Neutral Citation Number: [2024] EWHC 2815 (Admin)

Case No: AC-2023-LON-000091

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LONDON

Wednesday, 6th November 2024

Before:
FORDHAM J

- -

Between:

MANTAS BARKAUSKAS	**Appellant**
- and -	
PROSECUTOR GENERAL OF THE REPUBLIC OF LITHUANIA	**Respondent**

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Benjamin Seifert (instructed by Lansbury Worthing Solicitors) for the **Appellant**
Hannah Burton (instructed by CPS) for the **Respondent**

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Hearing date: 31.10.24
Draft judgment: 1.11.24

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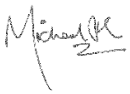
Approved Judgment



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FORDHAM J

FORDHAM J:

Introduction

1. This is an extradition case about particularisation and inter-prisoner violence. The Appellant is aged 37 and is wanted for extradition to Lithuania of which country he is a national. That is in conjunction with an accusation Extradition Arrest Warrant ("ExAW") issued on 18 April 2023 and certified 3 days later. He was arrested on it on 25 April 2023 and remanded in custody. District Judge Tempia ("the Judge") ordered his extradition for reasons set out in a judgment handed down on 11 August 2023, after an oral hearing on 27 June 2023. On 24 November 2023, Saini J refused permission to appeal on all issues except Article 3 ECHR (inter-prisoner violence in Lithuanian prisons) which he stayed pending the Divisional Court's judgment in the then pending lead case of Urbonas v Lithuania [2024] EWHC 33 (Admin). The judgment in Urbonas was handed down on 12 January 2024 and the Article 3 claim was dropped. It was picked up again, by an application to amend the grounds of appeal on 21 October 2024, in light of the latest report of the CPT (the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) published on 18 July 2024. Meanwhile, permission to appeal had been granted by Julian Knowles J on 11 June 2024, on two grounds. One is a ground under s.2(4)(c) of the Extradition Act 2003. It concerns particulars. The other is a ground under s.10 of the Act, read with s.64(3)(4). It concerns extradition offences and dual criminality. The hearing was fixed for 31 October 2024.

The Question of a Stay Pending El-Khouri (SC)

2. In her skeleton argument dated 25 October 2024, Ms Burton for the Respondent drew my attention to the fact that – in a pending case called El-Khouri v USA – the Supreme Court has invited argument at a hearing on whether Belgium v Cando Armos [2005] UKHL 67 [2006] AC 1 was correctly decided. The hearing is scheduled for 18 November 2024 and the exchange of written arguments is imminent. By a note (28 October 2024), Mr Seifert for the Appellant then asked this Court to stay this case pending the SC's judgment in El-Khouri, on the basis that the correct approach in law to the mirror provisions to s.64(3)(4) (ie. s.137(3)(4)) are about to be reconsidered in that case by the Supreme Court. The Respondent opposes a stay.

3. I am not ruling on the appropriateness or inappropriateness of a stay. That is because I was not able to hear the argument for the Appellant that I would have needed. I do not consider it obvious that a stay is necessary or appropriate. I would need to hear more about the implications of El-Khouri and how it links to the s.10 arguments in this case. At the start of the oral hearing, Mr Seifert informed the Court that he considered himself professionally embarrassed from advancing such arguments, since in El-Khouri he acts for the requesting state. That being his assessment of his professional position, Ms Burton did not ask me to proceed to hear arguments on whether to stay the s.10 ground. She recognised that the Appellant would be blamelessly left without representation on that issue. The s.10 ground of appeal will stand adjourned, until the Appellant's application for a stay can be argued. This is not a stay. It is the deferral of an argument about a stay.

Section 2(4)(c) Particulars

4. None of that is a reason for declining to deal now with s.2(4)(c) and Article 3. By s.2(2)(b) of the 2003 Act a Part 1 ExAW is to contain the information in s.2(4) which –

by s.2(4)(c) – means "particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence, and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence".

