Neutral Citation Number: [2020] EWHC 1267 (Admin)

Case No: CO/133/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th May 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

VYTAUTAS ZAPALSKSIS

Appellant

v

PROSECUTOR GENERAL'S OFFICE (REPUBLIC OF LITHUANIA)

Respondent

- -
- -

MALCOLM HAWKES instructed by ITN Solicitors (Katy O'Mara) for the **appellant**
HANNAH HINTON instructed by the CPS (Stefan Hyman) for the **respondent**

Hearing date: 14 May 2020

JUDGMENT ON PERMISSION TO APPEAL

MR JUSTICE FORDHAM:

Introduction

1. This hearing proceeded by Skype video conference, with the agreement of the parties. It and its timing had been listed in the cause list with contact details for anyone wanting to ask for permission to observe. Counsel addressed me in exactly the way as if we were in the court room. I am quite satisfied that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it was justified as necessary and proportionate. This is a renewed application for permission to appeal, permission to appeal having been refused on the papers by Eady J. The case raises issues relating to ECHR article 3, article 8 (as to which, see s.20(1A)(1)(a) of the Extradition Act 2003) and proportionality by reference to seriousness of the conduct alleged to constitute the extradition offence and likely penalty (s.20(1A)(1)(b) with (1A)(3)(a)(b) and CrPR PD50A.2 to 50A.5).

2. Extradition was ordered by DJ Snow ("the judge") on 8 January 2020. The appellant had been arrested on 16 October 2019 in conjunction with an accusation EAW dated 26 February 2019, relating to alleged thefts which took place in June 2011 and August 2011. The judge found that the article 3 point was unsustainable in the light of an assurance dated 7 August 2018 ("the August 2018 assurance") and the judgment of the Divisional Court in Bartulis [2019] EWHC 3504 (Admin). Eady J, refusing permission to appeal on 16 March 2020, agreed and pointed out that in Bartulis the Divisional Court had since also refused (on 11 February 2020) to certify a point of law of general public importance. The judge also conducted the familiar discipline of an article 8 'balance-sheet' approach and found extradition to be article 8-compatible. He then applied section 21A(1A)(1)(b) and (3)(a)(b), with PD50A.2 to 50A.5, and found extradition to be proportionate by reference to seriousness and likely penalty. Eady J explained why she considered the appeal in those respects not to raise any reasonably arguable point. The hearing of the appellant's renewed application for permission to appeal was fixed for yesterday 14 May 2020, given a time slot of 2pm and a time estimate of 45 minutes. In the event, I allowed the hearing to run for two hours, in order to deal with the points that had arisen. I would have given an ex tempore judgment at 4pm, but for the fact that Mr Hawkes told me that clashed with a read-out judgment in the substantive appeal which he had argued in the morning. I decided to issue a written ruling, to be made available to the parties today. Arrangements will be made for it to be the subject of a 'virtual hand down' on a suitable date in the near future.

Article 3 and the Covid Caveat

3. The appellant's case on article 3 had been fully set out in amended grounds of appeal dated 28 January 2020 (paragraphs 7 to 40) and grounds for reconsideration dated 24 March 2020 (paragraphs 8 to 41). That is how things stood until yesterday morning. Mr Hawkes, in those passages, had attempted a wholesale assault on the conclusions in Bartulis, at least so far as detention on remand is concerned. His ultimate submission in writing was that, for a number of reasons: "the current factual position requires a full, and proper re-evaluation of the prison conditions question". He submitted that: "the court should have before it an updated inspection report from an independent expert who has undertaken unfettered visits to the prison/s in which the [appellant] may be

held." The respondent replied to that wholesale assault in a skeleton argument dated 3 March 2020, updated on 13 May 2020, accompanying a respondent's notice.

