IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2023-404-000218
[2023] NZHC 2055

UNDER	Section 68, Extradition Act 1999
BETWEEN	STEVEN PAUL WHITE Appellant
AND	UNITED KINGDOM Respondent

Hearing:	17 July 2023
Appearances:	S Wimsett for the Appellant R McCoubrey for the Respondent
Judgment:	4 August 2023

JUDGMENT OF GORDON J

This judgment was delivered by me
on 4 August 2023 at 11 am

~~Registrar~~/Deputy Registrar
Date: 4.08.2023

A. Tila-Muagututia
Deputy Registrar
High Court

Solicitors/Counsel:
Meredith Connell, Auckland
S Wimsett, Barrister, Auckland

[1] The appellant, Steven White, appeals on questions of law from a decision of Judge S Bonnar KC in the District Court at Auckland on 12 April 2023.[1] Judge Bonnar found that Mr White was eligible for surrender to the United Kingdom in relation to seven offences of indecent assault for which Mr White's extradition was sought.[2]

[2] In the District Court there was no dispute that:[3]

(a) a warrant for Mr White's arrest endorsed under s 41 of the Extradition Act 1999 (the Act) had been produced to the Court;[4]

(b) Mr White is an extraditable person in relation to the United Kingdom;[5] and

(c) the alleged offences are extradition offences in relation to the United Kingdom.[6]

[3] In the District Court Mr White argued, unsuccessfully, that he was not eligible for surrender under the discretionary restrictions in s 8(1)(b) and (c) of the Act.[7]

District Court decision

[4] The Judge first referred to the factual background for the alleged offences. They were said to have occurred between 1 October 2002 and 31 March 2003 when the complainant was a 15 year old schoolgirl at a school in the Greater Manchester area. Mr White was a 28 year old teacher at the school where the complainant was a pupil. The alleged indecent assault involved allegations of kissing and intimate touching.

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1 Appeals to the High Court against determinations of eligibility for surrender are restricted to questions of law only: Extradition Act 1999, s 68.
2 *United Kingdom v White* [2023] NZDC 7008.
3 At [13].
4 Extradition Act, s 45(2)(a).
5 Section 45(2)(b)(i).
6 Section 45(2)(b)(ii).
7 Section 8(1)(b) applies if the accusation was not made in good faith in the interests of justice; s 8(1)(c) relates to the passage of time since the alleged offence; and in either instance where, in all the circumstances, it would be unjust or oppressive to surrender the person.

[5] The Judge noted that although the complainant alleged sexual intercourse also took place between herself and Mr White on several occasions, Mr White does not face any charges in the United Kingdom in relation to those allegations as the relevant offence of unlawful sexual intercourse with a girl under 16 is time-barred.

[6] The Judge stated that there was no dispute between the parties as to the relevant chronology of events and accordingly adopted the chronology set out in the submissions on behalf of the United Kingdom, annexing them to his judgment. The chronology will similarly be annexed to this judgment, but with the name of the complainant, a teacher at the school and the school redacted.

[7] Mr White filed an affidavit in opposition to the application. Notwithstanding its late filing, the United Kingdom did not object to its admission, save for the paragraphs in which Mr White denied involvement in the offending.[8] The Judge admitted the affidavit with the exception of those parts.

[8] The Judge then referred to Mr White's personal circumstances as deposed to in the affidavit and arising from Mr White's evidence and cross-examination at the hearing. I will refer to those personal circumstances, as necessary, further on in this judgment.

[9] Turning to s 8 of the Act, the Judge noted that the onus was on Mr White to satisfy the Judge that a discretionary restriction applied under s 8. The Judge recorded the acceptance by counsel for Mr White that the threshold for establishing injustice or oppression under s 8 is a high threshold to meet.[9]

[10] The Judge framed the issues for determination as follows:

> [15] The issues for me, therefore, are whether I am satisfied, first, that the accusations against Mr White were not made in good faith in the interests of justice and, if so, whether that factor, in combination with the passage of time between the alleged commission of the offences and the present and the other

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8 Section 45(5)(a) of the Extradition Act prevents the Court from receiving evidence contradicting an allegation that the person has engaged in the conduct constituting the offence for which the surrender is sought.

9 *United Kingdom v White*, above n 2, at [14] citing *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [52].

> circumstances of the case, it would be unjust or oppressive to surrender Mr White to the United Kingdom.

[11] On the first issue, whether he was satisfied that the accusation against Mr White was not made in good faith in the interests of justice, the Judge said:

> [17] ... The respondent points to the fact that no complaint was made to the police for approximately 14 years after the alleged events, that is until May 2017, and that the complaint was made by the complainant after she became aware that Mr White had settled into a new life and had family and children in New Zealand. He also points to the fact that the complainant initially told the police that she had no contact with Mr White after 2009. Mr White has, however, produced evidence of social media and email messages between the complainant and him which occurred in 2011 and 2013 and one further message in 2015. The submission is made that these matters reflect bad faith on the part of the complainant.
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> [18] In relation to the time between the alleged offending and her complaint to the police, in 2019 [the complainant] told the police that she was now working in mental health intervention and, as a result of her employment, she realised that she was still affected by what had happened to her. That is what prompted her to go to the police.
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> [19] The communications were addressed in a supplementary affidavit filed by the applicant. Detective Constable Eastwood of the Greater Manchester police spoke to the complainant about those communications in September 2022. The complainant accepted that she did have those communications with Mr White. She said, however, that the messages and communications provided by Mr White do not paint the full picture. She told the police that she communicated with the respondent at the time because she was still vulnerable and she now considers that Mr White still had a hold over her. In relation to what she had earlier told the police, she said that she had previously thought she had last contacted Mr White in 2009 but, having now seen the communications, she accepts that she must have misremembered that.

