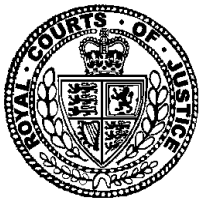

Neutral Citation Number: [2021] EWHC 1410 (Admin)

Case No: CO/393/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

ANTANAS BERNOTAS	**Appellant**
- and –	
LITHUANIAN JUDICIAL AUTHORITY	**Respondent**

- -
- -

DAVID BALL (instructed by the **National Legal Service**) for the **Appellant**
HANNAH HINTON (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 20 May 2021

- -

Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The appellant, Antanas Bernotas, is sought by the Klaipeda Circuit Court, Lithuania pursuant to a European arrest warrant issued on 18 August 2015 and certified on 3 September 2015. The warrant seeks his surrender to serve a sentence of 2 years and 2 months' imprisonment for conspiracy to supply cannabis.

2 There was also a second warrant issued on 26 November 2015 and certified on 15 December 2015 for trial for an offence of evading service of a sentence of imprisonment.

3 After a hearing at Westminster Magistrates' Court, District Judge Mallon handed down a judgment on 29 January 2020 in which she gave her reasons for ordering the appellant's extradition under the first warrant but discharging him in respect of the second.

4 The appellant appeals pursuant to s. 26 of the Extradition Act 2003 ("the 2003 Act"). On 26 November 2020, Eady J granted permission on limited grounds: that extradition would be incompatible with the appellant's rights under Article 3 of the European Convention on Human Rights ("ECHR") (ground 1) and Article 8 ECHR (ground 2).

5 Ground 1 is focussed narrowly on the contention that there is a real risk of treatment contrary to Article 3 in Šiauliai Remand Prison, where the appellant submitted persons extradited under conviction warrants have in the past been sent for up to 10 days after their surrender, before being sent to one of the "correction houses" where convicted persons serve their sentences. That ground arises from a letter sent by the Lithuanian authorities on 3 April 2020 revoking and replacing previous assurances. This letter post-dated District Judge Mallon's judgment, so the Article 3 ground was not ventilated before her. Eady J's grant of permission was limited to the question of whether the assurances communicated on 3 April 2020 covered those surrendered under conviction warrants or only those surrendered under accusation warrants.

6 Under ground 2, permission to appeal was granted only insofar as the appeal was based on evidence of a change in circumstances arising from the birth of his child since the decision appealed from. For these reasons, the appellant submits that extradition is barred by s. 21 of the 2003 Act.

Ground 1: Article 3 ECHR

<u>The background</u>

7 There is a general presumption that a State party to the ECHR will comply with its obligations under that Convention. Clear, cogent and compelling evidence is required to rebut the presumption. The type of evidence required is "something approaching an international consensus": *Krolik v Poland* [2012] EWHC 2357 (Admin), [2013] 1 WLR 490, [4] and [7].

8 In *Jane v Lithuania* [2018] EWHC 1122 (Admin), the Divisional Court held at [20] and [30] that there was an international consensus that, in some remand prisons, namely Lukiškės and Šiauliai, there was a real risk of treatment contrary to Article 3. This arose in particular from overcrowding, which was compounded by the need to segregate prisoners. The Divisional

Court allowed the Lithuanian authority to provide a further assurance about the treatment of those who might spend time in a remand prison.

9 A further assurance was provided on 7 August 2018 in the following terms:

> "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 the 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 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 of the 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 Lukiškės Remand Prison-Closed Prison or Šiauliai 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."

10 In *Jane v Lithuania (No. 2)* [2018] EWHC 2691 (Admin), the Divisional Court held that this assurance was satisfactory: there was no real risk of a breach of Article 3.

11 The next decision in relation to Lithuania was *Bartulis v Lithuania* [2019] EWHC 3504 (Admin). This concerned the "correction houses" where convicted persons serve their sentences. The Divisional Court noted that there had been concerns about violence by prison officers towards prisoners and about violence by prisoners towards other prisoners. These problems were, however, being addressed by an action plan: see [40], [48]. In the light of the action plan and evidence about its implementation, the Court concluded that the presumption of compliance with Article 3 was not displaced in relation to correction houses: [126]. Therefore, although assurances had been offered in relation to correction houses, reliance on them was unnecessary.

The letter of 3 April 2020

12 On 3 April 2020, in response to the start of the Covid-19 pandemic, the Director General of the Prison Department of the Ministry of Justice of Lithuania wrote to the Crown Prosecution Service in these terms:

> "We would like to inform you, that 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, the management of Lithuanian correctional system could be encumbered in the nearly future.
>
> Thus avoiding any infringements of the guarantees of 07 August 2018 and 8 July 2019 with regards specific detention conditions for the persons surrendered to the Republic of Lithuania from the United Kingdom on the grounds of the European arrest warrant ('EAW') we have to notify you, that above mentioned guarantees will not be further applied from the moment of signing this letter."

