Neutral Citation Number: [2020] EWHC 438 (Admin)

Case No: CO/2136/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2020

Before :

THE RIGHT HONOURABLE LORD JUSTICE IRWIN AND
THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

JOHN SHORT	**Appellant**
- and -	
THE FALKLAND ISLANDS	**Respondent**

- -
- -

Martin Henley (instructed by **Noble Solicitors**) for the **Appellant**
Rachel Kapila (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 30 January 2020

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Approved Judgment

LEWIS J:

INTRODUCTION

1. This is an appeal by John Short against the decision of the Senior District Judge sitting in the Westminster Magistrates' Court on 26 March 2019. The Senior District Judge found that there were no bars to the extradition of the appellant to the Falkland Islands, that there was a case to answer and that extradition would not be a disproportionate interference with the appellant's and his family's right to family life under Article 8 of the European Convention on Human Rights ("ECHR"). She therefore sent the case to the Secretary of State for her to make a decision on whether the appellant should be extradited. This is the first occasion on which this court has considered a request from the Government of the Falkland Islands for the extradition of a person from the United Kingdom to stand trial in the Falkland Islands.

2. In brief, the extradition of the appellant was requested in respect of historic sexual offences said to have occurred over 20 years ago when the appellant was under the age of 14. The appellant contends that the Senior District Judge erred in considering only the law as it applied in England and Wales and should have considered the law of the Falkland Islands. In relation to four of the five offences, the law providing for a rebuttable presumption that a child under 14 was incapable of committing a crime had been abolished in England by the time the offences were alleged to have been committed but a similar law had not yet been abolished in the Falkland Islands. The Senior District Judge considered English law and did not, therefore, consider whether there was evidence that the presumption of incapacity had been rebutted in relation to those four offences. The appellant also contends that the Senior District Judge erred in not considering whether extradition would be unjust, oppressive, or disproportionate, because of the prospect of acquittal or the likelihood that a non-custodial sentence would be imposed in the event of a conviction.

FACTS

3. The appellant was born in the Falkland Islands on 28 August 1986. He is a British national. He currently lives in the United Kingdom with his wife and two children.

4. By a request dated 23 July 2018, the Governor of the Falkland Islands requested the extradition of the appellant for five sexual offences alleged to have been carried out on two children at the family home in the Falkland Islands whilst the appellant was himself a child aged under 14.

5. Four of the offences were alleged to have been committed against one complainant, "A", on dates between 19 July 1999 and 20 July 2000. A was then aged 9 and the appellant was aged between 12 and 13. One offence alleged that the appellant had vaginal sexual intercourse with A when she was a child under the age of 13. Three offences alleged that the appellant indecently assaulted A when she was a child under the age of 13 by placing his fingers in her vagina.

6. The fifth offence was alleged to have been committed against another complainant, "B", on a date between 14 May 1997 and 2 November 2000 when the complainant was aged between 10 and 13 years. The appellant would have been aged between 10 and 14.

Proceedings before the Westminster Magistrates' Court

7. The appellant was arrested and brought before the Westminster Magistrates' Court. The Senior District Judge found that the relevant particulars had been provided and that the offence was an extradition offence within the meaning of sections 78(4)(b) and 137 of the Extradition Act 2003 ("the 2003 Act").

8. The Senior District Judge considered whether there was a prima facie case, that is, whether there was evidence which would be sufficient to make a case requiring an answer within the meaning of section 84 of the 2003 Act. Mr Henley for the appellant had submitted that the court was required to have regard to the presumption that a child over 10 but under 14 years old was incapable of committing an offence, a concept described in the Latin phase "*doli incapax*". The position in relation to that was that the presumption had been abolished in English law with effect for offences committed on or after the 30 September 1998. It had been abolished in the law of the Falkland Islands for offences committed on or after the 27 February 2003.

9. The Senior District Judge held that she was required to consider whether there a prima facie case under English law. Counts 1 to 4 referred to conduct which was said to have occurred between 19 July 1999 and 20 July 2000, that is at a time when the presumption of *doli incapax*, or incapacity, had been abolished as part of English law. She therefore considered that she did not need to consider if there was a prima facie case that the presumption had been rebutted in relation to those offences.