[12] The Judge considered that the provision in the Act regarding bad faith (s 8(1)(b)) is principally directed to whether there is bad faith on the part of the prosecuting authorities in bringing the proceedings against the respondent. The Judge said:[10]

> ... I consider that s 8(1)(b) of the Act is principally directed to whether there is bad faith on the part of the prosecuting authorities in bringing the proceedings against the respondent. That follows from the use of the words "not made in good faith in the interests of justice". The inclusion of the words "in the interests of justice" are more readily applicable to the standards expected of prosecuting agencies rather than of complainants. I am supported in that interpretation by the previous judgment of this court in *Commonwealth of Australia v Sarker*.

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[10] At [20] (footnote omitted).

[13] The Judge stated that there was nothing before him to suggest that the prosecuting agencies in the United Kingdom had brought the proceedings in anything other than good faith. However, in case he was wrong in that interpretation, the Judge said he did not consider that the matters raised on behalf of Mr White supported the suggestion that the complainant was, herself, acting in bad faith. The Judge said:

> [22] In terms of the delay between the alleged events and the complaint, our Court of Appeal has recognised that delay by a complainant who has suffered sexual assault is understandable and, indeed, common. That conclusion has been drawn by the court in the context of extradition proceedings.
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> [23] In terms of the ongoing communications between the complainant and the respondent in the intervening years, that is also not uncommon in cases of alleged sexual offending. Further, the complainant has said that she simply forgot the dates of the later communications. It is not for me to determine any issues of substantive fact or issues relating to the credibility of the complainant in these proceedings. That will be for the tribunal of fact to determine in due course if Mr White does, indeed, stand trial.
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> [24] I am not satisfied that these matters, either individually or cumulatively, indicate that the complainant is not acting in good faith in making the allegations.
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> [footnote omitted]

[14] The Judge then turned to consider the passage of time noting that the events were alleged to have occurred some 20 years earlier. The Judge noted the timeframes as follows:

> [25] ... The initial complaint to police was made some 14 years after the events. There was then a period of something approaching two and a half years before a warrant was issued by the City of Manchester Magistrates Court for the respondent's arrest. The evidence in support of the application for extradition was sworn on 21 April 2021, some 16 months later. I note, in passing, that the original officer in charge of the investigation had retired in the intervening period and Detective Constable Eastwood had subsequently taken over the conduct of the case on behalf of the police.
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> [26] The ex parte application for the United Kingdom arrest warrant to be endorsed by this court was filed on 15 July 2021. The warrant was endorsed by Judge Paul of this court the following day.

[15] The Judge noted the submission made on behalf of Mr White that he was severely prejudiced by the passage of time:

> [27] ... He says that memories fade over such a period of time, but he points to no specific prejudice faced by him in terms of the unavailability

> of evidence or witnesses. Related to that submission, he says that he may experience difficulties in presenting an effective, detailed defence other than the fact that the alleged offences did not happen because, again, memories of detail fade over time. I note that is not an uncommon submission made in relation to many allegations of historic sexual offending.
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> [28] Mr White also submits that the communications which passed between him and the complainant in the intervening period, while not disproving the allegations she makes against him, cast doubt over their reliability. Again, it is not for this court to sit as a trier of fact. I have already addressed the fact that ongoing communications between a complainant and an alleged offender in an intervening period is not an unusual feature of cases where sexual offending is alleged. In any event, these matters will be able to be canvassed at trial, if a trial takes place, potentially to the benefit of Mr White.

[16] The Judge concluded that he did not consider the matters relating to the communications between the complainant and Mr White went to the potential fairness of the trial process.

[17] The Judge also considered other cases where delay had been raised. He then said, in summary, the relevant factors he had considered in terms of whether it was unjust or oppressive to surrender Mr White to the United Kingdom were:[11]

> (a) The majority of the delay in this case is not attributable to bureaucratic or administrative reason.
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> (b) The delay on the part of the complainant in making her complaint is understandable and, indeed, common.
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> (c) I accept the applicant's submission that the time delays which have occurred here cannot be described as inexcusable or unjustifiable but are understandable in the context of a delayed complaint, a subsequent investigation, a global pandemic, and a busy justice system.
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> (d) I note that Mr White is unable to point to any issues of specific prejudice.
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> (e) In any event, the United Kingdom courts can be expected to adequately address any issues of general prejudice which might result as a result of the passage of time. Prosecutions for historic sexual offending routinely proceed in both this country and in the United Kingdom. Matters of potential prejudice or unfairness are dealt with by trial courts in both jurisdictions on a routine basis.
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> (f) I also consider there is some merit in the applicant's submission that any delay in this case has, in fact, benefited the respondent by reason

[11] At [37].

of the United Kingdom's inability to prosecute him for the alleged offences of unlawful sexual intercourse with a girl under the age of 16.

