of being fairly tried. This point was noted by Deputy Chief Magistrate Ikram in his judgment in this case. The present situation is not outside that general category. Were Mr Barber to be surrendered I consider that the court hearing the case could and would ensure a fair hearing of the charges against Mr Barber.

13. Further it seems to me unlikely that there would be anything in the missing material likely to bare materially on the existence of any bar to extradition. Judge Ikram was satisfied that the section 84 requirement that there be a sufficient case to answer was met. I can see no error in that conclusion and it is not a conclusion challenged in this appeal. In the circumstances of this case the fact that some of the information gathered in the first investigation is now unavailable does not indicate that any other potential bar to extradition could be made out.

14. Mr Barber's alternative submission on section 82 rests on the decision of 5 September 2001 that he should not be prosecuted. That decision must have been taken, by the then AGLA, following due and careful consideration. It would be oppressive now the better part of 20 years later, to order extradition.

15. Judge Ikram rejected this submission. He placed weight on the gravity of the charges that Mr Barber now faces. He continued as follows:

> "9. I observe that I have not heard any evidence from [Mr Barber] as to the oppression or injustice that he says he would suffer if he were returned to face trial. I have no idea of the impact of the notification that he would be prosecuted in 2001. I do not know exactly what was said, nor any consequences. I, of course, even without his evidence, observe his own age and the inevitable challenges of allegations of such age.
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> …
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> 11. I note that [Mr Barber] has been carer for his partner [CN]. She gave evidence on the effect on her and I also heard from Charlotte Finlayson-Jackson, a specialist occupational therapist. That said, as far as section 82 is concerned, I agree with Mr Allen, that it is focused on the injustice and oppression on [Mr Barber] rather than impact on others.
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> 12. I also bear in mind the gravity of the allegations. I have not been persuaded by [Mr Barber] that extradition would be unjust or oppressive by reason of the delay."

16. I consider this evaluation of the matter was wrong. The September 2001 decision was unqualified. It was taken by the relevant prosecuting authority, the AGLA himself. The prejudice consequent on any reversal of that decision is self-evident. In 1998 Mr Barber faced serious accusations. They were investigated at that time. There is no reason to suppose that the investigation was materially incomplete. The evidence produced was carefully considered and Mr Barber was informed he would not be prosecuted. After a period of almost 20 years that decision was reversed.

17. In the meantime, Mr Barber has come to care full-time for his partner, CN. They have been together since 1996. She suffers from rheumatoid arthritis and osteoarthritis, and since 2000 her health has progressively deteriorated. She is now 80 years old. In her own evidence CN explained how she is now completely reliant on Mr Barber's assistance. I have also been provided with a copy of the expert report dated 10 November 2019 that was before Judge Ikram. That report, prepared by an occupational therapist, corroborates CN's evidence, explaining the high level of support that she requires, and is presently provided for by Mr Barber. Judge Ikram concluded that the effect on CN were Mr Barber to be extradited was a matter apart from anything that could be relevant to oppression for the purposes of section 82 of the 2003 Act. His conclusion was that any adverse effect on CN could not oppress Mr Barber. I disagree. It is clear to me that the care and support Mr Barber provides for CN is his manifestation for his love and affection for her. It would be oppressive for him to be prevented to continuing to provide that care. In any event, I am not convinced that the notion of oppression for the purposes of section 82 of the 2003 Act is such as to exclude the effects of extradition on persons other than the requested person, in an appropriate case.

18. When it comes to deciding whether extradition now would be oppressive, it is highly significant that no reasoned explanation has been given for the reversal of the 2001 decision not to prosecute. No such explanation is readily apparent from comparison

of the witness statements taken in 1998 and those taken in 2017. There is no specific evidence in these extradition proceedings to explain why the September 2001 decision has been reversed. All that is available is the bare statement that the present AGLA, Mr Howard, has concluded that the September 2001 decision was "wrong" (see the witness statement of Detective Inspector Demetriou, set out above).