4. By an email at 10:03 yesterday 14 May 2020, Mr Hawkes informed me and Miss Hinton that his submission "on article 3 and the Lithuanian prison conditions issue boils down to" the following point: "the Lithuanian authorities' concession on 3 April 2020 that they cannot uphold their guarantees hitherto given, in the light of the Covid–19 crisis. My submission is that concession alone requires proper re-consideration of the prisons issue in the light of the enduring article 3 concerns".

5. At the hearing, which began at 2pm yesterday, Mr Hawkes told me that the documentation from the Lithuanian authorities dated 3 April 2020 had been served on the appellant's representatives in this case promptly on 6 April 2020. That reflects a prompt discharge of the duty of candour (Bartulis paragraph 133). The updating of Miss Hinton's skeleton argument made reference to the 3 April 2020 documents, which were included in the bundle for the hearing. Having had the documents over a month ago, as Mr Hawkes accepted, the issue identified in the 10:03 email regarding the 3 April 2020 "concession" had not been the subject of any other submission communicated in any other document. There was no draft revised grounds of appeal, and no short supplementary skeleton argument. Mr Hawkes maintained that the point he wished to advance arose out of a change in the respondent's position and fell within the scope of his wholesale article 3 issue, such that no formal amendment to grounds of appeal nor requirement as to any skeleton argument ought to be imposed, in order to evaluate its viability. If Miss Hinton had been in a position to deal with the substance of the point, I would have considered the question of reasonable arguability and permission to appeal, notwithstanding the absence of any document articulating the point other than the 10:03 email. I would neither have shut it out – not did Miss Hinton seek to do so – nor directed the production of a document for the purposes of consideration by me.

6. But, in the event, Mr Hawkes recognised that he could not realistically expect to advance the point without allowing the respondent time to consider and respond to it substantively. It could and should have been articulated in the run up to the hearing, to put the respondent on notice and to assist the Court's own preparation. This point is about the discipline and timing of the documents before the court. It is not an arid technical point. It is not nit-picking. It engages, in a direct and practical way, fairness to the respondent. It promotes sound case-management and allocation of judicial resources. It means that the Court can prepare by pre-reading in a focused way. It ensures that both parties are in a position to deal with the viability of the argument, with nobody taken by surprise or needing to reflect or take instructions. It also has practical consequences if there is to be any further hearing, as to the proper state of the papers going forward.

7. As I have said, had Miss Hinton been in a position to deal squarely with the substance of the point yesterday, I would have proceeded to hear argument on it. However, Miss Hinton submitted that she was not in a position to deal with the point yesterday. She needed time to address it, taking instructions about it, and would want to articulate written submissions having done so. I was not surprised to hear that. As I have said, Miss Hinton did not seek to shut out the point on grounds of lateness in it being raised. Her invitation was that I should defer the application for permission to appeal until a fair opportunity had been afforded. I am quite sure that this is the appropriate course. The real questions are about what the precise form of that deferral should be, and what

should happen to the other arguments sought to be advanced in this case, on article 3 and article 8. Miss Hinton submitted that there is no reasonably arguable point on any of them, and that I should refuse permission to appeal on them here and now. I was satisfied that it was appropriate to hear argument on everything else, and to adopt a robust case-management approach to determining what I fairly could, on this permission to appeal application. I have also decided that it would be appropriate to give rather fuller reasons than I ordinarily would.

8. I shall come on to explain what the issue is regarding what I will call the "Covid Caveat". I was informed of two other pending hearings that are expected to take place involving that issue. Both Counsel told me that the magistrates court is expected to hear argument on this subject in a three-day 'multi-hander' hearing, scheduled for August 2020. More immediately, Miss Hinton informed me that the High Court (Johnson J) on 24 April 2020 had directed a rolled-up hearing of the same issue in the case of Gerulskis CO/2054/2018, in which a substantive hearing (time estimate half a day) has been fixed for 11 June 2020. Yesterday evening Miss Hinton sent me the order of Johnson J, from which I see that the time estimate was provisional, and that Johnson J gave permission to appeal on an article 8 ground.