(g) I acknowledge, however, that Mr White's circumstances have, indeed, changed in the intervening period. I also acknowledge that he is likely to be separated from his family in New Zealand, at least for a period of time, while these matters are dealt with. However, Mr White chose to leave the United Kingdom as an adult in his late 20s and to move to New Zealand. At least part of his reasoning in support of his decision not to return to the United Kingdom was because of the disciplinary investigation relating to another student. I return to the previous quoted extract from the judgment of Simon Brown LJ in *Woodcock v Government of New Zealand*. I consider that I must be wary of paying excessive heed to the change of circumstances where, as here, Mr White voluntarily chose to leave the United Kingdom and remain in New Zealand. There is no reason to consider that equivalent changes of circumstance, in terms of his personal life, would not have occurred had he remained in the United Kingdom or, indeed, in Europe in the intervening period.

(h) I also take into account that these are relatively serious offences, involving alleged sexual offending against a young person by a teacher, at her school, in a position of trust relative to her. That must be a relevant factor to consider in weighing whether a surrender to stand trial in the United Kingdom would be oppressive.

(i) Finally, I also note that this is not a case where the respondent has been led to believe, by anything he had been told either by the complainant or by the UK authorities, that he was free to live his life in New Zealand without the risk of prosecution for the alleged offences in the United Kingdom.

[18] Weighing all of the above matters, the Judge was not satisfied that by reason of the passage of time since the offences were alleged to have been committed and all of the other circumstances of the case, it would be oppressive or unjust to surrender Mr White to the United Kingdom.

[19] The Judge accordingly concluded that Mr White was eligible for surrender in relation to the offences for which his extradition was sought.

Grounds of appeal

[20] Mr White advances three grounds in support of his appeal:

(a) Regarding s 8(1)(b) of the Act, the Judge erred in law by failing to take into account relevant matters, namely that Mr White had not been

interviewed or been given the opportunity of an interview, by the prosecuting authority. Further, the time before trial in the United Kingdom is relevant.

(b) The Judge erred in concluding that s 8(1)(b) focused on the prosecutor's conduct and did not give enough weight to the complainant's conduct when assessing whether the accusations were brought in bad faith.

(c) The Judge erred by failing to consider it would be oppressive to surrender Mr White because his good relationship with the complainant over the years after the alleged offending lured him into a false sense of security which allowed him to settle in New Zealand, including raising a family. As a result, the Judge was wrong to conclude the complainant did not act in bad faith.

[21] Mr White says, on the basis of the above grounds taken together, it would be unjust and oppressive to surrender him to the United Kingdom.

[22] Mr McCoubrey, for the United Kingdom, submits there were no errors of law as alleged as none of the discretionary restrictions on surrender in s 8 of the Act apply.

Statutory provision: Extradition Act, s 8

[23] Section 8(1) of the Act provides:

> **8 Discretionary restrictions on surrender**
>
> (1) A discretionary restriction on surrender exists if, because of—
>
> (a) the trivial nature of the case; or
>
> (b) if the person is accused of an offence, the fact that the accusation against the person was not made in good faith in the interests of justice; or
>
> (c) the amount of time that has passed since the offence is alleged to have been committed or was committed,—
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> and having regard to all the circumstances of the case, it would be unjust or oppressive to surrender the person.

General principles

[24] The following general principles apply in this appeal.

[25] First, the onus lies on Mr White to establish that the threshold in s 8 of the Act has been met, on the balance of probabilities.[12] The grounds in s 8(1)(a)–(c) are a pre-requisite for the exercise of a discretionary consideration under s 8. One of those grounds must be established before the Court can consider whether it would be unjust or oppressive in all the circumstances of the case to surrender the person.[13]

[26] When considering "all the circumstances of the case", other personal circumstances may be relevant but there must be a clear nexus between those circumstances and at least one of the grounds in s 8.[14] In *Tukaki v The Commonwealth of Australia* the Court of Appeal said:[15]

> ... The words "all the circumstances of the case" are, on their face, words of very broad application capturing everything to do with the person and the criminal proceeding. The critical limitation is that the personal circumstance must be connected to the passage of time since the offending or to the lack of good faith in the making of the accusation. ...

[27] The Court of Appeal in that case also considered that its approach was consistent with that described by Lord Diplock in *Kakis v Government of the Republic of Cyprus*.[16] Quoting from *Kakis* the Court stated:[17]

> So one must look at the complete chronology of events ... and consider whether the happening of such of those events, as would not have happened before the trial of the accused in Cyprus if it had taken place with ordinary promptitude, has made it unjust or oppressive that he should be sent back to Cyprus to stand his trial now.

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12 *Commonwealth of Australia v Mercer* [2016] NZCA 503 at [29] citing *Wolf v Federal Republic of Germany* [2001] NZAR 536 (HC) at [66] and *New Zealand v Moloney* [2006] FCAFC 143, (2006) 154 FCR 250 at [31].

