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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

_____

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

IN THE MATTER OF THE EXTRADITION ACT 2003

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BETWEEN:

VIKTORAS MICHAILOVAS

Appellant

-v-

THE REPUBLIC OF LITHUANIA

Respondent

_____

Before: McCloskey LJ and McFarland J

_____

Representation

Appellant: Mr Barry Macdonald QC and Mr Sean Devine, of counsel, instructed by Wilson Nesbitt Solicitors

Respondent : Mr Tony McGleenan QC and Ms Marie-Claire McDermott, of counsel, all instructed by the Crown Solicitor's Office

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INDEX **Paragraph**

Lexicon

The Appellants, Gintaris Dusecivius and Viktoras Michailovas, both nationals of Lithuania: "Mr D" ** and "Mr M".
The Respondent and its various emanations are described mainly as "the Lithuanian Government/State".
The following prisons in Lithuania – Alytus, Marijampole and Pravieneskes – are described as 'A', 'M' and 'P' Prisons respectively.
United Kingdom = "UK".
Action Plan = "AP".
The Council of Europe Committee for the Prevention of Torture = "CPT"
Crown Prosecution Service: "CPS"
[** There is a separate judgment in each case]

McCLOSKEY LJ (giving the judgment of the court)

Preamble

The hearing of this appeal on 17 February and 19 March 2021 was conducted exclusively by remote means. All three parties and their respective three-member legal teams were in attendance by this mechanism. Judgment was delayed by the need to await the requesting state's reply to the court's requests for further information.

I. Overview

[1] The appellants challenge the decision and orders of the County Court for the Division of Belfast dated 27 and 30 November 2020 respectively ordering their extradition to Lithuania. Leave to appeal to this court was refused by the decision of the single judge dated 6 January 2021. The appellants renew their applications for leave.

[2] In the court below these two cases eventually formed part of a larger group of 11 cases, all involving Lithuanian nationals and the Lithuanian State. This number grew progressively with the passage of time. As they had certain issues in common these cases were managed and progressed together. The case of Mr D emerged as the lead one, followed by that of Mr M. This judgment is confined to Mr M's appeal.

[3] The litigation history of these two appeals is of particular importance having regard to the consideration that much material evidence has been generated since their inception. This history can be traced by reference to the five successive judgments of Belfast County Court during the period January 2018 to November 2020. Four of these decisions were made in the case of Mr D. The fifth was in the case of Mr M. As already noted, it is common case that the Article 3 ECHR issue applies without distinction to both appeals.

[4] While the proceedings have become somewhat protracted it is clear that the several individual segments of delay and related complexities, coupled with the progressively large number of cases, combined to pose challenges with which the first instance judge has dealt admirably.

[5] At this stage judgement at first instance has been given in these two cases only. The generic issue linking all 11 cases is whether their extradition to Lithuania would violate the requested persons' rights under Article 3 ECHR by exposing them to a real risk of inhumane treatment by reason of prison conditions in Lithuania, in contravention of section 21 of the Extradition Act 2003 (the "*2003 Act*") and also, it would seem, section 6 of the Human Rights Act 1998. Her Honour Judge Smyth resolved this issue in favour of the Lithuanian State. This court is, in substance, invited to conclude that the judge erred in law in doing so.

[6] The generic issue outlined above is to be distinguished from other issues specific to individual cases. Thus, as the present appeals demonstrate and by illustration only, any Article 8 ECHR ground of appeal will inevitably be fact specific in nature. Such an issue arises in the case of Mr M only.

II. The Eleven Cases

[7] It is convenient to note here a useful table, provided by the respondent state at the court's request. This is reproduced at Appendix 2. It details, as regards each of the requested persons concerned, the date of the EAW, the date of their arrest, the

nature of the EAW and, finally, the offence/s of which each requested person has been convicted or is suspected. The cases of Mr M and Mr L belong to this group. It is understood by this court that Belfast County Court has deferred final determination of the other 9 cases pending the decision of this court in these conjoined appeals.

[8] As appears from the table, some of these warrants are of disturbing vintage. Almost half are of more than four years vintage. In every case the requested person has been arrested. The oldest arrests occurred in September 2016 and the more recent (that of Mr M) in September 2019. These observations take their colour from one of the principles underpinning the Framework Decision, namely the principle of expedition, discussed later in this judgment.

III. The Decisions Under Appeal

[9] **Mr D**. By the decision and order of the County Court for the Division of Belfast dated 30 November 2020 the court acceded to the request of the Lithuanian State for the surrender of Mr D pursuant to a EAW dated 27 October 2015 in respect of charges of eight alleged offences of theft and criminal damage said to have been committed in 2013. This case, therefore, involves a so-called "accusation warrant". While Mr D had also been the subject of an earlier "conviction warrant" dated 28 February 2014, following execution he served his sentence and this is of no enduring relevance, a formal discharge order of Belfast County Court having been ultimately made. Both EAWs were executed on the same date, 12 June 2017, following which Mr D served his "Lithuanian sentence" in respect of the first EAW.

