Neutral Citation Number: [2020] EWHC 1645 (Admin)

Case Nos: CO/254/2018 & CO/113/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2020

Before :

LORD JUSTICE DINGEMANS
and
MR JUSTICE GARNHAM

- -

Between :

(1) JONAS GERULSKIS **(2) VYTAUSKAS ZAPALSKIS**	**Appellants**
- and -	
THE PROSECUTOR GENERAL'S OFFICE OF THE REPUBLIC OF LITHUANIA	**Respondent**

- -
- -

Peter Caldwell (instructed by **Oracle Solicitors**) for the **First Appellant**
Malcolm Hawkes (instructed by **ITN Solicitors**) for the **Second Appellant**
Helen Malcolm QC and Hannah Hinton (instructed by **CPS**) for the **Respondent**

Hearing date: 16 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 o'clock on 26 June 2020.

Lord Justice Dingemans :

Introduction

1. This is the hearing of two appeals and rolled up hearings (of applications for permission to appeal and the appeal if permission is granted) against orders for extradition to Lithuania made by the Westminster Magistrates' Court. These cases have been listed to be heard together because the cases raise a common issue about assurances and prison conditions in Lithuania.

2. In addition to the point about prison conditions and assurances, the appellants, Mr Gerulskis and Mr Zapalskis, also contend that both of the judges who ordered their extradition were wrong to do so because extradition would be incompatible with their rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and so contrary to section 21A(1)(a) of the Extradition Act 2003, and would be disproportionate and so contrary to section 21A(1)(b) of the 2003 Act.

3. By the conclusion of the written and oral submissions it was apparent that the issues in the appeals and applications of both Mr Gerulskis and Mr Zapalskis are: (1) whether permission to appeal ought to be granted and if so whether there is a real risk of impermissible treatment contrary to article 3 of the ECHR given the assurances provided by Lithuania relating to prison conditions; (2) whether extradition would involve a breach of rights under article 8 of the ECHR; and (3) whether extradition would be disproportionate.

Relevant background and the proceedings below in the case of Mr Gerulskis

4. Mr Gerulskis appeals against the judgment of District Judge (Magistrates' Court) Blake dated 12 January 2018 ordering his extradition pursuant to an accusation European Arrest Warrant ("EAW") dated 7 July 2017. Following refusal of permission to appeal on paper, Mr Gerulskis was granted permission to appeal by Johnson J. on the article 8 ECHR point and the issue about prison conditions and assurances was ordered to be heard at the appeal as a rolled up hearing of the application for permission to appeal as well as the substantive appeal if permission is given.

5. On 15 December 2009 Mr Gerulskis is alleged to have broken the window of a store and entered to steal a lawn mower and three trimmers valued at 2,102.60 euros. The offence is punishable in Lithuania by a maximum of six years imprisonment.

6. Mr Gerulskis was arrested on 16 December 2009 and a pre-trial investigation was commenced. He was questioned in the presence of defence counsel on 17 December 2009 and released from detention, but thereafter Mr Gerulskis could not be found by the authorities in Lithuania. It was common ground that Mr Gerulskis was not under any form of conditional bail or legal obligation but the information from Lithuania provides that "after his release the measure of coercion was not imposed against J. Gerulskis. Since then, the suspect J. Gerulskis has hid himself from the pre-trial investigation officers."

7. Mr Gerulskis said that he was released without bail conditions and was directed to pay money for the damage he had caused. He said that he had paid the money back over

the course of a year. Mr Gerulskis said at the time of the offence he had been abusing drugs. He had in the past been imprisoned for carrying out thefts and burglaries to fund his habit.

8. Mr Gerulskis was listed as wanted on 11 October 2010 and attempts to find him were made. It appears that Mr Gerulskis came to the UK in August 2010, met his partner in 2011 who had two children from a previous marriage, and he and his partner subsequently had two further children together.

9. In 2013 Mr Gerulskis' parents were questioned about his whereabouts but no significant information was provided. In December 2013 during criminal record checks it was discovered that Mr Gerulskis had committed an offence in the UK. Mr Gerulskis had been convicted of shoplifting shortly after arriving in the UK, and then cautioned for breaking into a motor vehicle and for possession of a bladed article. He has 9 convictions for 18 offences which include theft and offences of failing to comply with requirements of a community order. He has been imprisoned for short periods of time in the UK for some of these offences.

10. A request for assistance was made on 14 March 2014 and the UK authorities confirmed on 27 January 2015 that the request was being processed. Information on Mr Gerulskis' offending was supplied to the UK on 3 September 2015 and on 7 December 2016 the requesting judicial authority verified Mr Gerulskis' data.

11. In May 2017 the EAW process was started in Lithuania. The EAW for Mr Gerulskis was issued on 7 July 2017 and certified by the National Crime Agency on 10 August 2017. There was some email correspondence between Mr Gerulskis and the investigator in Lithuania. The investigator asked Mr Gerulskis to contact him saying "there is no civil suit we just need to sentence you" and in a later email asking him to return to Lithuania. Mr Gerulskis suggested paying some kind of fine, making it clear that he was not hiding. The investigator replied saying "we just need to sentence you and that's it you can go back" and Mr Gerulskis replied saying that he was raising four children and his wife was on maternity leave so that he was the only breadwinner.

