Neutral Citation Number: [2024] EWHC 2797 (Admin)

Case No: CO/3665/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2024

Before :

Mrs Justice Cutts DBE

- -

Between :

Mickael HISCOX	**Appellant**
- and -	
Public Prosecutor to the Regional Court of Lille, FRANCE	**Respondent**

- -
- -

Nicholas Hearn for the **Appellant**
Kiera Oluwunmi for the **Respondent**

Hearing date: Tuesday 29th October 2024

- -

JUDGMENT

The Honourable Mrs Justice Cutts DBE :

Introduction

1. This is an appeal against a decision of Clarke DJ (the "DJ") made on 28 September 2022 to order the appellant's extradition to France. His extradition is sought pursuant to a "conviction" warrant (the "AW") issued by the Deputy Public Prosecutor of the Regional Court of Lille on 6 August 2019, and certified by the National Crime Agency on 15 January 2022.

2. The AW is based upon the default judgment of the Criminal Court of Lille dated 18 February 2004, resulting in a sentence of four years imprisonment, all of which remains to be served. The sentence was imposed in relation to two offences which

are said to have taken place on 12 May 2001. In summary the appellant is said to have been complicit in the importation of 1.96kg of cocaine into France.

3. The single ground of appeal is that extradition would be oppressive by reason of the passage of time and therefore barred by section 14 of the Extradition Act 2003 (the "Act"). The DJ was wrong to find otherwise.

Information before the DJ at the extradition hearing

The AW

4. The AW at box D confirmed that the appellant did not appear in person at the trial resulting in the decision. He was not personally served with the decision but would be so served without delay after the surrender and would be told of his right to a retrial or appeal in which he has the right to participate and which allows the merits of the case, including fresh evidence to be re-examined and which may lead to the original decision being reversed. In this case the initial judgment will be overturned, and he will be tried again for the facts.

5. At box E the offences are particularised. It is alleged that the quantity of cocaine was brought into France by a man named Colin Jones on 12 May 2001. It had been entrusted to him by the appellant and Paul Hiscox (the appellant's brother) in Amsterdam. Jones admitted to importing the drugs on their behalf. In a judgment of 18 February 2004, the Criminal Court of Lille found the appellant guilty in absence of complicity in the unauthorised import of prohibited goods.

Further information

6. Further information from Louise Chretien, deputy public prosecutor, dated 22 July 2022 stated the following:

   i) The appellant was not arrested for the offences within the AW.

   ii) He did not appear before the court in relation to the case and did not plead guilty.

   iii) The appellant never went to France. He gave the drugs for importation to an accomplice for importation. He had therefore never been arrested and had always been free.

   iv) A first arrest warrant was issued by the judge on 27 November 2001, the European arrest warrant procedure did not exist. The EU framework decision of 13 June 2002 was transposed into French law by the law of 9 March 2004. The Court of Lille confirmed this arrest warrant in its sentencing judgment dated 18 February 2004 and a request for the release of Schengen had been made before the entry into force of the law of 9 March 2004, therefore according to the law applicable at that date.

   v) A first European arrest warrant was issued on 17 October 2005 and again on 1 June 2007. Several exchanges for clarification took place until November 2007. On 14 November 2007 Paul Hiscox was arrested under the EAW but the appellant, who was present, was not arrested as the UK authorities requested corrections to the EAW. The corrected EAW was sent several times in December 2006 and again on 21 May 2008 at the request of Interpol London due to the return of the appellant to London from Bangkok. Despite the sending of these documents and the requests made by Interpol

London, the appellant was never arrested. I cannot provide you with any explanation as to why Interpol London did not arrest him. A final EAW was drawn up and sent by the prosecutor on 6 August 2019 to relaunch the procedure which had never led to an arrest despite the documents being sent.

vi) Paul Hiscox, the appellant's brother, was arrested by the UK authorities on 14 November 2007 in the same proceedings as the appellant, for the same facts and under the EAW issued in the same conditions. The appellant was present at his brother's address.

vii) The appellant was not under any restriction to stay within the jurisdiction of the Judicial Authority.

viii) The appellant was not under any obligation to notify the relevant authorities of any change of address.