10. The position was different in relation to count 5. That count concerned conduct alleged to have occurred on a date between 24 May 1997 and 2 November 2000, that is, the conduct may have occurred at a time when the presumption of *doli incapax* did form part of English law. The Senior District Judge did, therefore, consider whether there was a prima facie case that the presumption had been rebutted in relation to that offence. She found there was not. In reaching that conclusion, the Senior District Judge expressly held that she could not consider evidence given in the achieving best evidence ("ABE") interview of A. The offences involving her were said to have occurred when the appellant was about 2 years older (i.e. between the age of 12 years and 13 years). As a child matures with age, it could not be inferred that he knew at the age of 11 that what he was doing was seriously wrong because he might know two years later, at the age of 13, that it was seriously wrong.

11. The Senior District Judge considered the evidence in relation to the four offences involving A. She ruled that an expert report from Dr Latif, a chartered and registered practitioner psychologist, was inadmissible to assess the credibility and reliability of A. The report did not provide any relevant expert opinion but was nothing more than common sense, ie that with time, memories fade and lack detail. The Senior District Judge considered that there was sufficient evidence for the case to proceed. She referred to the ABE interview of A which she found compelling. The witness set out the detail of the sexual activity, the location and circumstances, and the period of time over which the conduct was said to have continued.

12. The Senior District Judge considered whether extradition would be unjust by reason of the passage of time since the alleged commission of the offences, as required by section 82 of the 2003 Act. She was satisfied that the appellant could have a fair trial,

including on the question of whether under Falklands law the presumption of *doli incapax* had been rebutted.

13. The Senior District Judge considered whether extradition would be oppressive and a disproportionate interference with the appellant's, and his family's, right to respect for their private and family lives, contrary to Article 8 ECHR and section 87 of the 2003 Act. She heard evidence from the appellant's wife. The appellant lived in Southampton with his wife and two sons aged 7 and 2. Both had a genetic condition, retinitis pigmentosa, although only the older child exhibited symptoms. The Senior District Judge records details of the conditions and symptoms and the fact that the older child may be selected for medical trials which would be carried out at Moorfields' Hospital. The appellant's wife worked. She had dyspraxia and did not drive. She walked to work and took her two sons to school on foot. The Senior District Judge found her an impressive witness. She recorded her sympathy for the family. Nevertheless, as she observed, her role was to balance the various factors for and against extradition, in accordance with the approach advocated by the Divisional Court in *Polish Judicial Authority v Celinski* [2016] 1 W.L.R. 551. The Senior District Judge set out her analysis in the following terms:

> "55. On the one hand, these are serious allegations of sexual misconduct including rape when the complainant A was very young and a couple of years younger than the defendant. Serious allegations such of this should be tried. The criminal justice system in the Falkland Islands is fairly like our own so I may have confidence that the defendant's case will be tried relatively quickly, he will have a lawyer and a chance to put his defence that the alleged assaults did not happen and challenge the allegations made by A. He will also understand proceedings and will not require an interpreter. I also know that the defendant will be on bail there as there is nowhere to hide. I bear in mind too that Mr Y's mother and family are there and he will have support from them and I assume a place to stay. In those circumstance, I do not find such prosecution would be oppressive.
>
> "56. Factors against extradition are the effect on the family. Mrs Y relies on her husband for his support. They are close and he is a loving father to his two little boys. The family will suffer financially and Mrs Y will need extra help from her parents when her mother was hoping to help less. The oldest son George may be selected for the clinical trial at Moorfields in which case that will put further pressure on her and her mother. I have no doubt that the boys will miss their father but at least until he is imprisoned, if that is the decision of the court, they will be able to have regular contact with him by Skype although I appreciate that is not nearly as good as having a father in the home.
>
> "57. Mr Henley may be right too when considering the likely sentence in the case. This conduct, if is proved, happened when the defendant was a child, he is of good character in this jurisdiction and has turned his life around since an inauspicious start in the Falklands. The purpose of youth sentencing is rehabilitation not punishment and that is likely to be the case in the Falklands. I accept that the defendant was a troubled child, clearly vulnerable and ended up in care. If the sentence is one of imprisonment then it is likely to be a short sentence.
>
> "58. Having conducted the balancing exercise, the seriousness of the allegations outweighs the undoubted hardship the family will suffer, extradition is proportionate in my judgment on charges 1 to 4 with complainant A."