12. Mr Gerulskis was arrested on 18 September 2017. He was granted conditional bail and remains on conditional bail.

13. There was a full hearing on 22 December 2017. Mr Gerulskis gave evidence and evidence was given by a psychologist Dr Esther Rose who had observed Mr Gerulskis and his family. Dr Rose addressed the psychological impact on family members in the event of Mr Gerulskis' extradition and the practical impact on family life. Dr Rose considered that the uncertainty of separation for extradition would aggravate stress for the children and cause significant disruption to the children's attachment relationships.

14. District Judge (Magistrates' Court) Blake gave judgment dated 12 January 2018. The procedural history was set out. The Judge held that he could not find to the relevant standard that Mr Gerulskis was a fugitive, because no bail conditions were imposed or "coercion was not imposed" on his release after his arrest and interview. The judge noted that a fair trial was possible. Mr Gerulskis had been given an opportunity to resolve the case but Mr Gerulskis had rather hoped it had gone away. He had set up home with his partner and taken on the burden of supporting stepchildren and had children. His absence would be difficult but he had not had a blameless life and the

family had coped with his absence in prison previously. There was no bar to extradition by reason of oppression.

15. In respect of interference with article 8 rights the judge carried out a balance of factors for and against extradition. Factors in favour of extradition were the high public interest in ensuring that extradition requirements were met. Other factors referred to by the judge were: the strong public interest in discouraging the UK being seen as a state willing to accept fugitives from justice and Mr Gerulskis had evaded prosecution by coming to the UK; and his poor record of offending and complying with court orders in the UK. Factors militating against extradition included: his large family who would be affected emotionally and financially by his absence; the delay during which time he had taken responsibility for step children and had children of his own; the offence whilst not minor was not serious; and he had sought help with alcohol and drug addictions.

Relevant proceedings and the proceedings below in the case of Mr Zapalskis

16. Mr Zapalskis appeals against the judgment of District Judge (Magistrates' Court) Snow dated 8 January 2020 ordering his extradition pursuant to an accusation EAW dated 26 February 2019. Following refusal of permission to appeal on paper, Fordham J. granted permission to appeal on the article 8 ECHR and proportionality point, and directed the issue of prison conditions and assurances to be heard as a rolled up hearing at the same time as the appeal and application of Mr Gerulskis.

17. In June 2011, it is alleged, Mr Zapalskis with others stole a trailer and on 31 August 2011 he with others (including the owner of the trailer) stole various tools from a garage. There was information on behalf of Mr Zapalskis suggesting that the reason that it was not a burglary was because he was working for the garage owner and had been provided with keys. There is a maximum sentence of up to 3 years imprisonment. Mr Zapalskis was obliged to register at a police station and is alleged to have "hid from trial". He was announced as wanted in court rulings dated 26 September 2013 and 15 January 2014.

18. An EAW was issued on 26 February 2019 and certified by the NCA on 16 October 2019. Mr Zapalskis was arrested on 16 October 2019 and remanded in custody where he remains.

19. In the judgment dated 8 January 2020 District Judge (Magistrates' Court) Snow set out the background before recording the terms of an assurance dated 7 August 2018 which was considered in *Bartulis and others v Lithuania* [2019] EWHC 3504 (Admin) and was found to dispel the risk that the appellants would be subject to conditions in Lithuanian prisons that would breach article 3 of the ECHR.

20. The judge then considered and rejected challenges to the wording of the EAW. The judge found that a decision to try Mr Zapalskis had been taken. The judge then considered the issue of delay. He noted Mr Zapalskis' evidence that he had been living openly in the UK since 2012 but also recorded his sentence for 12 months imprisonment suspended for 12 months in the Crown Court at Southwark in 2015 for the offence of handling stolen goods. The judge rejected Mr Zapalskis' evidence and found that Mr Zapalskis had left Lithuania to avoid the criminal proceedings and therefore rejected the complaints based on delay. The judge then balanced matters for and against extradition for the purpose of considering the article 8 ECHR claim. The judge noted

that Mr Zapalskis' ex-wife, daughter, son in law and grandchildren live in the UK, but noted that he had last spoken to his daughter 4 or 5 months ago, there was no close contact and he had had no contact for 15 years.

21. The judge finally considered the proportionality of the extradition and referred to the table at paragraph 50A.5 of the Criminal Procedure Practice Direction on Extradition. He noted that there was a theft of a trailer and theft of tools from a garage, with high culpability because he was alleged to be in a group with others. The Judge ordered Mr Zapalskis' extradition.

Fresh evidence

22. Both sides relied on evidence about prison conditions and compliance with assurances in Lithuania which post-dated the hearings in the Magistrates' Courts below and which was therefore not available to either party before. It was therefore common ground that the Court should consider the evidence for the purpose of deciding the appeal, but formal admission of the evidence depends on whether the evidence would have led to a different result below, see rule 50.20(6) of the Criminal Procedure Rules and paragraph 20 of *Szombathely City Court, Hungary v Fenyvesi* [2009] EWHC 321 (Admin). I will therefore take full account of the further evidence and address its formal status at the conclusion of the appeal.

A summary of recent cases and assurances relating to prison conditions in Lithuania

23. In order to understand the points raised by the appellants about the assurances provided by Lithuania it is necessary to summarise some recent cases and record the terms of some of the assurances which have been provided in the past. The compatibility of prison conditions in Lithuania for remand and convicted prisoners with article 3 of the ECHR has been the subject of a number of decisions by Courts considering extradition requests.

24. It is unlawful for the United Kingdom to extradite a requested person where he is at real risk of being subjected to treatment contrary to the right in article 3 of the ECHR not to "be subjected to torture or to inhuman or degrading treatment or punishment". Detention for more than a few days in space measuring less than 3 square metres without more is likely to be such degrading treatment.

