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Case No: AC-2024-LON-001697

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/04/2025

Before :

LORD JUSTICE DINGEMANS
- and -
MR JUSTICE CHOUDHURY

- -

Between :

RICHARD JOHN PAYNE	**Appellant**
- and -	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**Respondent**

- -
- -

Ben Cooper KC and **Mary Westcott** (instructed by **Sperrin Law**) for the **Appellant**
David Perry KC and **Adam Payter** (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 25 March 2025

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Approved Judgment

This judgment was handed down remotely at 3pm on 30 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Dingemans :

Introduction

1. This is the hearing of an appeal against the decision dated 14 March 2024 by District Judge (Magistrates' Court) Robinson (the judge) to send the case of the appellant, Richard Payne, to the Secretary of State for the Home Department. The Secretary of State made an extradition order on 6 May 2024.

2. Mr Payne is a British citizen who is in his mid-fifties. He previously lived and worked in South Africa. Mr Payne's extradition is sought by the respondent, the Government of the Republic of South Africa (the Government of RSA), to stand trial alongside 15 other co-defendants for 258 offences including racketeering, fraud, corruption and money laundering between 2006 and 2010.

3. The extradition request was issued on 4 November 2022 and certified by the Secretary of State on 8 November 2022. Mr Payne was arrested on 7 December 2022 and has been detained since that date.

4. There is one ground of appeal for which permission to appeal has been granted, which is that Mr Payne's extradition is an abuse of process. It might be noted that permission to appeal was granted only because of legal developments in South Africa after judgment had been given by the judge.

5. This ground of abuse of process is put in two different ways. The first is that, in the light of recent legal developments in South Africa, it is now apparent that the original extradition request was unlawful because it was made by the National Prosecution Authority of South Africa (NPA) and not by the Minister of Justice & Correctional Services of South Africa (the Minister of Justice). This means that the extradition proceedings are a *Zakrzewski v Poland* [2013] UKSC 2; [2013] 1 WLR 324 (*Zakrzewski*) abuse of process. The second way in which the ground is put is that the Government of RSA have continued to rely on the original extradition request in breach of the law applying in South Africa and have thereby manipulated the court process, so that it is to be inferred that the Government of RSA is acting in bad faith and that the proceedings are an abuse of process.

The proceedings before the judge

6. The extradition hearing was held in February 2024 before the judge. At the hearing, the District Judge was provided with documents and heard evidence on behalf of both Mr Payne and the Government of RSA. There were expert reports by Dr Alan Mitchell about prison conditions in South Africa. There were assurances about the conditions in which Mr Payne would be detained in South Africa. The evidence adduced on behalf of Mr Payne included a report from Mr Anton Katz SC, a South African advocate involved in litigation in South Africa concerning the validity of issued extradition requests. The evidence adduced on behalf of the Government of the RSA included a note headed "information on the validity of the extradition request" from Mr Luckson Mgiba, Deputy Director of Public Prosecutions (DPP) of the NPA and Mr Edgar Botes, Acting Director, International Legal Relations, Department of Justice and Constitutional Development, and evidence from Mr Masenyani Andrew Chauke, DPP, Gauteng Local Division of the High Court.

7. There were four grounds on which Mr Payne's extradition was challenged before the judge. Each ground was rejected by the judge in a careful and comprehensive judgment.

8. The first ground was "passage of time" under section 82 of the Extradition Act 2003 (the 2003 Act). This in turn raised issues about whether Mr Payne was a fugitive. The judge, on the basis of evidence, including evidence about Mr Payne's movements and the use of mixed up names to book accommodation for Mr Payne and his family, found that Mr Payne was a fugitive. The second ground was that there was a real risk of torture and inhuman and degrading punishment, contrary to article 3 of the European Convention on Human Rights (ECHR) arising from prison conditions. The judge accepted assurances as to where Mr Payne would be held. The third ground was that extradition constituted an impermissible infringement of Mr Payne's private and family life, contrary to article 8 of the ECHR. The judge held that the public interest in Mr Payne's extradition outweighed those considerations.