THE STATUTORY FRAMEWORK

15 Part 2 of the 2003 Act deals with extradition to territories designated as category 2 territories for these purposes by the Secretary of State: see section 69 of the 2003 Act. The Falkland Islands is a British Overseas Territory with its own constitution, courts and legal system. Legislation in force comprises Ordinances and secondary legislation made by the relevant bodies and also certain United Kingdom statutes. In addition, English common law is applicable except in so far as it is inconsistent with Falkland Island legislation and certain United Kingdom statutes. The Falkland Islands is a category 2 territory for the purposes of the 2003 Act.

16 Provision is made by the 2003 Act for the certification of requests for the extradition of a person to a category 2 territory and for the issuing of arrest warrants. A person arrested under such a warrant must be brought before an appropriate judge, that is a designated District Judge, who fixes a date for an extradition hearing (see sections 75 and 139 of the 2003 Act).

17 At the initial stages of the extradition hearing, the appropriate judge must ensure that certain particulars have been provided and, if so, that the offence for which extradition is requested is an extradition offence: see section 78. For present purposes, an offence will be an extradition offence if it satisfies the definition in section 137 of the of the 2003 Act. The material provisions for present purposes provide that:

> **"137 Extradition Offences: person not sentenced for offence**
> (1) This section sets out whether a person's conduct constitutes an "extradition offence" for the purposes of this Part in a case where the person—
>
> (a) is accused in a category 2 territory of an offence constituted by the conduct, or
> (b) has been convicted in that territory of an offence constituted by the conduct but not sentenced for it.
>
> (2) The conduct constitutes an extradition offence in relation to the category 2 territory if the conditions in subsection (3), (4) or (5) are satisfied.
>
> (3) The conditions in this subsection are that—
>
> (a) the conduct occurs in the category 2 territory;
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom punishable with imprisonment or another form of detention for a term of 12 months or a greater punishment if it occurred in that part of the United Kingdom;
> (c) the conduct is so punishable under the law of the category 2 territory.
> ….."

18 The appropriate judge must decide whether there are any specified bars to extradition such as the passage of time (see sections 79 and 82 of the 2003 Act). Section 82 provides as follows:

> "**82 Passage of time**
>
> A person's extradition to a category 2 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)".)

19 Assuming the conduct amounts to an extradition offence, and there are no bars to extradition, section 84 of the 2003 Act requires the appropriate judge to consider if there is a case to answer. Section 84(1) provides that:

> **"84 Case where person has not been convicted**
>
> (1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer if the proceedings were the summary trial of an information against him".

20 That section is applied to Scotland and Northern Ireland with suitable amendments to the phrase "summary trial of an information" to reflect the different methods of proceeding in those jurisdictions: see section 84(8) and (9) of the 2003 Act.

21 Finally, the appropriate judge must consider whether extradition would be compatible with the person's Convention rights, that is the rights conferred by the ECHR and incorporated into domestic law by the Human Rights Act. If extradition would not be compatible with a person's Convention rights, he or she must be discharged. If extradition would be compatible, the District Judge must send the case to the Secretary of State for his decision on whether the person is to be extradited. Section 87 of the 2003 Act is in the following terms:

> " **87 Human rights**
>
> (1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (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 send the case to the Secretary of State for his decision whether the person is to be extradited."