9. Ultimately, Miss Hinton invited me to direct that this case be linked to Gerulskis, with permission on the article 3 points relating to the 3 April 2020 documents and their implications to be heard on a rolled-up basis on 11 June 2020 by the same judge, dealing with both cases with an overall time estimate of one day. She asked me to refuse permission to appeal on everything else, in relation to article 3 and article 8. Mr Hawkes agreed to the course of linking to Gerulskis and the issue deferred on a rolled-up basis, but asked me to grant permission to appeal on everything else, in relation to article 3 and article 8.

10. I am quite satisfied that the appropriate deferral of the new point about the April 2020 communications is the linkage to Gerulskis on a rolled-up basis, for hearing on 11 June 2020. I am not prepared to grant or refuse permission to appeal in circumstances where the respondent tells me that it wishes to have time to deal with the point, and when the point has only been raised so very late, on the morning of the hearing. It will also be necessary for Mr Hawkes properly to set out in writing his case in relation to the 3 April 2020 documentation and its implications. For that, he requested, and I grant 14 days from today. What will be needed is a single composite document to constitute his revised grounds of appeal and skeleton argument. Miss Hinton can then reply with a single skeleton argument. If there are reply points arising out of Miss Hinton's position, Mr Hawkes will need promptly to produce a supplementary skeleton argument in good time before the hearing and ask the judge's permission to rely on it. I will be granting a general liberty to apply to vary my directions, in case there is some difficulty in the linking of the cases or the time estimate, having in mind that Miss Hinton who appears for the respondent in Gerulskis is before me but her opponents in that case are not and I cannot have complete visibility.

11. As I have indicated, the critical question then becomes what should happen to the remainder of the arguments that have sought to be advanced in the present case. One option I have not yet mentioned would be to direct a rolled-up hearing in relation to the case in its entirety. In my judgment, there is no reason at all why I should not, and every reason why I should – having regard to the overriding objective – deal with the other points on their legal merits, so far as concerns the question whether they disclose any

reasonably arguable self-standing ground. Points should proceed to a further hearing only if (a) they are reasonably arguable self-standing grounds or (b) they properly link to a point which is proceeding to a hearing. The latter point is significant: I must consider the other points having clearly in mind any possible link to the issues which will be ventilated at the rolled-up hearing in June, so that no point which may be properly relevant to, or arguable when linked to, those issues is unjustly shut out. Ultimately, the judge conducting the June hearing will judge what points are properly capable of pursuit. But I will be as clear and specific as possible in what I say and do at this hearing, so that points which are not reasonably arguable are not given a green light.

12. Given the need to consider what may be relevant to, be arguable in conjunction with, and so link to the new point in the 10:03 email, I need to say something about the nature of the documents dated 3 April 2020 and the Covid Caveat. Nothing I say is intended in any way to influence or constrain the court dealing with the June hearing.

13. The position in outline is as follows. In Bartulis, the Divisional Court considered the issue of article 3-compatibility and prison conditions in relation to long-term places of correction, concluding that assurances were not necessary to support the conclusion of article 3-compatibility (paragraphs 126 and 127). The Court did not rule in its judgment on article 3-compatibility in the context of places of remand. That was because permission to appeal had been refused on that issue. Permission had been refused in relation to remand detention, on the basis that the August 2018 assurance (Bartulis paragraph 31) served to eliminate any incompatibility in the context of pre-trial detention (paragraph 8). The August 2018 assurance was a document which was served on a number of individuals including Mr Jane. His case had been decided at [2018] EWHC 1122 (Admin) ("Jane No.1") and [2018] EWHC 2691 (Admin) (Jane No.2"). The August 2018 assurance was also served on the present applicant. In the present case, the district judge relied on the August 2018 assurance at paragraphs 8 and 59 of his judgment. The present case is an accusation warrant case, in which remand detention in Lithuania is relevant, as it had been in Mr Jane's case.