The appellant's evidence

7. No issue was taken with any of the appellant's evidence. In summary, and in so far as is relevant, the appellant (who is now 48 years of age) lives at an address in Port Talbot and has done so since he was aged 7 years. He has a criminal record in the UK spanning 1988 to 2013. He stopped offending in 2013 by addressing the alcohol issues which had led to much of it. He sought one to one counselling and had stayed out of trouble thereafter.

8. He has been unable to work for much of his life due to a combination of mental health issues and problems with his back. He was abused as a child which has led to depression. He damaged his back playing sport in 2006. He said he is always in

pain and will have shooting pains in the back of his legs, pain in his knees, his spine and has sciatica problems. He is on medication for both conditions.

9. He has two sons aged 17 and 23 at the time of the extradition hearing with whom he has regular contact and a young granddaughter. He is not financially responsible for them. He does not provide care for anyone.

10. With regard to the instant proceedings the appellant said that he recalled police coming to his home in 2007/2008 looking for his brother. The police told them they were not looking for him but for his brother. His brother was the subject of extradition proceedings in France. He was arrested and extradited there. He was acquitted of any wrongdoing. The appellant understood that this was due to a lack of evidence. His brother told him on his return from the UK that the case was against them both at that stage but had been thrown out. As far as the appellant was aware the proceedings had concluded. He forgot about it until his arrest in May 2022.

11. The appellant was in prison in Cardiff when the original sentence was imposed. He had always resided at the same address. It would not have been difficult for the authorities to find him.

12. In the 21 years since the alleged commission of the offences and the execution of the EAW the appellant had travelled internationally many times. No one had ever indicated that he was wanted for any offence.

13. Asked to compare his life now with when the offence was said to have occurred, the appellant said that was 21 years ago when he was about 25 or 26. His first child had been born then and he used to drink all the time and get into trouble. Now he is a different person altogether.

The findings of the DJ

14. On the evidence the DJ found that the appellant was convicted in his absence in 2004. He was not present in France when the offences were committed nor was he present for any part of the court proceedings which led to his conviction.

15. There were a number of delays in issuing the final AW. The detail in relation to that delay was to be found largely in the further information. There was an absence of information as to why the authorities in the UK did not arrest the appellant. Clearly his brother was arrested in 2007. It seemed from the further information that there was a warrant in place but there seemed to have been outstanding corrections to the AW at the time requested by the British authorities which may explain why he was not arrested then.

16. There is no suggestion that the appellant is a fugitive and she could not make such a finding.

17. The appellant is a British national who has lived in the UK for all of his life. He has lived in Port Talbot since he was 7 years of age. He has two grown up sons who are not dependent upon him. He has a close relationship with both sons and his granddaughter.

18. The appellant has some health problems as already outlined.

19. The appellant has worked for large parts of his adult life although lost work during the pandemic and has been in receipt of benefits since.

20. The appellant has a lengthy list of previous convictions including for serious offences. His last conviction was in 2013.

21. The DJ correctly identified the law and the test to be applied on an application that extradition was barred by s.14 of the Act. In terms of delay at [50] she said:

“ Looking at the delay and the reasons for it, some of it can be explained and some cannot. It appears that for a considerable period of time there were corrections required to the AW. I do not know the reasons behind that but there was clearly discourse taking place between the French and British authorities. It then seems that once the corrections were complete, in about 2008, the [appellant] was not arrested and there appears to be no explanation for that. The appellant says he has lived at his address since he was 7. That was the address that his brother was living at when he was arrested. It is surprising to say the least that the [appellant] was not arrested. The blame for that delay, in the absence of any other information must lay at the door of the British authorities. When one looks at the PNC, after 2008, the [appellant] appeared in UK courts on two occasions. On both occasions he was subject to supervision in some form or other by the Probation Service and so his whereabouts were not unknown.”

22. The DJ then set out what had happened in the appellant’s life since the alleged offences were committed and he was at large. These were that he had a second child; he now has a grandchild; he has been working for large parts of his life; he has stopped offending with his last offence in 2013; he has tackled his problems with drink and his health has deteriorated. He has back problems, is often in pain and has depression.

23. The DJ found there had been considerable unexplained delay in this case with a great many years since the appellant became unlawfully at large and a greater

number of years since the offences were committed. The appellant was a far younger man back then and committing offences regularly. He is now a man who has stopped offending and is a family man with some health issues.