9. The fourth ground on which extradition was resisted was abuse of process, on the basis that the extradition request had not been made by the proper authority of the Government of the RSA. The judge considered some decisions of the courts in South Africa. These included *Spagni v DPP and others* (17224/2021) (*Spagni*) which was appealed to the Supreme Court of South Africa reported as [2023] ZASCA 24. The appeal in *Spagni* to the Supreme Court of Appeal of South Africa had been dismissed because the appeal was described as moot and there was no determination on the merits of the arguments. The other main authority was a decision of the High Court in *Schultz v Minister of Justice and Correctional Services & Others* [2022] ZAGPPHC 1001 (*Schultz*). In that case the High Court had held that the authority to make extradition requests was vested in the NPA. On the basis of those authorities the judge concluded that the authority to make extradition requests was vested in the NPA, and that the extradition requests had been validly transmitted.

Fresh evidence

10. Both sides have adduced fresh evidence in the form of affidavits, letters, statements and court reports. The fresh evidence relates to the developments in the law of South Africa, and in particular a judgment dated 23 May 2024 by the Supreme Court of Appeal of South Africa in *Schultz* [2024] ZASCA 77. This had overturned the judgment of the High Court in *Schultz* which had been relied on by the judge at the extradition hearing. The evidence also addressed attempts by the NPA to appeal against the judgment in *Schultz,* and further litigation in South Africa.

11. The evidence includes a letter from Mr Kessler Perumalsamy, the South African junior advocate representing Mr Payne in proceedings commenced by Mr Payne following the judgment of the Supreme Court of Appeal of South Africa in *Schultz.* Mr Payne issued proceedings in South Africa against the Director of Public Prosecutions, Gauteng Local Division, the National Director of Public Prosecutions and others (*Payne v DPP*). Mr Perumalsamy stated that the decision in *Schultz* was not suspended and said that Mr Payne's extradition request was to be treated as invalid. The evidence also includes a letter from Mr Chauke responding to Mr Perumalsamy's evidence. Mr Chauke explained that the extradition request for Mr Payne remained valid notwithstanding the decision in *Schultz*. There was a report from a South African attorney, Mr Marcus Gilbert SC, considering various aspects of South African law in relation to the legal status of *Schultz* and the effect of the NPA's application to appeal that decision, which

responded to Mr Chauke's letter. Mr Gilbert's opinion was that the decision of the Supreme Court of Appeal of South Africa in *Schultz* was binding authority unless and until it is overruled by the Constitutional Court. There was also evidence from a paralegal working for Mr Frank Brazell who represented Mr Payne in the proceedings in South Africa. There was evidence from the National DPP, Shamila Batohi, and there was a response from Mr Mgiba to the evidence of the paralegal and setting out the position of the NPA.

12. There was also a statement from Ms M Kubayi, the Minister of Justice, dated 4 March 2025 saying "I, as a member of the national executive, would have approved the request for extradition of Mr Richard John Payne be forwarded to the Department of International Relations and Cooperation for onward transmission to the United Kingdom, if I was required to consider the request, subsequent to the Schultz judgment."

13. I will admit all of this evidence because it relates to the judgment of the Supreme Court of Appeal of South Africa in *Schultz* which post-dates the hearing before the judge below, and because it contains the responses on behalf of Mr Payne and the Government of the RSA to the decision of the Supreme Court of Appeal of South Africa in *Schultz* and to the evidence of the other side, and because it is in the interests of justice to do so. That said, I accept that the evidence of the paralegal who gave evidence about the proceedings which took place in *Payne v DPP* on 18 March 2025 in South Africa (which evidence was criticised by Mr Mgiba), was helpful to the extent that it showed that the proceedings in *Payne v DPP* had not led to a conclusion on 18 March 2025, but did not assist when the paralegal strayed into an analysis of the effect of submissions which had been made on behalf of the NPA. In the final event, there were no material disputes of fact about the updated position in South Africa, and the summary below is based on this common ground.