THE APPEAL

22 There are three grounds of appeal advanced, namely that the Senior District Judge erred in:

(1) finding that there was a case for the appellant to answer on counts 1 to 4 for the purposes of section 84 of the 2003 Act (a) without considering if there was prima facie evidence to rebut the presumption of incapacity or *doli incapax*, or (b) on the evidence before the Senior District Judge;

(2) finding that extradition would not be unjust or oppressive by reason of the passage of time since the alleged commission of the offences having regard to (a) the possibility of acquittal by reason of the presumption of

incapacity or *doli incapax* or (b) the likelihood that any sentence would be non-custodial; and

(3) finding that extradition would be compatible with the appellant and his family members' rights under Article 8 ECHR without having regard to (a) the possibility of acquittal by reason of the presumption of incapacity or *doli incapax* or (b) the likelihood that any sentence would be non-custodial.

GROUND 1 – THE FUNCTION OF THE MAGISTRATES' COURT UNDER SECTION 84 OF THE 2003 ACT

Submissions

23 Mr Henley, for the appellant, submitted that the Senior District Judge erred by not having regard to the presumption of *doli incapax* given that the appellant was less than 14 years old at the time of the alleged commission of counts 1 to 4. He accepted that, in general terms, section 84 of the 2003 Act required the judge dealing with the extradition hearing to consider whether there was a prima facie case that the conduct amounted to an offence under English law. He submitted, however, that the presumption of *doli incapax* still formed part of English law. Alternatively, he submitted that section 84 of the 2003 Act does not preclude the judge in exceptional cases from considering questions of foreign law where, on the facts, it would be unfair or unjust not to have regard to a defence available in foreign law. This was one such case. The Senior District Judge had considered the question of *doli incapax* in relation to count 5 and it would be unfair not to do so in relation to counts 1 to 4. In relation to other matters, Mr Henley submitted that the Senior District Judge was wrong to refuse to admit the expert report and failed to consider the effect of A having retold her account to various people over the years on her reliability and credibility.

24 Ms Kapila, for the respondent, submitted that under section 84 of the 2003 Act the judge was concerned with whether there was sufficient evidence that there was a case to answer applying English law. The judge was not concerned with applying the law of the requesting state. The fact is that, at the material time in relation to counts 1 to 4 (19 July 1999 to 20 July 2000), the presumption of *doli incapax* did not form part of the law of England and Wales. The Senior District Judge was not therefore required to consider whether the respondent had established a prima facie case that any such presumption had been rebutted. Ms Kapila relied on the decision of the House of Lords in *In Re Nielsen* [1984] 1 A.C. 606 that the judge was considering whether the evidence would, according to the law of England, justify committal. Ms Kapila submitted that the Senior District Judge was entitled to find that the expert report did not furnish the court with information likely to be outside its knowledge and experience and so was inadmissible. She submitted that the Senior District Judge was entitled to find there was sufficient evidence in the present case to make a case requiring an answer.

Discussion

Is the presumption of *doli incapax* part of English Law?

25 The first question is whether the law of England and Wales includes the presumption that a person aged over 10 or under 14 is presumed to be incapable of committing an offence. Section 34 of the Crime and Disorder Act 1998 ("the 1998 Act") provides, that:

> "The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished."

26 That provision came into force on 30 September 1998 and applies to any offences committed on or after that date. The provision does not apply to anything done before 30 September 1998: see paragraph 1 of Schedule 1 to the 1998 Act.

27 The question arose in *R v T* [2009] 1 A.C. 1310 as to whether the effect of section 34 of the 1998 Act was simply to abolish the rebuttable presumption that a child aged between 10 and 14 was incapable of committing an offence but left the defence available if the child could prove that, at the material time, he was *doli incapax,* that is, he did not understand that what he had done was seriously wrong. The Supreme Court held that, on a proper interpretation, the section abolished the defence of *doli incapax* entirely. As a result, that concept forms no part of English law in relation to children aged 10 to 14 in relation to conduct occurring on or after 30 September 1998. I, therefore, would reject Mr Henley's submission that the concept remained part of English law and had to be applied by the Senior District in relation to offences 1 to 4 in the extradition request which concerned conduct said to have occurred after 30 September 1998.

