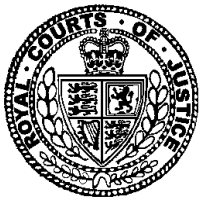

Neutral Citation Number: [2021] EWHC 1900 (Admin)

Case No: CO/2509/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2021

Before :

LORD JUSTICE FULFORD
MR JUSTICE JOHNSON

- -

Between :

OSCAR MADISON **Appellant**

- and -

GOVERNMENT OF AUSTRALIA **Respondent**

- -
- -

Joel Smith (instructed by Tuckers Solicitors) for the Appellant
Daniel Sternberg (instructed by CPS Extradition Unit) for the Respondent

Hearing date: 30 June 2021

- -

Approved Judgment

Mr Justice Johnson:

1. The Respondent seeks the extradition of the Appellant, now aged 62, for his prosecution on 36 charges of sexual offences allegedly committed against boys and young men between 1 January 1983 and 24 March 1990 (so between 31 and 38 years ago). The Appellant contends that his extradition is barred by the passage of time pursuant to section 82 Extradition Act 2003. The then Chief Magistrate, Senior District Judge Arbuthnot, rejected that contention and made an order that all 36 charges should be sent to the Secretary of State for her decision as to whether extradition should take place. The Appellant appeals against that order in respect of 6 of the charges, but not in respect of the remaining 30 charges. The 6 charges in respect of which the Appellant challenges the District Judge's order relate to allegations of sexual assault committed in 1983-1984 and 1985-1989 against a complainant, B, who had been 14 in 1983. B died in 2018.

The facts

2. In 1990, another complainant, D, made a complaint to the police in Western Australia ("WA") that he had been a victim of sexual assaults perpetrated by the Appellant. The Appellant, in interview, admitted that he had been in a sexual relationship with B. He was charged with offences allegedly committed against D. B made a statement to the WA police in which he said that, at around this time, the Appellant told him that he had raped a boy, that he had been charged, and that he was leaving Australia.

3. On 5 September 1990, the Appellant failed to attend court. Six days later, a warrant for his arrest was issued. The Appellant came to the United Kingdom. The WA police did not at this point know where the Appellant was.

4. In 1999, another complainant, C, made complaints to the WA police that he had been a victim of sexual assault by the Appellant in the 1980s. He said that B, and another complainant, A, were witnesses. A and B were approached for evidence, and they then each made complaints that they too had been sexually assaulted by the Appellant in the 1980s.

5. The Appellant visited his father in Australia on a number of occasions between 2002 and 2004. He did so using his British passport, rather than his Australian passport.

6. On 11 November 2005, the WA police became aware that the Appellant had been charged with sexual offences in the UK. This is the first time that the WA police knew that he was in the UK. On 12 January 2006, the Appellant was convicted at Southwark Crown Court of offences of indecent assault, buggery and rape, committed in London between 1993 and 1998 against two teenage male complainants. On 31 March 2006 he was sentenced to life imprisonment, with a minimum term of 6 years. The WA police became aware of this on 20 September 2006. There is evidence that they considered that he could not be extradited because he was serving a term of imprisonment in another jurisdiction.

7. On 10 March 2014, the WA police were told that the Appellant was still in prison and that his earliest parole eligibility date was September 2014. In the event, the Appellant was released from prison on 24 April 2015.

8. In June 2016 a new WA police investigator was appointed. Further witness statements were obtained. In November 2016, a further warrant was issued in WA in respect of 32 sexual offences. On 1 December 2016, the WA police sought approval to extradite the Appellant, but this request was not timeously actioned. On 26 October 2018, B died.

9. On 7 October 2019 the Appellant's extradition was requested. The request was certified by the Secretary of State, under section 70 of the 2003 Act, on 22 October 2019. The Appellant was arrested on 26 November 2019. He has remained in custody since then.

The statutory framework

Passage of time

10. The Senior District Judge was required to decide whether extradition is barred by the passage of time – see section 79(1)(c) of the 2003 Act. Section 82 states:

> "**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)."