24. The DJ then reminded herself that the test for oppression due to the passage of time is a high one and is not easily satisfied. Hardship is not enough. A causal link must be established, and she had to bear in mind the gravity of the offending.

25. The DJ concluded at [55]:

> *"If this were a case in which the offending was less serious, the passage of time and the circumstances of the [appellant's] life may now mean that extradition would be oppressive. If the offending in this case, being as serious as it is, was balanced against many other factors present in the [appellant's] life now such as people being dependent upon him (as one example) that may well mean that it would be oppressive to extradite him. However, in this case, when considering the gravity of the offending as against the circumstances as they are now I do not find that it would be oppressive to order his extradition. It will lead to hardship and may seem unfair but it is not oppressive."*

After the hearing and before judgment

26. Following the hearing at the court below and before the judgment was handed down the respondent sent an additional statement dated 7 September 2022 to the DJ. It is common ground that this statement was sent by the CPS as part of their duty of candour rather than as additional evidence. It is conceded by the respondent that this was not made clear. The statement was from Mr Barton, a G5 Extradition Officer of the NCA, in which he gave further information about the

reasons for the delay in the appellant's arrest. Mr Barton gave the following chronology:

i. On 14 November 2007 Interpol London confirmed to Interpol Paris that Paul Hiscox had been arrested and confirmed that his brother, the appellant, who was also wanted in France, was also at the same address. The appellant was not arrested as the European arrest warrant provided by Interpol Paris had not been certified because it required certain amendments.

ii. An amended European arrest warrant was requested from Interpol Paris on 14 November 2007 and was chased on 28 November 2007.

iii. Communication between Interpol Manchester and Interpol Paris continued intermittently until 2010 with Interpol London always chasing copies of the amended European arrest warrant.

iv. On 10 September 2010 border alerts in the UK showed that the appellant travelled to Corfu in Greece. In response final and further chasers were sent to Interpol Paris requesting the amended European arrest warrant. Shortly after this, on a date which is not exactly known, the appellant was removed from Interpol I-24/7 circulation, indicating that he was no longer sought through Interpol channels and, in response, the PNC and borders circulations in the UK were deleted.

v. Due to a loss of records relating to SIRENE following the UK's departure from the European Union, all data pertaining to the period between 2011 and 2019 cannot be confirmed.

vi. In 2019 the appellant was recirculated by Interpol Paris and in 2021 the UK identified that he was likely to be living back in this jurisdiction and requested either a European arrest warrant or a newly issued warrant under the Trade and Co-operation Agreement. On 13 December 2021 a European arrest warrant was received and was certified the following month on 15 January 2022.

vii. The warrant was issued to the National Extradition Unit on 15 January 2022 and the appellant was arrested on 16 May 2022.

27. Following receipt of this statement the DJ added a "postscript" to her judgment in the following terms:

" After this judgment had been prepared but before it was handed down, I received an email from the reviewing lawyer at the CPS attaching a statement from the NCA dealing with delay. I have had no substantive response on behalf of the RP about this statement or whether I should admit it into evidence. However it seems to me that no leave was sought to adduce this evidence and no indication given that it may be forthcoming. Given the late provision of it and given the circumstances, particularly given the findings I have made in relation to section 14 which mean that this statement would not take this matter any further, I am not going to admit it into evidence."

The legal framework

28. There is no dispute as to the law which applies in this case.

29. Section 14 of the Act relates to the relevance of the passage of time and states:

"A person's extradition to a category 1 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) *[...]*

b) *become unlawfully at large (where he is alleged to have been convicted of [the extradition offence]"*

30. The House of Lords in *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 made clear that a fugitive who had brought about the delay could not then claim that it was unjust or oppressive for him to be extradited. Lord Diplock considered that 'unjust' was 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. There is room for overlapping and between them they would cover all cases where to return him would not be fair. Lord Scarman referred to a requested person who is not a fugitive potentially having "a sense of security from prosecution" by reason of the delay.

