EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2016-009-005221
[2016] NZDC 15560

THE QUEEN

v

FRANCISCUS MARIA SCHAAPVELD

Date of Ruling: 11 August 2016

Appearances: K South for the Crown
P Allan for the Defendant

Judgment: 11 August 2016

RULING OF JUDGE J A FARISH

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[1] On 21 April 2012 Mr Schaapveld was detained at the UK border by customs. In the truck that he was driving was six million pounds' worth of cocaine. He was detained and spoken to and denied any knowledge as to the contents of the truck. He was released on a bail bond, was not charged with any offence, the bail bond simply requiring him to surrender himself to the police initially in October of 2012.

[2] No travel documents were taken from him and he was, as he said to me in submissions, basically as he understood it free to leave the UK if he wished to do so. In June of 2012 he returned to New Zealand. He had originally resided here. His mother was resident here. He had gone to live in the UK in 1998.

[3] In December of 2015, extradition procedures were initiated with the New Zealand authorities to extradite Mr Schaapveld back to the UK to answer to charges of conspiracy to import cocaine and also a charge of a conspiracy to

fraudulently evade a prohibition in relation to the importation of a drug amphetamine.

[4] Mr Schaapveld opposes the extradition order that is now sought. He opposes it on the basis that the delay that has been caused by the UK authorities in seeking to extradite him means that it would be unjust and oppressive for him to be returned to the UK.

[5] The facts very briefly are that Mr Schaapveld was employed as a truck driver. He has a long history, some 40 years' history of being a truck driver. He had returned to the UK with his wife and three children to live in 1998. Unfortunately, his wife fell ill with cancer and passed away in 2006, the matter which Mr Schaapveld says devastated him and left him with ongoing problems in relation to depression.

[6] He was a long-haul truck driver so would drive throughout Europe returning goods to the UK. On 21 April he was stopped at the border. The truck and trailer unit that he was driving was searched and within the trailer unit was the alleged drugs that is the six million dollars' worth of cocaine. He was detained overnight, spoken to by both customs and the police and then released the following day.

[7] He decided in June of 2012 to return to New Zealand. His mother is an older person. She has some health difficulties in relation to her hips. She requires a hip replacement operation. His children had grown up. He told me that he only has one child now left in the UK and he made his way back here on his normal passport. He did not in any way attempt to evade the authorities. He understood that they were fully aware of him leaving and he came back and worked in New Zealand as a driver for Fonterra.

[8] In 2014 he entered into a relationship. Unfortunately though, the lady who he was living with also succumbed to cancer after an illness of some eight months. This reignited the issues of depression that he had. Throughout that period of time, he had had no contact from the UK and there had been no enquiries that he was aware of or charges laid against him that he was aware of.

[9] The UK authorities were aware that he was living here in August of 2013. Interpol in Wellington had confirmed with the UK authorities that Mr Schaapveld had entered the country and was residing in Christchurch. In June and July of 2015 Mr Schaapveld's alleged co-conspirator stood trial in the United Kingdom. They were convicted and on 24 July they were sentenced to 20 years' imprisonment.

[10] A warrant and a charging document was not laid until 14 September 2015 in the Manchester Magistrates Court and the application for extradition was filed with the New Zealand authorities on 19 December 2015. Mr Schaapveld was arrested in April of this year and he has now been in custody for some three months.

[11] In relation to the law that there is not a great deal of dispute, the test as set out under s 45 Extradition Act 1999 really contains a three step process before the Court can issue an extradition order pursuant to s 46 of the Act.

[12] The three step process is as follows. The Court must determine if a warrant for arrest of a person described in s 41(1) and endorsed under that section has been produced to the Court. I am satisfied and it is not disputed that a warrant for arrest described was endorsed by Judge Murfitt against Mr Schaapveld.

[13] Secondly, whether the respondent, that is Mr Schaapveld, is an extradited person in relation to an extradition country. Again that is not disputed. It is accepted that Mr Schaapveld is an extradited person. Thirdly, whether the offences Mr Schaapveld is charged with are extradition offences in relation to the extradition country. Again that is not in dispute. The charges here are clearly extraditable offences within the UK legislation and also within New Zealand.

[14] Now given that those criteria are not in dispute, Mr Schaapveld is eligible for surrender unless he can demonstrate on the balance of probabilities and in this case pursuant to s 8(1) Extradition Act that to return him to the UK would be unjust and/or oppressive.

[15] The meaning of unjust and oppressive has been discussed in a number of High Court and Court of Appeal cases. The first is of course the decision of the

Court of Appeal in *Wolf v Federal Republic of Germany* (2001) 19 CRNZ 245 (CA) and more recently in relation to the definition of unjust or oppressive, the decision of Fisher J in *Police v Thomas*[1] and there is also a general description in another case again recorded in the case of *Kim v Prison Manager, Mt Eden Corrections Facility* [2015] NZCA 2 (25 February 2015).