25. As a result of the principle of mutual trust between member states, membership of the Council of Europe is of fundamental importance in deciding whether an extradited person would, in fact, be likely to suffer treatment contrary to article 3 if extradited to another member state. Each Member State must, save in exceptional circumstances, consider and presume the other Member States to be complying with EU law and with the fundamental rights recognised by EU law, see the judgment of the CJEU in *Dorobantu v Romania* Case-128/18 at paragraph 46.

26. This presumption may be rebutted by clear, cogent and compelling evidence, which is close to being an international consensus. Evidence rebutting the presumption of compliance would include a pilot judgment of the European Court of Human Rights ("ECtHR") identifying structural or systemic problems in the prison estate.

27. As was found in *Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 1122 (Admin) ("*Jane (No.1)")* at paragraph 30, there was an international consensus that prison conditions in some remand prisons in Lithuania, and certainly in Lukiskes remand prison, would lead to a real risk of a detained individual suffering inhuman or degrading treatment, and would thus infringe article 3 of the ECHR.

28. The remand prison at Kaunas was not the subject of criticisms or any finding that there would be a real risk of impermissible treatment. Therefore in order to enable extraditions to take place in accordance with the law Lithuania used to provide what was known as the "Kaunas assurance" namely that the extradited person would be kept on remand in Kaunas remand prison. The Kaunas assurance was given in March 2013 and revoked in 2016, see *Bartulis and others v Prosecutor General's Office, Lithuania* [2019] EWHC 3504 (Admin) at paragraph 16. The removal of the Kaunas assurance prompted the litigation in *Jane (No.1)*.

29. In *Jane (No.1)* it was decided that because Lithuania had lost the presumption of compliance in respect of remand prisons in Lithuania (apart from Kaunas) it would be appropriate to give an opportunity to the Lithuanian authorities to provide an appropriate assurance to dispel the real risk of impermissible treatment for extradited persons.

30. Seven further assurances were provided on behalf of the Prosecutor General's Office in Lithuania between 21 and 26 June 2018. A further assurance dated 7 August 2018 was provided by the Prisons Department of the Ministry of Justice, which because it was the most comprehensive, became the relevant assurance to consider. It provided:

> "The Director General of the Prison Department under the Ministry of Justice of the Republic of Lithuania hereby assures and guarantees that the below stated conditions will be applied to all persons surrendered to the Republic of Lithuania from the United Kingdom on the grounds of the European Arrest Warrant ("EAW") for the purpose of a criminal prosecution or execution of a sentence of imprisonment during their detention.
>
> 1. All persons surrendered under an accusation warrant from the United Kingdom will be held in Kaunas Remand Prison, Lukiskes Remand Prison – Closed prison or Siauliai Remand Prison, whereby they will be guaranteed a minimum space allocation of no less than 3 square metres per person in compliance with article 3 of the European Convention on Human Rights.
>
> 2. Persons surrendered under a conviction warrant that may spend a maximum of 10 days at one of the remand centres set out in clause 1, will be subject to the same guarantees and will be housed in cells with a minimum space allocation of no less than 3 square metres per person in compliance with article 3 of the European Convention on Human Rights.
>
> 3. All persons held in Lukiskes Remand Prison – Closed Prison or Siauliai Remand Prison as per clause 1 and 2 above, will only be

> held in the refurbished or renovated parts of the prisons and in compliance with article 3 of the European Convention on Human Rights."

31. The Court in *Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 2691 (Admin) *(Jane (No.2)* accepted that the assurance dated 7 August 2018 meant that there was no real risk of Mr Jane suffering impermissible treatment if extradited. Judgment in *Jane (No.2)* was given on 16 October 2018.

32. Mr Jane should have been extradited within 10 days after the period for appealing the decision in *Jane (No.2)* had expired pursuant to sections 32 and 36 of the Extradition 2003 Act. Mr Jane was not removed and he challenged his continued detention and a decision to extend time for his removal. In *Jane v Westminster Magistrates' Court* [2019] EWHC 394 (Admin); [2019] 4 WLR 95 a challenge to his continued detention pending extradition to Lithuania was rejected in a judgment dated 26 February 2019.

33. On 6 March 2019 permission to appeal was granted in the case of *Bartulis and others v Prosecutor General's Office, Lithuania*. One of the other appellants was Mr Kmitas. The issue in that case was whether detention in Lithuania, following conviction, would create a real risk of impermissible treatment contrary to article 3 of the ECHR.

34. It seems that on 2 July 2019 Lukiskes Remand prison was closed.

35. Preparations were made for the hearing of the appeals in *Bartulis*. In the meantime the Prison Department of the Ministry of Justice provided a further assurance dated 8 July 2019. So far as is material this provided:

> "1. All persons surrendered from the United Kingdom will be guaranteed a minimum space allocation of no less than 3 square metres per person in compliance with Article 3 of the European Convention on Human Rights;
>
> 2. All persons surrendered will not be required to serve any part of their sentence at unrenovated premises (blocks/wings) of Alytus Correctional House, Marijampole sector (subdivision) of Marijampole Correctional House and sector No. 1 and No. 2 of Pravieniskes Correctional House-Open Prison Colony;
>
> 3. All persons surrendered from the United Kingdom will be detained in conditions reducing a risk to inter prisoner violence/disease transfer and drug influences;
>
> 4. All persons surrendered from the United Kingdom will be guaranteed the protections of the European Convention on Human Rights;
>
> 5. Persons surrendered will be housed in cell-type accommodation, where possible. We also draw to your attention:

> a) A renovated block in Marijampole (opened in 2016) with capacity of 87 places in cell type premises;
>
> b) Marijampole Correctional House (as a legal entity) has a sector (subdivision) in Kybartai, these subdivisons, though separate are both referred to as Marijampole Correctional House;
>
> c) Pravieniskes Correctional House-Open Prison Colony has a fully renovated sector No. 3 (opened in 20 18) with capacity of 360 places in cell type premises;
>
> d) These correctional institutions (including Alytus) also have small number of cells, where surrendered inmates could be detained isolated and without any risk to inter prisoner violence/disease transfer and drug influences."