11. In *Kakis v Government of the United States of America* [2007] 1 WLR 47 Lord Diplock explained that the word "unjust" in this context is "directed primarily to the risk of prejudice to the accused in the conduct of the trial", whereas the word "oppressive" is "directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration" (see at 782 - 783). Lord Diplock also explained that delay which is brought about by the accused "fleeing the country, concealing his whereabouts or evading arrest cannot… be relied upon as a ground for holding it to be either unjust or oppressive to return him." Where delay is not occasioned by the acts of the accused then the responsibility for the delay, and whether it is culpable or otherwise, is not generally relevant. What is important is "the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude."

12. In *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21 [2009] 1 WLR 1038 Lord Brown, giving the opinion of the Appellate Committee of the House of Lords, made reference to the development, since *Kakis*, of the common law jurisdiction to stay proceedings for an abuse of process where a fair trial is impossible. He said: "we regard [that] as the essential question underlying any application for a section 82 bar on the ground that the passage of time has made it unjust to extradite the accused." In applying that question, Lord Brown considered it sufficient to refer to five propositions that were identified in the judgment of the Privy Council in *Knowles v Government of the United States of America* [2007] 1 WLR 47 – see *per* Lord Bingham at [31]:

> "First, the question is not whether it would be unjust or oppressive to try the accused but whether . . . it would be unjust or oppressive to extradite him… Secondly, if the court of the requesting state is bound to conclude that a fair trial is impossible, it would be unjust or oppressive for the requested state to return him... But, thirdly, the court of the requested state must have regard to the safeguards which exist under the domestic law of the requesting state to protect a defendant against a trial rendered unjust or oppressive by the passage of time… Fourthly, no rule of thumb can be applied to determine whether the passage of time has rendered a fair trial no longer possible: much will turn on the particular case… Fifthly, there can be no cut-off point beyond which extradition must inevitably be regarded as unjust or oppressive…"

13. These propositions were extracted from the judgment of the Divisional Court in *Woodcock v Government of New Zealand* [2003] EWHC 2668 (Admin) [2004] 1 WLR 1979. The need to have regard to the safeguards in place in the requesting state was explained by Simon Brown LJ in *Woodcock* at [20] – [21] (and endorsed in *Gomes* at [34]):

> "20. [The approach adopted by the courts in New Zealand to delay] seems to me very similar to that adopted by our own courts. Is that, however, a relevant consideration when it comes to applying s11(3)(b), or must this court decide for itself one way or the other whether there is "the risk of prejudice to the accused in the conduct of the trial itself" of which Lord Diplock spoke? … Section 11(3)(b) in terms requires this court's decision not upon whether, having regard to the passage of time, it would be unjust to *try* the accused, but rather whether it would be unjust to *return* him (albeit, of course, return him for trial).
>
> 21. To my mind that entitles, indeed requires, this court to have regard to whatever safeguards may exist in the domestic law of the requesting state to ensure that the accused would not be subjected to an unjust trial there. There are, it should be borne in mind, clear advantages in having the question whether or not a fair trial is now possible decided in the domestic court rather than by us. That court will have an altogether clearer picture than we have of precisely what evidence is available and the issues likely to arise. …If, of course, we were to conclude that the domestic court in the requesting state would be bound to hold that a fair trial of the accused is now impossible, then plainly we would regard it as unjust (and/or oppressive) to return him. Equally, we would have no alternative but to reach our own conclusion on whether a fair trial would now be possible in the requesting state if we were not persuaded that the courts of that state have what we would regard as satisfactory procedures of their own akin to our (and the New Zealand courts') abuse of process jurisdiction."

14. In *Gomes* the House of Lords rejected a submission that the test to be satisfied under section 82 is "that of a flagrant denial or justice such as would give rise to an article 6 bar under section 87" but nonetheless stressed that the test of establishing the likelihood of injustice is not easily satisfied (see *per* Lord Brown at [36]).

15. On the question of the impact of the culpability of a requesting state for delay, Lord Brown said that this is not relevant in the case of a fugitive save in the most exceptional circumstances, but that where the accused is not to blame it might be capable of tipping the balance in a "borderline" case – see at [27], and see *Scott v Government of Australia* [2020] EWHC 2924 (Admin) *per* Bean LJ at [60] – [67].

Right of appeal

16. Section 103 of the 2003 Act provides a right of appeal against the order of the Senior District Judge. By section 104(3), the Court may allow the appeal if:

> "(a) the judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge."

