Neutral Citation Number: [2019] EWHC 2062 (Admin)

Case No: CO/5208/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2019

Before:

LADY JUSTICE RAFFERTY

MR JUSTICE GARNHAM

- -

Between:

Veronica De Zorzi	**Appellant**
- and -	
Attorney General Appeal Court of Paris (France)	**Respondent**

- -
- -

Graeme Hall (instructed by **Tuckers Solicitors**) for the **Appellant**
Jonathan Swain (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 26th June 2019

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Approved Judgment

Mr Justice Garnham:

Introduction

1. Is a requested person a "fugitive" if she fails to return to the jurisdiction of the requesting state from the country of which she is a resident in breach of the obligation placed on her by the courts of the requesting state at a time when she was in her home country? That is the critical question which arises in this appeal by Ms Veronica De Zorzi against the decision of District Judge Zani on 19 December 2018 ordering her extradition to France.

2. We have had the benefit of detailed written and oral submissions from Mr Graeme Hall on behalf of the Appellant and Mr Jonathan Swain on behalf of the Respondent. I am grateful to both for their clear and economically expressed submissions.

The History

3. The factual background to this appeal is not entirely straightforward. The account set out below is gleaned from a number of documents presented to us, including the Appellant's witness statement, the further information provided by the requesting state, the statement of Mr RJ Portegies, the Appellant's Dutch lawyer, a chronology prepared by Mr Hall and, importantly, the decision of the District Judge. The detail is significant to the resolution of this appeal.

4. The Appellant was born on 15 November 1963 and is a dual South African and Italian national. She has resided in the Netherlands since 1985.

5. It is common ground that on 14 July 2000, the Appellant was arrested by the French police at the Gare du Nord in Paris, on five charges of buying, possessing, trafficking, importing and smuggling 1400 doses of LSD from the Netherlands. She was brought before a court and released the following day under "judicial supervision". She says in her witness statement that she was represented in the police station and at court by the same lawyer.

6. She told the District Judge that she was told by the French judge that she was free to leave France but would have to return to France the following year. According to the further information, she was required to respond to summonses issued by the French Court and to inform the court of any change of address. (It is to be noted that there is an error in the District Judge's Ruling at paragraph 28(iii) when he refers to 15 June 2002; it should have been 15 June 2000.)

7. The French Court wrote to her on 30 October 2000, at her Dutch address, indicating that in accordance with the provisions of Article 175 of the French Code of Criminal Procedure, the necessary information had been obtained and the record of the proceedings would be sent to the public prosecutor 20 days later. We have seen a copy of that letter.

8. The Appellant told the District Judge that she received notification in 2001 requiring her to attend the court and she said she duly appeared. She told him she "was again allowed to leave court after the hearing". In her witness statement she says that she was represented on this occasion by the same lawyer who had represented her before.

She says there that "the Court said to me I could go and that they did not think I would hear anything further from them although they were not sure."

9. According to the further information, the Appellant appeared before the court following a summons by the French examining magistrate. We were told during argument that this was on 28 June 2001 and that was not challenged. (It appears there is another error in the District Judge Ruling at this point; his reference to 28 June 2002 should have been 28 June *2001*.)

10. According to the further information, although she appeared before the court on that occasion, she was not present for the judgment, when she was convicted of the offences charged. Instead, it is said, her lawyer presented a medical certificate in English which the court had translated. It was said to consist of a certificate written by a homeopathist "which was not detailed" and which the court rejected, holding that the excuse provided by this letter was insufficient.

11. We have seen, and discuss below, a short, handwritten letter, written in English by a Dutch doctor, dated 24 January 2002 and relating to a later hearing. Plainly, that does not refer to the hearing on 28 June 2001. It follows that either there was another inadequate letter from the Appellant's doctor produced by the Appellant's lawyer to the court in June 2001, or the further information is in error and the reference by the French authorities to a letter from a doctor seeking to excuse the Appellant's attendance relates to the later hearing. Certainly, no letter relating to the hearing on 28 June 2001 was produced to the District Judge or has been shown to us.

12. In any event, it is clear that on 28 June 2001, a request was made by the French authorities for the provisional arrest of the Appellant for the purpose of extradition. That emerges both from the further information and from a statement from the Amsterdam immigration police confirming the Appellant's arrest on 17 December 2001 pursuant to the Dutch Extradition Act. According to the further information, that warrant was issued as a result of a failure to comply with the obligations of her judicial supervision. It is not immediately obvious why it would be necessary to issue such a request if the Appellant was present in court at the time. Further, it is to be noted that the further information asserts that "there was no period of (her) being unlawfully at large".