Relevant legal proceedings in South Africa

14. In cases in South Africa, including *Spagni* and *Schultz,* it had been contended on behalf of persons whose extradition had been sought to South Africa, that the power to seek extradition from a foreign state was vested in the Minister of Justice and not in the NPA. This had been disputed by the NPA. The evidence showed that the NPA had, since the commencement of the 1996 Constitution, made all of the extradition requests on behalf of the Government of RSA and that other organs of the state had been a conduit only through which the requests were made. There are over 80 outstanding requests for extradition that have been made by the NPA to various states around the world.

15. There were a number of competing decisions by the courts in South Africa. The various decisions were referred to in the expert evidence of lawyers practising in South Africa, one of whom had been an advocate in some of the cases, which was adduced in evidence. It is not necessary to set out the detail of all that evidence. The reason that it is not necessary to set out the effect of the competing decisions or the evidence, is because by its judgment in *Schultz*, the Supreme Court of Appeal of South Africa set aside the judgment of the High Court in *Schultz.* The Supreme Court of Appeal of South Africa summarised the evidence about extradition requests, including evidence from Mr Botes who also gave evidence in these proceedings, which was to the effect that "the Department of Justice and Corrections Services' (the Department) role in an extradition request is simply to function as a conduit to channel the request to the

Department of International Relations and Co-operation …". The evidence went on to show that "the entire process is prosecution-driven, with the Ministry playing no more than an administrative role. What is more, as Mr Botes explained, 'it is not the Minister in person who deals with the extradition or considers the extradition'."

16. The Supreme Court of Appeal of South Africa considered the various contentions and declared that only the Minister of Justice "in his capacity as a member of the national executive of the Republic of South Africa, has the power to make an extradition request", in that case from the USA. Although some reference had been made to the fact that the decision in *Schultz* related to an extradition request to the USA, and the request in this case was to the UK, it became common ground at the hearing that the decision in *Schultz* applied to extradition requests to the UK as it applied to extradition requests to the USA. The decision of the Supreme Court of Appeal of South Africa in *Schultz* post-dated the hearing and decision of the judge in these proceedings below. Before the judge below, reliance had been placed on the decision of the High Court of South Africa in *Schultz*, now reversed by the Supreme Court of Appeal of South Africa.

Payne v DPP

17. In *Payne v DPP,* Mr Payne sought an order from the High Court in South Africa declaring that the extradition request made by the DPP, Gauteng Local Division to the United Kingdom was inconsistent with the Constitution of South Africa and should be set aside. At the hearing before the court on 25 March 2025, it was confirmed that the proceedings in South Africa in *Payne v DPP* broadly equated to judicial review proceedings before the Courts in England and Wales.

18. It appears that, after proceedings had been issued in *Payne v DPP,* the NPA then sought leave to appeal out of time in *Schutlz* to the Constitutional Court in South Africa. It seemed that the original grounds of appeal sought to revisit the finding of the Supreme Court of Appeal of South Africa in *Schultz* to the effect that only the Minister of Justice had power to issue extradition requests. There was also a request to the Constitutional Court to make the effect of the declaration in *Schultz* prospective only pursuant to the provisions of section 172(1)(b) of the Constitution of South Africa. This provides an express constitutional power to make any decision prospective only in effect (which it was suggested in submissions was broadly similar to the common law power to make any ruling prospective considered in *In Re Spectrum* [2005] UKHL 41; [2005] 2 AC 680). This is because the NPA had made all of the requests for extradition on behalf of the Republic of South Africa since the adoption of the 1996 Constitution, and that there are over 80 outstanding requests for extradition made on behalf of the Government of RSA. There were then some further procedural steps taken in relation to the application for leave to appeal including a suggestion that the appeal would be withdrawn by the NPA.