5. It is common ground that s.2(4)(c) is reflective of an obligation on the international plane (ie. Trade and Cooperation Agreement Article 606(1)(d)(e)), which the requesting judicial authority – here the Lithuanian court – knows it needs to meet when the relevant box in the ExAW is drafted. Whether it meets that requirement is another question.

6. The basic purposes of s.2(4)(c) particulars are to secure fairness and effective protection for the requested person (RP) facing extradition: in knowing the case against them; in being able to raise bars to extradition (such as s.10/s.63); and in having the post-extradition protection of specialty. Specialty is about a prosecution following extradition falling within the scope of the extradition. These are key reasons why particulars matter.

7. The relevant law is gathered in the judgment which is under appeal. It is often thus. The Judge said this:

> ***The particulars must be sufficiently accurate to inform the RP of what offence he is accused of and the nature and extent of the underlying allegations against him. As stated at §81 in Dhar v Netherlands [2012] EWHC 679 (Admin), a defendant is "entitled…. to understand how the case is being put against him on critical allegations without that understanding being obscured by the fog of vagueness or ambiguity". Furthermore in the same case at §68 King J stated that the particulars of the conduct have to be clear and unambiguous to enable the RP to invoke specialty if "on his surrender, he, for example, finds himself facing allegations in the requested state as regards his degree of participation in the alleged offence (for example being that of having the master role in a conspiracy) which go materially beyond that which was alleged in the [ExAW]". In Von der Pahlen v Government of Austria [2006] EWHC 1672 (Admin) at §21 Dyson LJ referred to the four elements of particulars which must be included in a request and stated that the "difficulties" are in the first element, the conduct. A "broad omnibus description" will not suffice. In Biri v Hungary [2018] EWHC 50 (Admin) at §§29-42 Julian Knowles J set out the correct approach to deciding whether a warrant contain sufficient particulars of conduct and extradition offences where a warrant contains multiple offences and recommended the re-introduction of "draft charges" "as a means of identifying the equivalent English offences for the purposes of the dual criminality exercise".***

8. To this, Mr Seifert added emphasis from Biri (at §§28 and 32) on identifying "the episodes of conduct … which are said to constitute the foreign offences" and Blanchard v Spain [2021] EWHC 1776 (Admin) at §74, where it was "impossible to know for what offence or offences the [RP was] to be extradited".

9. The question on appeal is whether the Judge was "wrong" in deciding that the legal standards of particularity were met. In the present case, nothing turns on whether that was an evaluative assessment to which any latitude is to be afforded.

10. Here, the ExAW refers to three offences. The applicable provisions of the law are the Criminal Code of Lithuania Articles 7(2) and 147 (trafficking in human beings); and Article 307(2) (organising or controlling prostitution). There are five named victims: a man and four women. There is a Lithuania-based criminal group, with a named leader. There is narrative about the leader and the group, and the Appellant joining it. But the "criminal offences" can in my judgment straightforwardly be summarised as follows:

(1) Offence 1. When the named man was transported by other members of the group to Hamm in Germany from Lithuania in 2009, the Appellant – acting in Germany as a member of the group which he had previously joined – received him and exploited him, by forcing him to distribute heroin, taking advantage of his dependence, and by imposing physical violence and physical punishments, until the man's death on 28 July 2009. The crime in the Lithuania Criminal Code is trafficking in human beings.

(2) Offence 2. When three named women were transported to Amsterdam in the Netherlands from Lithuania by other members of the group, and the fourth named woman then travelled to join one of them, which was in 2008/09 (the first named woman), April 2009 (the second named woman) and 2009 (the third and fourth named women), the Appellant – acting in the Netherlands as a member of the group which he had previously joined – received the three and recruited the fourth, organised and controlled the sex work of the four women, and took the money they earned and giving it to the group's Lithuania-based leader. In the case of one named woman this had finished by July 2009 and it finished with their escapes on 14 February 2010 and August 2012. The crime in the Lithuania Criminal Code is trafficking in human beings.

(3) Offence 3. This involves the same conduct as is alleged for the second offence. The crime in the Lithuania Criminal Code is organising or controlling prostitution.