13. On 27 December 2001, the French Ministry of Justice issued a request under the 1957 European Convention on Extradition ("1957 Convention") seeking the Appellant's surrender "for the purpose of enforcing an irrevocable prison sentence of three years…"

14. The Appellant appealed the sentence of 3 years and the appeal was listed for February 2002.

15. As noted below, we have been shown a copy of a letter from someone called "E. Stiekema", a doctor in Amsterdam. The letter is handwritten and difficult to read. However, it is dated 24 January 2002 and appears to say that the Appellant "is not able because of physical and mental problems to appear in court in France on 20 February 2002". The Appellant did not appear on that occasion and it appears the hearing was adjourned.

16. A subsequent hearing was fixed for 5 June 2002. The Appellant was summonsed to that hearing but did not attend. She was represented by her lawyer. She later received notification from the French Court that the Court of Appeal had upheld the three-year prison sentence for the offences committed in July 2000 and that a warrant had been issued for her arrest. Her failure to attend the French Court in 2002 put her in breach of the terms of the judicial supervision imposed in July 2000.

17. The French authorities sought her extradition from the Netherlands pursuant to the 1957 Convention and the Dutch Extradition Act. She was arrested in the Netherlands on that warrant in 2003. She resisted extradition from Holland. On 19 September 2005 a European Arrest Warrant ("the first EAW") was issued in respect of the same criminal conduct but was not enforced.

18. On 7 October 2005, the Dutch courts refused the extradition request, a decision confirmed by the Dutch Minister for Justice on 9 January 2007.

19. On 6 October 2015, the French authorities published an alert for the first EAW. That first EAW was certified by the National Crime Agency (NCA) on 28 October 2016.

20. On 29 July 2018, the Appellant was arrested at Manchester Airport, pursuant to the first EAW, whilst returning home to the Netherlands after visiting her former partner who was seriously ill in a hospital in the city.

21. For reasons that are opaque, a fresh EAW ("the second EAW") was issued on 4 September 2018 to replace the first EAW which was withdrawn. The second EAW was certified by the NCA on 21 September 2018. On 11 October 2018, the Appellant was arrested by appointment on the second EAW and the present proceedings were formally opened at Westminster Magistrates' Court.

The Statutory Scheme

22. The relevant statutory provisions are s11, s14 and s27 of the Extradition Act 2003 ("2003 Act"). S11 provides:

> "11 Bars to extradition
>
> (1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of…
>
> (c) the passage of time;…"

23. S14 provides:

> "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) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

24. S21 provides:

> "(1) If the judge is required to proceed under this section (by virtue of section 20 he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
>
> (4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
>
> (5) If the person is remanded in custody, the appropriate judge may later grant bail."

25. The relevant convention right here is article 8 ECHR.

The District Judge's Decision

26. District Judge Zani provided a detailed ruling dated 19 December 2018. He noted that the challenges raised were the passage of time under s14, article 8 under s21, prison conditions and article 3 and abuse of process. Only the first two are pursued before us.

27. The Judge correctly noted that France was seeking the Appellant's extradition to serve a sentence of three years' imprisonment in respect of the conviction set out in the second EAW. He noted that this was a replacement EAW for one that had been originally issued on 19 December 2005 but later withdrawn. He noted that a full hearing took place on 28 November 2018 when both parties were represented by counsel.

28. The Judge recorded that, in evidence, the Appellant had told him that she had been arrested for this matter in July 2000 and had been charged and appeared in court. She had told him she had informed the French judge that she wished urgently to return to Amsterdam to join her two-year-old daughter. She added that she was allowed to leave by the Court and was advised to "go and change my life".

29. The Appellant told the Judge that she was informed by the French judge of the need to return to court in Paris the following year. She received notification the following year to attend court and did so. She was again allowed to leave court after the hearing. She was summonsed to a further hearing in 2002 but was not able to attend due to illness and this, she said, was confirmed in writing by her doctor. Some months later, she received notification from the French government that she had been given a three-year sentence of imprisonment and that a warrant for her arrest had been issued. She said she felt she had turned her life around and decided not to surrender to the French authorities.