19. It is now common ground that the NPA has an outstanding application to the Constitutional Court in *Schultz* for leave to appeal out of time to the Constitutional Court, and that the ground of appeal is that the Constitutional Court should use the power set out in the Constitution to make the effect of the decision in *Schultz* prospective only. It seems likely that there will be a further delay before the issue of leave to appeal out of time is determined, and if leave is granted, a further delay of up to a year before the full hearing takes place in the Constitutional Court. This could

mean that if leave to appeal out of time is granted, there may be a delay of about 18 months before the decision of the Constitutional Court is available.

20. There was a hearing due on 17 or 18 March 2025 in the High Court in South Africa in the proceedings in *Payne v DPP*. By order dated 17 January 2025 Thornton J directed that the hearing of this appeal should not be listed until after 17 March, but still heard before 16 April 2025.

21. A hearing took place in the High Court of South Africa in *Payne v DPP* on 18 March 2025. It appears that the NPA sought to stay Mr Payne's application for a declaration to the effect that the extradition request was invalid, pending the outcome of the application for leave to appeal to the Constitutional Court in the judgment of *Schultz*. A "Joint Practice Note" was submitted by the advocates on behalf of Mr Payne and on behalf of the NPA. The Joint Practice Note sets out an agreed chronology of the background and list of issues for the hearing.

22. The Joint Practice Note identified the issues before the court as being "is Mr Payne entitled to an order declaring the request for his extradition unconstitutional and reviewing and setting it aside" and "is the NPA entitled to a stay of proceedings concerning Mr Payne's challenge to the request for his extradition". It was noted that it was "common cause that the extradition request of the DPP for Mr Payne is unlawful. The NPA accept this in their practice note dated 27 February 2025". The Joint Practice Note went on to record that Mr Payne submitted that in the light of "the NPA's concession as well as the binding judgment in *Schultz*, he is entitled to" relief which included declaring the extradition request to the UK declared invalid and set aside. The Note went on to state "in contradistinction, the NPA submits that Mr Payne's review application, in its entirety, should be stayed pending a decision from the Constitutional Court in *Schultz*." As noted above, the NPA is seeking leave to appeal out of time to the Constitutional Court to submit that the ruling of the Supreme Court of Appeal of South Africa in *Schultz* should have prospective effect only.

23. As already recorded, the paralegal's evidence about the submissions was the subject of criticism from Mr Mgiba, and we have not relied on that summary of the hearing. Mr Mgiba, in his letter commenting on that summary of the proceedings, stated "the NPA has not conceded that Mr Payne's extradition and/or detention are unlawful. The NPA's position is and continues to be that the request it has made to the UK is lawful and enforceable. Quite aside from anything else contained in the ….. statement, the request for Mr Payne has not been set aside by any court and thus remains valid and binding."

24. Judgment on the application for a stay in *Payne v DPP* was reserved, and we were told that the best estimate was that judgment would be delivered in about a month after the hearing on the ruling on the application for a stay.

25. Before this court, neither party sought an adjournment of these proceedings. This was because Mr Payne wanted the issue determined so that the order made by the judge should be set aside, and because the Government of RSA contended that the appeal should be dismissed and Mr Payne extradited to South Africa. We agree that it is not necessary to adjourn this appeal. This is because it is apparent that if a stay is granted in *Payne v DPP*, and leave to appeal to the Constitutional Court in *Schultz* is granted to the NPA, there will be a further delay of up to 18 months before any ruling is available

from the Constitutional Court. It would not be appropriate to delay Mr Payne's appeal for that period of time, in circumstances where extradition proceedings are intended to be conducted without delay.

The request for extradition

26. As the appeal raises the issue of abuse of process because it is contended that the extradition request is invalid, it is necessary to set out some further detail about the request. The evidence shows that requests are made by the respective DPP and approved by the National DPP, and endorsed by the Director-General of the Department of Justice and Constitutional Authority who is the designated Central Authority for the Republic of South Africa. It was confirmed that the Minister of Justice "had no role in the issue of the extradition request for Mr Payne" in the note dated 29 August 2023 from Mr Mgiba and Mr Edgar Botes. This was explained to be because "it is not a requirement under the Constitution or any other laws of the Republic". It might be noted that this note referred to the position before the Supreme Court of South Africa had overturned the High Court judgment in *Schultz*.