[16] Unjust usually generally signifies prejudice to the accused in presenting a defence to the charge, the prejudice being of a kind that cannot safely be left to be dealt with by the trial Court. Oppressive generally signifies hardship to an accused resulting from changes in his circumstances that have taken place during the period under consideration. Her Honour Potter J noted that oppression is a word of considerable strength implying, "Very harsh or grossly unfair conduct, crushing or trampling down another person, in derogation of that person's rights."

[17] Here, the argument for Mr Schaapveld which Mr Schaapveld has filed submissions on personally and also Mr Allan as his counsel, is that the passage of time and the absence of any explanation as to the delay in charging Mr Schaapveld means that it would be oppressive for Mr Schaapveld to be returned to the United Kingdom to face charges.

[18] It is true that there is absolutely no explanation as to why Mr Schaapveld was not charged along with his alleged co-conspirators. I am well aware that the United Kingdom can try people in absentia. However, that was not done. The charges were not laid against Mr Schaapveld until after the alleged co-conspirators' trial and after they had been sentenced.

[19] There is a delay here and it is not a small delay. It is a considerable delay. Mr Schaapveld in his written submission to me explained that as time went on and without any contact at all from any authorities in the UK or his lawyers, he believed that the matter had now come to an end, particularly given that the other alleged co-conspirators had been dealt with although there is no indication that he was actually even aware of that prior to his arrest in New Zealand in April of this year.

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[1] *Police v Thomas* (1989) 4 CRNZ 454

[20] He has also set out for me that his circumstances have changed. He has been working in New Zealand under his own name paying taxes. He is anxious about his mother being left here. She is elderly and that he would like to care for her. Although he has a child and I think a brother in the UK, he does not have a lot of support or family there and he had decided in 2012 that he would return to New Zealand to make a life for himself here.

[21] Mr Allan on behalf of Mr Schaapveld submits that the emphasis under the s 8 considerations are not really that it would be unjust to return Mr Schaapveld to the United Kingdom. He would be able to defend the charges. However, Mr Allan says that in the overall circumstances of this case including the nature of the charge, the unexplained delay in the charging of Mr Schaapveld and the changes in his circumstance, in his personal circumstances relating to his family, that it would be oppressive to return him to the United Kingdom and Mr Allan's submission on behalf of Mr Schaapveld is that on the balance of probabilities I should exercise my discretion and not make a warrant for extradition.

[22] On behalf of the Crown Ms South submits that all of the above matters are reasonable to raise. However, they do not meet what is reasonably high threshold in relation to s 8 considerations. She has referred to a recent decision of Fogarty J in *R v Smith* [2014] NZHC 2091 and also comments of the Supreme Court in the Kim Dotcom case *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745, (2014) 27 CRNZ 537. Although that case was not in relation itself to extradition, it related to a search warrant issue, there were general comments made in relation to countries who are part of the extradition treaty interpreting statutes in a way which will allow persons to be extradited.

[23] Ms South has also reminded me that I am not to sit in the position of a Judge in the United Kingdom in relation to whether or not the pre-trial delay is enough to amount to a situation where a stay could be granted to Mr Schaapveld in relation to the charges. She has also reminded me that I cannot look behind the charges themselves and consider what evidence may or may not be available to the UK authorities in relation to the charges against Mr Schaapveld.

[24] On a humane level I think it is unfair for Mr Schaapveld this length of time, after he had been stopped in April of 2012, to be now looking down, being deported effectively back to the United Kingdom and to face very serious charges where he knows that there are obviously very serious penalties. However, I do not make the law. I have to abide by the High Court decisions and despite the matters that Mr Schaapveld has raised they do not bring me to a point where I could legitimately say that it would be oppressive to return Mr Schaapveld to the United Kingdom.

[25] Therefore, I am not in a position where on the balance of probabilities I am satisfied that it would be unjust or oppressive and I, therefore, must make an order for extradition, endorse the warrant for extradition pursuant to s 46(1) Extradition Act. I understand from the Crown submissions that this will allow Mr Schaapveld if he wishes to appeal the decision and then there is a separate procedure.

[26] I do not need to consider whether or not I should refer the matter to the Minister under s 48 Extradition Act. None of the grounds for referral have been made out or submitted to me during the course of argument.

[27] So Mr Schaapveld I am sorry. I have made the order for extradition. As we discussed the other day, I think you have got a window of I think it is about 15 days to lodge an appeal against my decision. Otherwise I think you will be extradited back to the UK fairly promptly at the expiry of those 15 days.

J A Farish
District Court Judge