



Neutral Citation Number: [2024] EWHC 3275 (Admin)

Case No: AC-2024-LON-001697

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2024

Before :

Mrs Justice Thornton DBE

Between :

RICHARD JOHN PAYNE

- and -

**GOVERNMENT OF REPUBLIC OF SOUTH
AFRICA**

Applicant

Respondent

Ben Cooper KC and Mary Westcott (instructed by **Sperrin Law**) for the **Applicant**
Adam Payter (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: **27 November 2024**

Approved Judgment

This judgment was handed down remotely at 11am on 17 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE THORNTON DBE

Mrs Justice Thornton DBE:

Introduction

1. The Applicant is a 55-year-old British citizen who previously lived and worked in South Africa. His extradition is sought by the Respondent to stand trial alongside 15 other co-defendants for 258 offences including racketeering, fraud, corruption and money laundering between 2006 and 2010. The extradition request was issued on 4 November 2022 and certified by the Secretary of State on 8 November 2022. The Applicant was arrested on 7 December 2022 and has been held in custody since.
2. A two-day extradition hearing was held in February 2024 before the District Judge. The case was sent to the Home Secretary on 14 March 2024, who ordered the Applicant's extradition on 6 May 2024.
3. Four issues were advanced by the Applicant before the Judge, who dealt with and dismissed each of these in turn in his written reasons. These were: (i) s. 82 of the Extradition Act 2003 (fugitivity and the 'passage of time' bar), (ii) Article 3 ECHR (real risk of torture inhuman or degrading treatment or punishment), (iii) Article 8 ECHR (disproportionate interference with the right to private and family life), and (iv) abuse of process. With the exception of ground (iii), the same grounds were relied upon on appeal.
4. At the hearing, the District Judge received extensive documentation and heard evidence from both the Applicant and Respondent, much of which has also been seen by this Court. These included (but are not limited to): expert reports by Dr. Alan Mitchell concerning prison conditions in South Africa; assurances about the conditions in which the Applicant will be detained in the Johannesburg Correctional Centre ("JCC") and a report from Mr Anton Katz SC (a South African lawyer involved in litigation in that jurisdiction concerning the validity of issued extradition requests). A helpful summary of the live evidence heard at the trial is set out in Annex 1 of the judgment, spanning some 50 pages.
5. The test on appeal is whether the District Judge ought to have decided an issue under challenge differently leading to discharge (s104(3) Extradition Act 2003) or whether fresh evidence would have led the District Judge to order discharge (s104(4)). Put simply, the test is whether the judge got the decision wrong (Love v USA [2018] 1 WLR 2889 at [26]).
6. Permission to appeal was refused on the papers by Sir Peter Lane on 23 September 2024. The Applicant's renewed application was heard by this Court on 27 November 2024, over the course of three hours, during which I indicated my preliminary view that I would grant permission only in respect of ground (iv). These are my written reasons in which I:
 - i) Set out the developments since the decision of the District Judge which have confirmed my provisional view that ground iv) (abuse of process) is arguable; and

- ii) Explain why I have refused permission in relation to the other grounds (Article 3 ECHR (real risk of torture inhuman or degrading treatment or punishment) and Section 82 (fugitivity and passage of time)).

Abuse of process – permission to appeal granted

7. Before the District Judge, the Applicant contended that extradition is an abuse of process because the extradition request issued by the National Prosecuting Authority (“the NPA”) in South Africa is invalid. Submissions focussed on two conflicting South African authorities on the point - Spagni v Acting Director of Public Prosecutions, WC and Others, unreported (Case No. 17224/2021, delivered on 6 April 2022) and the first instance decision of Schultz v Minister of Justice and Correctional Services & Others (76/2023) ZASCA 77 (23 May 2024). The judge considered a report from Mr Anton Katz SC and heard evidence before rejecting the submission advanced on behalf of the Applicant that the first instance decision of Schultz would be overturned on appeal. He concluded the Respondent had established to the criminal standard that the request was validly issued and no abuse of process arises (¶213 & 214).
8. However, subsequently, on 23 May 2024, the Supreme Court of Appeal of South Africa handed down judgment in Schultz overturning the decision at first instance and concluding that the power to request the extradition of a person from the United States to stand trial in South Africa vests only in the executive authority of the Minister of Justice and Constitutional Development. This Court is told that the NPA has applied (out of time) for leave to appeal the decision. In addition, the Applicant has filed a motion in the High Court of South Africa seeking a declaration that his extradition request is unconstitutional and invalid. The Respondent resists the motion and seeks to stay it pending the determination of its appeal in Schultz.
9. In reflection of the dynamic legal landscape in South Africa in this regard, both sides applied to adduce fresh evidence in the run up to the renewed permission hearing on 27 November, as follows:
 - i) By an application dated 12 November 2024, the Applicant applies to adduce a letter from Mr Kessler Perumalsamy, the South African advocate representing the Applicant in the challenge to the extradition request in the South African High Court as to the legal status of Court of Appeal’s decision Schultz in light of the out of time appeal against the decision. He opines that the decision is not suspended and the Applicant’s extradition request is therefore to be treated as invalid.
 - ii) By an application dated 20 November 2024, the Respondent applies to adduce a letter from Mr MA Chauke, Director of Public Prosecutions (Gauteng Local Division: Johannesburg) responding to Mr Perumalsamy’s letter. Mr Chauke explains his view that the extradition request for Mr Payne remains valid notwithstanding the decision in Schultz.
 - iii) By an application dated 25 November 2024 the Applicant applies to adduce a report by an independent South African attorney (Mr Marcus Gilbert SC) considering various aspects of South African law in relation to the legal status of Schultz, the effect of the NPA’s application to appeal that decision, and to respond generally to Mr Chauke’s letter. In summary, Mr Gilbert view is that