36. The Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") published its latest report on the Lithuanian prison estate on 25 June 2019. The CPT reports provide relevant information when assessing whether there is anything approaching an international consensus about whether there is a real risk of impermissible treatment contrary to article 3 of the ECHR in prisons in Lithuania. The Court in *Bartulis and others* made a request of the Lithuanian authorities for further evidence and assurances. Further assurances were provided in August 2019.

37. In an assurance simply dated August 2019 the Prison Department of the Ministry of Justice reported that Lithuania could not provide a guarantee that persons would not be held in Alytus Correctional House ("ACH") or Pravieniskes Correctional House-Open Prison ("PCH"). Guarantees that prisoners would have a minimum space of 3 square metres were repeated. Further information about attempts to combat intra-prisoner violence were given. Assurances were again provided about minimum space and to the effect that extradited persons would not be held at unrenovated parts of prisons.

38. The appeal in *Bartulis and others* was heard on 16 October 2019. Judgment was given on 20 December 2019 and reported as [2019] EWHC 3504 (Admin). The focus of that case was not space available to inmates, although the physical conditions of the prisons were relevant, but the risk of violence from other inmates of the prisons, see paragraph 9 of *Bartulis and others*.

39. In that judgment it was held that Lithuania had not lost the benefit of the presumption that it would treat prisoners in accordance with the provisions of article 3 of the ECHR, see *Bartulis and others* at paragraph 126. For that reason the Court did not seek to rely on the assurances offered. However the Court emphasised "it is important nevertheless to stress that, once given, they 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". It was noted that breach of assurances might prove significant in the future.

40. By a letter dated February 2020 the Prison Department of the Ministry of Justice confirmed that all persons surrendered by the United Kingdom "shall be subject to the detention conditions as mentioned in the previous assurances" and copies were provided. The letter recorded that "detention conditions … are constantly improving

in the Republic of Lithuania". It was also recorded that remand prisons were now Siauliai remand prison, Kaunas remand prison, PCH and Vilnius Correction House ("VCH"). Details of the prison conditions and that there were three or four persons per cell were given. It was noted that VCH and PCH had only taken remand prisoners from 2019. The letter recorded that it was not possible to identify in which prison a person would be detained, because of issues such as health, vacancies, recommendations and intelligence.

41. A further assurance was provided by letter dated 3 April 2020 from the Prisons Department of the Ministry of Justice. This referred to the COVID-19 pandemic and recorded that the management of the Lithuanian correctional system could be "encumbered" in the near future. It stated that the guarantees in the letters of 7 August 2018 and 8 July 2019 "will not be applied from the moment of signing this letter". A new guarantee was provided. This was set out in a letter dated 3 April 2020 which provided: a guarantee of no less than 3 square metres of space; surrendered persons would be held only in refurbished parts of Siauliai remand prison; and convicted persons who would spend a maximum of 10 days at Siauliai remand prison would have the same guarantees. The letter also drew attention to the quarantine regime introduced by the Government of Lithuania and noted "the work of Lithuanian institutions is encumbered, which might have impact on the implementation of the assurance". This was referred to as the "Covid caveat".

42. Further information was served for the purposes of this appeal dated 29 May 2020 and 9 June 2020 which related to complaints made about the implementation of assurances relating to Mr Jane and Mr Kmitas, and it will be addressed below. In the letter dated 29 May 2020 the Prison Department of the Ministry of Justice referred to the Covid caveat and noted that there were no persons infected with COVID-19 in the Lithuanian prison estate but that because of the "much complicated pandemic" situation in the UK, air transport may not be allowed to enter Lithuania "for much longer time". It was noted that prisoners might have to spend 14 days rather than 10 days in Siauliai as previously promised.

Principles relating to assurances

43. The principles relating to assurances were summarised in *Jane (No.1)* and also in *Giese v Government of the United States of America* [2018] EWHC 1480 (Admin); [2018] 4 WLR 103. At paragraph 38 Lord Burnett LCJ said "whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept". Lithuania, as a Member State of the European Union, is a friendly foreign government.

44. The First Chamber of the Court of Justice of the European Union ("CJEU") gave judgment in *ML (Generalstaatsanwaltschaft Bremen)* [2018] EUECJ C-220/18PPU. In paragraphs 108 to 117 of *ML* the CJEU considered extradition assurances. At paragraph 112 it was held that where an assurance is "given, or at least endorsed, by the issuing judicial authority … the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities … must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular

detention centre" do infringe the relevant protections against inhuman or degrading treatment.

45. In *Dorobantu v Romania* it was noted that "It is therefore only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding an assurance such as that referred to in the preceding paragraph, there is a real risk of the person concerned being subjected to inhuman or degrading treatment …".