13 *Wolf v Federal Republic of Germany* [2001] NZAR 963 (CA) at [37] and *Mailley v District Court at North Shore* [2013] NZCA 266 at [48].

14 *Wolf v Federal Republic of Germany*, above n 13; at [60]; *Mailley v District Court at North Shore*, above n 13, at [48]; *Commonwealth of Australia v Mercer*, above n 12, at [29]; and *Tukaki v The Commonwealth of Australia* [2018] NZCA 324, [2018] NZAR 1597 at [11].

15 *Tukaki v The Commonwealth of Australia*, above n 14, at [22].

16 *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779.

17 *Tukaki v The Commonwealth of Australia,* above n 14, at [23] quoting *Kakis v Government of the Republic of Cyprus,* above n 16, at 782.

[28] As to the meaning of the words "unjust" and "oppressive", the words of Lord Diplock in *Kakis* are commonly referred to:[18]

> "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. ...

[29] The threshold for oppression is a high one.[19]

First ground of appeal

[30] Mr Wimsett, counsel for Mr White, submits that the Judge erred in law by failing to properly consider the conduct of the United Kingdom's Greater Manchester Police and Crown Prosecution Service (UKCPS) while investigating the alleged offences. Mr Wimsett says this is based primarily on what he says was a failure to interview Mr White or provide an opportunity for him to comment on the allegations before charging him.

[31] The United Kingdom's Director of Public Prosecutions provides guidance on charging decisions. This is contained in a document "Director's Guidance on Charging" (The Director's Guidance).[20]

[32] Mr Wimsett refers to cls 5.2 and 5.3 of the Director's Guidance. Clause 5.2 states:

> 5.2 [Prosecutors and Police decision makers] must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge, based on an objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. ...

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18 *Kakis v Government of the Republic of Cyprus*, above n 16, at 782-783. For example, cited in *Tukaki v The Commonwealth of Australia*, above n 14, at [12] and quoted in *Commonwealth of Australia v Mercer*, above n 12, at [33].

19 *Commonwealth of Australia v Mercer*, above n 12, at [52].

20 *Director's Guidance on Charging* (Crown Prosecution Service, 6th ed, 31 December 2020).

[33] Clause 5.3 states:

> 5.3 The Code clarifies that a realistic prospect of conviction means *"an objective, impartial and reasonable jury, bench of magistrates or a judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged"*. ...
>
> [footnote omitted]

[34] Mr Wimsett says that Mr White had no opportunity to put information or potential defences forward for investigators to consider. He submits the decision to charge Mr White without an opportunity to be interviewed runs counter to the requirements of the Director's Guidance.

[35] Mr Wimsett further relies on the UKCPS guidance targeted at rape and sexual offences. He refers to Chapter 2: Applying the Code for Crown Prosecutors to Rape and Serious Sexual Offences (Code Guidance), which discusses a defendant's interview as follows:[21]

> The Prosecutor must consider the account provided by the suspect in [the] interview. This will help to identify the issue in the case and will assist in establishing what reasonable lines of enquiry should be pursued. Prosecutors should assess the credibility and reliability of the suspect's account by considering all the evidence available. ...

[36] Mr Wimsett submits that in the absence of an interview, that process could not have occurred. He says this strengthens the submission that the prosecution displayed bad faith in investigating and charging Mr White.

Discussion

[37] The way in which the Director's Guidance and Code Guidance are framed presuppose that an interview has in fact taken place with the defendant. However, neither document provides that a suspect may not be charged, nor that a prosecution may not continue, until the suspect has been interviewed or afforded that opportunity. The Director's Guidance and the Code Guidance simply stipulate that all information available to the decision-maker should be taken into account. As Mr McCoubrey submits, this is unsurprising.

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21 *Rape and Sexual Offences* (Crown Prosecution Service, 21 May 2021).

[38] Mr McCoubrey further submits that the Director's Guidance and Code Guidance must be approached with a degree of realism where a suspect is overseas. He submits this is particularly the case where a suspect, as is the case with Mr White, left the United Kingdom partly because he was being investigated, albeit in respect of other allegations.[22]

[39] I give only limited weight to those submissions in [38] above. Possible options for the investigating Police force, had Mr White agreed to be interviewed, might have been for a Police officer to travel to New Zealand to interview Mr White; or an interview by Zoom may have been available; or the Police force concerned may have been able to obtain the assistance of a New Zealand Police officer to conduct an interview. However, in my view, the highest it can be put for Mr White is that out of fairness, he should have been afforded the opportunity to be interviewed in either one of those ways. The fact that Mr White was not provided with an opportunity does not get anywhere near the high test of "bad faith".

[40] Accordingly, given that Mr White has failed to establish bad faith, the Court is not able to go on to consider whether it would be unjust for Mr White to be surrendered on this ground. I will, however, consider the "unjust" limb (as well as the "oppressive" limb) in connection with the third ground of appeal. As part of that later consideration I will also address the time to trial, referred to in the first ground.

[41] For completeness, I nevertheless go on to consider whether in the absence of an opportunity to be interviewed before he was charged, it would be "unjust" for Mr White to be surrendered.