the Supreme Court of Appeal's decision in Schultz remains binding authority unless and until it is overruled by the Constitutional Court. It is accordingly binding authority for the proposition that both incoming and outgoing extradition requests must be made by the Minister and therefore Schultz is binding on the present case.

10. I have considered the legal developments in South Africa since the decision of the District Judge and I have considered the fresh evidence provisionally to see whether it is capable of making a difference. Having done so I have reached the conclusion that it is arguable that, had the fresh evidence been available to the judge, it would have led him to decide the question of abuse of process differently and to order discharge (s104(4) Extradition Act).

Article 3 ECHR – permission to appeal refused

11. The Applicant's challenge under Article 3 focusses on the assurances about the prison conditions in which the Applicant will be detained on extradition. Annex 1 of the judge's ruling lists the assurances issued by the Respondent. Five assurances relate to the location of detention, accommodation and space. Eight assurances relate to conditions and activities. Six assurances relate to healthcare. Two assurances relate to prisoner violence.
12. Annex 1 also lists the evidence before the judge which included:
 - i) Evidence on behalf of the Respondent comprising affidavits from: the Director of Public Prosecutions in the Guateng area; the acting National Commissioner of Correctional Services; the Guateng Regional Commissioner for the Department of Justice and Correctional Services; the Department of Justice Manager of Healthcare Services for the Johannesburg area; and a retired judge of the Constitutional Court (Judge Cameron) [Annex I ¶2]. Judge Cameron visited the JCC where the Applicant will be detained [Annex I ¶14-17].
 - ii) Evidence on behalf of the Applicant comprising two reports from Dr Mitchell, who was described by the judge as an acknowledged expert on prison conditions and President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Dr Mitchell visited the Johannesburg Correctional facility, having been permitted to do so by the Respondent [Annex I ¶20-27]. Following concerns expressed in his first report, further assurances were provided in response [Annex I ¶18-19]. Dr Mitchell also gave oral evidence summarised by the judge at [Annex I ¶28-57] to the effect that there is a real risk of the Article 3 rights not being respected.
13. The judge summarises the legal framework, which was common ground and the submissions before him before setting out his assessment over 21 pages of his ruling [¶146-182]. The main issues under consideration before him were the availability of cell heating and natural light and the potential for isolation. The judge concluded that the assurances given were reliable and provide particulars of the material conditions that the Applicant will experience, sufficient for the Court to assess whether there is a real risk of an Article 3 violation [¶180-181]. Whilst the conditions on remand will be austere and the Applicant's mental state may deteriorate to some extent, the assurances

allay any concerns that there is a real risk of violation of Article 3 ECHR in the event of extradition [¶ 182].