Whether there is a real risk of impermissible treatment given the assurances provided by Lithuania relating to prison conditions – issue one

46. The appellants submit that the Court should cease to have any confidence in the assurances provided by Lithuania. This is because the appellants submit: (1) the assurance provided in the case of Mr Jane has been breached; (2) the evidence of the treatment of Mr Kmitas shows that the assurance has been breached; (3) there was a breach of the duty of candour on the part of Lithuanian authorities because there was a non-disclosure of the conditions in their prisons which must have been highlighted in the process leading up to the 2019 CPT report; and (4) the Covid caveat means that the assurance cannot be relied upon.

47. In answer the Respondent submits that: (1) there was a technical breach only in the case of Mr Jane because he was moved to a newly refurbished prison and not Lukiskes, Kaunas or Siauliai remand prisons, but there has been compliance with the material parts of the 7 August 2018 assurance because he had been provided with the appropriate space; (2) there was no breach in the case of Mr Kmitas; (3) the complaint about the breach of the duty of candour had been assessed in *Bartulis and others* and rejected; and (4) the COVID caveat shows a Lithuanian prison department keen to be transparent and work with the UK authorities, and does not show any real risk of impermissible treatment.

48. It is apparent that the issues raised by this challenge are arguable and I would grant permission to appeal.

No breach of duty of candour in relation to 2019 CPT Report

49. So far as the allegation relating to the breach of duty of candour is concerned this was addressed by the Divisional Court in the case of *Bartulis and others*. This was addressed from paragraphs 128 to 134 of the judgment and rejected because there was no basis for saying that there was any deliberate or undue delay in the publication of the CPT 2019 report. It was also noted that the inspection by the CPT, which occurred in 2018, had been made known at the Magistrates' Court. We were not shown any materials which would have undermined the conclusions of the Divisional Court in *Bartulis and others* on this point, and we reject this complaint.

Breach of assurance relating to Mr Jane

50. So far as the breach of assurance in the case of Mr Jane is concerned it is apparent, from a witness statement made by him and by Ms Gitana Megvine, a solicitor, that he has been held in both VCH and PCH, and was now at PCH. Mr Jane reported on the difficult experiences that he had in the Lithuanian prison system, the problems that the

language barrier has caused him, and the fact that he was locked up in his cell for 23 hours a day. He provided details of his moves around Lithuania so that he could be questioned for the court case. Mr Jane noted that he had a guarantee to go to Kaunas or Siauliai which had been broken. Mr Jane noted that now that he knew the prison rules he might as well stay at PCH pending his trial, which might be two years in the future. Ms Megvine had visited Mr Jane on 3 February 2020 at PCH.

51. It is apparent from the further information provided by the Lithuanian authorities that Mr Jane has been held in PCH and not Kaunas, nor Lukiskes which has closed, nor Siauliai. However it is apparent that he has had 5 square metres of living space and separated lavatories.

52. It is apparent that there was a breach of the assurance provided on 7 August 2018 in the case of Mr Jane. This is because it provides that remand prisoners extradited from the UK would be held in Kaunas remand prison, Lukiskes remand prison or Siauliai remand prison and Mr Jane has been held in PCH. Although Mr Jane was not finally extradited until December 2019, by which time the assurance in July 2019 had been provided, that was not provided to the Court for the purposes of considering whether there was a real risk of impermissible treatment in Mr Jane's case. On the other hand it is apparent from the litigation in *Jane (No.1)* and *Jane (No.2)* that the most material part of the assurance was that Mr Jane would be provided with 3 metres square of living space, and that had been honoured.

53. In these circumstances it is apparent that the most important part of the assurance had been honoured, and it is apparent that Mr Jane had not suffered treatment in breach of article 3 of the ECHR. However it might also be noted that Lithuania's practice of providing general assurances, and then replacing them as prison conditions improve, risks creating problems of technical breaches of assurances. This is because it is apparent that Lithuania has not tracked the assurances provided to the Court in relation to Mr Jane against his movement in the prison estate. It is apparent that assurances are provided to prison governors and other officers responsible for detained persons, but that if an assurance had been replaced it is not apparent that the old assurance would be known about. These would not matter if the assurances were always better than the assurances before (which has been the case in recent years) but an assurance about an individual prisoner, once given, must be complied with until the expiry of the prisoner's sentence of imprisonment.

54. However in my judgment this breach of the assurance does not amount to such a circumstance that would justify this court ignoring assurances or information provided by Lithuania. This is because the most important and material part of the assurance, namely the provision of the 3 square metres of living space was honoured and there was no impermissible treatment of Mr Jane contrary to article 3 of the ECHR.

No breach of assurance relating to Mr Kmitas

55. The evidence in relation to Mr Kmitas comes from a witness statement dated 17 February 2020 from Ms Megvine. He had been extradited on 26 February 2020. He had spoken to Ms Megvine on the telephone on 20 May 2020 from Siauliai remand prison. Mr Kmitas complained to Ms Megvine that he was being held in an unrefurbished part of the prison, conditions were appalling, paint was peeling, and the toilet was separated only by a curtain. His mattress was smelly and stained. There was

a sink with cold running water and showers were permitted only once a week. He had been moved between Kaunas remand prison and Siauliai remand prison. He said that the authorities were not aware of any assurances provided to him and he was being treated in the same way as other prisoners.