11. That is my summary. There are more details than this, giving more particulars, in the ExAW. For example, there are the details about the way the Appellant is said to have recruited the woman; there are given addresses in the Netherlands where the sex work is said to have taken place; there is a description of physical violence and punishment; of accomplices and their roles; of locations from and to where the five victims are said to have been transported; and of the group leader. The word "received" is Ms Burton's and I adopt it. The point is that the summary I have given is an accurate and straightforward encapsulation of what is set out. In my judgment, there is no difficulty as to what, when and where. There is no difficulty in the Appellant knowing the case against him; in being able to raise bars to extradition; and in being protected as to the scope of the extradition. There is background narrative within the ExAW, but the focus comes where it is needed. Yes, there is a reference to the four women within the description of offence (1). Yes, the conduct in respect of offences (2) and (3) are stated in a combined section (I have done that too). The alleged conduct is clear. These are crimes delineated by reference to the named victims, the dates, and the places. The delineation of offence (1) is clear. So is the delineation between offence (2) as trafficking in human beings; and offence (3) as organising or controlling prostitution. That is clear from the references first to Code Articles 7(2) and 147; and then the reference to Code Article 307(2)).

12. In her judgment the Judge expressly set out and then accepted the following points. That means she was effectively incorporating them by reference, just as if she had set them out as her out findings:

> ***The warrant contains all the particulars required under section 2. It fully and comprehensively sets out the activities of the criminal group of which the RP was a member, how his conduct fell into the greater criminal enterprise and the activities of the co-accused. There is no vagueness or ambiguity about what the RP had done. The group operated over 8 years and the warrant sets out the time period of allegations the RP faces. The group was run by [the named leader].***

> ***In respect of offence (1), the RP received the victim of trafficking, [the named man], in the destination country of Germany where he was exploited and physical violence used against him. He was in a foreign country and had little money so had to sell heroin for the organisation in Germany. The RP was acting as a member of the criminal group with both the leader of the group and others who are named in the warrant and was involved in making sure the complainant was recruited in Lithuania and transported out of the country to be exploited in another country. This offending took place in 2009 and the complainant was found dead on 28th July 2009. The time frame is clearly set out as is the place where [the named man] was recruited, how he made his journey, the location of where he was received and the RP's role as the person who either exploited him once he had been trafficked or once the journey had taken place.***
>
> ***The same is correct in respect of offences (2) and (3), when the recruitment of women started at the end of 2008 or the beginning of 2009. The warrant contains detailed information about how others of the group acted as part of it to recruit the named victims in Lithuania and contains information about how they were trafficked to the Netherlands. Information is given about the address they were received at in the Netherlands and the RP's role within the organisation in arranging their trafficking is set out. He received them in the Netherlands. He controlled their work as prostitutes so money earned could be distributed amongst the criminal group. In relation to one specific victim who was not persuaded to work in the Netherlands as a prostitute, the RP took advantage of her vulnerability when she visited a friend who had been recruited by starting a close relationship with her and after gaining her trust recruited her into prostitution. He falsely promised to divide her income into two parts one for him and one for her and under that false premise she started to work. The offending stopped in August 2012.***
>
> ***The offending was committed as part of an organised criminal group for which members could make a financial gain. The offences in Lithuania are identified and amount to the trafficking of human beings and, in relation to the prostitution offences, there is the additional offence of gaining profit from another's prostitution.***

13. I agree with the Judge. There is no s.2(4)(c) inadequacy of particulars. I cannot therefore accept this ground of appeal.

Article 3

14. It is common ground that, even though this is a substantive appeal at which an application to amend the grounds of appeal (to restore a previously abandoned point) arises, the right approach, in the particular circumstances of the present case, is for me to confine myself to whether the Article 3 ground is reasonably arguable. If not, I should refuse permission to amend. If so, I should grant permission to amend and permission to appeal, and leave it there for now. The Respondent would be able to consider whether to file any further materials. Consideration could also then be given to whether to convene a Divisional Court.