14. The August 2018 assurance involved a 'where' component and a 'what' component. The 'where' component was that all persons surrendered under an accusation warrant would be held only in one of three named remand prisons: Kaunas, Lukiskes or Siaulai. The 'what' component was that those persons would, at those locations, be guaranteed a minimum of 3m² per person of prison cell space, in compliance with article 3. A further document dated 8 July 2019 ("the July 2019 assurance") contained no 'where' component, but it repeated the 'what' component. The Court in Bartulis referred to the July 2019 assurance at paragraph 52. There was some discussion before me as to whether the July 2019 assurance on its face "superseded" the August 2018 assurance. For my part, I regard that as an open question. The judge in the present case did not treat it as having done so.

15. What happened on 3 April 2020 is that two letters were written by the Lithuanian authorities to the CPS. The first confirmed that the August 2018 assurance and July 2019 assurance "will not be further applied from the moment of signing this letter". That means that neither the August 2018 assurance nor, if it had superseded it, the July 2019 assurance now govern the present case. That disapplication was explained to be "due to quarantine regime introduced by the decision of the government of the Republic of Lithuania, in the view of the danger caused by the spread of Covid-19 disease",

which meant that "the management of Lithuanian correctional system could be encumbered in the nearly future". This disapplication of the August 2018 assurance and July 2019 assurance was described as a step taken to secure "avoiding any infringements" of those guarantees. The second letter ("the April 2020 assurance") contained three assurances, the first two of which relate to detention in remand cases: one is a general 'what' component; the second is a specific 'where' component relating to Siauliai remand prison. The April 2020 assurance then ends with the Covid caveat. It reads: "we also drawn to attention that due to the quarantine regime introduced by the decision of the government of the Republic of Lithuania, in the view of the danger caused by the spread of Covid-19 disease, the work of Lithuanian institutions is encumbered, which might have impact on the implementation of the assurance".

16. The thrust of the argument which Mr Hawkes wishes to advance, as I see it, is this: that the Covid caveat qualifies a previously unqualified assurance which was necessitated, in an unqualified form, to support a positive conclusion as to article 3-compatibility of extradition as to detention on remand. That is the issue whose consideration I am deferring to another hearing. In order to evaluate it, it is going to be necessary for the Court to consider submissions from the parties about: the April 2020 assurance; the Covid caveat; and the underlying position prior to April 2020. The Court will revisit the question of whether and to what extent an assurance, and an unqualified assurance, was and remains necessary in order to secure article 3 compatibility. It may need to consider whether the position in relation to remand is in fact the same as in relation to longer-term post-conviction custody in correction houses: namely, that there is a sufficient basis to conclude that there is article 3 compatibility without there being an assurance. Even if that is so, the Court may need to consider whether such guarantees, as could be taken as existing without the need for an assurance, is nevertheless undermined by the fact that there is an express and deliberately qualified communication.

17. I shall turn later to the point about breach of the August 2018 assurance in the case of Mr Jane. I mention now a point that arose as part of Miss Hinton's response to that point. Her submission is that detention in Lithuanian remand facilities was, and has remained, article 3-compatible independently of the presence or absence of any assurance, in the case of all facilities except for Siaulai (and Lukiskes – which was subsequently closed). She says it was only Siaulai that has needed an assurance. She says the correct analysis in respect of remand detention anywhere else would have matched the conclusion at paragraph 126 of Bartulis for long-term correction houses. At the hearing, she drew to my attention the Bartulis permission to appeal judgment [2019] EWHC 504 (Admin) at paragraph 13; and Jane (No.1) at paragraph 30. An email which I received from her yesterday evening added references to Jane (No.1) paragraphs 20-29; Jane (No.2) paragraph 13; and Bartulis (permission to appeal) paragraph 10a. In relation to this point, I also noted paragraph 23 of Mr Hawkes's amended grounds of appeal, and I note that the second specific remand-related assurance in the April 2020 assurance addresses Siauliai Prison, and does so by means of a guarantee that persons surrendered will be held only in refurbished or renovated parts of that prison. However, even that part of the assurance is then, on the face of it, qualified by the Covid caveat.