30. She said she was arrested in Amsterdam in 2003 under the terms of the arrest warrant issued in France. Those proceedings in the Netherlands lasted until 2007 when she learned that the French request for her to be returned to France has been refused. She said that she heard no more about the case until she came to the UK on 27 August 2018 to visit her daughter's father who was seriously ill in hospital in Manchester. She was arrested on her arrival at Manchester Airport.

31. The Appellant adduced into evidence a statement from Mr Portegies which discusses the Dutch extradition proceedings. As the Judge noted, he stated in short "That extradition was refused by the authorities in the Netherlands because VZ was considered by the Dutch authorities to be an "integrated foreign national"". Mr Portegies suggested that the French authorities could have made an application to the Dutch authorities for the Appellant to serve her sentence in Holland but no such request was made.

32. The Judge noted the further information provided by the French judicial authority. He noted that information asserted that the Appellant "was aware that she had been placed under judicial parole" on 15 June 2002 but did not respect the conditions imposed and "did not present herself to the summons anymore" As a result of which, said the Judge, "an arrest warrant was issued on 28 June 2002". I note, in passing that there must be an error by the Judge; the further information in fact refers to the issue of an arrest warrant on 28 June 2001.

33. In addressing the challenge under s14, the District Judge referred to the well-known authorities of *Kakis v Government of Cyprus* [1978] 1WLR 779, *Gomez v Government of Trinidad and Tobago* [2009] UKHL 21, *Wisniewski v Poland* [2016] EWHC 386 (Admin) and *Kila v Governor of Brixton Prison* [2004] EWHC 2824 (Admin).

34. At [41], the Judge dealt with submissions that the French authorities had been guilty of culpable delay by failing to take steps other than seeking extradition. He then set out his reasons for concluding that the Appellant was a fugitive from French justice and that she was accordingly unable to avail herself of the protection that this section of the 2003 Act provides. I return to his reasoning below.

35. On that basis, he rejected the first ground of challenge. As to article 8, the District Judge referred to the Supreme Court's decision in *Norris v Government of United States* [2010] UKSC 9, *HH v Italy* [2012] UKSC 25 and *Polish Judicial Authorities v Celinski* [2015] EWHC 1274. He went on to set out the article 8 balancing exercise as follows at [95] – [96]:

(a) Factors said to be in Favour of Granting Extradition:

(i) There is a strong and continuing important public interest in the UK abiding by its international extradition obligations.

(ii) The seriousness of the criminal conduct in respect of which she has been convicted and sentenced. There remains the full sentence of **3 years** outstanding.

(iii) The assertion by the Judicial Authority and the finding by this court that the requested person has remained a fugitive from French Justice for a number of years.

(b) Factors said to be in Favour of Refusing Extradition

(i) VZ has been settled in Belgium (Plainly, a typing error; Holland intended) for many years.

(ii) She is in full-time employment and has fixed accommodation, where she lives with her 18 year old daughter, to whom she provides some financial and emotional support.

(iii) VZ has led a law-abiding life in Belgium and, save for the matter set out in this EAW, she has no other criminal convictions.

(iv) She asserts that he is not a classic fugitive from justice.

(v) The offending conduct occurred over 18 years ago, since when VZ's life has changed in many positive ways, such that it would be Article 8 disproportionate to order her return.

36. He concluded that it would not be a disproportionate interference with the article 8 rights of the requested person for extradition to be ordered. His reasons and findings for so doing so were set out at [97]:

(i) It is very important for the UK to be seen to be upholding its international extradition obligations. The UK is not to be considered a '*safe haven'* for those sought by other Convention countries either to stand trial or to serve as prison sentence.

(ii) In my opinion, the criminal conduct as set out in the EAW is serious and, in the event of a conviction in the UK for like behaviour, a prison sentence of some length may well be imposed.

(iii) This court finds that the requested person is unlawfully at large. The reasons for this finding are that she has been

aware, since she appeared in court in 2001, that these proceedings were ongoing in France. She became aware of the sentence imposed but chose not to surrender herself to serve the sentence. The French authorities have not given her any indication of a desire to withdraw or abandon these proceedings.

(iv) Albeit her return to France was refused by the authorities in the Netherlands some time ago, she will have been aware that she remained wanted in France and that if she chose to travel outside the Netherlands, she risked arrest and return under the terms of this live French request.

(v) It is appreciated that there will be hardship caused to VZ and, to some extent, to her 19-year-old daughter. However, hardship alone, of itself, is not sufficient to prevent an order for extradition from being made.