[42] A fair trial may conceivably be impossible in the requesting state altogether because, for example, of a lack of basic procedural safeguards. However, that conclusion would be highly unlikely in the case of a Part 4 request,[23] which proceeds on the basis of an expedited "fast track" procedure known as a "backed warrant" procedure.[24]

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22 See *United Kingdom v White,* above n 2, at [10].
23 *Commonwealth of Australia v Mercer*, above n 12, at [43(d)].
24 At [18].

[43] Alternatively, a fair trial may not be possible because of some significant impairment that lies in the way of the conduct of a fair trial.[25]

[44] A conclusion that a fair trial is not possible for either reason will depend on evidence. A court is unlikely in the case of a Part 4 request to infer impossibility of a fair trial without evidence unless the point is obvious and unarguable otherwise.[26]

[45] Mr Wimsett submits that in the absence of at least the offer of an interview giving Mr White the opportunity to provide an explanation, he would likely need to give evidence at trial. In my view, the Court cannot conclude that a fair trial would be impossible on that basis. That does not give rise to prejudice in the conduct of a trial to such an extent that a fair trial would not be possible. The Court is entitled to be satisfied that the courts in the United Kingdom have the necessary procedures to ensure a fair trial.

[46] There was a discussion about safeguards in the requesting country in *Woodcock v Government of New Zealand*[27] where the Government of New Zealand sought the extradition of Mr Woodcock, a one-time Roman Catholic priest, who had been charged with a number of sexual offences committed mostly in the early 1980s. The judgment of Simon Brown LJ contains a discussion of the "unjust" limb[28] in the context of delay. After considering evidence from a New Zealand Crown solicitor as to procedures in New Zealand, and after referring to Lord Diplock's speech in *Kakis*, Simon Brown LJ said:[29]

> [20] ... In my judgment, however, that would not be the correct approach to this provision. 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).
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> [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. ... If, of course, we were to conclude that the domestic court in the requesting state

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25 At [43(e)].
26 At [43(f)].
27 *Woodcock v Government of New Zealand* [2003] EWHC 2668 (QB), [2004] 1 WLR 1979.
28 Pursuant to s 11(3) of the Extradition Act 1989 (UK) (repealed), which, on the present issue, is materially similar to the provision in s 8 of the Extradition Act (NZ).
29 *Woodcock v Government of New Zealand*, above n 27.

> 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.

[47] Although there was no evidence in the District Court regarding procedures in the United Kingdom for guarding against an unfair trial, it was not suggested that the courts in the United Kingdom do not have the necessary procedures to ensure a fair trial.

[48] Accordingly, although it is strictly unnecessary for the Court to decide this point (having found there was no bad faith), I do not consider that the absence of the opportunity for an interview before a charging decision was made means it would be unjust for Mr White to be surrendered.

Second ground of appeal

[49] Mr Wimsett submits that s 8(1)(b) of the Act makes no distinction between the conduct of the prosecuting agency and that of the complainant when assessing bad faith. He submits, therefore, that s 8(1)(b) should rightfully involve an assessment of the conduct of both parties equally as they work in tandem to bring the accusations about.

[50] No authorities are provided in support of that submission.

[51] The authorities of which this Court is aware from both Australia and New Zealand are to the opposite effect.

[52] For example, in *Vyner v Keeper of Her Majesty's Penitentiary at Malabar*[30] the New South Wales Supreme Court considered this issue in the context of a habeas corpus application after the plaintiff had been committed to prison pending his return

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30 *Vyner v Keeper of Her Majesty's Penitentiary at Malabar* (1975) 6 ALR 105.

to England following a request for extradition. The relevant statutory provision in that case[31] is materially the same as s 8 of the Act. The Court stated:[32]

> It was argued by [counsel for the Attorney-General of the Commonwealth of Australia] – and in my opinion correctly – that the "accusation" referred to is that made by the person who lays the information, or otherwise actually initiates the proceedings, and not the "accusation" made to the police or to the Director of Public Prosecutions, in this case by the company. Support for this view is to be found in the definition in s 4 of "fugitive" (a word which appears, inter alia, in s 9 which deals with the overriding liability of a fugitive to be surrendered) as meaning "a person accused of an extradition crime that is alleged to have been committed ...". I think it is clear that it is only when an information or other initiating process for his apprehension has been laid or issued that a person can be said to be "accused" in a relevant sense and it is my opinion also that "accusation" in s 16(b) has the same meaning. The consequence is that where, as here, and unlike the situation in *Ex part McElwain; Re Cook*, it is the Director of Public Prosecutions who has had the available evidence put before him and has decided to prosecute, a person who relies upon s 16(b) must relate it to the Director of Public Prosecutions and not to any other "accuser"; (see, as to this, *Zacharia v Republic of Cyprus* and *R v Governor of Brixton Prison; Ex parte McCheyne*).

[53] The same position was adopted in *Narain v Director of Public Prosecutions*[33] on an appeal and cross-appeal of a decision of a Judge of the Federal Court of Australia given in an application for review made by the appellant in relation to a decision of a Magistrate ordering the extradition of the appellant to New Zealand.

