Neutral Citation Number: [2021] EWHC 1019 (Admin)

Case No: CO/3542/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd April 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

ARNAS CIVILKA	**Appellant**
- and -	
PROSECUTOR GENERAL'S OFFICE (LITHUANIA)	**Respondent**

- -
- -

David Williams (instructed by Taylor Rose MW) for the **Appellant**
Hannah Hinton (instructed by the Crown Prosecution Service) for the **Respondent**

Hearing date: 22.4.21

Judgment as delivered in open court at the hearing

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

Introduction

1. This is a renewed application for permission to appeal in an extradition case. The Appellant is aged 25 and is wanted for extradition to Lithuania. That is in conjunction with an accusation European Arrest Warrant (EAW) issued on 15 April 2019 and certified on 9 May 2019. The relevant index offences – 5 having been the subject of an order for discharge – are 43 offences of fraud, forgery and the like, allegedly committed between 2016 and 2018. DJ Goozee ordered extradition on 25 September 2020 after a two-day oral hearing in August 2020. The case was linked with two other cases, because they all raised a general Article 3 issue relating to prison conditions and the adequacy of assurances. The Appellant's case raised a distinct Article 3 issue relating to risks arising from his position as a gay man. Another of the three individuals (Mr Guzikauskas) raised a distinct Article 8 issue. On 14 February 2021 Murray J, on the papers, refused permission to appeal on all issues in all three cases. The Appellant renewed his application for permission to appeal, but limited to his distinct Article 3 issue. Mr Guzikauskas (CO/3537/2020) renewed his application for permission to appeal relying on his distinct Article 8 issue but also the general Article 3 issue. On 17 March 2021 Eady J directed that this case and the case of Mr Guzikauskas be separately listed for hearing, but that the same judge should deal with both. I have considered the case of Mr Guzikauskas at a separate hearing and giving a separate judgment.

Mode of hearing

2. This was a remote hearing by Microsoft Teams. Both Counsel were satisfied, as am I, that this mode of hearing involved no prejudice to the interests of their clients. A remote hearing eliminated any risk to any person from having to travel to a court room or be present in one. I have inferred that in this case it also enabled Mr Williams to avoid having to return the brief and enabled the Appellant to retain Counsel of choice, because Mr Williams has been able to attend this remote hearing from a room at the crown court building where a jury is out in a trial in which he appears. I am satisfied that the mode of hearing was justified and appropriate. Open justice was secured. This case and its start time, together with an email address usable by any member of the press or public who wished to observe this public hearing, were published in the cause list. The hearing was recorded. This ruling will be released in the public domain.

The Issue

3. Mr Williams submits that it is reasonably arguable that the relevant Article 3 ECHR threshold is crossed in the present case, given the risk of ill-treatment as a gay man in prison in Lithuania. He emphasises what he says is a heightened risk both in terms of the incidence of ill-treatment, but also in terms of the severity of that ill-treatment were it to occur; he also emphasises, as a relevant and contributory factor, the particular issue of lack of tolerance arising on the ground on the part of those who would be or might be in a position to protect. The argument in relation to risk has as its roots, it seems to me, these three combined features: (i) the "caste system" (sometimes referred to as the "informal prison hierarchy") in Lithuanian prisons and inter-prisoner violence in those prisons within that caste system; (ii) the position of

gay men within that caste system; and (iii) the insufficiency of protection from the state authorities (given the position in relation to freedom of movement and the degree of supervision and control, as well as the tolerance to which Mr Williams has referred).

4. The District Judge addressed this distinct Article 3 argument as part of a specific judgment delivered in the Appellant's case (the general Article 3 issue was addressed in a stand-alone joint judgment in all three cases, in which it was the common issue). The District Judge concluded, on the distinct Article 3 argument, that there would be no violation of Article 3 in extraditing the Appellant. The District Judge arrived at that conclusion by reference to the relevant risk and harm thresholds. It is not said by Mr Williams that the District Judge got the law wrong, but rather that his approach to the facts and evidence, and his evaluative conclusion, were arguably wrong. It does not need saying – but it has infused the submissions made and the materials that the Court has before it – that the particular context of inter-prisoner violence and lack of protection, and in particular sexual orientation and lack of state protection, are particularly anxious matters and always need to be the subject of very careful consideration.