17. This test was elucidated by the Divisional Court in *Love v USA* [2018] EWHC 172 (Admin) [2018] 1 WLR 2889 *per* Lord Burnett CJ and Ouseley J at [25]-[26]:

> "25. The statutory appeal power in section 104(3) permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. …
>
> 26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong…. The appellate court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should

> have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

Hearsay evidence – Australian law and procedure

18. Expert evidence was adduced before the District Judge as to the approach that would be taken to B's evidence. If B's evidence is not adduced then the 6 charges which relate to alleged offences against B will be discontinued. B's evidence is only capable of being adduced under clause 7 of schedule 3 to the Western Australia Criminal Procedure Act 2004. The fact that the statement is relevant to a central issue in the case, rather than a peripheral issue, and the fact that it tends to show that the Appellant committed the offence, are factors in favour of the statement being admitted. The fact that it is the only evidence in relation to the critical elements of the offence charged is a factor that militates against the statement being admitted.

19. It will be open to the Appellant to seek to exclude B's evidence on the grounds that it cannot now be tested by cross-examination. That application will succeed if the admission of B's statement would be unfair to the Appellant. In assessing that question, the court will consider whether there are other means of challenging B's evidence, and whether the Appellant is unable to pursue lines of cross-examination to his material advantage. The court will also consider whether any unfairness that might otherwise arise can be "negatived by directions given by the trial judge". If B's evidence is adduced, the jury will be directed to treat his evidence with caution. They will be given a direction, known as a "Longman warning", which highlights the disadvantage to the Appellant occasioned by the delay – see *Longman v The Queen* [1989] JCA 60 (1989) 168 CLR 79.

The judgment of the Senior District Judge

20. The Senior District Judge found that the Appellant came to the United Kingdom to avoid being prosecuted for the alleged assaults on D, but that at that stage the Respondent did not know where he was. If the Appellant had remained in Australia he would have faced trial in relation to the allegations made by D. As it was, the Appellant remained in the UK and failed to give himself up to the authorities in Western Australia between 1990 and 2004. Although the Appellant had made trips back to Australia in that period, the District Judge considered it was not surprising that he had not been apprehended.

21. When the Australian authorities discovered that the Appellant had been charged with offences in this jurisdiction, there was good reason not to pursue extradition pending the outcome of those proceedings. It was very unfortunate, but understandable, that extradition was not sought whilst the Appellant was serving his sentence of imprisonment. There was, however, "particularly egregious delay" between December 2016 (at which point the Respondent knew that the Appellant had been released) and the end of 2019 when his extradition was requested. If the Respondent had acted with expedition in 2016 then B would have been alive and able to give evidence at the Appellant's trial.

22. The District Judge accepted that B's evidence was likely to be "the sole and decisive" evidence against the Appellant. However, she pointed out that there were features of

B's account which resonated with other evidence. Thus, B had said that the Appellant had admitted to him, B, that he had raped D and had told him that he had been arrested and charged but that he was going to go to the UK. The Senior District Judge considered that this was relevant evidence in relation to the complaints made by B. Moreover, the Appellant had said in interview that he had a sexual relationship with B. The Senior District Judge did not consider that she was in a position to determine questions of cross-admissibility and propensity. She observed that these were matters for the trial court in Australia.

23. The Senior District Judge pointed to the safeguards that are available in Australia when considering whether to allow a prosecutor to rely on hearsay evidence. The court will take account of the delay, the reasons for the delay, and the reasons for the absence of the witness. The fact that the Appellant will not be able to challenge B will be taken into account, as will the fact that the jury will not be able to see B react to cross-examination, and the fact that B's account is the sole and decisive evidence against the Appellant.