(vi) This court does bear in mind, in an Article 8 context, that the offending conduct took place over 18 years ago, since when her life has changed but during which time VZ has chosen resiliently not to return to France to serve the outstanding sentence.

(v) As this court has found as a fact that VZ is a fugitive from justice, this finding brings paragraph 39 of the decision in *Celinski* above into consideration. I do not find that there are such strong counter-balancing factors as would render extradition Article 8 disproportionate in this case.

<u>The Competing Arguments</u>

37. On behalf of the Appellant, Mr Hall noted that the Judge had found that the Appellant was a fugitive from justice because she knew she had been convicted and sentenced and had chosen not to return to France during the appeal proceedings. She was clearly aware she was wanted and had "thwarted French efforts to execute the sentence". The Judge had found there was no culpable delay and implicitly that no false sense of security arose.

38. He challenged each of those conclusions. Those conclusions had been reached whilst considering the s14 challenge but must "have equally infected the conclusions" in respect of article 8.

39. Relying on *Pillar-Neumann v Public Prosecutor's Office Klagenfurt* [2017] EWHC 3371 and *Versluis v The Netherlands* [2019] EWHC 764 (Admin), he submits that the Appellant had not evaded arrest, concealed her whereabouts, evaded justice or put herself beyond the reach of the authorities. He says her domestic arrest warrant was issued on the same day as the 1957 Convention request and she was entitled to defend the extradition proceedings. She had not concealed her whereabouts in that the Respondents had always know where she lived. She had been released on bail and had returned to France on one occasion. She had been summoned to attend again but

had sent a doctor's letter stating she was ill. The Appellant had not placed herself beyond the reach of the authorities; she had been permitted to leave and so was not unlawfully at large.

40. Mr Hall acknowledges that culpable delay can only be relied on if the Appellant is not a fugitive. Nonetheless he submits that there were a number of serious failures by the French authorities which have contributed to the delay: they failed to appeal the decision of the Dutch court in 2005 under the 1957 Convention request; they failed to seek to enforce the three-year sentence in the Netherlands; they failed to include the Appellant's Dutch address in the EAW issued in 2005 and they failed to seek to enforce the EAW in the Netherlands. He says, furthermore, that the courts have consistently held that inaction may lead to a false sense of security.

41. As to article 8, Mr Hall argues that if the Judge was wrong as to his conclusion on the Appellant's fugitive status, this court should undertake its own balancing exercise.

42. In response, Mr Swain, on behalf of the French Authorities, says that the District Judge was right to conclude that the Appellant was a fugitive. He says that the evidence from the Judicial Authority establishes that the Appellant was under judicial supervision from 15 July 2000 and that she failed to comply with the conditions of that supervision with the result that the arrest warrant was issued on 28 June 2001. He says that the District Judge was right to conclude that the Appellant was aware of the summons requiring her to attend the appeal hearing in 2002 which she failed to attend. She received notification from the French courts of the sentence and that a warrant for her arrest had been issued following her failure to attend. She then "decided not to surrender herself to the French penal authorities". He says this provides a proper basis for the District Judge's findings that the Appellant was a fugitive.

43. Mr Swain say that *Pillar-Neumann* was a case which turned on its facts and can be distinguished. He points out that the requested person in that case had been residing in the UK before the criminal investigation began and only became aware of the criminal proceedings whilst in the UK. She had never been under any obligation to the Judicial Authority. She could not have returned even if she had wished to do so because she had no passport. He accepts that resisting extradition did not render an individual a fugitive but asserts that that conclusion did not form the basis of the District Judge's findings in the present case. He says that *Versluis* can similarly be distinguished on its facts. The requested person there was not under any obligation to co-operate with the enforcement of the prison sentence. By contrast here, the Appellant, argues Mr Swain, was the subject of obligations imposed by the court including obligations to attend hearings. She breached those obligations; she failed to surrender to the court and she became a fugitive.

44. Mr Swain says that the District Judge was correct to determine there was no culpable delay on the part of the Judicial Authority in this case. He says there are no grounds for criticising the failure of the French authorities to appeal the Dutch decision refusing extradition. He says the Judicial Authority cannot be criticised for failing to request a transfer of the sentence to the Netherlands given that there is no evidence before the court to address the legal requirements for such a process to be undertaken. He says there was no significant delay after the refusal of the original request in January 2005 before the EAW was issued in September 2005. Mr Swain argues that

no false sense of security was created in the present case. Further, there was no decision by the requesting state communicated to the accused not to pursue the case. Instead, there remained a live extradition warrant throughout the relevant period.