14. On behalf of the Applicant, Mr Cooper's challenge to the judge's assessment was detailed covering 8 pages of written submissions in the Applicant's Skeleton Argument and which are not repeated here, but to which I respond below.
15. I am not however persuaded that there is substance to Mr Cooper's submissions. The judge understood the need for careful scrutiny of the conditions of detention directing himself to the authority of Muršić v Croatia (2016) App 7334/13, October 20 [¶111]. His extensive summary and assessment of the evidence and submissions before him demonstrates the requisite scrutiny. He did not simply rely 'in good faith' on 'unreliable' representations by the Respondent. He was aware of the need to assess the quality of the assurances directing himself to Othman v United Kingdom (2012) 55 EHRR [¶113]. He was entitled to rely on caselaw to the effect that assurances in relation to other South African prisons have been found by the Courts to be reliable [¶121]. It is unrealistic to suggest he would not have been aware of the 'borderline' cramped cell given his detailed scrutiny, particularly given he cites the dimensions of the cell [Annex I ¶70] and relevant extracts from Muršić [¶111]. The judge repeatedly explains that he considered the assurances individually, collectively and cumulatively in his assessment [¶ 146, 179, 182]. The absence of a concrete assurance about staff numbers is not arguably material in a context where Mr Cooper's submissions about the numbers of prisoners on the unit were speculative. The evidence before the judge was that there are 12 prisoners in a wing with a capacity for 22 [Annex I ¶7(d)]. In large part Mr Cooper's submissions amounted, in essence, to the proposition that the judge should have unquestioningly accepted the evidence of Dr Mitchell given his acknowledged expertise. Other submissions were narrow in focus (e.g. that the Applicant will need to pay for a phone call) or repetition of submissions rejected by the judge (e.g in relation to the availability of natural light). The judge was entitled to take into account that materially identical assurances in relation to extradition to the same wing have been subject to judicial scrutiny and accepted (Lomas (No.1) [2024] EWHC 388). Following an oral renewal hearing in Lomas, Fordham J concluded that it was not reasonably arguable that the district judge in that case was wrong to accept materially identical assurances for a requested person – who, unlike Mr Payne, was said to be seriously unwell and highly suicidal.
16. Permission to appeal is refused on this ground.

S 82 Extradition Act - fugitivity and passage of time - permission to appeal refused

17. It was common ground, and cited by the judge at [¶94], that the test for fugitivity in the present context is whether a person has "knowingly placed himself beyond the reach of the criminal justice system concerned" (Argeseanu v Romania [2023] EWHC 513 at ¶24). The application of the principle requires a fact specific approach [¶94].
18. The judge concluded that the Applicant was a fugitive on the basis that:

"[95] ...When the RP left RSA in 2012 for Mauritius, when he last left in 2014 and when he came to the UK in 2022, on each occasion he knowingly placed himself beyond the reach of the criminal investigation. He did so in each case at least in significant part in order to keep a step ahead of the criminal investigation of which he was aware and

feared the outcome. Whilst not seeking entirely to disappear, he then knowingly sought to remain elusive and out of reach of the RSA authorities first whilst in Mauritius and then whilst in the UK. The linked themes of locational dynamism; informational deficit; and intended consequential elusiveness all feature significantly in his conduct”.

19. On behalf of the Applicant, Ms Westcott submitted that whilst it was open to the judge to find that the Applicant stayed away from South Africa, it was not open to him to find that he had left South Africa in 2012 as a fugitive. The judge’s conclusion in this regard was inconsistent with his earlier acceptance at [¶69] that the Applicant was not hiding from the authorities within South Africa and that he had not been arrested or interviewed when he went to Mauritius in 2012. Ms Westcott also submitted that the judge fell into error by focussing his findings on the Applicant’s arrival in the UK in 2022 without sufficient focus on events in 2012.
20. The difficulty with Ms Westcott’s submissions is that they focussed on dissecting the internal logic of the judge’s reasoning and/or the actions of the prosecuting authorities, without acknowledging the judge had heard evidence from the Applicant and his wife on relevant matters and had come to the view that:

“...each was seeking to mislead the court about material events and circumstances” [¶46].
21. In this regard I remind myself that an appellate court should think carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence (Celinski & Others v Slovakian Judicial Authority [2015] EWHC 1274 (Admin) at [¶21]).
22. Read fairly, the judge starts his ruling with his assessment of the evidence in relation to the arrival of the Applicant and his wife in the UK in 2022 but then turns to events in 2010/12. Having made the findings at [¶69] which are favourable to the Applicant, the judge went on to address other factual elements in issue between the parties including the Applicant’s knowledge of the criminal investigation against him when he went to Mauritius and the extent of threats faced by the Applicant which prevented him from returning to South Africa [¶71]. At [¶87] the judge concludes that:

“drawing these threads together I am sure the RP has deliberately sought to mislead this court about the full circumstances in which he left the RSA for Mauritius in 2012; the extent between 2012 and 2022, of his awareness of the criminal investigation into his activities and his reasons for staying away from RSA”.
23. In other respects, Ms Westcott’s submissions amounted, in essence, to an attempt to reopen factual findings, as to which, it is well established that “findings of fact especially if evidence has been heard must ordinarily be respected” Celinski & Others v Slovakian Judicial Authority [2015] EWHC 1274 (Admin) at [¶23].
24. I have concluded that it is not reasonably arguable that the judge was wrong to conclude that the Applicant is a fugitive. Accordingly, it is not necessary for me to go on to consider the passage of time bar.
25. Permission to appeal is refused on this ground.

Decision

26. For the reasons set out above, permission to appeal is granted in relation to ground iv) abuse of process and refused in relation to grounds (i) s. 82 of the Extradition Act 2003 (fugitivity and the 'passage of time' bar) and (ii) Article 3 ECHR (real risk of torture inhuman or degrading treatment or punishment).