27. There was a letter dated 2 November 2022 sent from the Department of International Relations & Cooperation in South Africa (DIRCO) to the South Africa High Commission in London. The letter forwarded a minute with supporting documentation received from the Department of Justice in South Africa for transmission to the appropriate authorities in the UK. It was said that it was a request for extradition from the UK to South Africa of Mr Payne on charges of racketeering, fraud, corruption and money laundering.

28. On 4 November 2022 the Department of Justice and Constitutional Development in South Africa sent a letter to the International Criminality Directorate, UK Central Authority, Extradition Team in London saying "please find attached a request for the extradition of" Mr Payne.

29. On 8 November 2022 a certificate was issued pursuant to section 70 of the 2003 Act stating "the Secretary of State hereby certifies that the request from the Republic of South Africa received on 07th November 2022 … for the extradition of Richard John Payne is valid and has been made in the approved way".

The respective cases on appeal and the issues

30. Mr Cooper KC on behalf of Mr Payne submitted that the extradition request was unlawful, and there was therefore no lawful basis for Mr Payne's continuing detention. This was because an unlawful originating request resulted in arbitrary detention, and that the detention infringed Mr Payne's rights protected by article 5 of the European Convention on Human Rights (ECHR). The proceedings were an abuse of process for this reason. The proper test for the burden of proof for abuse of process was set out in *R(Government of the United States of America) v Bow Street Magistrates Court and Tollman* [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157 (*Tollman*), and not *Lazo v USA* [2022] 1 WLR 4673 (*Lazo*). In any event this was a clear *Zakrzewski* type of abuse.

31. Mr Cooper also submitted that the proceedings were an abuse of process because the Government of RSA was not operating in accordance with its law as declared in South

Africa by the Supreme Court of Appeal of South Africa in *Schultz*. There was now an out of time attempt to challenge the past effect of the decision, which did not seek to challenge the general rule that extradition requests should be made by the Minister of Justice. The continuation of the extradition proceeding was a manipulation of the court proceedings.

32. Mr Perry KC on behalf of the Government of RSA submitted that this was a case in the courts of England and Wales and not South Africa. It was not appropriate for this court to consider the laws of South Africa or attempt to work out the law in South Africa, where proceedings were ongoing and where no declaration had been made that the extradition request in Mr Payne's case was unlawful. There was no unlawful detention in this case, because the detention was pursuant to a lawful order, which had been made in accordance with the statutory scheme, and there was therefore no infringement of article 5 of the ECHR. Any challenge to the Secretary of State's decision to recognise the extradition request had to be brought by way of judicial review of the decision under section 70 of the 2003 Act, as held in *Akaroglu v The Government of Romania* [2007] EWHC 367 (Admin); [2008] 1 All ER 27 (*Akaroglu*) which noted that there was no right of appeal against the decision of the Secretary of State to certify.

33. Mr Perry also submitted that there was no abuse of process because the Government of RSA had not manipulated the legal process, as the Government was acting in accordance with the domestic proceedings before its own courts.

34. Mr Cooper did not make any written application to bring proceedings by way of judicial review to quash the Secretary of State's certification of the extradition request, to deal with Mr Perry's reliance on *Akaroglu*, relying on *Zakrzewski* abuse of process which Mr Cooper pointed out had post-dated *Akaroglu*. Mr Perry did not seek to rely on any further extradition request from the Minister of Justice at the appeal, pointing to the delays which might be caused by any subsequent request for extradition.

35. I am very grateful to Mr Cooper and Mr Perry, and their respective legal teams, for their helpful written and oral submissions. It was apparent that by the conclusion of the submissions that the following matters were in issue: (1) whether there was a *Zakrzewski* abuse of process because the extradition request was not valid as it was made by the NPA and not the Minister of Justice; and (2) whether there was an abuse of process because the Government of RSA has manipulated the court process so that it is to be inferred that it is acting in bad faith.