56. It was common ground that Mr Kmitas' statements to Ms Megvine were hearsay. However it was also common ground that this court could admit the evidence pursuant to the provisions of Extradition Act 2003 and the Criminal Justice Act 2003 because Mr Kmitas is overseas and in custody. We therefore admit the hearsay evidence, but we have to assess its weight in the light of the further information provided by Lithuania. In the letter dated 9 June 2020 detailed information was given about the cells occupied by Mr Kmitas in both Siauliai and Kaunas remand prison, and it was noted that at all times he had more than 3 square metres of living space. Work to the cells had been carried out in July 2016 and September 2018 and details of the works were provided. It was said that Mr Kmitas had been only in refurbished cells since his extradition. It was noted that mattresses were changed every three years, and that mattresses and bedding were disinfected for each new detained person. It was noted that the assurances had been distributed to prison governors and other officers responsible for the redistribution of detained and sentenced persons.

57. I have not had an opportunity to hear evidence from either side on these respective cases or witnesses respond to questions. It is possible both for Mr Kmitas to be in a refurbished cell, and for paint to be peeling, and on the evidence I accept that Mr Kmitas was held in a refurbished cell. The information from Lithuania shows that Mr Kmitas was kept in a cell where he had at least 3 square metres of living room. It is apparent that the assurances provided in respect of Mr Kmitas have been communicated to prison governors. The fact that he is being held in the same conditions as other prisoners does not prove a breach of the assurance, because conditions in Lithuanian prisons have improved over recent years, although the CPT report of 2019 identifies important further work to be carried out. In these circumstances I do not find any breach of the assurance relating to Mr Kmitas.

The letters dated 3 April 2020 and the Covid caveat

58. I have considered carefully the letters dated 3 April 2020 and the further information dated 29 May 2020 and 9 June 2020. Everyone will understand the difficulties of running prisons during the COVID-19 pandemic. In those circumstances the actions of the Prison Department of the Ministry of Justice in writing to the Crown Prosecution Service to warn of potential difficulties in complying with the assurances provided in the past shows both transparency and a proper regard for the importance of communicating through the CPS with the Courts in England and Wales in accordance with the principles of the Framework Decision. However I agree with Mr Hawkes that the wording of the first letter dated 3 April 2020 and in particular the passage "… we have to notify you, that above mentioned guarantees will not be further applied from the moment of signing this letter" does cause concern. This is because it suggests that the relevant Lithuanian authorities did not feel bound to honour assurances provided to the Courts of England and Wales, which were relied on to order the extradition of requested persons to Lithuania. However I agree with Ms Malcolm QC that it is necessary to consider the second letter dated 3 April 2020. This shows that the most material parts of the assurances, namely that extradited persons will be guaranteed not less than 3 square metres of space and that they would only be held in refurbished or

renovated parts of Siauliai remand prison were repeated. This shows that there does not exist a real risk of impermissible treatment contrary to article 3 of the ECHR.

59. It is also necessary to consider the last part of the second letter termed the Covid Caveat, which provides that "in 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". The first point to note is that the evidence shows that there is no COVID-19 in the prisons in Lithuania at the moment. The second point to note is that evidence of deficiencies in a system, even if systemic, does not necessarily imply that there will be an infringement of human rights and there must be a minimum level of severity in all the circumstances of the case to amount to an infringement, this takes account of the duration of the conditions, see paragraphs 54 and 59 of *Dorobantu v Romania*. In my judgment there is nothing to suggest that the assurances provided by the Prison Department of the Ministry of Justice should be either discounted or ignored.

60. Before leaving the letters dated 3 April 2020 it is worth repeating the point made in paragraph 53 above, to the effect that Lithuania's practice of providing general assurances, and then replacing them as prison conditions improve, risks creating problems of technical breaches of assurances. An assurance about an individual prisoner, once given, must be complied with until the expiry of the prisoner's sentence of imprisonment.

No real risk of impermissible treatment contrary to article 3 of the ECHR

61. In the light of my findings on the four matters set out above relating to: the findings in *Bartulis and others* relating to the duty of candour; Mr Jane's assurance; Mr Kmitas' assurance; and the 3 April 2020 letters and assurances; and having regard to the principles of mutual trust, I find that there is nothing to suggest a real risk of impermissible treatment contrary to article 3 of the ECHR if Mr Gerulskis and Mr Zapalskis were to be extradited to Lithuania.

Principles relating to article 8 of the ECHR

62. I turn next to the challenges to the decisions of the judges in each case that extradition would not involve an infringement of rights under article 8 of the ECHR.

63. There was no material dispute about the applicable legal principles. Section 21A of the 2003 Act requires the Court to determine whether the extradition of the Appellant would be proportionate and compatible with rights under the ECHR. Article 8 of the ECHR provides a right to a private and family life, which is qualified. The relevant principles governing the approach to this issue have been established, see *Norris v USA* [2010] UKSC 9, [2010] 2 AC 487; *H(H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25, [2013] 1 AC 338; and *Poland v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551. Delay is a relevant factor for any article 8 assessment, see *Konecny v Czech Republic* [2019] UKSC 8; [2019] 1 WLR 1586.

64. In *H(H)* the Supreme Court reviewed the approach set out in *Norris v USA* in the light of the decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, and in the light of the way the guidance in *Norris v USA* had been applied in practice, see *H(H)* at paragraphs 2 and 22. It was acknowledged in

H(H) at paragraph 1 that the impact on younger children of the removal of their primary carers and attachment figures would be devastating. It was noted that the interests of the children were a primary consideration, as set out in article 3.1 of the United Nations Convention on the Rights of the Child but "a primary consideration" is not the same as "the primary consideration" let alone "the paramount consideration" (emphasis added), see *H(H)* at paragraph 11. The importance of paying careful attention to what will happen to the child if the sole or primary care giver is extradited was emphasised, as was the need for a court to consider whether the public interest in extradition could be met without doing serious harm to a child, see *H(H)* at paragraph 33.

