Neutral Citation Number: [2025] EWHC 144 (Admin)

Case No: AC-2024-LON-001723

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 January 2025

**Before** :

**MR JUSTICE CONSTABLE**

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**Between :**

**ANNIE MELANIE LUCAS** — **Appellant**

**- and -**

**GOVERNMENT OF THE COMMONWEALTH OF AUSTRALIA** — **Respondent**

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George Hepburne Scott (instructed by Bark & Co Solicitors) for the Appellants
The Respondent did not appear

Hearing dates: 23 January 2024

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# JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Tuesday 28TH of January 2025.

**Mr Justice Constable:**

Introduction

1. The Appellant renews her application for permission to appeal the order of District Judge Clewes dated 16 May 2024. The Appellant also applies to admit fresh evidence, namely the statements of the Appellant and Roger Lucas, the Appellant's husband.

2. The Requesting State is the Government of Australia. An Arrest Warrant (AW) was issued on 13 July 2023. The Appellant was arrested on 6 September 2023 and was brought before Westminster Magistrates Court the same day. She did not consent to her extradition and the hearing was opened and adjourned. Various case management directions were given and the Appellant was remanded in custody but subsequently admitted to bail. The final extradition hearing took place over two days on 9 and 10 April 2024.

3. The AW is an 'accusation' warrant and was issued in relation to 103 offences which took place between 9.7.2007 and 3.5.2013. It is alleged that whilst working for the family business as a bookkeeper the Appellant stole or misappropriated approximately AUS $1.7million [approx. £1m GBP]. All of the above offences are punishable with a maximum sentence in the Australia of 10 years imprisonment.

4. Permission to appeal was refused by Mould J on the papers on 22 October 2024. The application to renew was served slightly out of time, but an extension of time was granted. The appeal is advanced on the basis that: (1) fugivity and oppression/injustice under 'passage of time' for the purposes of section 82 of the 2003 Extradition Act; (2) the Appellant's medical condition; (3) Article 8, in light of the delay. The Appellant seeks to introduce 3 statements by way of fresh evidence: two from the Appellant (one of which Mould J did not give permission to adduce); and one from the Appellant's husband. These statements are relevant to the Article 8 ground of appeal.

5. I thank Mr Hepburne Scott for the able and realistic way in which he developed his written submissions orally at the renewal hearing.

The Renewal Application

Ground 1: Fugivity and Oppression/Injustice – section 82

6. I take the same view as Mould J. The District Judge directed himself properly in accordance with Kakis v Cyprus [1978] 2 All ER 634. He proceeded correctly on the basis that the burden was on the respondent to prove that to be the case, to the criminal standard. The District Judge was right to identify that the essential question was whether the requested person has knowingly placed himself or herself beyond the reach of a country's legal process.

7. The District Judge heard the evidence given by the Appellant and her daughter in respect of this question. As to the evidence of the Appellant, the District Judge found (at [125]) that she was not a reliable or honest witness and her evidence was manipulative and designed to engender sympathy for her and to seek to blame others for her actions. The credibility of the Appellant was also judged against the fact that, although the skeleton argument stated that the Appellant completely denied the allegations made against her, '*in her evidence she did admit taking money. And that was clearly the understanding of her husband Roger as well. If that was not the case then their actions in handing over virtually all of their property to Steve Kemp are wholly inexplicable*.' The District Judge's assessment of the Appellant's credibility cannot sensibly be, and is not, challenged on appeal.

8. The District Judge also had significant concerns about the evidence of the Appellant's daughter and husband. Jessica Lucas gave evidence about family proceedings relating to her ex-partner's refusal to allow her son to be taken to the UK. The real issue regarding her evidence was the state of her (i.e. Jessica's) understanding about her mother's awareness of the existence of a warrant when she was stopped at Brisbane airport in December 2014 (see [62]). The District Judge found, '*I do not believe the evidence of Jessica Lucas. She was, I find, doing the very best to help her mother and that is understandable. But her account is simply not reliable. I find she knew about the existence of the warrant and her attempts to suggest that the judge in the Family case was unsure about it I do not accept*.' Given the District Judge's reference to the December 2023 letter in the papers from the Senior State Prosecutor with the Office for the DPP which, based upon the judgment in the family court proceedings, contradicted Ms Lucas' account, this was a finding the District Judge was entitled to make. As to Roger Lucas, the District Judge found, '*I did not find the evidence of Roger Lucas credible either…He says he handed over virtually all his worldly possessions to that man and was left living in a caravan. If he did, then he must have known that [the Appellant] owed Steve Kemp a very great deal of money and knew [the Appellant] would be in serious trouble if the police became involved….Either the evidence he gave about the behaviour of Steve Kemp is not true or his evidence about his own state of knowledge is not true*'. This assessment of the evidence was a matter for the District Judge and this was a finding clearly open to him to make.