13 In place of the previous assurances, a "new guarantee" was attached:

> "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 the criminal prosecution during their detention:
>
> 1. All persons surrendered under an accusation warrant 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 form the United Kingdom, if held in Šiauliai Remand Prison, 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.
>
> 3. All persons surrendered form the United Kingdom, if convicted, that may spend a maximum of 10 days at Šiauliai Remand Prison will be subject to the same guarantees as contained in clause 1 and 2."

14 The letter of 3 April 2020 was considered by the Divisional Court in *Gerulskis and Zapsalskis v Lithuania* [2020] EWHC 1645 (Admin). At [41], Dingemans LJ described the statement that "in the view of the danger caused by the spread of COVID-19 disease, the management of Lithuanian correctional system could be encumbered" as "the Covid caveat". At [59] and [61], he rejected the argument that this undermined the "new guarantee", such as to give rise to a real risk of treatment contrary to Article 3 ECHR. At [58], he said this:

> "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."

The 8 February 2021 assurance

15 On 8 February 2021, the Deputy Director of the Prison Department of the Ministry of Justice gave a further assurance in these terms:

> "The Prison Department under the Ministry of Justice of the Republic of Lithuania hereby confirms, that due to national legal regulation, the below listed persons, if surrendered to Lithuania will not serve their sentences in Šiauliai Remand Prison"

16 There then followed a list of 20 names, the last of which was the appellant's. In his case, this was said:

> "Antanas Bernotas (born 19/10/1992), who is wanted on an accusation and a conviction warrant, will not serve his sentence in Šiauliai Remand Prison. If he is held in Šiauliai Remand Prison in pre-trial detention for the offences set out in the warrant issued on 25/1/2015, for the period of his trial, Antanas Bernotas will be granted all assurances as stated in the Prison Department's letter dated 3 April 2020."

17 It can be seen that the author of this document was not aware that by this time the appellant had been discharged in respect of the accusation warrant. There was a footnote explaining the "national legal regulation" referred to. It referred to an order of the Director of the Prison Department of 30 June 2020 by which "inmates could be allocated to serve their sentences in Šiauliai Remand Prison only if the duration of imposed sentences exceeds 10 years of imprisonment".

The appellant's submissions

18 For the appellant, David Ball submitted that the letter of 3 April 2020 on its face revoked the previous assurances. The "new guarantee" related only to persons "surrendered… for the purpose of a criminal prosecution", i.e. those surrendered under accusation warrants. Until 8 February 2021, there was no assurance relating to those surrendered under conviction warrants.

19 The 8 February 2021 assurance promised that the listed persons would not "serve their sentences" in Šiauliai Remand Prison. This was on the basis of a law providing that prisoners could be "allocated to serve their sentence" there only if the duration of the sentence exceeded 10 years. But there was nothing to indicate whether this ruled out the practice (to which the assurance of 7 August 2018 related) of sending those returned pursuant to conviction warrants to a remand prison for up to 10 days after their surrender, before being allocated to a "correction house" to serve the main part of their sentence.

20 An assurance must be precise and not vague: *Othman v United Kingdom* (2012) EHRR 1, [189(ii)]. It should be construed *contra preferentem*. The Lithuanian judicial authority has had every opportunity to provide a clear assurance on this point. They have failed to do so. In those circumstances, the court can have no confidence that the appellant will not spend time at Šiauliai Remand Prison.

The respondent's submissions

21 In paragraph 16 of their submissions in response to the application for permission to appeal, the respondent (then represented by other counsel) said this of the "new guarantee" of 3 April 2020:

> "The terms of the new assurance are the same, in essence, as the August 2018 assurance, which has been approved by the courts. Clause 3 of the assurance makes clear that Clauses 1 and 2, guaranteeing a minimum of 3 square meters of personal space and guaranteeing detention in renovated or refurbished parts of the prison, apply to those convicted of offences."

22 Hannah Hinton, for the respondent, explained to me that this submission must have been made in error because the assurance did not extend to conviction warrants. The position was not, however, clarified until 12 May 2021, just over a week before the hearing, when the respondent explained the "new guarantee" communicated on 3 April 2020 as follows:

> "As you may see from the text, it is clearly stated, that the guarantees (clause 1 - 3) will be applied for persons surrendered to Lithuania from the United Kingdom for the purpose of criminal prosecution (i.e. under accusation warrants only).
>
> The text of clauses 1 and 2 is directly concerned with surrendered persons while they are detainees on remand. Clause 3 is engaged when the same persons become inmates after a conviction is pronounced. No other categories of persons (i.e. those surrendered for the purpose of execution of sentences under conviction warrants) are mentioned in this guarantee."