31. The court in *Zengota v Poland* [2017] EWHC 191 (Admin) summarised the law in respect of oppression in the context of section 14. The following principles apply:

   i. Oppression is not easily satisfied; hardship is not enough.

   ii. The onus is on the requested person to satisfy the court that it would be oppressive to extradite him by reason of the passage of time.

iii. The requested person must establish a causal link between the passage of time and its oppressive effects through the change of circumstances.

iv. The gravity of the offence is relevant to whether changes in the circumstances of the requested person have occurred which would render his return to stand trial oppressive.

v. If the requested person is a fugitive he cannot take advantage of oppression save in the most exceptional circumstances.

vi. The requesting authority must establish that the requested person is a fugitive to the criminal standard.

vii. Delay brought about other than by the requested person is not generally relevant since the focus is the effect of the events which would not have happened, for example a false sense of security.

viii. It is only in borderline cases, where the accused himself is not to blame, that culpable delay by the requesting state may tip the balance against extradition.

32. In a conviction case the passage of time runs from the point at which the requested person became unlawfully at large, notwithstanding the fact that that he may be entitled to request a retrial upon surrender. *Konecny v Czech Republic* [2019] UKSC 8.

The parties' submissions

Appellant

33. It is common ground that the appellant is not a fugitive and is therefore entitled to rely upon the passage of time as a potential bar to his extradition. In this case that runs from 18 February 2004 and is thus a period of 20 years. It is common ground that the appellant is not responsible in any way for that delay.

34. The DJ correctly identified the aspects of the appellant's life which have changed since February 2024. However, it is submitted that her overall evaluation was wrong and these crucial factors should have been weighed so significantly differently as to make the decision wrong. See *Love v USA* [2018] EWHC 172 (Admin) at [26]

35. Mr Hearn, on behalf of the appellant, acknowledges that the offences in this case are serious and concedes that, had the extradition request been made promptly following conviction, there could have been no bar to extradition. But that is not the case here. He submits that this is an extremely unusual case in the context of extradition cases by reason of the combination of an extremely lengthy delay, the fact that the appellant is not a fugitive and the significant changes in his life since 2004.

36. The DJ acknowledged a long period of delay in her judgment but the information regarding the reasons for it were not before her at the hearing. The statement of Mr Barton did not reach her until she had drafted her judgment. It is clear from the postscript to her judgment that the DJ misunderstood the import of it. Without assistance from either the respondent or the appellant as to its status she understood the respondent was seeking to adduce it as fresh evidence in support of their case. In fact, the statement was sent to the judge as part of the respondent's duty of candour as potentially undermining their case. Mr Barton's statement underlines

that there was culpable delay in this case which was largely down to the requesting authority.

37. It is clear from the statement of Mr Barton that the case could easily have been progressed at the time the appellant's brother was arrested. The appellant was present at that arrest. His whereabouts were known to the authorities. He has remained at that same address throughout. The UK authorities made several requests for an amended warrant which were wholly ignored. The appellant's name was then removed from the Interpol list of wanted people.

38. The sheer length of the delay makes this a borderline case when considered alongside the seriousness of the offending. Whilst the offending clearly is serious it is right to point out that it is not an offence of violence, no victim has been deprived of their right to have their case heard.

39. The appellant's life has changed significantly in the intervening years. He has a significant criminal record which came to an end in 2013 since when he has turned his life around. He addressed his long-standing alcohol problem which had led to most of his offending behaviour. That was a significant achievement. It would be wrong to be plucked from recovery to face extradition to serve a four-year sentence for offences said to have taken place 20 years ago. This would be more than unfair. It would be oppressive. In addition, the appellant has recognised health issues and a close relationship with his family.

Respondent

40. Miss Oluwunmi for the respondent accepts that lengthy delay occurred in this case. Although she drew back from conceding that it was culpable, she did concede that

something went wrong in the proceedings which is unexplained and that the procedure in this case is not the way that extradition should work.

41. She submits, however, that it is the impact of the delay in this case which is of consequence. The DJ applied the correct test in that regard, conducted a full evaluation and her ruling cannot be said to be wrong.

42. The DJ considered the gravity of the offending as against the appellant's circumstances as they are now. She found that whilst his extradition would cause hardship and may seem unfair it would not be oppressive.

43. It is accepted that the information that the appellant's name was removed from Interpol circulation contained in Mr Barton's statement was not before the DJ when she concluded that the British Authorities were at fault for the failure to arrest the appellant between 2010 and 2019. However, even if the DJ had found that the fault of the delay lay with the French rather than the British authority due to the removal of the appellant from Interpol Circulation, this would not necessarily have rendered extradition oppressive.