15. Reasonable arguability is a modest threshold. Article 3 rights are fundamental and absolute. The point that has been raised is one of general application in all Lithuanian extradition cases. I would only refuse permission to amend if there is a clean knock-out blow. There are three key reference points: (1) the judgment of the Divisional Court in Urbonas [2024] EWHC 33 (Admin); (2) the CPT Report published on 18 July 2024 ("CPT 2024") reference CPT/Inf (2024) 25; and (3) the Lithuanian Government's Response published on 29 October 2024 ("LGR 2024") reference CPT/Inf (2024) 30. CPT reports and responses are at www.coe.int. I repeat, as the Court said in Urbonas at §§12 and 18 that it is important to read such reports and responses in full. I have done so and commend the same course.

16. The relevant law is not in dispute. It is in Urbonas at §4. Whether a requested person's extradition is compatible with their Article 3 rights involves a real risk test. The starting point is whether there are substantial grounds for believing that there is a real risk that the requested person, if extradited, would suffer harm which crosses the Article 3 threshold of severity as torture, inhuman or degrading treatment or punishment. But there is a second question. It is whether the harm would be at the hands of the requesting state or its state agents. If so – as with cell floorspace – the real risk of relevant harm is the end of the enquiry. But if not – as with inter-prisoner violence – the question is whether the requesting state "has failed to provide reasonable protection against such ill-treatment". This is what engages the question about the presumption that Lithuania will comply with its Article 3 obligations to provide prisoners with "reasonable protection" against the risk of ill-treatment from other prisoners. The Court in Urbonas concluded that this presumption had not been rebutted: see §38. Mr Seifert says it is reasonably arguable that the opposite conclusion is now the correct one, in light of CPT 2024 and LGR 2024.

17. The Divisional Court had the CPT Report published on 23 February 2023 ("CPT 2023"), based on visits in December 2021, and the Lithuanian Government's Responses of February and April 2023 ("LGR 2023"): see Urbonas §§8 and 18.

18. From the helpful and focused written and oral submissions of Mr Seifert, the following headline points emerged. First, given the link between inter-prisoner violence and "dormitory-style" prison accommodation, the Lithuanian Government's acknowledged infrastructure programme to replace dormitory-style with "cellular" accommodation is insufficient (and, if anything, is being delayed rather than accelerated). Secondly, given the link between inter-prisoner violence and staffing levels within prison accommodation, the Lithuanian Government's acknowledged recruitment steps are small numbers and insufficient. Thirdly, what matters to the individual being extradited is practical and effective protection from real risk, now. So, for example, a new prison by 2027 is no good for Mr Barkauskas. What he would need, at least arguably, is a targeted assurance that he would be detained in cellular and not dormitory-style accommodation.

19. Mr Seifert says, rightly (see Urbonas §37) that there is no shortcut answer that there has been no "public statement" by the CPT pursuant to the Torture Convention Article 10(2), discussed in Urbonas at §27.

20. The position in overview is this.

    (1) CPT 2023 reported problems of grave concern of an unacceptable situation of widespread inter-prisoner violence, linked to the informal prisoner hierarchy and abundance of omnipresent illegal drugs, in reducing whose scale there had been no significant progress, with ineffective steps, systemic and persistent shortcomings; and with many long-standing recommendations remaining fully or partly unimplemented (Urbonas §§9-10). The situation could be considered to violate Article 3 for "untouchables" within this informal prisoner hierarchy; and for those in the "impoverished disciplinary confinement regime for many months" having refused to live in assigned dormitory-style units and requesting "cellular" isolation (Urbonas §§13, 15).

    (2) Urbonas found a real, long-standing and continuing problem of inter-prisoner violence, contributed to by the existence of the informal prisoner hierarchy, lack of

adequate staff supervision and control, and the presence of illegal drugs; where measures taken had not been effective in eliminating the problem at December 2021 (§32). It found that the Lithuanian Government's responses (§§18-26) evidenced a clear acceptance of the problem, a continued attempt to address the problem by a variety of measures and the offering of practical protection to those prisoners who fear violence or abuse if they remain within the general prison population; and there was not yet clear, compelling evidence amounting to an international consensus that there are structural or systemic failings such as to rebut the presumption that Lithuania will afford reasonable protection to prisoners against the risk of inter-prisoner violence and ill-treatment as would constitute a violation of Article 3 (§36). The reasons focused on non-deterioration and recognition (§33); four aspects of new measures (§34); and the removal of disciplinary sanctions from protective confinement (§35).