23 At the hearing, Ms Hinton confirmed on behalf of the respondent that the 3 April 2020 assurance did not apply to those surrendered under conviction warrants. The assurance of 8 February 2021 did, however. That assurance is "absolutely clear as it says in terms that the appellant will not serve his sentence in Šiauliai Remand Prison". The prospect that he might be sent there arose only if remanded pursuant to the accusation warrant, which the Lithuanian authorities erroneously understood to be live. This meant that the appellant would not serve any part of his sentence in Šiauliai Remand Prison, not even a few days at the start.

Discussion

24 The dispute between the parties is narrow. In argument before me, it centred on the proper meaning to be ascribed to the assurance of 8 February 2021. Both counsel seemed to assume that the assurance fell to be construed objectively. In some procedural contexts, it may be appropriate to apply that mode of construction to an assurance given by an organ of a foreign State. In immigration proceedings, for example, the court cannot sensibly construe such an assurance in any other way. But that is because the text of the assurance is generally the only authoritative indication of the intention of the State concerned.

25 Here, by contrast, the authorities of the requesting State are party to the extradition proceedings. They are before the Court. If, in the context of the proceedings, they are advancing a submission about what the assurance means, it is difficult to see why the Court should reject that submission – assuming that it represents the authoritative position of the State concerned and is not obviously inconsistent with the text of the written assurance.

26 Ms Hinton made absolutely clear that she had express instructions to tell the Court that the appellant would not spend any time at all at Šiauliai Remand Prison, not even a few days immediately after surrender. She accepted that, having made that submission, it would be right to regard Lithuania as in breach of an express assurance given to this Court if the

appellant spent any time at all at Šiauliai. In that event, it is likely that there would be consequences for future extradition requests.

27 As to the weight to be placed on what Ms Hinton has said, Mr Ball very properly reminded me that the Lithuanian authority had previously submitted, in response to the application for permission to appeal, that the new guarantee of 3 April 2020 covered those surrendered under conviction warrants; and that this turned out to be wrong. In the meantime, permission was refused on the papers in another case on the basis of this incorrect interpretation of the new guarantee of 3 April 2020. (Permission was, however, subsequently granted at an oral hearing.)

28 Given that there is no evidence that the earlier submission made to this Court was made otherwise than on instructions, I agree with Mr Ball that this change of position means that caution is required before accepting submissions made through counsel in these proceedings.

29 However, the issue now in dispute between the parties is rather different from the question whether the new guarantee of 3 April 2020 covered persons surrendered under conviction warrants. On that issue, the new guarantee was drafted in precise and clear terms. When those terms are compared with those of the assurance 7 August 2018, the natural reading of that document is that it did not cover persons surrendered under conviction warrants. The letter of 12 May 2021 confirms that natural reading.

30 Although Eady J's grant of permission was limited to the question then in issue about the construction of the new guarantee of 3 April 2020, the 8 February 2021 assurance is a material new development and it was not suggested by the appellant that it would be right to ignore it. The 8 February 2021 assurance is about where the listed persons will serve their sentence. To say that they will not serve their sentences at Šiauliai is, on a natural reading, to say that they will not serve any part of their sentences there. The additional text relating to the appellant seems to me to confirm this reading. That text makes clear that he might spend time in Šiauliai, but only if held there on remand having been surrendered on the accusation warrant. Read as a whole, the text would be misleading if, upon extradition under a conviction warrant alone, it was intended or envisaged that he might spend any part of his sentence at Šiauliai. So, Ms Hinton's very clear indication that he will not, made on express instructions, is consistent with the plain terms of the written assurance. It accords with the meaning I would have ascribed to that assurance in any event. In those circumstances, it bolsters my view about the meaning of the assurance.

31 Accordingly, I am unable to find that the appellant has established a real risk that he would be subjected to treatment contrary to Article 3 ECHR if extradited. Ground 1 therefore fails.

Ground 2: Article 8 ECHR

The judgment below

32 The judge directed herself correctly in accordance with the principles derived from *Norris v Government of the USA (No. 2)* [2010] UKSC 9, [2010] 2 AC 487, *HH v Italy* [2012] UKSC 25, [2013] 1 AC 338 and *Celinski v Poland* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551.