45. As to article 8, Mr Swain submits the District Judge approached the balancing exercise correctly. In particular, he was correct to conclude the Appellant was a fugitive, correct to consider there was no false sense of security and correct to reject the suggestion that there was culpable delay in this case for which requesting state was responsible.

Discussion

The legal principles

46. The decisions of the House of Lords in *Kakis* and the Supreme Court in *Gomes v Trinidad and Tobago* [2009] UKHL 21 authoritatively determine the effect of s14. The Divisional Court decisions in *Wisniewski* and *Pillar-Neumann* are persuasive authorities on us and neither party has sought to suggest they are wrong. In my judgment, the following seven principles can be drawn from theses authorities:

(i) "Unjust" in s14 refers to the risk of prejudice to the accused in the conduct of the trial; "oppressive" is directed to hardship resulting from changes in the requested person's circumstances during the period in issue (*Kakis* 782-3).

(ii) Delay in the commencement or prosecution of extradition proceedings resulting from the requested person's conduct in fleeing the country, concealing his whereabouts or evading arrest does not (save in the most exceptional circumstances) make it oppressive or unjust to order his return (*Kakis* (p782-3)). In other words, where a person has knowingly placed himself beyond the reach of a legal process he cannot invoke the passage of time resulting from such conduct to support the existence of a statutory bar to extradition (*Wisniewski* [59]; *Pillar-Neumann* [64]).

(iii) A person who "deliberately flees the jurisdiction in which he had been bailed to appear" cannot seek to share the blame for the delay with the requesting state on the ground of its inaction or dilatoriness (*Gomes* [26]).

(iv) It is only where the requested person is informed by the requesting state of a deliberate decision not to pursue the case against him, or some similar circumstance, that a sense of security on his part, notwithstanding his flight, could be said to be justified (*Gomes* [26]).

(v) A person is "unlawfully at large" within s14(b) if he is at large in contravention of a lawful and immediate sentence of imprisonment under the applicable legal system (*Wisniewski* [52] and [54]). That is an objective test, unaffected by the requested person's state of knowledge (*Wisniewski* [54]).

(vi) Serious delay by a requesting state prior to the order for the requested person's detention will not found an argument for oppression under s14, but may be relevant to an argument

under Art 8 ECHR and s21 (*Wisniewski* [56] and HH v Italy [2012] UKSC 25 at [6]

(vii) "Fugitive" is not a statutory term, but a concept developed in the case law. It describes a status which must be established to the criminal standard, but which, if established precludes reliance on the passage of time under s14 (*Wisniewski* [58]).

The proper approach to determining fugitive status

47. The critical question in this appeal, in my view, is whether the District Judge was wrong in his conclusion that Ms De Zorzi was a fugitive. If she was not a fugitive, delay becomes important in determining whether it would be oppressive to extradite her and in determining the balancing exercise under article 8.

48. The test for fugitive status is whether the requested person knowingly placed himself beyond the reach of a legal process. It is to be noted that, unlike the test for being unlawfully at large (which is objective), the test for fugitive status is subjective – the requested person must be shown deliberately and knowingly to have placed himself beyond the reach of the relevant legal process.

49. It is valuable to see how that question was addressed by Hamblen LJ in *Pillar-Neumann:*

> "65. In the present case, the Appellant has been resident in this country, as the wife of a British citizen, since 1998, six years before the criminal investigation began. The UK is her home.
>
> 66. She has throughout lived in this country openly. She has taken no steps to conceal her identity or her location. She has been on the electoral role and has paid council tax and utility bills.
>
> 67. The Respondent argues, and the judge found, that the Appellant is a fugitive because in 2004 she became aware that a domestic warrant for her arrest had been issued in Austria and that, by failing to leave her home in the UK and to go to Austria, so that she could be arrested pursuant to that warrant, she was evading arrest and was therefore a fugitive.
>
> 68. In my judgment, even if she was aware of the domestic warrant, which is disputed, lawfully remaining in her established country of residence does not mean she was evading arrest or was a fugitive.
>
> 69. She was not fleeing the country or concealing her whereabouts. She was not taking any positive steps to evade or avoid arrest. She was simply carrying on living in her country of residence, as she was lawfully entitled to do.
>
> 70. Nor was she knowingly placing herself beyond the reach of a legal process. She took no positive steps to place herself