19. The material part of Judge Ikram's judgment was as follows.

> "4. The allegations are now up to 43 years old. Attitudes within the legal system towards sexual offending have changed in more recent years. The criminal justice system has made a significant shift in terms of assessment of complainants' credibility and a rejection of myths that have previously been prevalent. It is not either uncommon, nor unfair for there to be an evidence review, even many years after the events. Many sex offences come to light many years after the events."

While I do not disagree with any of these observations as matters of general principle and general experience, these points do not suffice in the circumstances of this case. The central matter raised by this request for extradition is not that the allegations are over 40 years old; rather it is that having been investigated in 1998 Mr Barber was told there would be no prosecution. So far as that decision is concerned, there is nothing to suggest the decision not to prosecute was the consequence of "myths … previously … prevalent". When in 1998, the complaints were evaluated the complainants were not disbelieved; Detective Inspector Grieg's opinion was that the complaints were genuine. The decision not to prosecute must have been taken on that basis.

20. This highlights the problem with the Judge's conclusion. In the absence of any reasoned explanation for the 2017 decision to prosecute, the court can only speculate on what the reasons for that decision might be. The possibility that the reason for the new decision might have stemmed from a change in prosecutorial temperament between 1998 and 2017 is no answer to Mr Barber's submission in this case. A prosecutor's responsibilities when deciding whether or not to prosecute are very weighty indeed, particularly when, as here, the allegations are grave. Decisions whether or not to prosecute are solemn events. When, as in this case, a suspect is told there will be no prosecution because there is no reasonable prospect of a conviction, the suspect will, quite reasonably, rely on that as bringing matters to a close. The reversal of that decision, after the passage of many years, will be an exceptional course resting, for example, on the emergence of significant further evidence or something else of the like (the class of such matters is not closed). Absent such circumstances, there is a strong public interest that decisions not to prosecute should be adhered to. Suspects such as Mr Barber, informed there will be no prosecution, ought not to be held hostage to fortune. I do not underestimate the seriousness of the offences for which extradition is sought. But the seriousness of the charges means a decision to prosecute now is of enormous importance not only to the complainants, but also to Mr Barber.

21. For these reasons I accept the submission that it would be oppressive to extradite Mr Barber. This appeal must therefore succeed.

(2) Extradition a disproportionate interference with article 8 rights.

22. Given my conclusion on the section 82 ground of appeal it is not necessary for me to set out my decision on the article 8 ground of appeal at length. Judge Ikram addressed this part of the case before him applying the well-known *Celinski* balance sheet approach (see *Polish Judicial Authorities v Celinski* [2016] 1 WLR 551 per Lord Thomas CJ at paragraphs 14 – 17). In this appeal, the submission for Mr Barber does not concern Judge Ikram's general approach rather, it is directed to his assessment of the competing considerations and his conclusion that overall the interference with Mr Barber's article 8 rights, and CN's article 8 rights, was justified.

23. It is not for this court on appeal simply to second-guess the decision of the court below on a proportionality issue. A conclusion on a proportionality issue may only be reversed on appeal if the appeal court is satisfied that the decision was wrong: see per Lord Neuberger in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1WLR 1911 at paragraphs 90 to 94. Before deciding that a conclusion on a proportionality question is wrong, an appeal court must also carefully reflect on any advantages the first instance judge may have had from seeing and hearing witnesses in the case.

24. Having all this well in mind I am satisfied that Judge Ikram was wrong to conclude that extradition would be a justified interference with Mr Barber's and CN's article 8 rights. The public interest that the United Kingdom honour extradition arrangements it has made is strong, particularly where the offences to be tried are serious. However, in the circumstances of this case, that interest is outweighed taking account of the September 2001 decision not to prosecute, the passage of time since that decision, the unexplained reversal of the September 2001 decision, and the very significant impact of extradition which would render Mr Barber unable to continue to care for CN, and leave CN without the benefit of that care. I place particular weight on the September 2001 decision and the particular distress and harm that reversal of that decision after some 18 years will cause to Mr Barber and CN. Taken together, the matters I have listed establish a compelling case that extradition would be an unjustified interreference with their Convention rights.

25. In the premises, the article 8 ground of appeal also succeeds.

C. Disposal

26. For these reasons Mr Barber's appeal is allowed and the order made under section 87 of the 2003 Act will be set aside.