9. In coming to the conclusion that the Appellant knew about the arrest warrant before boarding the plane in Brisbane, he was entitled to rely upon the Appellant's own proof of evidence which, as the District Judge states, makes it crystal clear that she was told of the warrant at the airport. Not only was this stated in her evidence, but the skeleton argument, which the District Judge was entitled to conclude can only have been prepared on the Appellant's instructions, stated, "*As they were checking in for their flight from Brisbane airport to the UK on 14.12.14 it became clear that there was a warrant out for Mrs Lucas' arrest. She was taken aside by a policeman at check-in who informed her of an arrest warrant associated with her name*." The District Judge found the Appellant's attempts in oral evidence to distance herself from these earlier statements unconvincing (at [116]), and

it is not reasonably arguable that this assessment was not open to the District Judge.

10. Perhaps in light of this, in oral submissions, Mr Hepburne Scott did not, sensibly, suggest that it was not open to the District Judge to conclude that she knew about the domestic arrest warrant which had been issued in Western Australia at the point at which she left Australia. Mr Hepburne Scott focussed, instead, on the submission that it was nevertheless reasonably arguable that the District Judge had erred in determining that the Appellant made a decision *at the airport* to put herself and then remain beyond the reach of the authorities. Ultimately, the submission boiled down to a plea to 'common sense' that the Appellant would not have made a momentous decision at the airport.

11. However, having found that the Appellant knew about arrest warrant before leaving Brisbane, the District Judge was entitled to conclude that the Appellant was '*at least partly motivated in leaving Australia to put herself beyond that country's reach, even if she had a different motive to leave Australia and one that may have been genuine*'. He was entitled to draw an inference of which he was sure, in light of all the evidence, that at the point of departure the Appellant had no intention of returning. This surrounding evidence included what she is likely to have known about the probability of charges against her given (a) whether in fact she had or had not taken money and (b) her prior interactions with Steve Kemp. It also included what happened afterwards. In this respect, the District Judge was also entitled to take into account his conclusion, in judging the Appellant's state of mind when leaving Australia, that the alternative innocent explanations offered by the Appellant and her family for her actions since departing Australia for the UK in December 2014 were entirely unconvincing: see in particular at [116], [123] and [124].

12. I conclude, as did Mould J, that the reasoning in [131] is a proper application of the burden and standard of proof. It is not reasonably arguable that the District Judge was wrong in reaching the conclusion that the Appellant was, and is, a fugitive from Australian justice.

13. As the District Judge found, the consequence of that finding is that the Appellant cannot from the moment of her departure onwards rely on the passage of time under s82 of the 2003 Act, even if there was culpable delay on the part of the Australian authorities.

14. The District Judge went on at [134] to address the question of whether extradition would be oppressive even had he found the Appellant not to be a fugitive. As stated by Mould J, his reasons for concluding that would not be the case are convincing. Not least given the sums involved and the duration over which the extraction of money took place (admitted, at least to some extent, by the Appellant in her evidence), this is a case with very high public interest. That remains so notwithstanding the delays by the Australian authorities in pursuing extradition which are undoubtable. However, the District Judge was justified in finding that (irrespective of the label of fugitive) the Appellant has been aware since setting foot on British

shores that she might at some point be called upon to account for her actions, and that there has been no change to her life since arriving that was so significant that it would be unjust to extradite her. The cases referred to at [135] to [137] supported the District Judge's reasoning, even if the seriousness of the offences in Kakis and Barci v Albania [2017] EWHC 369 was plainly greater than the Appellant's alleged offending.