> anywhere. The Respondent's case is that she was somehow obliged to place herself within the reach of a legal process instituted in another country and to leave and give up her home and lawful residence in the UK in order to do so. Not surprisingly, we have been shown no case in which it has been found, or even suggested, that failing to act in this way makes someone a fugitive.
>
> 71. In fact, she could not have returned to Austria in any event as she had no passport.
>
> 72. In the context of a European Arrest Warrant, it is unsurprisingly not suggested that a person who fails to give himself up, go to the country seeking extradition and submit to arrest there is evading arrest or acting as a fugitive, but that is where the logic of the Respondent's argument leads.
>
> 73. For all these reasons I have no doubt that the judge was wrong to find to the criminal standard that the Appellant was a fugitive. If so, there is no bar to her relying on the passage of time under section 14."

The Appellant a fugitive?

50. In the present case, as noted above, the Appellant was brought before the court and released on 15 July 2000 under "judicial supervision". She was told that she was free to leave France but would have to return the following year. She was required to respond to summonses issued by the French Court and to inform the court of any change of address. It is apparent from the fact that they were able to write to her on 30 October 2000, at her Dutch address, that the Court was kept aware of that address. Applying the principles set out above, she was not, during that period, unlawfully at large nor was she a fugitive.

51. She was required to attend the court on 28 June 2001 and did so. The Judge made no further finding on the facts about events that day, but in his conclusion on her status as a fugitive, at [44], he says that she was informed "in writing, by the French authorities of the conviction *not long after they were decided*". There is no suggestion by him that she was given that document or otherwise informed whilst she was at court or before she returned to Holland.

52. That limited finding of the Judge in relation to June 2001 is somewhat surprising. First, he does not deal with the suggestion in the further information that the Appellant produced a medical report at the time of the first instance hearing to explain her absence from court at the time of the judgment. It maybe that he thought, as the Appellant submits, that the requesting state had, in error, confused the evidence submitted in February 2002 with that submitted on 28 June 2001. It would have been helpful, however, if he had indicated what he made of that evidence.

53. Second, we were told that the date of the "judgment by the Court at first instance" was 28 June 2001 and it is clear that on that date the domestic arrest warrant was

issued. However, the Judge makes no mention of these events in his analysis. It might be thought that this evidence was of central importance to the question whether the Appellant was unlawfully at large after the hearing on 28 June 2001.

54. However, we are not the primary finders of fact; the District Judge was. He did not appear to reject her account of leaving with permission and did not suggest she left France unlawfully on that occasion. I see no grounds to go behind that.

55. On balance it seems clear, although this is not dealt with by the Judge expressly, that the conviction was dated 28 June 2001. As Lloyd-Jones LJ (as he then was) said in *Wisniewski, w*hether a person is unlawfully at large within s14(b) is an objective test, unaffected by the requested person's state of knowledge. It depends on whether he is at large in contravention of a lawful sentence. The Appellant here was *at large* from the time the sentence was pronounced and she was at large from that time in apparent contravention of the sentence pronounced by the court. She was not, however, *unlawfully* at large if, as the Judge appears to have accepted, she left the court with the permission of the court. The further information confirms the view of the French authorities that the Appellant was never unlawfully at large.

56. The Appellant then returned to Holland and stayed there lawfully until she came to the UK. The Judge's analysis of her fugitive status turned on her response to the summons to return to France for the appeal hearing in 2002.

57. He concluded, at [44], that the Appellant was a fugitive for four reasons. First, he said she acquired that status because she was informed in writing of the conviction and sentence not long after they were decided. It appears, however, that the Appellant was so informed when she was back in Holland. There is no evidence she fled to Holland to avoid being told the outcome of the trial; instead she was simply returning home. In my judgment, mere receipt of a document from a foreign court by a person in the country of their residence informing them of their conviction in that foreign state and requiring their return does not make them a fugitive. It cannot be said that that person knowingly *placed* herself beyond the reach of a legal process when they were already beyond its reach. As Hamblen LJ put it in *Pillar-Neuman*, "she took no positive steps to place herself anywhere"; she was already back home. (See to similar effect the judgment of Knowles J in *Versluis v The Netherlands*).