18. In circumstances where I am adjourning the issues relating to the April 2020 assurance, I do not consider it appropriate to rule – even provisionally – on whether Miss Hinton

is right that the need for assurances in the context of remand detention was something which was only relevant – and more importantly remained solely of relevance so as to be solely relevant today – in the context of Siauliai Prison. The August 2018 assurance was expressed to contain guarantees applicable to remand detainees who were detained at Siauliai (and Lukiskes). The July 2019 assurance was not expressed to contain guarantees applicable only to detainees who were detained at Siauliai. Even if, at various stages previously, Siauliai was the only facility requiring an operative assurance, there is a question whether that position has endured. At this point of the argument, there may be relevance in the point made by Mr Hawkes as to the multifunctional use of detention facilities for remand and sentenced prisoners. And there remains the question of what the position is today, with the Covid caveat apparently now being of general application.

19. The implications for all of this should be addressed when the respondent has had a fair opportunity to deal with the argument ventilated for the first time in yesterday morning's email. Having, I hope, sufficiently encapsulated the lie of the land so far as concerns the April 2020 communications and the Covid caveat, I turn to the other arguments which Mr Hawkes has articulated regarding article 3. In circumstances where the Covid caveat issue is to be addressed at a subsequent hearing, there are two related points which, in my judgment, can properly be advanced in support and which are therefore also adjourned to the rolled-up hearing. The first is a point which I have already mentioned, relating to the multifunctional use of detention facilities, which Mr Hawkes says is evidenced from June 2019. Insofar as that is relevant to the analysis regarding assurances and remand, in the light of the April 2020 documents, he should be heard on it. But it is not, in my judgment, an otherwise free-standing ground for revisiting article 3-compatibility.

20. The second, properly linked, point relates to what Mr Hawkes says is a clear breach, and Miss Hinton describes as a "technical" breach, of the August 2018 assurance in the case of Mr Jane. Material has been put before this court which describes Mr Jane as having, in the event, been detained in breach of – at least – the 'where' component of the August 2018 assurance. He was taken to Pravieniskes Prison. I am told this came to light in January 2020. Miss Hinton, in her revised respondent's notice skeleton, effectively attributes this to the July 2019 assurance having been regarded – rightly or wrongly – as having superseded the August 2018 assurance. There is a controversy between her and Mr Hawkes as to whether any breach of the 'what' element has befallen Mr Jane, and whether it matters. I would not have granted permission to appeal in relation to the Jane breach, any more than in relation to the multifunctional detention point, as a freestanding ground of appeal, seeking in effect to reopen the Bartulis analysis. However, in circumstances where I am deferring the points relating to the April 2020 assurance and the Covid caveat, I consider it equally appropriate to defer the question of the Jane 'breach' and its implications. I have already said that I am not prepared to rule on whether Miss Hinton is right about whether Siaulai alone was, and has remained to the present time, the sole facility in respect of which an assurance was relevant. It would be wrong, in my judgment, to shut out the Jane breach point as part of the factual matrix when the Court considers what the true position now is. Whether it goes anywhere, in conjunction with the April 2020 assurance and the Covid caveat points, will be a matter for the court dealing with those points. But the appellant is entitled, in my judgment, to say this: if there is a reason to look again at article 3 compatibility, in the current circumstances, then the point relating to the 'breach'

should appropriately be before the court. I have particularly in mind, moreover, what the Divisional Court said in Bartulis at paragraph 127: "it is important nevertheless to stress that, once given, [assurances] must be adhered to in respect of any prisoner extradited from the UK to Lithuania, since the terms of the assurances are offered expressly to all such. Breach of such assurances might prove significant in the future." Now that there is the question-mark arising out of the April 2020 documents, it is right and only fair that Mr Hawkes should be able to invoke that passage alongside what is now known about what happened in Mr Jane's case.