24. After making reference to these factors, the Senior District Judge said:

> "The safeguards and the way the Supreme Court of WA would approach the admission of the statement leads me to find that it would not be unjust to extradite the RP on charges 13 to 18. The court in in the RS would undertake the same sort of exercise that a court would in this jurisdiction. They would exclude the statement in whole or in part or not, if it were to be allowed in the court would give a warning to the jury about the weight of the statement and how they should approach it. If the statement is excluded the RS has made it clear charges 13 to 18 would be dropped.
>
> In this case the two conditions set out by Professor Spencer are met. The witness has good reason for not attending to give evidence and there are sufficient safeguards to ensure that the trial is as fair as it could be, to guard against a miscarriage of justice.
>
> It would not be unjust to extradite him on charges 13 to 18 and I find that a fair trial could take place.
>
> In terms of oppression, these allegations are extremely serious, the RP is going to be extradited for 30 of these offences in connection to alleged assaults on three boys who were under 16 at the time. The RP has known for years there was a warrant outstanding against him in Australia. It is not a case that he could have felt secure from prosecution. I accept that by extraditing him to Australia the RP is going to suffer hardship but the addition of charges 13 to 18 is not going to increase the hardship he will suffer by being extradited on the other charges."

Submissions

25. Mr Smith, on behalf of the Appellant, argues that the authorities in Western Australia are culpable for the delay since 1990, their culpability is the more egregious since 2005 when the Appellant's whereabouts was known, and that B died during the period of culpable delay. It follows that because of the culpable delay on the part of the Australian authorities, the Appellant will be unable to cross-examine his accuser who provides the sole evidence against him. Mr Smith submits that the Senior District Judge erred in asking whether B had a good reason for not attending the trial. The question was whether the Respondent had good reason for adducing B's evidence as hearsay. That question should be determined having regard to all the circumstances of the case rather than by refence only to the narrow and immediate reason for the non-availability of the witness. Where, as here, the witness has died it is, he says, relevant to take account of the broader circumstances, including the question of whether a trial could have taken place while the witness was still alive if the prosecutor had acted with reasonable diligence. He therefore argues that the Senior District Judge was wrong to find that, because B had died, it automatically followed that there was a good reason for adducing his evidence by way of hearsay. Instead, he says, the logical consequence of the Senior District Judge's findings that the delay was "particularly egregious" and that B would have given live evidence if the Respondent had acted with expedition is that there is no good reason for B's evidence to be adduced as hearsay. The requirement for a good reason to adduce hearsay evidence is treated as a fundamental threshold condition by the European Court of Human Rights before evidence that may be "sole and decisive" can, consistently with Article 6 ECHR, be considered for admission – see *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 23 at [120].

26. Here, the Respondent fails to surmount this threshold condition, and the Senior District Judge should therefore have concluded that a trial in Australia would inevitably be unjust. It was not necessary or appropriate to consider the safeguards available in Australia because the test for injustice under section 82 is less exacting than that for an article 6 breach – see *Gomes* at [36] (paragraph 15 above).

27. Further, the Senior District Judge focussed too much on the safeguards available under Australian criminal procedure. Instead, she should have focussed on the key question which was whether the Appellant could have a fair trial in Australia. There are, says Mr Smith, no safeguards which would allow for a fair trial in light of the reliance on hearsay evidence and the delay in requesting extradition. Accordingly, the Appellant's extradition would be unjust due to the passage of time, and the Senior District Judge was wrong to find otherwise.

28. Mr Sternberg, on behalf of the Respondent, contends that the Senior District Judge was entitled to reach the conclusions that she did. She was right to focus on the safeguards afforded to defendants when the prosecution seek to rely on hearsay evidence – that is the approach that is required in the authorities. She properly concluded that sufficient safeguards were in place to ensure fairness.

Discussion

29. The District Judge found that B provided the sole and decisive evidence against the Appellant in respect of the six charges that relate to alleged offences against B, that B had died during a period of "particularly egregious delay" and that if the Respondent

had acted with expedition then B would have been available to give live evidence. None of these findings are disputed. It follows that if the trial of the Appellant "had taken place with ordinary promptitude" then he would have been able to cross-examine B. Because of the "particularly egregious delay" the Appellant will not now be able to challenge, by cross-examination, the sole and decisive evidence against him on those charges. This provides the platform for the Senior District Judge's assessment of whether the passage of time had caused unfairness. As the care and detail of the Senior District Judge's judgment shows, she was well aware that the circumstances give rise to an acute question of whether a trial could be fair.

30. All that being the case, allocation of responsibility for earlier periods of delay is of, at best, peripheral relevance. Further, as *Kakis* shows, the question of whether a requesting state is culpable for periods of delay is not usually of central importance.