58. Second, the District Judge said that the Appellant appealed conviction and sentence through her lawyers. But, in my judgment, her appealing a sentence does not amount to her knowingly placing herself beyond the reach of a legal process; on the contrary she is engaging in the legal process, albeit at a distance and by means of her lawyers' representations.

59. Third, the Judge pointed to the fact that the Appellant chose not to surrender herself to the French prison authorities when required to do so. But to surrender herself would have amounted to abandoning her resistance to extradition, and both parties before us agreed that resisting extradition does not render an individual a fugitive. In any event, declining to surrender herself to the requesting state does not constitute knowingly *placing* herself beyond the reach of a legal process. It amounts instead to declining to place herself within the reach of that process. The Divisional Court in *Pillar-Neumann* rejected the Respondent's case there that the Appellant "was somehow obliged to place herself within the reach of a legal process instituted in another

country and to leave and give up her home and lawful residence…in order to do so". I would similarly reject that suggestion here.

60. Fourth, he said that the Appellant was aware that her return was sought when she was subject to the extradition proceedings in the Netherlands. That is true, but, in my judgment, it adds nothing to the previous point and fails to support the Judge's conclusion for the same reason: awareness that her return was being sought in 2005 is irrelevant to the question whether in 2001 or 2002 the Appellant had placed herself beyond the reach of the French legal process.

61. Finally, the Judge observed that at no time had she been informed by the French authorities that she was no longer wanted to serve the prison sentence. Being so informed, might enable an Appellant to rely on the passage of time even if they were a fugitive; however, it is not a factor that gives a requested person that status.

62. For those reasons I would conclude that the Judge was wrong to find that the Appellant was a fugitive.

63. I would add that had the Judge found as a fact that the Appellant had fled back to Holland during the course of the French proceedings and without the Court's permission; or was told on 28 June 2001 at the French Court that she had been convicted and sentenced, so that she knew that that was the position when she returned to the Netherlands, I would have held that the Judge's conclusion on fugitive status was correct, albeit for the wrong reasons.

Oppressive?

64. My conclusion that the District Judge was wrong to find the Appellant was a fugitive, fundamentally undermines his conclusions on both s14 and Article 8. His conclusion at [45] cannot stand. The Appellant was not barred from relying on the passage of time in arguing oppression.

65. More than 17 years passed between conviction and arrest. 19 years have now passed since the commission of these offences. During that period, the Appellant has continued her well-established life in the Netherlands and avoided any form of criminality. In those circumstances, where she bears no responsibility for the delay, in my judgment it would be oppressive now to require her extradition.

66. Similarly, under article 8, the balance is changed significantly by a conclusion that she is not a fugitive and it is necessary to conduct the *Celinski* balancing test afresh. I consider first the factors in favour of extradition.

67. First, the public interest in ensuring that, in the words of Lady Hale at [8] in *HH*, "… the UK is not a safe haven to which those convicted of crimes can flee in the belief that they will not be sent back" is not applicable. I note, however, that the other elements of the public interest identified in that paragraph by Lady Hale remain and are weighty. That "people convicted of crimes should serve their sentences" and that "the UK should honour its treaty obligations" remain significant factors in favour of extradition here.

68. Second, the weight to be attached to the public interest (in extradition) diminishes where there has been very significant delay for which the requested person is not responsible (see Lady Hale at [8] in *HH)*, as is the case here.

69. Third, the offending here – the illegal importation of drugs - undoubtedly remains serious, although it is not of the very gravest kind.

70. On the other side of the scales, extradition would interfere with the article 8 rights of the Appellant and, to a lesser extent, with those of her adult daughter.

71. First, the Appellant has been settled in Holland since 1985 and has an established family life there. As the Judge observed, she was "in full-time employment and has fixed accommodation where she lives with her (adult) daughter to whom she provides some financial and emotional support".

72. Second, as also pointed out by Lady Hale in *HH,* delay since the crimes were committed can increase the impact upon private and family life. Here the delay is very substantial indeed and, in my judgment, must plainly have had a significant effect on the private life the Appellant has established and developed in the Netherlands.

73. Third, she has led an apparently blameless life since 2000.

74. In my judgment, in the light of those factors, the article 8 balance now tips in the Appellant's favour.

Conclusion

75. For those reasons, if My Lady agrees, I would hold that the appeal succeeds on both s14 and article 8 grounds and that it is appropriate to order the Appellant's discharge. Given that conclusion it is not necessary to consider the other matters raised by Mr Hall.

Lady Justice Rafferty

76. I agree.