21. That, however, is the limit of the argument which I am deferring for rolled-up consideration on article 3. I am not impressed by any other point relating to article 3, whether as a freestanding ground of appeal or as a supportive point linked to the April 2020 documents. My conclusion is that the other aspects of the article 3 challenge, as articulated in writing and orally by Mr Hawkes, does not cross the threshold of reasonable arguability. It is unnecessary for me to deal with every point raised in writing. I will however say something about the remaining point which was emphasised by Mr Hawkes in his oral submissions. He submitted that new statistics available in January 2020 as to prison occupancy as against prison capacity constituted a "worrying trend" and constituted a relevant and sufficient basis for revisiting the article 3-compatibility evaluation in Bartulis. He compared the numbers in Bartulis (paragraph 107) of 6,440 within a capacity of 8,011, with the January 2020 numbers of 6,138 within a capacity of 7,236. When probed, the difference between these two is the difference between an 80% occupancy level and an 84% occupancy level. In my judgment, that is a wholly insufficient basis for suggesting that a re-evaluation is required in article 3 terms. The point is not reasonably arguable. Nor has Mr Hawkes persuaded me, in writing or orally, that there is any other arguable article 3 point.

22. So, in relation to article 3, I will adjourn to a rolled up hearing the point advanced in the email of 10:03 this morning. The appellant is entitled to advance, in conjunction with that issue, the points made at paragraphs 7, 9, 12b and 13 of the amended grounds of appeal. These relate to the points which I have discussed above, as being properly open. The appellant is to have 14 days to file revised grounds of appeal, in accordance with this ruling, to stand as his skeleton argument for the hearing in June. The respondent's substantive response can follow thereafter.

Article 8/ Proportionality

23. In my judgment, there are two linked and properly arguable points relating to article 8 and proportionality. They each concern seriousness of the alleged offending in the accusation warrant. The first point concerns how seriousness of the offending affects the weight to be attributed to the public interest for the purposes of the article 8 balancing exercise: see paragraph 8(5) of Lady Hale's judgment in H (H) [2012] UKSC 25. The second point concerns how seriousness of that alleged offending falls to be addressed pursuant to section 21A(1)(b) and (3), read with PD 50A.2 to 50A.5.

24. It is, in my judgment, reasonably arguable that the judge was wrong in characterising the offending in the present case, based on the description in the EAW, as being "serious" for the purposes of the article 8 balance. It is also, in my judgment, reasonably arguable that the district judge was wrong in the application of section 21A(1)(b) and (3), read with PD 50A.2 to 50A.5. As to the latter, there are points properly to be made about: whether the offences should have been regarded as "minor theft"; whether, if so,

there were "exceptional circumstances" on grounds of "multiple counts" and/or the appellant's UK conviction as "previous offending history"; whether the judge's reasons were sufficiently clear and legally adequate; and whether his evaluation should be revisited. The judge appears to have found that this was not a case of "minor theft". He did not explicitly address the question of "exceptional circumstances". He said the offences were both "unlikely to attract a custodial sentence in the UK", but that there was "high culpability", that they were "serious" (in his article 8 analysis); and that they were "likely to attract a term of imprisonment in Lithuania". I am satisfied that it is reasonably arguable that the judge should have approached the seriousness of the alleged offending differently. The court may be persuaded, on this basis, that it is appropriate to revisit the article 8 balancing and/or section 21A(1)(b) proportionality, in all the circumstances of the case.