33 Her findings were that: (i) the appellant was a fugitive from justice; (ii) the offences were serious, involving the supply of drugs; (iii) the sentence was not short; (iv) the appellant had

lived openly and without criminal convictions in the UK and had worked throughout; (v) the appellant had a long-term partner who undoubtedly would suffer emotionally and, to an extent, financially if he were extradited, though she had family in France to whom she could return; (vi) the appellant had built his life in the UK in the full knowledge of the existence of his sentence and the likelihood of these proceedings; (vii) the delay in this case had been caused by the appeal process followed by the appellant absconding, rather than any dilatory behaviour on the part of the judicial authority.

34 The judge listed the factors favouring extradition as: (a) the high public interest in this country complying with its international extradition treaty obligations; (b) the mutual confidence and respect that should be given to a request from the judicial authority of a member state; (c) the serious nature of the offences and the sentence imposed; (d) the fact that the appellant was a fugitive and this country should not be seen as a safe haven for those fleeing justice; (e) that the appellant's relatively short time in the UK had been totally based on the foundation of his fugitive status and there was nothing so compelling about his private and family life that it should outweigh the strong public interest in his extradition.

35 The factors to be weighed against extradition were as follows: (a) the appellant's private life and that his partner would be disrupted and there would be financial and emotional problems for her; (b) the appellant was very young when the offences occurred and he had not attended since in any jurisdiction; (c) his role in the offences was minor; (d) the appellant had worked throughout his time in the UK.

36 In the light of her findings, the judge found that, given the seriousness of the offences, and in the sentence to be served, extradition would be a proportionate interference with the appellant's Article 8 rights "notwithstanding the adverse effect that separation will have upon his partner".

The appellant's fresh evidence and submissions

37 Since the hearing before the judge, the appellant's partner has had a baby daughter. She is now 7 months old. In a proof of evidence dated 12 June 2020 (before the baby was born), the appellant explained that, although he and his partner were no longer "romantically together", they remained a family and wanted to give the baby a nice life and move to their own flat together. He did not want his partner to have to be a single parent. If he were extradited, she might not be able to travel to see her parents in France because of the Covid-19 restrictions. She would be isolated. She would not be able to visit Lithuania as the country is "very racially divided". The appellant was worried about the impact of extradition on his ability to maintain a relationship with his child. Although he was not working, and was relying on universal credit, his partner would find it difficult to get by if he were extradited.

38 The appellant also relied on the effect of the uncertainty caused by Brexit. It was uncertain whether the appellant, if extradited, would be permitted to return to this country. If he were not, that would have a much more serious effect on his ability to maintain his relationship with his daughter. Reliance was placed on *Antochi v Germany* [2020] EWHC 3092 (Admin), where at [50]-[51] Fordham J held that the Court could properly take "Brexit uncertainty" into account as an "objective factor" in the Article 8 balancing exercise, and *Rybak v Poland* [2021] EWHC 712 (Admin), where at [36] Sir Ross Cranston took into account the effect of Brexit on the appellant's free movement rights in the Article 8 balancing exercise.

Discussion

39 Given the terms in which permission to appeal was granted, I start from the proposition that the judge was entitled to conclude on the evidence before her that the factors in favour of extradition in this case outweighed those against it. Because circumstances have changed, however, I must undertake the balancing exercise afresh. I do so, however, on the basis of the facts found by the judge. These include, in particular, the fact that the appellant is a fugitive from justice, but also the fact that he committed these offences when he was just 18 years old and is now nearly 30 and that his role in the offences was minor.

40 I have carefully considered the fresh evidence. That establishes that the appellant enjoys a relationship with his daughter and also with his partner, albeit the latter is not a "romantic" relationship. There is no doubt that extradition will restrict his ability to maintain that relationship. That will obviously have a significant emotional effect on both the appellant's daughter and his partner. I accept that it is likely to make his partner more isolated. It may remain difficult for some time for her to visit her parents in France.

41 However, the extent of these effects should not be overstated. The current restrictions on travel between the UK and the EU are not likely to last for long. The appellant's financial contribution to the family unit has not been significant to date, because he has been out of work. This is not his fault, but it does lessen the likely impact of his extradition on the family unit.

42 I accept that it is uncertain whether the appellant will be able to return to the UK after he has served his sentence. But it is also uncertain whether he would be able to stay in the UK even if he is not extradited. His conviction in Lithuania would presumably have to be disclosed and might be taken into account in any application for settled status. It is not possible to say with any certainty that any consequent break-up of the family unit could be attributed to extradition rather than the conviction for which his extradition is sought.

43 Weighing up the factors taken into account by the judge and those disclosed by the fresh evidence, I consider that the public interest in extraditing the appellant to serve what it a substantial sentence for the supply of drugs continues to outweigh the effect on his, his daughter's and his partner's right to respect for their private and family life. Ground 2 therefore fails.

Conclusion

44 The appeal will therefore be dismissed.