15. It was not arguably wrong to decline to extradite by reason of the passage of time under section 82 of the 2003 Act.

Grounds 2: Health

16. In his oral submissions, Mr Hepburne Scott wrapped the 'health' point in with his general Article 8 submissions, for understandable reasons. For the sake of completeness, when taken in isolation under section 91 of the 2003 Act, the District Judge addressed the question whether the appellant's physical or mental condition was such that it would be unjust or oppressive to extradite the appellant to Australia in [138]-[141] of his judgment. The bar of oppression is a high one. As found by Mould J, there is no arguable error of law in his approach; nor was he arguably wrong on the material in front of him to conclude that the condition in section 91 of the 2003 Act was not satisfied in relation to the Appellant. There was no evidence that the conditions of which the Appellant complained are matters which can or will not be treated within the Australian system.

Ground 3: Article 8

*The Application to admit fresh evidence*

17. The application relates to three statements:

(1) The Second Statement of the Appellant (served just before Mould J considered the permission application on the papers). This relates some background to the Appellant's life, including abuse as a child and the loss of an infant daughter, and the perhaps inevitable emotional scars these events have caused. The statement then details the toll on her physical and mental wellbeing caused by living within her bail conditions and the stress and anxiety of the ongoing proceedings and the threat of extradition. She records that the depression recorded in her evidence before the District Judge has got worse.

(2) The Third Statement of the Appellant (re-)asserts that she is not a fugitive and that, '*the accusations against me are not only baseless but an affront to everything I stand for. I strongly maintain my innocence and am determined to clear my name*.' The statement goes on to state the emotional and physical effect on her of the ongoing proceedings, and her use of anti-depressants and alcohol. The statement also refers to the recent death of her stepdaughter and her understandable grief and the impact this has had on her mental wellbeing. Finally, she alleges that her '*estranged family in Australia poses a significant threat to my safety and wellbeing. They are untrustworthy intimidating individuals with substantial financial*

*resources. I have a genuine fear that they could use their wealth to frame me…*'

(3) The statement of Mr Lucas, in summary, explains the strain of the past 18 months, and the effect which extradition would have on his family, and in particular his mother who Mr Lucas says depends on Annie's full-time care and his support. He also speaks to the grief of losing his daughter (the Appellant's stepdaughter) at the age of 37, whose untimely death has occurred since the extradition hearing.

18. Mr Hepburne Scott on behalf of the Appellant submits that the evidence ought to be admitted on three bases.

19. The first basis is the proposition that on any appeal under Article 8, the Court should do so making its own determination on the relevant questions on the basis of '*all the material then available*'. In support of this, Mr Hepburne Scott relies upon the decision of Grigaliunaite v Lithuanian Judicial Authority [2021] EWHC 2068, in which Holman J was dealing with an appeal hearing of which (due to stays granted because of interrelated legal issues with other cases being determined in higher Courts) was taking place 3 years after the initial hearing. He said, '*I wish to stress very clearly at the outset of this judgment that I must, of course, consider the Article 8 point in the circumstances as they are now, which, indeed, includes the passage of time now since the alleged offences were committed, and also the total period of time now that this appellant has lived and made a private and family life here in England.*' He also relies upon Jagiellowicz [2023] EWHC 2751 (Admin), as well as the following quote from the Divisional Court in RT v Poland [2017] EWHC 1978 (Admin):

> "*72. In a fresh evidence, or fresh issue case, the court hearing an extradition appeal must make its own determination on the relevant questions on the basis of all the material then available*" (emphasis added by Counsel).

20. The short answer to the existence of this seemingly broad approach is that these cases are, when analysed, merely applications of the well-established approach taken in Hungary v Fenyvesi [2009] EWHC 231 (Admin) (which is Mr Hepburne Scott's second basis upon which he submits the evidence is admissible). In this case the Divisional Court considered the question of fresh evidence in an extradition appeal and stated that the well-known test from the case of Ladd v Marshall [1954] 1 WLR 1489 was applicable. Thus, in order to be admitted on appeal, such evidence must not, with 'reasonable due diligence', have been available at first instance and must also be determinative.