(3) CPT 2024 recognises a number of steps, including legal and organisational changes, and positive actions (§§9, 82); the further decrease in the prison population by 10.5% since December 2021, with planned decreases by changes in sentencing (§§13-14, 82); various Prison Service measures aimed at stopping the dominance of informal prisoner leaders (§20); a positive, significant and sharp reduction in "disciplinary" cellular confinement with increased efforts to find alternative protective solutions (§§21, 48, 82); a welcome initiative to stop a principal drug route (§51); welcome legislative, strategic and organisational steps to support prisoners with addiction problems (§§60, 82); the welcome efforts of action plans drawn up by individual prisons (§69); appreciated efforts to create more work opportunities for prisoner (§72); and a welcome March 2024 pinning of prison staff salaries to that in the police service (§77).

(4) However, CPT 2024 states that clearly much more is needed to significantly reduce the influx of illicit drugs into prisons and eradicate the influence of the informal prisoner hierarchy which need to be tackled much more vigorously by the Lithuanian authorities (§§83-84), with concrete and sustained efforts and substantially greater financial resources to accelerate the reconstruction of prisons from dormitory-type to cellular-type accommodation (§§9, 18); most importantly, with a significant, radical and urgent increase to staffing levels from their totally inadequate and totally insufficient levels (§§9, 74, 76, 84); and all with a dedicated, centralised, and targeted action plan from the Ministry of Justice as a carefully thought-out strategic approach (§§69-70, 83-84) as identified previously (fn. 61, referencing CPT 2023 §51, quoted in Urbonas §16).

21. I will start with the dedicated, centralised targeted action plan from the Ministry of Justice strategy as identified previously in CPT 2023 at §51. The Court in Urbonas identified this at §16 ("a holistic approach is urgently needed to tackle the phenomenon of informal prisoner hierarchy, preferably in the form of a targeted strategy …"). The Court identified from the Government of Lithuania's published response its new 2023 measures requiring each prison to have a director with responsibility for the safety and resocialisation of prisoners and tasking individual prison governors to plan and implement measures to counteract ill-treatment by prisoners (Urbonas §22). In its own analysis, the Court emphasised those measures as a first key consideration (Urbonas §34).

22. In the light of CPT 2024, LGR 2024 now gives (at pp.12-14) a full two-page description of a new national Plan on the elimination of criminal subculture in prisons, which has

now been prepared and approved. That description should be read in full. I record that LGR 2024 also describes measures such as the roll-out of the initiative aimed at the principal drug route and improved drug-rehabilitation (pp.7-8) and staff training in the new training centre (pp.13, 15). Mr Seifert, rightly in my judgment, takes no point on this aspect. He did not suggest that the Court needed to see the new national Plan itself (the hyperlink click at fn.11 of LGR 2024 did not work), in circumstances where its nature, timing and substance have been summarised.

23. That leaves the important and pressing topics of the infrastructure programme and of staffing levels, including the need for new resources. These, understandably, are what are emphasised by Mr Seifert. As to infrastructure, the description in LGR 2024 pp.12-13 of the new 2024 national Plan says this:

> ***The key factor that could completely minimise the manifestations of informal prisoner hierarchy is full conversion to cellular-type infrastructure. To speed up this process, additional sources of financing are sought for the implementation of already planned projects on the development of new prison infrastructure and reconstruction of old infrastructure into cellular-type accommodation enabling the number of cellular-type accommodation to account for more than two-thirds of the total number of accommodation by 2027.***