65. The question before both District Judges (Magistrates' Court) was whether interference with the article 8 right is outweighed by the public interest in extradition. There is no test of exceptionality. In the balance there is a constant and weighty public interest in extradition, people should have their trials, the UK should honour treaty obligations, and the UK should not become a safe haven for fugitives. The best interests of the children are a primary consideration, and Courts need to obtain the information necessary to make the necessary determinations relating to children. Delay since commission of the crime may diminish weight to be attached to the public interest and increase the impact on private life and likely future delay is a relevant feature to be taken into account. The question before me on appeal is whether the Judge was wrong in his assessment of the article 8 balance.

Judge entitled to find that there was no breach of article 8 in the case of Mr Gerulskis

66. The judge listed the factors for and against the extradition of Mr Gerulskis. It was apparent that all the relevant factors, including the report of Dr Rose and the interests of the four children, were taken into account. The factors against extradition had to be balanced against the public interest in complying with extradition obligations and Mr Gerulskis' continued offending in the UK. There is nothing to suggest that the assessment of the judge was wrong.

67. Mr Caldwell relied on the passage of further time since the order for extradition was made as a matter which meant that the balance had altered. The passage of time occurred because Mr Gerulskis' case was stayed pending the decision in *Bartulis and others*. The time since the commission of the offence has increased. However the stay was ordered so that the courts could make sure that there was no real risk of impermissible treatment of Mr Gerulskis in the event of his return and he has been on conditional bail in the interim. The fact that there is likely to be a continuing delay in his extradition because of the COVID-19 pandemic does not, in my judgment, alter the relevant balance so that it militates against extradition, but I return to this issue at the end of the judgment. In my judgment the order for extradition in this case will not infringe Mr Gerulskis' rights under article 8 of the ECHR.

Judge entitled to find that there was no breach of article 8 in the case of Mr Zapalskis

68. In the case of Mr Zapalskis the judge listed the factors for and against the extradition of Mr Zapalskis. The judge took account of all the relevant factors including the fact that he had deliberately evaded his prosecution in Lithuania, and delay. It is right to acknowledge that Mr Zapalskis' ex-wife and daughter and grandchildren are in the UK.

However it is also apparent that he did not have contact with his daughter for 15 years, and there was no continuing close contact between him and his daughter and grandchildren. There is nothing to show that the judge's assessment was wrong.

69. Mr Hawkes noted that Mr Zapalskis had been held on remand since his arrest on 16 October 2109, and that during this time the prison estate in the UK has been affected by the COVID-19 pandemic, so that his period of imprisonment (for which credit will be given on extradition) has been even more onerous than the usual effects of imprisonment, and this ought to be taken into account and weighed against his extradition because he has already suffered a difficult imprisonment. In my judgment this factor does not alter the balance so that it is against extradition for the purposes of article 8 of the ECHR. This is because Mr Zapalskis will be given credit for the time that he served on remand waiting for his extradition. Further the fact that there is likely to be a continuing delay in his extradition because of the COVID-19 pandemic does not alter the balance against extradition, but I return to this issue at the end of the judgment. In my judgment the order for extradition in this case will not infringe Mr Zapalskis' rights under article 8 of the ECHR.

Principles relating to proportionality

70. Section 21A of the Extradition Act 2003 provides:

> "**21A Person not convicted: human rights and proportionality**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D")—
>
> (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
>
> (b) whether the extradition would be disproportionate.
>
> (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
>
> (3) These are the specified matters relating to proportionality—
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
>
> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.

> (4) The judge must order D's discharge if the judge makes one or both of these decisions—
>
> (a) that the extradition would not be compatible with the Convention rights;
>
> (b) that the extradition would be disproportionate.
>
> (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions—
>
> (a) that the extradition would be compatible with the Convention rights;
>
> (b) that the extradition would not be disproportionate.
>
> (6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory."

71. Guidance on the approach to section 21A(3)(a) of the Extradition Act 2003 is provided in the Criminal Procedure Rules Part 50 CPD XI "Other proceedings 50A: Extradition: general matters and management of the appeal". Practice Direction 50A.2-4. This provides:

> "50A.2 When proceeding under section 21A of the Act and considering under subsection (3)(a) of the Act the seriousness of the conduct alleged to constitute the extradition offence, the judge will determine the issue on the facts of each case as set out in the warrant, subject to the guidance in paragraph 50A.3 below.
>
> 50A.3 In any case where the conduct alleged to constitute the offence falls into one of the categories in the table at paragraph 50A.5 below, unless there are exceptional circumstances, the judge should generally determine that extradition would be disproportionate. It would follow under the terms of s. 21A(4)(b) of the Act that the judge must order the person's discharge.
>
> 50A.4 The exceptional circumstances referred to above in paragraph 50A.3 will include: i. vulnerable victim; ii. crime committed against someone because of their disability, gender-identity, race, religion or belief, or sexual orientation; iii. significant premeditation; iv. multiple counts; v. extradition also sought for another offence; vi. Previous offending history."

72. The table in 50A.5 refers to "minor theft – (not robbery/burglary or theft from the person)". Examples given were "Where the theft is of a low monetary value and there is a low impact on the victim or indirect harm to others, for example: (a) Theft of an item of food from a supermarket; (b) Theft of a small amount of scrap metal from company premises; (c) Theft of a very small sum of money.