31. In any event, I do not consider that any error has been identified in respect of the Senior District Judge's assessment of the responsibility for the fact that the Appellant's extradition was not sought in the period before December 2016. The Appellant's submission that the Respondent bears culpability for the 15-year delay between 1990 and 2005 is impossible to sustain. The reason for that delay is that the Appellant fled from Australia to the United Kingdom in order to avoid prosecution. It has not been shown that the Respondent authorities knew or ought to have known that the Appellant was in the United Kingdom.

32. The Senior District Judge recognised that the Appellant had travelled back to Australia. He had done so using his British passport. There is no evidence as to what, if any, checks were carried out, or whether these would have been capable of linking the details in the Appellant's British passport with the outstanding warrant. The Senior District Judge was entitled to conclude that it had not been shown that the Respondent authorities were culpable for the fact that the Appellant was not apprehended. It would have been open to the Appellant, having come to the UK to flee from justice in Australia, to surrender to the authorities in Australia when he returned. If he had done so on any of the occasions when he visited Australia between 2002 and 2004 then he could have been apprehended and tried for the offences against B. As it was, he chose not to do so. Any responsibility on the part of the Australian authorities for failing to identify him – even if that had been technically possible - pales into insignificance by comparison.

33. The Senior District Judge also recognised that the Respondent knew, from 2005, that the Appellant was in the United Kingdom and that it would have been open to the Respondent to seek the Appellant's extradition, notwithstanding his prosecution, conviction and sentence in the United Kingdom. The WA police had maintained contact with Interpol during this period, but it was not possible to know precisely when the Appellant would be released, because of the nature of the sentence that was imposed. The WA police erroneously thought that the request for extradition could not be made until the sentence had been served. In fact, two alternative processes could have been adopted: extradition with an undertaking to return the Appellant to the UK at the end of the proceedings in Australia (see section 119 of the 2003 Act), or adjournment of the extradition proceedings until the Appellant was released from custody (see section 76B of the 2003 Act). The WA police were thus under a legal misapprehension. However, the Senior District Judge was entitled to regard this as "understandable", even though it was "very unfortunate." Both of those descriptions were apt.

34. Once the WA police were aware of the Appellant's release the District Judge did consider that there was a period of "particularly egregious" delay until the point at which extradition was requested (so the 3 year period from December 2016 to December 2019). Having found that B died during that period of delay for which the Appellant was not, primarily, responsible, the Senior District Judge critically assessed the safeguards that could be put in place to ensure fairness. This is precisely the approach that is required by the authorities – see the third of Lord Bingham's five propositions in *Knowles* (and see paragraphs 12-14 above).

35. The Senior District Judge's consideration of the safeguards that are in place in Australia show that they bear close comparison to the law and procedure that is adopted in England and Wales. Thus, a gateway has to be identified before hearsay evidence can be admitted – compare chapter 2 of Part 11 of the Criminal Justice Act 2003 with clause 7 of schedule 3 to Western Australia's Criminal Procedure Act 2004. In both cases, one possible gateway for the admission of hearsay evidence is that the witness is dead – compare section 116(2)(a) of the 2003 Act with clause 7(1)(a) of the Western Australia 2004 Act. Even where a gateway for admission of hearsay evidence applies, there is, in each jurisdiction, a residual discretion to refuse to admit the evidence on grounds of fairness – compare section 126 of the 2003 Act and section 78 of the Police and Criminal Evidence Act 1984, with clause 7(5) of the Western Australia 2004 Act. If the evidence is admitted, then similar directions are given to the jury to safeguard against the risk of unfairness – compare the Judicial College's guidance in the Crown Court Compendium (December 2020) at 14-3 with the "Longman warning" that is given in Western Australia. Ultimately, in both jurisdictions there is jurisdiction to stay for abuse of process – see, in Western Australia, *Barton v R* (1980) 147 CLR 75 and section 90 of the Western Australia 2004 Act.

36. Accordingly, and unsurprisingly, the courts in Australia have safeguards that correspond to those in England and Wales.

37. As *Gomes* and *Knowles* show, where the requesting state has satisfactory procedures of its own, akin to the abuse of process jurisdiction that applies in England and Wales, it is not necessary for the extradition court to reach its own final conclusion as to whether a fair trial would be possible. That is the case here, as it was (on different facts) in *Scott* (see *per* Bean LJ at [58]).