Relevant statutory provisions

36. Extradition to category 2 territories is provided for from section 69 of the 2003 Act.

37. Section 70, so far as is material, provides:

> "(1) The Secretary of State must [(subject to subsection (2))] issue a certificate under this section if he receives a valid request for the extradition [of a person to a category 2 territory].
>
> (3) A request for a person's extradition is valid if—

> (a) it contains the statement referred to in subsection (4) [or the statement referred to in subsection (4A)] 5 , and
>
> (b) it is made in the approved way.
>
> (4) The statement is one that–
>
> (a) the person is accused in the category 2 territory of the commission of an offence specified in the request, and
>
> (b) the request is made with a view to his arrest and extradition to the category 2 territory for the purpose of being prosecuted for the offence.
>
> …
>
> (7) A request for extradition to any other category 2 territory is made in the approved way if it is made—
>
> (a) by an authority of the territory which the Secretary of State believes has the function of making requests for extradition in that territory, or
>
> (b) by a person recognised by the Secretary of State as a diplomatic or consular representative of the territory.
>
> …
>
> (11) The Secretary of State is not to consider whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998."

38. Provision is then made for the issue of an arrest warrant by the judge in section 71. Bars to extradition are set out in section 79, but it is not a statutory bar to extradition that the extradition request was not made by the proper authority.

39. Sections 103 and 104 provide for appeals where the Secretary of State has made an order for the requested person's extradition. The High Court may allow the appeal, but only if the conditions in section 104(3) or (4) are satisfied. Section 104(4) includes the condition that "evidence is available that was not available at the extradition hearing" and "the evidence would have resulted in the judge deciding a question before him at the extradition hearing differently" and "if he had decided the question in that way, he would have been required to order the person's discharge".

Relevant provisions of law

40. The purpose of the 2003 Act was to reduce delays in extradition proceedings, which had become notorious before the 2003 Act. The 2003 Act set out procedures for the determination of extradition requests. This means that, in general, it is not necessary to consider issues of foreign law, see *Dabas v High Court of Justice in Madrid* [2007] UKHL 6; [2007] 2 AC 31 at paragraphs 53-54.

41. The court, however, has jurisdiction to consider whether the extradition proceedings are an abuse of process, even on grounds which are not expressly dealt with in the 2003 Act, see *Tollman*. The prosecutor must act in good faith, see *R(Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin); [2007] QB 727, and it is an abuse of process for a prosecutor to manipulate the court process. In extradition cases the starting point, applying mutual respect and comity, is that the requesting state has behaved properly, compare *Lazo* at paragraph 47.

42. In *Tollman* at paragraph 84 the court addressed steps to be taken by a judge if the issue of abuse of process, because the prosecutor was manipulating the court process, was properly raised (which included requiring the party alleging the abuse to particularise the alleged conduct), and concluded that the judge had to consider whether there were reasonable grounds to believe that such conduct may have occurred, and if there were, the judge should not order extradition unless the Judge was satisfied that such an abuse had not occurred.

43. In *Akaroglu,* which was decided in 2007, the Divisional Court held that a decision by the Secretary of State to certify a request was not amenable to the statutory appeals mechanisms under the 2003 Act. This was because the appeal is against the decision to extradite, and not the decision to certify, which is earlier in the process.

44. In *Zakrzewski,* which was decided in 2013, the Supreme Court held that there was another form of abuse of process. This abuse of process, exceptionally, allows the court to correct plain and obvious errors where there is no other right of challenge under the statutory scheme, see *Zakrzewski* at paragraphs 12 and 13. In *Zakrzewski* the particulars in a warrant were sufficient to justify an extradition, but they were said to be obviously wrong. This is an exceptional jurisdiction and the facts to correct the error or omission in the particulars "must be clear and beyond legitimate dispute". *Lazo* was a case raising a *Zakrzewski* type of abuse, and there the court was confronting a submission that the court needed to be satisfied that the requirements of section 78 of the 2003 Act had been met to the criminal standard, which it had been, because the judge needed only to be satisfied that the requesting state had forwarded to the Secretary of State, for onward transmission, that which the requesting state said was an arrest warrant.