21. It is only once admitted pursuant to this test that it is '*then available*'. Of course, once available, it must form part of the Court's consideration on appeal.

22. Whilst the mere additional passage of time may not require the further 'evidence', a passage of time alone will rarely ever be decisive (for the purposes of admission under Fenyvesi). It is, rather, *what has happened* to the Appellant during that passage of time which may be decisive. Demonstrating this and its impact would necessitate fresh evidence. Contrary to the implication of Mr

Hepburne Scott's first basis of admission, that evidence may be adduced only if the test in Fenyvesi is satisfied. If evidence is such that the impact would be determinative of the assessment, it is evidence which is likely to be admissible under Fenyvesi. The cases relied upon by Mr Hepburne Scott do not suggest otherwise: indeed RT v Poland, for example, which expressly described itself as a '*fresh evidence'* case in the quotation above.

23. Moreover, I note that Grigaliunaite was relied upon in the recent case of Furman v Polish Judicial Authority [2024] EWHC 3062 (Admin), a renewed application at which it was also submitted (also by Mr Hepburne Scott, as it happens) that an Article 8 determination should be made on '*all the material available at the date of the* [renewed] *appeal*'. Linden J, t at [9]-[10], observed as follows:

> "*Mr Hepburne Scott submits, relying on [the passage from Grigaliunaite quoted above], that the position in terms of whether the extradition of the applicant would be proportionate should be assessed as at the time of the appeal. …*
>
> *I do not necessarily agree with Mr Hepburne Scott as to the point in time at which the merits of a proportionality challenge under Article 8 should be assessed. In Molik v Poland [2020] EWHC 2836 (Admin), the court said that the position should be considered as at the date of the determination of permission. However, nothing turns on this at this stage*."

24. Molik v Poland was a renewed application for permission to appeal in an extradition case. Fordham J considered at some length, as a matter of principle, the point in time on which the permission-stage judge should focus, in considering the question of the appellant requested person's accumulating remand time. Should the permission judge look at that picture as at the date at which that judge is considering the grounds of appeal? Or should the permission judge project the position as it would be before a Court hearing the substantive appeal, at some later date, if permission to appeal were granted? He decided, at least in the context of the 'remand time' type case, that the focus should be on the date of permission, not the date of the appeal, save potentially where there is a freestanding durable basis to stay in the UK. Importantly for the context of this renewed application, the authorities upon which Fordham J drew (and in particular Kasprzak [2010] EWHC 2966 (Admin) (2.11.10, McCombe J); Wysocki [2010] EWHC 3430 (Admin) (24.11.20, Lloyd Jones J) emphasised the danger of the encouragement of prolonging the proceedings on behalf of those sought to be extradited in so as to raise a 'proportionality' point.

25. Although (unlike Molik and, indeed, Furman) the present case is not a 'remand time' case, in which the passing of each day may have a direct impact on the strength of a prospective extraditee's case, the point of principle has some potential application in any Article 8 case. In the present case, an application for permission to appeal was considered on its merits, and rejected in October 2024. If that decision was right on the evidence as it then stood, the Appellant would have been extradited. Insofar as Mr Hepburne Scott's test for admission of fresh evidence in Article 8 cases is somehow looser and broader than that required by Fenyvesi, such that the Court is bound without more to consider all material available at the date of the appeal or the renewed appeal, as may be the

case, it implies that the act of appealing or renewing the appeal can of itself be capable of generating the opportunity to advance a stronger proportionality argument. I do not regard the cases relied upon by Mr Hepburne Scott as authority for this proposition. Absent exceptional circumstances, it is unlikely that evidence amounting to the inevitable hardship and anxiety caused by ongoing extradition proceedings, or indeed other foreseeable impacts of the further progression of time, during the period of appeal/renewal could ever amount to determinative fresh evidence, and thus satisfy the test laid down in Fenyvesi. By definition, if such evidence were thought to be the determinative factor which tipped the balance in such a way that the Article 8 decision would be answered differently on appeal from that reached by the District Judge, then, but for the impact of appealing the extradition order made by the District Judge, the District Judge had not been wrong. If Mr Hepburne Scott were right, the fact of the appeal has created the very basis for appeal. It is for this reason that it is not generally right that the Court on appeal, or renewed appeal, simply looks at all material 'then available': the Court looks at the same evidence that the District Judge (or the Justice) did, save where an application to adduce fresh evidence on the basis of Fenyesi is successful.