73. In *Miraszewski v Poland* [2014] EWHC 4261 (Admin) the Divisional Court addressed what was then "the new freestanding proportionality test". The development of the "triviality test" from section 11(3) of the Extradition Act 1989 and comments in the European Handbook on how to issue an European arrest warrant produced by the Council of the European Union, in part in reaction to the "principle of legality", namely a requirement to take all measures to bring someone to justice, as applied in Poland, was traced in paragraphs 20 to 25 of *Miraszewski*. The table in 50A.5, based on the Lord Chief Justice's guidance, was a floor and not a ceiling, meaning that it might be disproportionate to order extradition for offences not described in the table. In paragraph 36 it was noted that "the seriousness of the conduct alleged to constitute the offence is to be judged, in the first instance, against domestic standards". This is because this test of proportionality is applied in the case of accusation warrants where the sentence imposed by the requesting courts will not be known. It was noted at paragraph 36 of *Miraszewski* that "some offences of theft are trivial (see the Lord Chief Justice's Guidance); others are not … the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim".

74. In considering the likely penalty on conviction it was said at paragraph 37 of *Miraszewski* that the principal focus is on the question whether it was proportionate to order the extradition of a person who was not likely to receive a custodial sentence in the requesting state. A judge is entitled to draw inferences from the contents of the EAW and to apply domestic sentencing practice as a measure of the likelihood of a custodial sentence being imposed. It was also noted in paragraph 39 of *Miraszewski* that "it does not follow that the likelihood of a non-custodial penalty precludes the judge from deciding that extradition would be proportionate". This is because there is a public interest in the prosecution of serious offences. A history of a fugitive disobeying court orders might be relevant.

Judge entitled to find that it was proportionate to extradite Mr Gerulskis

75. The judge found whilst the offence was not serious it was not minor, Mr Gerulskis could receive a custodial sentence, and there was no possibility of less coercive measures being taken. It was therefore not disproportionate to order extradition.

76. I have borne in mind the comment by the investigator to the effect that Mr Gerulskis simply needed to be sentenced before he could return, which did have overtones of the principle of legality. However I note that the investigator was not the sentencing court and it was apparent that this was not a minor theft. Nothing had been suggested by way of less coercive measures to be taken. In my judgment the judge was right to find that Mr Gerulskis' extradition would not be disproportionate. This was because this offence concerns the theft of 2,102.60 euros worth of equipment.

Judge was entitled to find that it was proportionate to extradite Mr Zapalskis

77. The issue was addressed by the judge who considered the relevant factors in section 21A(3)(a), (b) and (c). Mr Hawkes criticised the conclusion that it was proportionate to order the extradition of Mr Zapalskis because the judge found that "as individual offences they would be unlikely to attract a custodial sentence in the UK" but was "satisfied that the allegations are likely to attract a term of imprisonment in Lithuania

where offences against property appear to attract harsher penalties than they attract in this jurisdiction".

78. In this case it is alleged that Mr Zapalskis stole a trailer with others. It is apparent that Mr Zapalskis disputes his responsibility for that but it is not for this court to determine issues of guilt. It is then alleged that Mr Zapalskis stole tools from a garage with others, and that the reason that it was not a burglary was because he had been entrusted with the key by his employer, showing that the theft was in breach of trust. It might be that as individual offences they might be unlikely to attract a custodial sentence in the UK, but they were not individual offences and in our judgment the judge was right to find that the extradition of Mr Zapalskis for these two alleged offences of group offending was proportionate.

79. The question then arises of what is the effect of Mr Zapalskis' imprisonment. It is right that he has served a period of over 8 months' imprisonment to-date, including at a difficult time during the COVID-19 pandemic, but I am unable to say that the time served means that his extradition has become disproportionate.

Current position

80. It is apparent that because of the COVID-19 pandemic Lithuania will not be accepting any requested persons at the moment. Mr Gerulskis remains on conditional bail and he did not suggest any less coercive measures to be taken. It may be that the continuing delay that will occur because of the COVID-19 pandemic will allow both parties to reconsider this issue.

81. Mr Zapalskis remains in custody. Mr Hawkes submitted that he was at the risk of "indefinite detention". This is not the case. It is apparent that, given the likely delay in carrying out the order for extradition, issues of bail will need to be considered. Such applications for bail have been successful, see *Hartun v Poland* 30 April 2020 and unsuccessful see *Perry v United States* 3 April 2020. The application will depend on the individual circumstances of Mr Zapalskis. Again no point was taken on less coercive measures to be taken in Mr Zapalskis' case, but the continuing delay may allow both parties to reconsider these matters.

Fresh evidence

82. In circumstances where the fresh evidence has, on a full analysis, not led this Court to make a different order from below, we do not formally admit the evidence.

Conclusion

83. For the detailed reasons set out above I: (1) grant permission to appeal to Mr Gerulskis and Mr Zapalskis on the ground relating to the assurances and real risks of impermissible treatment contrary to article 3 of the ECHR; (2) find there is no real risk of impermissible treatment of Mr Gerulskis and Mr Zapalskis contrary to article 3 of the ECHR if extradited to Lithuania; (3) find that the judges were not wrong to find that extradition would not be an infringement of Mr Gerulskis' and Mr Zapalskis' rights under article 8 of the ECHR and that remains the position; (4) find that the judges were entitled to find that it was proportionate to extradite Mr Gerulskis and Mr Zapalskis and

that remains the position: (5) refuse the applications to adduce fresh evidence; and (6) dismiss both appeals.

Mr Justice Garnham :

84. I agree.