[54] The following passage from the judgment of Fox J makes the point:[34]

> It was argued in relation to both charges that the accusations were not made "in good faith or in the interests of justice" (s 27(1)(a)(ii)). Evidence was adduced to show that persons making the complaints to the police were acting vindictively or otherwise not in good faith, but the learned magistrate was not satisfied on this matter and the learned judge did not come to a conclusion respecting it. It is, in any event, a misapprehension to examine the motivation or level of intelligence of a person making a complaint to the police. The foundations of charges are many, and often are not dependent upon a complaint. The accusation is made by the police officer who lays the information (s 145 of the Summary Proceedings Act 1957 (NZ) and second schedule thereto). This is so in form and in substance. The police officer at the initial stage bears the responsibility for making and prosecuting the charge, and commonly he will have taken steps to satisfy himself that the charge is supportable. He may well have taken measures to see that a complaint is independently corroborated. In any event it is quite likely that activities by

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31 Extradition (Commonwealth Countries) Act 1966 (Cth), s 16.

32 *Vyner v Keeper of Her Majesty's Penitentiary at Malabar*, above n 30, at 108–109 (footnotes omitted).

33 *Narain v Director of Public Prosecutions* (1987) 15 FCR 411.

34 At 414.

> police officers are interposed between receipt of a complaint and the making of a charge. Whether this be so or not the subparagraph, in my view, when it refers to "the accusation" is referring to the "accusation [being] made in good faith" and is looking to the position of the informant. This was also the view of the Court of Appeal (NSW) in *Willoughby v Eland* (1985) 79 FLR 130 at 132–133.

[55] In the joint judgment of Wilcox and Jackson JJ, it is similarly stated:[35]

> For all of these reasons we conclude that the word "accusation" is used in s 27(a)(ii) to refer to the formal proceedings by which the prosecution was commenced. We agree with the views to that effect expressed in *Daemar v Parker*, *Willoughby v Eland* (1985) 79 FLR 130 and *Bates v McDonald*. A similar view, in relation to the use of the word "accusation" in s 16, was expressed by Yeldham J in *Vyner v Keeper of Her Majesty's Penitentiary at Malabar* (1975) 25 FLR 9 at 12–14. The non-technical term "accusation" was probably chosen so as to include all of the various procedures — information, charge, etc — which might be followed in New Zealand; or; in s 16, in any declared country. It follows from this conclusion that, in the present case, the two "accusations" were the informations laid by Detective Sergeant Currie. The question, then, is whether those informations were laid in good faith.

[56] The issue has been considered in New Zealand in the context of the discretionary provision in s 10 of the Fugitive Offenders Act 1881 (UK) which was in force in New Zealand,[36] and which applied prior to the enactment of the Act.

[57] In *Cook v Superintendent of Mt Eden Prison*[37] a request for the extradition of the plaintiff had been made for her return to England. Wylie J stated:[38]

> Nor has it been made to appear to me that the application for the return of the plaintiff has not been made in good faith in the interests of justice. That is so whether one looks at the motives of the actual "applicant" which I take, in technical terms, to be the informant Helen Mary Garlick, or those of the husband Mr Cook. It seems that it is to the former that I must look: *Vyner v Keeper of Her Majesty's Penitentiary at Malabar* (1975) 6 ALR 105; *Narain v Director of Public Prosecutions* (1987) 70 ALR 697.

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35 At 422.

36 See Fugitive Offenders Amendment Act 1976 (NZ) (repealed) which amended the Fugitive Offenders Act 1881 (UK) in its application to New Zealand as part of the law of New Zealand.

37 *Cook v Superintendent of Mt Eden Prison* HC Auckland AP82/87, 23 September 1987.

38 At 48.

[58] Then in *Liu v Crown Colony of Hong Kong*[39] the High Court similarly considered the issue of bad faith in the context of s 10 of the Fugitive Offenders Act 1881 (UK). Thorp J stated:[40]

> I agree with Miss Gordon's submission that "good faith" in terms of s 10 refers to the bona fides of the law enforcement authorities seeking extradition: see *Vyner v Keeper of Her Majesty's Penitentiary at Malabar* [1975] 6 ALR 105, *Narain v Director of Public Prosecutions* [1987] 70 ALR 697, and *Cook v Superintendent of Mt Eden Prison* (Auckland CP 184/87, unreported decision of Wylie J delivered 23 September 1987): and that there is nothing either on the face of the documents seeking the return of the fugitive nor in the procedure followed by the Hong Kong authorities to suggest that the present application has not been laid in good faith and in the interests of justice.

[59] None of the cases referred to are binding on this Court but I agree with their conclusions and reasons for those conclusions. The extradition process is more concerned with the bona fides of the extradition request, rather than the detail of the underlying criminal allegation. That is in part apparent from s 45(5)(a) of the Act which provides (in a Part 4 extradition request) that the person to whom the extradition proceedings relate is not entitled to adduce, and the Court is not entitled to receive, evidence to contradict an allegation that the person has engaged in conduct that constitutes the offence for which surrender is sought.

[60] I accept that there may be cases where there is an overlap between the bona fides of the extradition request and the underlying allegation. However, this is not such a case.

[61] Mr White points to messages sent to him by the complainant in 2011, 2013 and 2015 when the complainant initially told the Police that she had no contact with Mr White after 2009 (she later acknowledged she must have been mistaken). Mr White also refers to the complainant's delay in making allegations to the Police and the ongoing communications. However, neither of those two matters is uncommon in a case of alleged sexual offending.

