APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 29
HCA/2019/2/XM and
HCA/2019/3/XM

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEALS UNDER SECTION 26 OF THE EXTRADITION ACT 2003

by

EVALDAS IVOSKEVICIUS

Appellant

against

THE LORD ADVOCATE ON BEHALF OF THE LITHUANIAN AUTHORITIES

Respondent

Appellant: Mackintosh; Dunne Defence
Respondent: DJ Dickson AD (sol adv); for the Lord Advocate on behalf of the Lithuanian Authorities

3 May 2019

[1] The appellant seeks leave to appeal the decision of the sheriff at Edinburgh to order his extradition to the Republic of Lithuanian in respect of two separate European Arrest Warrants. The Lithuanian authorities advised that if extradited the appellant would be held on remand at Šiauliai Remand Prison. They have provided assurances in relation to all persons surrendered to Lithuania from the United Kingdom under a European Arrest

Warrant for prosecution or execution of a sentence. These assurances were that: (1) those returned under an accusation warrant would be held in one of three remand prisons, Kaunas, Lukiškés or Šiauliai, where they would be guaranteed a minimum space allocation of $3m^2$ per person, in compliance with Article 3 of the European Convention and Human Rights; (2) those returned under conviction warrants would be held in such remand conditions for a maximum of 10 days before being held in cells, which also met the space requirements of Article 3 of the Convention; (3) all prisoners held in Lukiškés or Šiauliai would be housed only in the refurbished or renovated parts of the prison.

[2] After hearing expert evidence and considering relevant material, the sheriff concluded that there was an international consensus that remand prison conditions in Lithuania were such as to give rise to substantial grounds for believing that a requested prisoner returned to such conditions faced a real risk of being subject to inhuman or degrading treatment. The whole basis of the sheriff's decision in relation to the remand institutions was that the conditions there would not be acceptable unless sufficient assurances were otherwise given. The fundamental problems repeatedly identified were overcrowding and poor conditions of hygiene and sanitary facilities. Typical violations within the prison were overcrowding, violations of privacy and, in some cases, unhygienic conditions.

[3] The only issue before the sheriff was thus whether the assurances given by the Lithuanian authorities were sufficient to dispel the risk of ill-treatment of the appellant, should he be extradited there and detained within Šiauliai Prison.

[4] It is generally recognised that, in these circumstances, four questions arise: (1) the terms of the assurances must indicate that on return the individual will not be held in conditions which breach Article 3; (2) the assurances must be given in good faith; (3) there

must be a sound objective basis for believing that the assurances will be fulfilled;

(4) fulfilment of the assurances must be capable of being verified.

[5] The sheriff required to consider whether the terms of the assurances were such as to overcome the risk that the appellant would be held in non-compliant conditions.

[6] We do not accept that it is arguable that in order to determine the reliability of the assurances, the sheriff would require to have the sort of detailed information suggested as to the precise details of the cell or conditions in which the appellant would be held. For example, the assurances are not merely that the appellant will be held in conditions where $3m^2$ of space is provided: the assurances are that mche will be provided with no less than $3m^2$ space "in compliance with Article 3 of the European Convention on Human Rights". The sheriff correctly noted that this entitled him to conclude that the minimum standard would be met. It seems clear from the evidence before him that it would at least be possible for the standard to be met. The expert witness (13 November 2018, page 30) said that both prisons had conditions that are in violation of the national and international requirements "in some cases". The primary issue of overcrowding arose when more than one prisoner was accommodated within certain, cells when the space requirements of the Convention might not be met. The issues described by the expert in relation to Lukiškés, was that space was a significant issue and lack of privacy. The risk anticipated by the expert witness, in respect of this appellant, concerned the likelihood of his being held at Šiauliai, where conditions are similar to Lukiškés. All the main problems are similar to Lukiškés; the two prisons being, in this respect, comparable. The expert witness accepted that generally the direction of travel is that conditions in Lithuanian prisons are improving. He also recognised that within Lukiškés there was a more newly renovated area where detainees

could be held in Article 3 compliant conditions. More recent inspection by the CPT suggested that the issue of overcrowding had decreased somewhat.

[7] In *Jane (No. 2)* [2018] EWHC 2691 (Admin), the court noted that Lithuania continues to make considerable efforts to improve conditions in its remand prisons. There is an ombudsman who has the right to make unannounced visits to any prison and who may demand to interview any prisoner held there. The Lithuanian authorities permit inspection by the CPT.

[8] The essential argument for the appellant was that in *Jane*, the assurances regarding Lukiškés were backed up by the evidence of the 2018 CPT report, which had confirmed the renovations referred to above and had not identified any failings in the renovated cells. There was no such information available about Šiauliai. However, whilst there is less up-to-date information about Šiauliai, as was noted in *Jane (No. 2)* para 13, it is a reasonable inference from the third paragraph of the assurances that prison facilities at Šiauliai had been refurbished or renovated as they have at Lukiškés. Indeed, the expert witness spoke of refurbishment having taken place at Šiauliai and having featured in the decisions of the domestic courts. At the least, the renovations addressed the dilapidated and mouldy conditions of the cells in question. Against the background of sincere efforts by the Lithuanian authorities to improve conditions, it is in our view not unreasonable to consider that the renovations at Šiauliai are likely to enable detainees to be held in Convention complaint conditions in accordance with the terms of the assurances. It is quite wrong to assert that the sheriff had no objective basis for believing that the assurances will be fulfilled. The sheriff correctly noted that the source of the assurance is important. Lithuania is a member of the European Union and the Council of Europe. The principle of mutual trust requires the court to assume, unless there can be shown good reason otherwise, that

assurances are given in good faith and that a member state will comply with its obligations thereunder. The expert acknowledged that Lithuania takes compliance with its obligations seriously and that where cases have been brought before domestic courts, compensation is awarded and paid. The tenuous basis upon which the expert called into question the likelihood that the Lithuanian Government would comply with the assurances was speculative and hypothetical and would not provide a basis for declining to rely on the assurances given.

[9] In *Jane (No. 1)* [2018] EWHC 122 (Admin), Lord Justice Hickenbottom noted that,

> 54 Even if the state's prisons are such that, as a general proposition, compliance with Article 3 cannot be guaranteed, often despite the considerable efforts of that country to improve prison conditions and comply. Although the presumption of compliance with the Article 3 obligations may be lost in that particular respect, that will not necessarily bear upon the reliability of that state in complying with the specific assurance it gives to this court as to, for example, where a prisoner will be detained. The nature of such a straightforward assurance is very different from that of the general obligation that lies upon a state in relation to its prison conditions in general. Similarly, the assessment of the risk of non-compliance will usually depend upon different factors.
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> 55 ... The starting point is that such a state is entitled to a presumption that it will comply with such a straightforward solemn assurance, even if it has lost the presumption in relation to its prison estate as a whole. Its general failures may, depending on the facts, bear upon its reliability in relation to an assurance, but that reliability would usually be tested in other ways; for example, by its previous compliance or non-compliance with similar assurances. Where a state has made obvious substantial efforts to improve its prison conditions, even where it has, as yet, failed to raise them sufficiently to show that there will be no risk of treatment that does not comply with Article 3, that may be evidence of good faith and thus positive evidence of the state's reliability in ensuring that specific assurance is met."

[10] We consider that the sheriff was entitled to conclude, as he did, and the application will be refused.