There is a cross-reference to the section (pp.2-3) which responds to the CPT's call for all possible measures to significantly speed up the process of modernising. Many initiatives are described there, in a passage which should be read in full. Mr Seifert says that one of those initiatives – 261 places by October 2024 – is the same conversion of a building at Alytus Prison to produce 199 places by June 2024 (Urbonas §26; CPT 2024 fn.12), so that the October 2024 time frame is slowing down not speeding up. I was given no reason why achieving 261 places by October 2024 is slowing down having got to 199 places by June 2024, and in any event I agree with Ms Burton that nothing can turn on this point. Mr Seifert does not dispute that other initiatives described in LGR 2024 are new, and were not seen in LGR 2023, including a new 400-place prison to be completed by 2027, for whose public-private partnership the negotiations are said in LGR 2024 to be coming to an end.

24. As to staffing levels, there is a separate section of LGR 2024 (p.15) dealing with staff in accommodation areas. Examples are given of moving 39 officers, previously deployed in a prison's perimeter security system prior to its modernisation; an increase in contact officers from 171 to 271; 65 officer posts being filled during 2025. Mr Seifert says these are small numbers. Reference is made to the 2024 pay rise of around 16% compared to 2023 "to make work in prisons more attractive". Elsewhere, which is context for staffing levels, there is a description of the reduction on the prison population and the ongoing measures to that end (pp.1-2). The description in LGR 2024 p.13 of the new National Plan says this:

> ***further increase in the number of staff and time of its contact work with prisoners in accommodation areas of prisons is foreseen. Compared to 2023, the number of officers actually working in accommodation areas has increased by 60% and will increase by a further 25% in 2025. In 2025 approx. 90% of posts for these contact officers will be installed in accommodation areas; moreover, having modernised the processes of sentences enforcement, not less than 60% of the total working time of these officers will be devoted to direct contact work with prisoners assigned to them.***

25. I recognise of course that the CPT will continue to give ongoing consideration to what, in practical terms and viewed against its expectations, all of this means and how to

monitor it. But from the perspective of this court as an extradition court, having close regard to the applicable legal standards and to the Divisional Court's reasoning in Urbonas, I am satisfied that Ms Burton for the Respondent has administered a clean knock-out blow. I can see no realistic prospect of the Article 3 ground succeeding at a substantive hearing. I am able to see no basis for making directions for a further hearing; or for deferral so that further information can be elicited. Beyond reasonable argument, the presumption has still not now been rebutted, that Lithuania will comply with its Article 3 obligations to provide prisoners with reasonable protection against the risk of ill-treatment from other prisoners. Beyond reasonable argument, there remains a clear acceptance of the problem, and there are continued and renewed attempts to address the problem by a variety of measures. Beyond reasonable argument, the presumption has now been rebutted, that Lithuania will comply with its Article 3 obligations to provide prisoners with reasonable protection against the risk of ill-treatment from other prisoners. Beyond reasonable argument, there is still not yet clear, compelling evidence amounting to an international consensus that there are structural or systemic failings such as to rebut the presumption that Lithuania will afford reasonable protection to prisoners against the risk of inter-prisoner violence and ill-treatment as would constitute a violation of Article 3.

26. In the end, Mr Seifert's case on Article 3 was that steps and progress are all very well, but they cannot and will not provide immediate protection to an individual extraditee. There is obvious force in that. And such a submission, where the Article 3 legal line is crossed, will succeed. If cellular accommodation were an Article 3 minimum standard, like 3 square metres floorspace, it would be viewed through the direct prism of state treatment. But it is necessary to go back to the fact that inter-prisoner violence is viewed through the prism of real risk of relevant harm plus failure of reasonable state protection. The idea of a duty of "reasonable protection" explains why – as in Urbonas – problems being acknowledged and steps being taken can provide the legal answer. There is no real risk of an Article breach, for the individual extraditee now, because of the legal sufficiency of ongoing steps of a state owing a duty of reasonable protection. And so, the individual needs to show – for the purposes of this judgment reasonably arguably – not just an individualised risk of harm, but also of a failure of reasonable protection and therefore of breach. For the reasons I have explained, I will refuse the application for permission to amend on the resurrected Article 3 ground of appeal.