38. Further, as *Gomes* and *Knowles* also show, the requesting state will generally be in a better position than the extradition court to determine whether a fair trial is possible and, if so, what measures should be put in place to ensure fairness. The present case is a good example of that. It involves 36 charges relating to alleged offences against 4 complainants. None of the primary evidence was before the Senior District Judge. Yet, it is only by scrutinising the evidence that it is possible to make the assessments necessary to determine whether the evidence of B should be admitted as hearsay, whether sufficient safeguards can be put in place to ensure fairness, what those safeguards should be and how they should be tailored to the particular facts. The court in Western Australia will be seized of the trial and it will be seized of all of the evidence. It can safely be relied on to ensure fairness. If, ultimately, it turns out that a fair trial on these 6 charges is not possible, then the Australian court will not proceed with the charges. If it turns out that particular safeguards are necessary to ensure fairness then it has the powers and procedures necessary to apply those safeguards, and it can be relied on to do so.

39. It was not therefore necessary for the Senior District Judge to reach a concluded view on whether a trial would be fair. The safeguards that are in place are such that it would not be unjust to extradite the Applicant. Nor was it necessary for the Senior District Judge separately to analyse the case by reference to Article 6 ECHR. This was not a human rights challenge to extradition, and Article 6 ECHR does not apply in Western Australia – the courts in Western Australia have different rules and mechanisms in place to ensure a fair trial. All that was necessary was for the Senior District Judge to satisfy herself that these were akin to those that apply in England and Wales.

40. In the event, however, the Senior District Judge did make a finding that a fair trial could be possible. That finding is not inconsistent with her acceptance that B gives the sole and decisive evidence in respect of 6 of the charges. Domestic and Strasbourg authority recognise that a fair trial by the standards of Article 6 ECHR may be possible even where sole and decisive evidence is hearsay – see *R v Horncastle* [2009] UKSC 14 [2010] 2 AC 373 and *Al-Khawaja*. That may be so, in particular, where there is a good reason for the non-attendance of the witness and there are sufficient safeguards against a miscarriage of justice resulting from the defendant's inability to question the witness.

41. Mr Smith is right that the mere fact that a witness has died does not mean that it will be fair to admit the witness' evidence as hearsay. A wider enquiry may be required. If, to take an example used by Mr Smith, a prosecutor causes delay in bad faith with the intention of rendering a witness unavailable for cross-examination, to the prejudice of the defendant, then it is unlikely to be fair to admit the witness' evidence as hearsay. Whether that is determined as a preliminary or threshold question, as indicated by *Al-Khawaja*, or whether it is determined by the application of a residual abuse of process jurisdiction, does not, for these purposes, make a practical difference.

42. In the present case there is no scope for any suggestion of bad faith on the part of the Respondent. Nor was there any reason for the Respondent to think that B was likely to die during the period 2016 - 2018. He was just 50 years old at the date of his death, and there is no evidence that he was known to be in ill-health. The fact that he died during a period of delay does not necessarily mean that there is no good reason for his evidence to be adduced as hearsay. Although B's written statement provides the sole evidence in relation to the actual commission of 6 of the offences, it is far from the only evidence in the case. As the Senior District Judge explained, the Appellant has admitted being in a sexual relationship with B, and questions of cross-admissibility and propensity may also arise. It has not been shown that B's evidence is incapable of being tested and assessed in the context of the case as a whole, by means other than cross-examination. Moreover, the Western Australia trial process contains sufficient safeguards against a miscarriage of justice resulting from the Applicant's inability to question B. Accordingly, even if it had been relevant and necessary to consider the provisions of the European Convention on Human Rights, it has not been shown that a trial in Australia would be incompatible with the requirements of Article 6 ECHR.

43. For all these reasons, the Senior District Judge was not wrong to reject the Appellant's contention that extradition would be unjust having regard to the passage of time.

Conclusion

44. I would therefore dismiss the appeal and uphold the decision of the Senior District Judge that the 36 charges should be sent to the Secretary of State for her decision as to whether the Appellant should be extradited to Australia.

Lord Justice Fulford:

45. I agree.