44. Nothing in the NCA statement alters the nature or seriousness of the offending nor has any fresh evidence come to light in relation to the appellant's circumstances as relevant to oppression. Notwithstanding the lengthy delay this was not a 'borderline case' such that culpable delay on behalf of the French Authorities (as distinct from delay caused by the UK authorities) could tip the balance. Even if the DJ ought to have found that the delay was culpable on the part of the French JA, her finding that extradition would not be oppressive remains correct.

Conclusion on oppression

45. I am quite satisfied in this case that there was culpable delay and, on the basis of the statement from Mr Barton, that the responsibility for that delay is that of the requesting Judicial Authority. The appellant is not in any way to blame for it. It is apparent that at least from 2007, when the appellant's brother was arrested for the same offending, the French judicial authority has known of the appellant's whereabouts. He has never moved from the address where he was present and witnessed his brother's arrest. There were unexplained issues with the warrant for the appellant. The UK authorities chased for the amended warrant intermittently for three years with no response. In 2010 the appellant's name was removed from Interpol Circulation. It would seem that this was by the French Authorities.

46. There is no statute of limitations in relation to extradition and, as said by Julian Knowles J in *Kopan v Regional Court in Czestochowa, Poland* [2024] EWHC 2229 (Admin) at [12] there is no "cut off" point beyond which extradition will, *ipso facto,* be unjust or oppressive. However, he acknowledged in that case that the nearly 20 year delay in that case was, if not unprecedented, certainly very long indeed and in his experience, at the outer reaches of the sort of time periods for alleged extradition offending.

47. The words of Lord Henry in *R v Secretary of State ex parte Patel* [1995] 7 Admin LR 56 at pages 71-72 are apposite in this context:

" 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 inured to delay. So too laymen associate the law with delay and their expectation of it may harden them to the fact of it. So the years trip off the tongue and so we reach a

position where a citizen may be surrendered to face trial in another state for matters at least nine years stale without examination of the reasons for the length of that delay or the consequences of it."

48. It is for the appellant to satisfy the court that extradition would be oppressive due to the passage of time. That is a high bar. I acknowledge that the court should hesitate before disturbing the DJ's value judgment as to whether it would or would not be oppressive to extradite the requested person and recognise that district judges are far more familiar with these questions and better placed through experience to judge on what side of the line a case falls. In this case the DJ correctly identified the aspects of the appellant's life which have changed since February 2004. I am however entirely satisfied that she should have weighed crucial factors so differently as to make her decision on oppression wrong.

49. The NCA statement from Mr Barton should have been available at the extradition hearing. When it was sent to the DJ there should have been an explanation from the respondent as to its relevance and status. Those acting for the appellant should also have assisted the DJ who was left to work it out for herself. I agree with the appellant that, without that assistance, from the postscript to her judgment the DJ appears to have misunderstood the status of the NCA statement. It was disclosed as potentially undermining the respondent's case and should have been considered in that context. There was additional material in the statement in particular that the appellant's name had been removed from Interpol circulation. It became clear that the reason for the delay lay at the requesting Judicial Authority's door. That does not mean of itself that extradition would be oppressive but if the culpability lies at

the door of the requesting rather than the British authorities that is a relevant factor when considering oppression which the DJ should have taken into account.

50. The NCA statement reinforces my view that the judge should have decided the question of oppression differently. These were serious offences but this was an inordinately long delay. To put the period of 20 years into perspective one only needs to consider the changes in one's own life in that time to realise how long that is in real terms. In the appellant's case in that time he had put his significant record of offending behind him. It should not be underestimated how difficult it is for those with addiction to break free of it and turn their lives around. I accept the appellant's submission that this was a significant achievement resulting in the appellant leading a law-abiding life since 2013. The appellant has some health problems and has a settled family life in the UK.

51. Notwithstanding the seriousness of the offences, these features of the appellant's life when set against the delay of 20 years for which the respondent is wholly and culpably responsible make it in my judgment oppressive to order his extradition. It is relevant that during those years he had every right to think that the authorities were not seeking his extradition, particularly as his brother was arrested in his presence when he was not and returned having been acquitted. For all he knew his brother was right that this was an end to it. I find that the DJ should have decided the question of oppression differently and that her conclusion was wrong.

52. For these reasons I allow the appeal and order the appellant's discharge.