Was the Senior District Judge Required to Apply English Law under Section 84 of the 2003 Act?

28 The next question is whether the Senior District Judge was required to apply English law or the law of the Falkland Islands in deciding whether there was a case to answer under section 84 of the 2003 Act in relation to counts 1 to 4 where the presumption of incapacity remained part of Falkland Islands law until 27 February 2003.

29 On a proper interpretation of section 84 of the 2003 Act, read in context, the section requires the Senior District Judge to consider whether there is a case to answer under English law, not the law of the requesting state. That conclusion follows from the following.

30 First, and foremost, the wording of the section contemplates that the appropriate judge will be deciding whether, on the evidence, the accused would have a case to answer if the proceedings were a summary trial of an information, that is, if the conduct were the subject of criminal proceedings in a magistrates' court in England or Wales. Those courts would, of course, apply the law of England and Wales. They would not be applying the laws of foreign states or overseas territories. There is nothing to suggest that the appropriate judge was expected to require evidence as to the law of the requesting state. There is nothing to suggest the appropriate judge was expected to identify the elements of the offence under foreign law, or consider whether there are defences available in that foreign law, in order to determine if there was evidence that, under the law of the requesting state, there was a case to answer.

31 Secondly, that conclusion is consistent with the interpretation of previous statutes dealing with extradition or the return of fugitive offenders to foreign or commonwealth countries. In *In re Nielsen*, the House of Lords was dealing with the proper interpretation of section 10 of the Extradition Act 1870 ("the 1870 Act"). That provided that:

> "10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of a criminal is duly authorised and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trail of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged".

32 The question arose as to whether the magistrates' court was required to consider the provisions of the law of the requesting state when carrying out its functions under section 10 of the 1870 Act. Lord Diplock, with whom the other members of the House of Lords agreed, held at pages ``624D-625A:

> "The jurisdiction of the magistrate is derived exclusively from the statute. It arises when a person who is accused of conduct in a foreign state, which if he had committed it in England would be one described in the 1870 list (as added to and amended by later Extradition Acts), has been apprehended and brought before the magistrate under a warrant issued pursuant to an order made by the Secretary of State under section 7 or confirmed by him under the last paragraph of section 8.
>
> At the hearing, sections 9 and 10 require that the magistrate must first be satisfied that a foreign warrant (within the definition in section 26 that I have already cited) has been issued for the accused person's arrest and is duly authenticated in a manner for which section 15 provides. Except where there is a claim that the arrest was for a political offence or the case is an exceptional accusation case, the magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state.
>
> The magistrate must then hear such evidence, including evidence made admissible by sections 14 and 15, as may be produced on behalf of the requisitioning foreign government, and by the accused if he wishes to do so; and at the conclusion of the evidence the magistrate must decide whether such evidence would, *according to the law of England* , justify the committal for trial of the accused for an offence that is described in the 1870 list (as added to or amended by subsequent Extradition Acts) provided that such offence is also included in the extraditable crimes listed in the English language version of the extradition treaty. In making this decision it is English law alone that is relevant. The requirement that he shall make it does not give him any jurisdiction to inquire into or receive evidence of the substantive criminal law of the foreign state in which the conduct was in fact committed. "

33 The same approach was taken in relation to section 7 of the Fugitive Offenders Act 1967 ("the 1967 Act") where the question was whether "the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of this court". In *R v Governor of Pentonville Prison ex p. Osman* [1990] 1 W.L.R. 277 at page 302G-H, Lloyd L.J. observed that:

> "The magistrate is not, of course, concerned with whether the offence is made out in foreign law. He is concerned solely with whether the evidence would support committal

> for trial in England, if the conduct complained of had taken place in England: see *In re Nielsen* [21984] 1 A.C. 606."