45. There is, in my judgment, no conflict between what was said about *Tollman* and *Lazo* about the burden of proving abuse of process. This is because *Tollman* was dealing with an abuse of process arising from the prosecutor manipulating the court process, where all that was said in *Tollman* applies. *Zakrzewski* was dealing with another type of abuse of process, which is where the extradition request seems to be in order, but in fact it is not. In the *Zakrzewski* type of abuse of process, it is necessary to show, on facts which are "clear and beyond legitimate dispute", that the request is not in order. Both forms of abuse of process are in issue in this appeal.

Whether there was a *Zakrzewski* abuse of process because the extradition request was not valid as it was made by the NPA and not the Minister of Justice – issue one

46. The first issue is whether this is a *Zakrzewski* type of abuse of process. I do not accept Mr Perry's submission that because *Zakrzewski* was a case dealing with particulars in, what was then, a European Arrest Warrant, and *Lazo* was a case dealing with the validity of an arrest warrant issued in the USA, *Lazo* had extended the *Zakrzewski* abuse

of process beyond its proper limits. The important point about *Lazo* was that if the arrest warrant could have been shown on a clear basis to be invalid, there would have been no remedy available to the requested person under the 2003 Act save for abuse of process. *Zakrzewski* abuse of process would prevent an injustice in such a case.

47. In this case, if it can be shown that the wrong authority has issued the extradition request, then in my judgment there could not be a valid extradition. As Lord Sumption pointed out in *Zakrzewski* at paragraph 13 "an invalid warrant is incapable of initiating extradition proceedings". The situation is the same with an invalid request for extradition. A request which is not by the relevant authority in the requesting state has no more legal effect than a request by a private citizen of the requesting state which is forwarded on by state authorities to the UK central authority.

48. In my judgment the Secretary of State was entitled to issue the certificate under section 70. This was because the Secretary of State believed that the request was made "by an authority of the territory which the Secretary of State believes has the function of making requests for extradition in that territory" (section 70(7)(a) of the 2003 Act, see above). The request had been transmitted in the manner set out in paragraphs 27 to 29 above, and had been transmitted by the Department of Justice and Constitutional Development in South Africa to the International Criminality Directorate, UK Central Authority. As was pointed out in *R(Chappell and others) v Secretary of State for the Home department* [2022] EWHC 3281 (Admin); [2023] 1 WLR 2489 (*Chappell*) embassy notes from the Japanese embassy were sufficient to make a valid request. Further, at the time that the Secretary of State received the request, it was assumed that the NPA was the relevant body for making the extradition requests on behalf of the Government of RSA.

49. Further the judge was right, on the materials which were then before the judge, to dismiss the *Zakrzewski* abuse of process challenge to Mr Payne's extradition. This is because the evidence before the judge was not clear and beyond legitimate dispute to show that the NPA did not have authority to make the request for extradition. The judgment in *Schultz* in the High Court in South Africa had confirmed that the NPA was entitled to make the extradition request. Although Mr Katz SC turned out to be correct when giving his opinion that *Schultz* at the High Court was wrongly decided, the judge was right not to accept that evidence, because the position was not clear and beyond legitimate dispute.

50. The position after the decision of the Supreme Court of Appeal of South Africa in *Schultz* is now different. It is now established that, under the Constitution of South Africa, as interpreted by the Supreme Court of Appeal of South Africa, a valid extradition request needs to be made by the Minister of Justice. It may be, for the purposes of South African law, that: if a stay is granted by the High Court in *DPP v Payne*; the Constitutional Court grants the NPA an extension of time and leave to appeal; and the Constitutional Court decides that the effect of the decision in *Schultz* shall be prospective only, South African law will treat the request made to the UK central authority to extradite Mr Payne as valid.