26. Applying the Fenyesi test to the material sought to be admitted, as Mr Hepburne Scott accepted in argument, some of the content of all three statements was in fact or could have been provided in the extradition proceedings themselves with reasonable due diligence (such as the perceived threat from the estranged family, and the caring arrangements for Mr Lucas' mother). This would not be admissible under the Fenyvesi test.

27. Some of the material is 'fresh' in the sense that it provides an overview of the (ongoing) impact of the extradition proceedings on the Appellant's mental and physical wellbeing and the ongoing impact on her family. By itself, however, it is not of a materially different nature to the material already before the District Judge and would not be determinative of a different outcome. It too would be inadmissible under the Fenyvesi test. This is no doubt why Mould J refused permission for its admission when he considered the matter on the papers.

28. The principal exception to this is the recent death of the Appellant's stepdaughter and the impact that this has had on the Appellant's mental health. This is evidence which is truly 'fresh' and material which, were it to be decisive, ought to be admitted on this renewed application to appeal.

29. I should note that Mr Hepburne Scott relies upon a third ground to admit the evidence, based upon paragraph [34] of Fenyesi, in which the Divisional Court also stated (in relation to an analogous section):

> "*34. Section 29(4) of the 2003 Act is not expressed in terms which appear to give the court a discretion, although a degree of latitude may need to be introduced from elsewhere. As Latham LJ said in Miklis, there may occasionally be cases where what might otherwise be a breach of the European Convention on Human Rights may be avoided by admitting fresh evidence, tendered on behalf of a defendant, which a strict application of the section would not permit. The justification for this would be a*

*modulation of section 29(4) with reference to section 3 of the Human Rights Act 1998…*"

30. On my reading of Fenyvesi, this paragraph explains that there may be 'exceptional' cases in which the Ladd v Marshall approach may be disapplied so that, even if material had been previously capable of being made available to the District Judge with reasonable due diligence, there remains discretion to admit it in the interests of justice. There is nothing before me to suggest, even arguably, that any particular exceptionality applies in this case to the evidence which would not be admitted otherwise under Fenyvesi.

*The Article 8 Assessment*

31. Before turning to the impact of the fresh evidence, I consider that the starting point is, as found by Mould J, that the District Judge correctly followed the established approach to evaluation of the Article 8 balance in [142]-[154] of his judgment. He acknowledged the effect of the delay in this case at [151] and of the weight properly to be given to the Appellant's state of health at [153]. The District Judge was correct to say that the offences alleged against the Appellant are serious and, given the admissions made, that the public interest in extradition was very high notwithstanding the delays. He was entitled to take into account his finding of fugivity for the reasons already given. It is not reasonably arguable that, without more, this Court would conclude that the District Judge was wrong in his conclusion at [154] of his judgment.

32. The remaining question is, therefore, whether the fresh evidence relating to the death of the Appellant's stepdaughter and its impact on the Appellant arguably tips the balance.

33. I cannot conclude that it does. That such an event will have caused, and no doubt will continue to cause, considerable grief on the part of the Appellant and her family is not in question. However, there is no independent psychological or medical evidence before the Court, whether to support any particularly exceptional impact of this fact or otherwise. It is also impossible entirely to separate the question of the weight to be attached to this fresh evidence from the finding of the District Judge, who had the benefit of seeing the Appellant give live evidence, that the Appellant was not a reliable or honest witness and that her evidence was manipulative and designed to engender sympathy. Even if this is put to one side, there remains no evidence upon which the Court could conclude that the Appellant's ongoing depression and other anxiety related conditions are incapable of being treated properly by the Australian authorities.

34. Therefore, whilst obviously extremely sad, the death of the Appellant's stepdaughter which has happened since Mould J considered the matters on the papers and this renewal application does not tip the balance in favour of discharge.

35. Permission to appeal is refused.