34 The Extradition Act 1989 ("the 1989 Act") consolidated the provisions of the 1870 Act and the 1967 Act. Section 9(8) of the 1989 Act provided that the function of the magistrate, unless the Order in Council giving effect to the extradition arrangements provided otherwise, was to decide whether "the evidence would be sufficient to warrant his trial if the extradition crime had taken place within the jurisdiction of the court". Specific provision was also made in relation to existing extradition treaties with foreign states where the provisions of section 10 of the 1870 Act were maintained (see section 1(3) and paragraph 7 to Schedule 1 to the 1989 Act).

35 The 1870 Act referred to evidence which would justify the trial of the accused "if the crime of which he is accused had been committed in England". The 1967 Act and section 9 of the 1989 Act referred to evidence which would justify committal if the extradition crime "had taken place within the jurisdiction of the court" (i.e. England and Wales). Both forms of words were understood to mean that the function of the magistrates' court was to determine whether there would be sufficient evidence that the accused had engaged in conduct which would be an offence applying English, not foreign, law. The wording of section 9(8) of the 1989 Act was amended by section 158 of the Criminal Justice and Public Order Act 1994 ("the 1994 Act") to substitute the words "make a case requiring an answer by that person if the proceedings were the summary trial of an information against him". The material provision is now contained in section 84(1) of the 2003 Act. Those sections use different language from the 1989 Act but reflect the same underlying concept, i.e. that there is sufficient evidence for there to be a case to answer in the domestic courts. The clear implication is that Parliament intended, in enacting section 158 of the 1994 Act, and then section 84 of the 2003 Act, to continue the system under section 9 of the 1989 Act whereby the function of the appointed judge was to consider if there would be sufficient evidence to establish that there was a case to answer if the offence had been committed in England and Wales, i.e. if he were being tried for an offence under English law. There is nothing to indicate that section 158, or subsequently section 84, intended to make a change, still less a significant or dramatic change, in the role of the magistrates' court so that it was now required to receive evidence of foreign law and determine whether there was a case to answer under that foreign law. Rather, they reflect the approach required under the earlier legislation and the question is whether there is evidence which would establish that there was a case to answer on a summary trial in England and Wales, i.e. under English law.

36 Mr Henley accepted that, in general, the appropriate judge would be considering whether there was sufficient evidence to establish a case to answer under English law. He submitted, however, that there was nothing in section 84 of the 2003 Act to prevent the court, in appropriate cases, from considering questions of foreign law. He submitted that the court should do so where there would otherwise be unfairness or injustice. Here the only difference between English law and the law of the Falkland Islands was the date on which the presumption of *doli incapax* was abolished. Further, the Senior District Judge had had to consider the question of the presumption in relation to count 5 and should do so in relation to counts 1 to 4 as well. In those circumstances, he submitted, the Senior District Judge erred in not considering the operation of the presumption of *doli incapax* when considering if there was a case to answer in relation to counts 1 to 4.

37 I do not accept that submission. First, there is nothing in the language of section 84 of the 2003 Act to suggest that there is a general discretion on the part of the appropriate judge to consider questions of foreign law. The task for the judge under section 84(1) is to determine whether there would be sufficient evidence to establish that there was a case to answer if the proceedings were a summary trial of an information (i.e. a case before the magistrates' court in England and Wales). Secondly, there is no principled basis for determining in which cases the appropriate judge may, or must, have regard to foreign law. It is difficult to see how "a fact-specific approach" could provide any such basis. Facts only become relevant in this context because foreign law provides that the offence is only committed, or a person has a defence, if certain facts are established. There is no basis for determining when a magistrates' court should look at the foreign law to determine what facts that law considers relevant. It is difficult, therefore, to see how, or on what logical basis, an appropriate judge could decide to consider possible defences under the law of one requesting state but not another. That reinforces the conclusion that Parliament did not intend the magistrates' court to carry out that exercise.

38 Finally, assessing the existence of a case to answer under English law rather than foreign law does not result in any unfairness or injustice. Section 84 is simply concerned with whether there is sufficient evidence to make a case requiring an answer applying English law. That provides an additional safeguard to an accused facing an extradition request. If he has defences available under the law of the requesting state, he will be able to rely upon those in any proceedings in that state.