[62] As the District Court Judge correctly held, these issues will be for the tribunal of fact to determine at any trial.

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39 *Liu v Crown Colony of Hong Kong* HC Auckland M2148/89, 10 October 1990.
40 At 8–9.

[63] In short, even if I am wrong and the Court may take into account matters in relation to the complainant in determining whether the accusations were not made in good faith in the interests of justice, there was no error on the part of the District Court Judge when he found that the matters raised by Mr White did not support the suggestion that the complainant was, herself, acting in bad faith.[41]

Third ground of appeal

[64] Mr Wimsett refers to the fact that Mr White has lived in New Zealand since 2004. He has married and remarried, is the father of five children and supports them through child support payments. He has been in his current relationship for seven years and works full-time as a hotel manager in Auckland. He describes that job as stable and he says it allows him to support his family.

[65] Mr White says in his affidavit that he has no recent connections to the United Kingdom with the exception of a brother who lives in Kent. Other members of his family are now deceased. Mr Wimsett submits that Mr White is estranged from his brother and would have no bail address in the United Kingdom. He further suggests that Mr White may be remanded in custody until the conclusion of the trial. However, Mr White does not specifically say in his affidavit that he is estranged from his brother, nor that he would have no bail address in the United Kingdom.

[66] Mr Wimsett further submits that there is a clear nexus between Mr White's circumstances and the bad faith displayed by the prosecution and the complainant in bringing charges against him. He says the passage of time since the alleged offending and the prolonged positive, friendly communications between Mr White and the complainant lured Mr White into a false sense of security, and he built a new life here in New Zealand.

[67] As is apparent, on this ground of appeal Mr White relies on s 8(1)(b) of the Act. However, I have already determined the Judge did not err in finding there was no bad faith on the part of the United Kingdom authorities or the complainant.

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41 *United Kingdom v White*, above n 2, at [22]–[24] as set out in [13] of this judgment.

[68] Although the ground of appeal was not framed under s 8(1)(c) of the Act, I will go on to consider whether, given the passage of time since the alleged offending (20 years) and in all the circumstances of the case, it would be unjust or oppressive to surrender Mr White.

[69] In *Commonwealth of Australia v Mercer*[42] the Court of Appeal was required to consider whether it would be unjust or oppressive to extradite a New Zealand citizen to Australia to face further charges of sexual offending against children when, he had served a sentence of imprisonment already for related offending; he was thereafter deported by Australian authorities; at that time the authorities were aware of complaints by the present complainant; but they interviewed neither the complainant nor the alleged offender. In that case the offences were alleged to have been committed in 1985. The arrest warrant was issued in Australia on 31 October 2013.

[70] The appeal raised issues of whether the extradition of Mr Mercer would be unjust and whether his extradition would be oppressive. The Court of Appeal considered the meaning of "unjust" for the purposes of s 8(1)(c) and held that no basis existed on which to conclude that a fair trial in Australia would be impossible.[43] The Court stated that the fact of long delay does not alone suffice and that Queensland and New Zealand have comparable laws bringing the application to the trial court for a stay of prosecution.[44]

[71] In the present case there was no evidence to suggest that a trial would be unfair because of the passage of time. It was submitted in the District Court that memories fade over time.[45] But there was no suggestion, for example, that an essential witness was unavailable or that Mr White could not understand the charges, plead to them, or give evidence due to ill-health.[46] Just as was said in *Mercer* regarding comparable laws between Queensland and New Zealand for a stay of prosecution, the same can be said with the United Kingdom. In *Woodcock,* after referring to the approach of the New Zealand courts where a prosecution is brought long after the event, as discussed

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42 *Commonwealth of Australia v Mercer*, above n 12.
43 At [45].
44 At [45].
45 *United Kingdom v White*, above n 2, at [27].
46 See examples given in *Commonwealth of Australia v Mercer*, above n 12, at [43(e)].

in *R v O*,[47] Simon Brown LJ stated that that approach seemed to him "very similar to that adopted by our own courts".[48]

[72] For all the above reasons I do not consider it would be unjust to surrender Mr White by reason of the passage of time since the alleged offences occurred. Taking into account all the circumstances of the case, there are no circumstances that would support a finding of injustice.

[73] I turn to consider whether, in all the circumstances, the extradition of Mr White would be oppressive as a result of the length of time since the alleged offences were said to have been committed. In *Mercer* it was said that in the context of a Part 4 extradition, the oppression limb is likely to be more promising for a respondent and that unsurprisingly, respondents tend to rely on it more than the first limb.[49]

[74] As already noted, the threshold for oppression is a high one. The oppression must be linked with the prospect of extradition.[50] The observation of Simon Brown LJ in *Woodcock* is relevant here:[51]

> [26] I would add just this with regard to the concept of oppressiveness in s 11(3)(b). As I observed during the course of argument, it seems to me in any event puzzling in present times why someone should be able to improve their chances of escaping trial by travelling abroad and then changing their circumstances in their new country of residence. Why, say, should an Australian who has committed a series of frauds in Sydney then be better placed to escape trial (through it being found oppressive to extradite him) if he moves to England than if he moves to Darwin? The court should to my mind be wary of paying excessive heed to 'hardship to the accused resulting from changes in his circumstances' following upon the accused's move to another country when equivalent hardship is likely to have occurred even had he remained in his country of origin.