25. In arriving at that conclusion, I have had two points at the forefront of my mind. The first is that in the case of Kalinauskas [2020] EWHC 191 (Admin), the court was persuaded by reference to section 21A(1)(b) that, if the Lithuanian authorities were to impose a custodial sentence in that case, its duration when put alongside the remand period already served by the appellant would lead to his immediate release. The court concluded that "having regard to our assessment of the seriousness of the appellant's conduct and the fact that he has now served in excess of any sentence that could have been imposed for his conduct, his extradition would be disproportionate". The appellant is, in my judgment, entitled to have that same argument considered in this case. It, and the other points relating to and arising out of seriousness of the alleged offending, are short points. They will and should not, in my judgment, require extensive and time-consuming amplification. The second point that I have had in mind is that I am in any event deferring this case to a hearing in a month's time, in light of the article 3 issue. In those circumstances, it is particularly appropriate that the court should consider the Kalinauskas question at that time, and it would be unjust if I had acted today to shut that out from consideration.

26. Mr Hawkes had a long series of other points relating to article 8. They included a series of submissions taking issue with the specific findings of the judge. Findings which Mr Hawkes submitted were not open to the judge related to: the circumstances of his leaving Lithuania, and the judge's the disbelief of his evidence in relation to that; and the judge's findings of fact - on a criminal standard - that a reporting condition was not lifted and the appellant simply stopped comply with it, that he left Lithuania in 2012 in the knowledge that he faced ongoing trials in respect of both allegations, and that he left Lithuania to evade his prosecution, in other words as a fugitive from justice. The conclusion that he is a fugitive from justice was repeated later in the article 8 'balance sheet' exercise. Mr Hawkes also criticised the judge's approach to the issue of delay, the lapse of time and the duration of UK residence, to which the judge attributed no weight" in the circumstances. He criticised the judge for not finding that the Lithuanian authorities had failed to act with appropriate "vigour" in their pursuit of the appellant. I am quite satisfied that there is nothing in those criticisms of the judge. I refuse permission to appeal on these points.

27. It may be, on the point on which I have granted permission, that the court at the substantive hearing in this case is persuaded to reopen the article 8 balancing exercise. If so, whether the Court is persuaded to take a different view of the lapse of time (see H (H) paragraph 8(6)), and whether it is persuaded to look at seriousness of alleged

offending by reference to the appellant's evidence, in the absence of any explicit finding of fact in relation to that aspect of his evidence, these are all matters for the court dealing with the seriousness of the offending issue, in relation to which I have granted permission to appeal. I do wish to be clear, however, that I could see no reasonably arguable other freestanding article 8 point. I am not for a moment encouraging - quite the opposite - Mr Hawkes seeking to re-run his entire article 8 case on the back of the point on which I have granted him permission to appeal.

28. So, the appropriate order so far as article 8 is concerned is that I will grant permission to appeal, limited to paragraphs 47 to 55 and 57 of the amended grounds of appeal. Those are the paragraphs which related to the specific points which I have identified as falling within the scope of my grant of permission to appeal. They, together with explicit reference to paragraph 8(5) of H (H), should be included - with any appropriate amplification relating to them - in the revised grounds of appeal/skeleton to be filed and served within 14 days.

Conclusion

29. The Court at the June hearing will therefore be dealing with this case (a) in relation to the article 3 April 2020 documents and Covid caveat issue on a rolled-up basis and (b) in relation to the article 8/section 21A(1)(b) seriousness of alleged offending points on a substantive basis. As it happens, the order of Johnson J in Gerulskis was of a similar hybrid nature. I will direct that the cases be linked, with a full day as the time estimate By extending the June hearing, with its current time estimate of half a day, to a full day, I feel confident that the linking of the present case - including the short, discrete article 8/section 21A(1)(b) point - ought not to have any derailing effect, provided that counsel confined themselves to clear and targeted written and oral submissions. But I will include liberty to apply to allow for any necessary adjustment. It is also my hope that the explanation given in this written ruling will assist in the June hearing being a suitably focused one.