39 Nor is there any unfairness or injustice by reason of the fact that the Senior District Judge considered the issue in relation to count 5 but not in relation to counts 1 to 4. The fact is the presumption of *doli incapax* did form part of English law for at least part of the period covered by count 5. She had to consider whether there was a prima facie case that that presumption had been rebutted, as that was required by English law. The presumption had ceased to be part of English law by the time that the conduct forming counts 1 to 4 was alleged to have occurred. Consequently, the Senior District Judge was not required to consider the presumption when considering under section 84 of the 2003 Act whether there was evidence giving rise to a case to answer counts 1 to 4.

40 Two further issues arise in relation to section 84 of the 2003 Act. The appellant says that the Senior District Judge was wrong to rule that the expert report of Dr Latif was inadmissible. Dealing with the matter shortly, evidence tending simply to provide the expert's view of the credibility or reliability of a witness is generally inadmissible: see *R v Bernard V* [2003] EWCA Crim 3917 at paragraph 28. Having read the report of Dr Latif, the Senior District Judge was entitled to conclude that the report did not offer evidence on matters outside ordinary knowledge and experience and was no more than common sense indicating that, with the passage of time, memories and details can fade and may lack detail. The report simply set out the views of the expert witness on whether she considered the complainants to be reliable and credible witnesses. The Senior District Judge was entitled to rule that the report was inadmissible. Further, there is no basis for saying that the Senior District Judge erred by failing specifically to refer to the possibility that the retelling of events may affect the reliability of evidence. The task for the judge was whether there was evidence which would be sufficient to make a case requiring an answer. The Senior District

Judge applied that test. She found the ABE interview compelling in that the witness described the type of sexual activity alleged to have occurred and the location and circumstances in which it was said to have occurred. The Senior Judge was entitled to find that there was a case to answer on the material before her.

GROUNDS 2 AND 3 – THE PASSAGE OF TIME AND ARTICLE 8 ECHR

Submissions

41 It is convenient to deal with grounds 2 and 3 together. Mr Henley submitted that it was unjust and oppressive to extradite the appellant when he would be likely to be acquitted because of the presumption of *doli incapax*. He further submitted that the likelihood of acquittal reduced the public interest in extradition and the Senior District Judge should have included that factor in the balancing exercise when deciding whether extradition would be a disproportionate interference with the appellant and his family's rights under Article 8 ECHR. Further, he submitted that the likelihood that the appellant would receive a non-custodial sentence, even if convicted, because of his age at the time of the offences (about 12 or 13 years old) and his subsequent good character, rendered extradition disproportionate and oppressive.

42 Ms Kapila submitted that it was inappropriate for the court, having concluded that there was a case to answer under section 84 of the 2003 Act, to embark upon an exercise of assessing the likelihood of acquittal when considering questions of proportionality or oppressiveness. That would also usurp the role of the Falkland Islands' court. The possibility of an acquittal, or the likelihood of a non-custodial sentence if acquitted, did not lessen the public interest in extradition.

43 Dealing first with Article 8 ECHR, the fact that the appellant may ultimately be acquitted in the Falkland Islands does not lessen the public interest in extradition. There is a public interest in honouring extradition arrangements. Further, there is a public interest in ensuring that those charged with offences are tried. In the present case, the appellant is charged with serious offences of sexual assault on a 9-year-old girl, including penetrative sexual intercourse. The Senior District Judge determined that there is evidence that there is a case to answer in relation to those allegations. The Senior District Judge took carefully and fully into account the impact of extradition on the appellant and his wife and children. There is no proper basis for concluding that the Senior District Judge was wrong in concluding that extradition was proportionate in the circumstances of this case. The fact that the appellant may, ultimately, be acquitted (whether because the prosecution do not prove that the acts occurred, or because the appellant will be found to lack capacity) does not diminish the public interest in ensuring that extradition arrangements are honoured and serious allegations tried.