5. In considering the issue, the District Judge referred to five features in particular. The first two features related to the position in society in Lithuania as a whole. Feature (1): The historical background of deep, widespread, entrenched and unchallenged discrimination against gay men in Lithuania. Feature (2): The 'enormous strides' to 'criminalise hate crime and take positive action to deal with complaints of discrimination and victimisation' in Lithuania. The remaining three features related to the position in prison and the prison hierarchy (or caste system) in particular. Feature (3): That the Divisional Court in Bartulis [2019] EWHC 3504 (Admin) had considered the caste system and inter prisoner violence and had determined that requested persons were not exposed to a real risk of treatment contrary to Article 3, as a consequence of those matters. Feature (4): That further information in the present case demonstrated that the Ministry of Justice is alive to the problems of violence, and is taking steps to combat violence by reducing prison numbers and increasing security as confirmed in an Action Plan. Feature (5): That other further information in the present case specifically demonstrated that Lithuania provides protection in respect of the rights of the LGBTQ+ community. It was in light of those five features that the District Judge concluded that the Appellant had not produced sufficient cogent evidence that Lithuania could not provide legally adequate protection from the ill-treatment, and found against the Appellant.

6. The essence of the renewed challenge to the District Judge's assessment is really, as I see it, that the District Judge failed sufficiently to consider: the individual circumstances of this individual requested person; or at least the particular circumstances of gay men within the Lithuanian prison system and the caste system. Mr Williams says the District Judge ought not to have rejected the article 3 ground for resisting extradition; that he should have found that it was well-founded. Alternatively, Mr Williams says, the District Judge should have concluded that he needed more information; or that further safeguards were needed before extradition could take place; and the familiar steps relating to eliciting information and obtaining protective assurances should accordingly have been further engaged. Mr Williams has maintained the submissions which he has made in this case in writing and he has, in

the usual way, helpfully expanded orally upon them, emphasising particular points and showing me particularly significant materials. I have considered all of the strands to the argument, whether put in writing or emphasised orally. Mr Williams submits as follows. He says the Bartulis case did not closely relate to an individual with a particular vulnerability within the caste system. He says that evidence before the District Judge, and before this Court, does relate to the risks and particular vulnerability of gay men in a custodial setting with its caste system. He says there was a need to analyse the individualised risk in a context where the Appellant would be in the lowest category within the caste system, with "risks of his being subject to inhuman or degrading treatment… very different to those of a requested person with different personal characteristics i.e. the more general position considered in other cases"; or, as he put it orally, "risks greater than many other requested persons and to a greater degree". Mr Williams points to materials which describe homosexuals as within the "lowest and most despised" caste in the prison subculture. He draws my attention in the materials: to the others within that lowest caste; to varieties and roles; and to the description in the materials of the sorts of harm. He emphasises a 2018 article emanating from the national LGBTQ+ rights organisation and the instances they there gave about ill-treatment. He criticises the District Judge who, in describing that material in relation to what I have called Feature (1), described it as neither objective nor up to date, and characterised it as reporting on homophobic attacks on high-profile activists and the inability of law enforcement to deal effectively with hate crime. Mr Williams has emphasised orally what he says is, at least arguably, an insufficiency in the material relating to legal instruments which seek to protect against hate crime, discrimination and victimisation.

Discussion

7. In my judgment, there is no realistic prospect that this Article 3 challenge could succeed on a substantive appeal hearing before this Court. In my judgment the Article 3 ground, important though it undoubtedly is, is not a reasonably arguable one in the context of the authorities and the materials. In my judgment, the strong starting point and secure platform on which consideration of these issues takes place, is the judgment of the Divisional Court in the Bartulis case. The Court in that case specifically considered (see paragraphs 115 to 118) the 'real problem' regarding the caste system, and inter-prisoner violence, but held that it was that problem which the Court was satisfied was being addressed through a legally adequate response (paragraph 121), such that the presumption of compliance had not been displaced (paragraph 126). The Court applied the Article 3 standard and was satisfied that there was no breach arising from the risks of incidents, their prevalence and nature, the nature of tolerance or failure of protection within the caste system and within the prison system. In my judgment, it is – beyond reasonable argument – clear that the Divisional Court was not considering "the … general position" or the position of "many requested persons". The Court was not limiting its assessment to those who were in particular castes within the hierarchy. The Court was looking at the position as a whole, precisely because of the importance of seeing whether there was a lack of protection for those who would, or could, suffer within the caste system. The whole point about the caste system is the ill-treatment experienced by those who are disadvantaged by it and vulnerable within it, and the greatest concern is about those most disadvantaged by it and most vulnerable within it. If the Divisional Court had considered that a different answer was – or even might be – applicable, depending on

which specific "caste" was the relevant one in an individual case, that is what the Court would have said. The Court would, moreover, inevitably have had to undertake an assessment as to within which "caste" the relevant appellants in that case could be expected to be identified. These points are reinforced by the fact that one of the individuals who features in the that case was recorded by the Court as having referred to the caste system and having said that he "himself was in a lower caste" (paragraph 25). Mr Williams realistically accepts that that description ("a lower caste") is one which at least might be a reference to the "lowest caste". The point is that even an ambiguity in relation to whether the "lower caste" did or did not mean the "lowest caste" would – necessarily – have had to be addressed and resolved in the Court's judgment, unless the Court was reaching a conclusion that there was a sufficiency of protection for even those in the most vulnerable of groups.