51. Whatever may be the merits of the suggestion in *Akaroglu* that the remedy for a wrongful certification was judicial review, and it might be noted that *Akaroglu* was decided before the Supreme Court in *Zakrzewski* had identified the possibility of finding a *Zakrzewski* abuse of process, such a remedy does not assist in this case. First

this was because the Secretary of State was entitled to "believe", for the purposes of section 70(7)(a) of the 2003 Act, that the NPA had the function of making requests for extradition on the basis of the past practice from the start of the 1996 Constitution, and on the basis of the jurisprudence from South Africa about who had the right to make extradition requests. Secondly it was because any such claim for judicial review would have been substantially out of time.

52. The position therefore is, at the present time, that: it is clear and beyond legitimate dispute that the NPA made the request for extradition for Mr Payne; the NPA did not have the authority to make the request for extradition; and therefore there was an invalid request for extradition. This is an exceptional case where the only remedy is a *Zakrzewski* abuse of process to ensure that Mr Payne is extradited only pursuant to a valid extradition request.

53. The fact that it might have been assumed from the way in which the request for extradition of Mr Payne was made that the appropriate authority had made the request, compare *Chappell*, does not assist the Government of RSA in circumstances where it is clear and beyond legitimate dispute, on the basis of the evidence before the judge and this court, and from what was said in *Schultz,* that the Minister of Justice had no role in the making of the request for extradition.

54. That leaves only the fact, as appears from the statement of the Minister of Justice, it seems that the Minister of Justice would have approved the request if the Minister of Justice had been asked to make the request. The short answer to this point is that there has been no valid request from the Minister of Justice, even since the decision of the Supreme Court of Appeal of South Africa in *Schultz*. It is not necessary to consider whether such a request might have been certified, dealt with below and tied up with these proceedings, because such a request was not made. It is apparent, however, that it is very likely that a request for extradition of Mr Payne will be made by the Minister of Justice.

55. For these reasons, the extradition proceedings against Mr Payne are a *Zakrzewski* abuse of process. The evidence now available that was not available at the extradition hearing would have led the judge to decide the matter differently. The request was made by the NPA which had no authority to make a request for extradition, and the Minister of Justice did not have any involvement in the making of the request.

Whether there was an abuse of process because the Government of RSA has manipulated the court process so that it is to be inferred that it is acting in bad faith – issue two

56. It is right to record that the Government of RSA persisted with the request for extradition after the decision of the Supreme Court of Appeal of South Africa in *Schultz.* However it is apparent that, despite some variations in the approach to the appeal, the NPA is attempting to appeal the decision in *Schultz* to the Constitutional Court so that, at the least, the effect of any ruling is prospective only for the purposes of the law in South Africa. There is the fact that the court in *DPP v Payne* has not yet declared the request for Mr Payne's extradition to be invalid. Finally the Government of South Africa was entitled to make the submission that the effect of *Akaroglu* was that the only remedy available to Mr Payne was judicial review, which had not been pursued, and that the extradition should proceed. The fact that those submissions have been rejected

for the reasons set out above does not make the Government of the RSA's resistance of Mr Payne's appeal an abuse of process.

57. There is therefore, in my judgment, no basis to show that the Government of RSA, as prosecutor, has manipulated the court process. The request for extradition was made by the NPA in accordance with established practice in South Africa following the adoption of the 1996 Constitution. There was a proper basis for making the request for extradition on the basis of the materials available to the NPA. Mr Payne was, as the judge held, a fugitive.

Conclusion

58. For the detailed reasons set out above I would find that: (1) the extradition proceedings against Mr Payne are a *Zakrzewski* abuse of process; and (2) there was no basis to show that the Government of RSA, as prosecutor, had manipulated the court process. I would therefore allow Mr Payne's appeal against the order made by the judge.

Mr Justice Choudhury

59. I agree.