44 Furthermore, I accept the submissions of Ms Kapila on this issue. It is inappropriate for the court, having concluded that there is a case to answer, to embark on an exercise of seeking to assess the likelihood of an acquittal. That would be to usurp the role of the Falkland Islands courts whose task it is to decide if the charges are proven. It is not appropriate to speculate on whether or not that presumption would be rebutted. The position in relation to counts 1 to 4 is different from count 5. The appellant was about 2 years older, almost 13 (12 years and 11 months old), than he was at the start of the relevant period covered by count 5. There is evidence which, if

the Falkland Islands' court accepts it, indicates that the appellant waited until others were out of the room before carrying out the alleged assaults and also that he told untruths about what he and the complainant had been doing. It will be a matter for the Falkland Islands' court to decide if that indicates concealment and an awareness that the appellant knew what he was doing was seriously wrong. There may be further evidence available to that court when it comes to consider the matter. The mere fact that these matters are to be determined in criminal proceedings in the Falkland Islands rather than as part of the process of deciding whether to extradite the appellant, does not mean that extradition is disproportionate or gives rise to any injustice or oppression.

45 Similarly, the fact that the appellant may receive a non-custodial sentence would not render disproportionate the extradition of the appellant to face trial on what are serious allegations of sexual assault against a young girl of 9. The Senior District Judge was well aware, as appears from paragraph 57 of her judgment set out above, that it was possible that the sentence might be non-custodial, or even if a custodial sentence was imposed it was likely to be short. Given the serious nature of the allegations, and the public interest in honouring extradition arrangements, and notwithstanding the effect on the appellant and his family, it cannot be said that the Senior District Judge was wrong to conclude that extradition was proportionate.

46 Dealing with section 82 of the 2003 Act and the question of injustice or oppression arising by reason of the passage of time, counts 1 to 4 are concerned with conduct alleged to have occurred between 1999 and 2000, that is over 20 years ago. The complaints were first made to the Falkland Islands' police in about July 2017. In terms of the effects of the passage of time, as Lord Diplock observed in *Kakis v Government of the Republic of Cyprus* [2978] 1 W.L.R. 779 at pages 7782H-783A:

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

47 The appellant will have available to him the defence of incapacity, or *doli incapax*, in any proceedings in the Falkland Islands. He will benefit from the rebuttable presumption of *doli incapax* in those proceedings. There is nothing unjust in those matters being dealt with in the criminal proceedings in the Falkland Islands rather than in the extradition proceedings. The matter will be dealt with by the appropriate court, at an appropriate time, on the evidence then available. There is no reason to doubt that the trial process, including that relating to the presumption of incapacity or *doli incapax*, will be fairly conducted as the Senior District Judge found.

48 Nor does the possibility of an acquittal or a non-custodial sentence mean it would be oppressive to extradite the appellant. As the House of Lords observed in *Gomes v Government of Trinidad* [2009] 1 W.L.R. 138 at paragraph 31:

> … "the test of oppression will not easily be satisfied; hardship, a comparatively commonplace consequence of an order for extradition, is not enough".

49 The Senior District Judge was entitled to find that the impact on the appellant's family, and the fact that the appellant will be separated from his family and will spend time in the Falkland Islands awaiting trial, did not give rise to oppression. Further, on the facts of this case, the Senior District Judge had information from the Falkland Islands Government indicating that the appellant would be likely to be remanded on bail, not in custody, that the maximum time before the commencement of trial would be 5 months, and that the appellant had an address (his family) where he could stay.

CONCLUSION

50 The appropriate judge is required under section 84(1) of the 2003 Act to determine whether there is evidence that would be sufficient to require an answer from the accused in a summary trial before a magistrates' court in England and Wales applying English law not the law of the requesting state. In the present case, therefore, the Senior District Judge was correct not to consider the presumption of incapacity, or *doli incapax*, in relation to counts 1 to 4 as that did not form part of the law of England and Wales at the time that those offences were alleged to have been committed. The Senior District Judge was entitled to conclude that there was sufficient evidence establishing a case to answer. She was further entitled to find that extradition would not be oppressive, unjust or disproportionate. For those reasons, I would dismiss the appeal.

IRWIN LJ

51. I agree.