8. Next, it is relevant to recognise that the materials which describe gay men within Lithuanian prisons as being within the "lowest and most despised caste" also describe the sorts of others who similarly fall within that "lowest" (fourth) caste. Mr Williams took me back to those materials illustrating that very point. Reference is made in the materials, describing the "lowest" caste, to: those imprisoned for sex crimes; feminine-looking men; men with feminine manners; physically weaker men; those with low intelligence. As Mr Williams emphasised, there are also references to individuals who fall within that lowest caste as a punitive response in the light of some action or perceived action on their part. It is very important, of course, not in any way to overlook this "lowest" caste, in the case of any individual who may be said to fall within it. But the Divisional Court in Bartulis did not do so. Nor did the District Judge in this case. And nor have I. What I cannot accept is that there is, supported by the materials, a particular subcategory, in effect a lower (or "fifth") group, in respect of whom there are particularly heightened risks of ill-treatment occurring or of ill-treatment of a particular nature occurring. There is, in my judgment and beyond reasonable argument, no basis for identifying a group of individuals, or in this case an individual gay man, as not having the legal protection which the Divisional Court in Bartulis was satisfied exists, so that (as that Court held) the presumption of compliance is intact and has not been displaced, and there is no need to require further information or further safeguards.

9. The whole point of the District Judge's Article 3 analysis, in the judgment relating specifically to the present case, was that it was addressing the specific risks arising out of the position within the caste system of the Appellant given his sexual orientation. But in addressing that question, in my judgment beyond reasonable argument, the District Judge identified features on which his conclusion securely rested. Most important, and directly relevant to the prison setting and the caste system issues, were Features (3), (4) and (5). Mr Williams criticises the District Judge's comments in relation to Features (1) and (2), so far as concerns: the 2018 article by the National rights organisation; the reference to legislative provisions; and certain parallels which the District Judge identified. As to parallels, the District Judge likened Lithuania to the United Kingdom in terms of 'historical background' (Feature (1)); he then likened Lithuania to all EU nations in terms of 'strides' taken 'to criminalise hate crime and take positive action' (Feature (2)). Mr Williams submits that such parallels were unjustified and that the particular problems arising in Lithuania, so far as concerned gay men in society, are far more serious than in the United Kingdom; and that the steps being taken cannot be equated to steps in other EU states. But the

District Judge was not, in making those references, failing to consider the specific position in Lithuania. He referred to, and relied on, information which was all about Lithuania. Ultimately his conclusion needed to be as to the position in Lithuania, and it was. In any event, the ultimate analysis, and the point which was and is at the heart of the Article 3 issue, concerns the position as a gay man in custody in Lithuania. That is so, even if the District Judge mischaracterised the 2018 article, in his observations as to the content of that article, as to its objectivity, as to its date, and as to whether it was only really addressing (a) the inability of law enforcement to deal effectively with hate crime and (b) alleged attacks on 'high-profile activists'. Those observations were relevant, and made, in the context of Features (1) and (2). I do not accept that the District Judge, even arguably, gave that material "no weight at all", as Mr Williams put it. The District Judge referred, in terms, to the aspect of it which was concerned with 'inability of law enforcement to deal effectively with hate crime', but he relied on other material and the Further Information to which, beyond argument, he was entitled to have regard. I repeat: the ultimate analysis and the point at the heart of this case, as Mr Williams has rightly and fairly recognised, is about prisons and the caste system and protection within prisons, for those who suffer as a consequence or risk suffering as a consequence of their place within the caste system. That was the focus of Features (3), (4) and (5) relied on by the District Judge. It was those Features on which the District Judge relied in relation to what he described as the "individual submissions under Article 3 that the Appellant as a homosexual male in the prison hierarchy will be at high risk of suffering violence, degrading treatment and discrimination and will not be protected". It was those points ultimately which, convincingly, supplied the answer when considering whether there was a failure to provide state protection against ill-treatment, in relation to: the "lowest" caste within the prison hierarchy in Lithuania; gay men within that lowest caste; and the Appellant individually as a gay man.

10. I can see no realistic prospect of this Court finding that the District Judge's approach, or conclusion, was wrong. In those circumstances, and with gratitude to Mr Williams for the way in which he has presented the materials and his submissions, permission to appeal is refused.

22.4.21