[75] Here, it is said on Mr White's behalf that the communications between Mr White and the complainant lured him into a false sense of security. Mr White does not in fact say that in his affidavit. He simply refers to the existence of the

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47 *R v O* [1999] 1 NZLR 347 at 350.

48 *Woodcock v Government of New Zealand*, above n 27, at [20].

49 *Commonwealth of Australia v Mercer*, above n 12, at [50] citing *New Zealand v Moloney*, above n 12, at [58].

50 *Commonwealth of Australia v Mercer*, above n 12, at [52] citing *Knowles v Government of United States of America* [2006] UKPC 38, [2007] 1 WLR 47 at [31].

51 *Woodcock v Government of New Zealand*, above n 27.

communications. I consider the Judge was correct when he said this is not a case where Mr White had been led to believe, by anything he had been told either by the complainant or by the authorities in the United Kingdom, that he was free to live his life in New Zealand without the risk of prosecution for the alleged offences in the United Kingdom.[52]

[76] Further, this is not a case where there was a significant delay by the requesting authority, as is apparent from the annexed chronology. It was acknowledged on behalf of Mr White in the District Court that it was difficult to submit that there was any significant prosecutorial delay. It was not argued otherwise in this Court.

[77] It is the case that Mr White's circumstances have changed in the intervening period since the alleged offending. As the Judge noted, Mr White is likely to be separated from his family in New Zealand, at least for a period of time, while these matters are dealt with.[53] However, as the Judge also noted, Mr White chose to leave the United Kingdom as an adult in his late twenties and at least part of his reason for doing so was because of a disciplinary investigation in relation to another student.[54]

[78] The Court accepts it will be hard for Mr White to face trial on the alleged offences after a number of years but the change in circumstances referred to linked with the passage of time do not meet the oppression threshold. Telling in favour of extradition is the fact that the alleged offending against a student by her teacher, who was in a position of trust, is serious. Further, as the Judge said, there is some merit in the submission that any delay in this case has in fact benefited Mr White by reason of the United Kingdom's inability to prosecute him for alleged offences of unlawful sexual intercourse with a girl under the age of 16.[55]

[79] For all the above reasons I do not consider, in all the circumstances, it would be oppressive for Mr White to be surrendered.

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52 *United Kingdom v White*, above n 2, at [37(i)].
53 At [37(g)].
54 At [37(g)].
55 At [37(f)].

Result

[80] The appeal is dismissed. I confirm the determination of the District Court Judge that Mr White is eligible for surrender to the United Kingdom in relation to the offences for which his extradition is sought.[56]

Gordon J

[56] Extradition Act, s 72(1).

ANNEXURE: CHRONOLOGY OF EVENTS

Date	Event
1 October 2002 – 31 March 2003	Timeframe of Mr White's alleged offending
October 2003	Mr White allegedly calls [the complainant] to say he is seeing his sister in America and will be gone for a while. At a later time, Mr White sends a text message to [the complainant] stating that he will not return to England because his contact with another girl was being investigated
7 December 2003	Mr White arrives in New Zealand from Sydney
17 December 2003	Mr White leaves New Zealand, flying to Sydney
3 January 2004	Mr White arrives in New Zealand, again from Sydney
January 2004	Meeting at [redacted] School to investigate Mr White's conduct does not take place as he had disappeared
February 2004	Mr White dismissed from [redacted] School in his absence
6 January 2006	New Zealand Immigration Service receives an application for Mr White's residency
2007	Mr White granted a New Zealand resident visa
23 September 2013	Mr White becomes a permanent resident visa holder
17 May 2017	[The complainant] makes contact with the Greater Manchester Police to report Mr White's alleged offending
27 June 2017	[The complainant] was formally interviewed by Police in the United Kingdom by way of video interview. Following this, Detective Constable Jeremy Nelson investigates the allegations, speaking to [redacted] (former Head Teacher at [redacted] School)
April 2018	Detective Constable Christopher Eastwood receives immigration documents from the New Zealand Police
6 December 2019	District Judge (Magistrates') Sam Goozee, sitting at the City of Manchester Magistrates' Court, grants a warrant to arrest Mr White
21 April 2021	The officer in charge of the investigation, Detective Constable Christopher Eastwood, swears an affidavit in support of an application for extradition, setting out the allegations against Mr White and the procedure leading up to the warrant issued for Mr White's arrest. The bundle of documents filed in support of extradition is authenticated by Edward Hartigan, a Justice of the Peace sitting at Tameside Magistrates' Court.
7 July 2021	The Crown Solicitor at Auckland is instructed to prepare and appear on extradition proceedings
15 July 2021	An ex-parte application for the warrant to arrest issued in the United Kingdom to be endorsed by a New Zealand Court is filed
16 July 2021	The warrant is endorsed by Judge E Paul in the Auckland District Court
11 August 2021	Mr White is arrested on the warrant