[10] **Mr M.** By the decision and order of the District Judge of the City of Westminster Magistrates' Court, dated 13 February 2013, Mr M was discharged in respect of the first EAW in his case. This was based on the judge's assessment that the EAW was invalid as it had not been issued by a judicial authority, contrary to section 2(2) of the 2003 Act. An ensuing out of time appeal by the Lithuanian State was dismissed by order of the High Court dated 22 April 2013. A phase of apparent inertia during the period April 2013 to September 2016 then intervened. Next the second (operative) EAW materialised, on 30 September 2016. Pursuant thereto, Mr M was arrested over three years later, on 12 December 2019. Mr M has been in custody ever since. The more detailed chronology of his case, provided at the request of the court, is found at Appendix 1.

[11] The request of the State of Lithuania for the surrender of Mr M pursuant to the second EAW is in respect of a sentence of 3½ years' imprisonment imposed on 15 January 2010 following his conviction of the offence of possession of narcotic substances for the purpose of supply, committed on 5 May 2008. The operative warrant is of some 4 ½ years vintage.

IV The Evidential Matrix

[12] The distinctive feature of the evidential matrix of both cases is that a substantial quantity of material evidence has been generated since the execution of the EAWs in both cases. An outline of this matrix in chronological sequence is essential for the purpose of identifying the issues before this court. The terminology of assurances is a recurring feature of both the evidence and the relevant jurisprudence. The parties' agreed chronology of relevant assurances is reproduced in Appendix 4.

[13] The evidential matrix is constituted firstly by certain reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the "CPT"), an organ of the Council of Europe. These reports provided the stimulus for another important *corpus* of evidence, namely the formal requests devised by Belfast County Court from time to time and the response thereto of the Lithuanian State. In the evidence before this court the first milestone in the chronology is the inspection of certain Lithuanian prisons by a CPT delegation in 2012: see [14] *infra*. However, the history is more extensive, as will become apparent from our consideration of the cases of *Mironovas and Others v Lithuania* in [69] – [73] *infra*.

[14] The first of the CPT reports in the evidence before this court was published on 4 June 2014. It was based on an inspection of four Lithuanian prisons carried out by CPT members in November/December 2012. The report identified a series of shortcomings and concerns relating to the ill treatment of prisoners, access to a lawyer, health care screening of newly detained persons, conditions of detention (in multiple respects), overcrowding, health care services, the prevention, treatment and transmission of HIV in one particular prison ("A"), the adequacy of staffing and the availability of facilities for phone calls, visits and making complaints.

[15] The response of the Lithuanian Government to the first CPT report was published on the same date. This consisted of a detailed reply to all of the recommendations and requests for information of the CPT. This details *inter alia* certain completed reactive steps, some works in progress and other measures at the planning stage. It also highlights various provisions of domestic Lithuanian law such as the Code on Enforcement of Penal Sanctions and Law of Detention. It also describes works of renovation and modernisation of parts of the prison establishments inspected.

[16] The second main contributor to the evidential matrix is a series of letters from the Lithuanian Government (usually its Ministry of Justice) to the appropriate agencies in England and Wales (usually the Crown Prosecution Service – "CPS") and Belfast County Court. The first of these is dated 22 August 2016. It is couched in general terms, befitting a response to a general enquiry evidently made in the context of a specific case before Westminster Magistrates' Court. This letter is properly characterised defensive and evasive. It resolves to a central,

unparticularised assertion, evidently a repetition of what had been stated in previous letters, that "*… the detention conditions in Lithuania meet the minimum international standards.*" When one takes into account that this letter was written one month before the second CPT inspection of Lithuanian prisons giving rise to the second of the CPT reports containing a host of findings of unacceptable conditions, practices and arrangements, the general claim which it enshrines appears manifestly unsustainable. The same claim was repeated in a further letter, dated 1 September 2016, to the CPS.

[17] The first decision of Belfast County Court is dated 8 January 2018. The stimulus for this was the execution of the operative EAW in the case of Mr D (on 12 June 2017). At this stage Mr D's case was the one which the court was apparently most actively seized at that stage. The judge recorded at [5]:

> "*The sole bar to extradition relied upon is that the prison conditions to which the defendant would be exposed in Lithuania would give rise to a real risk of inhumane and degrading treatment contrary to Article 3 ECHR.*"

The court held that there was a real risk in the foregoing terms and ruled that "*… further enquiries will now be made regarding the conditions in which it is envisaged that the Defendant will be detained in order to ensure that his Article 3 rights will be safeguarded*", effectively staying the proceedings. In thus ruling the court considered that it was acting in accordance with the decision of the Grand Chamber of the CJEU in *Re Aranyosi* [2016] 3 CMLR 13 *(infra*).

[18] The response of the Lithuanian Government to the request of Belfast County Court for certain "*specific assurances*" is contained in a letter dated 29 January 2018 from the Prosecutor General's Office. This states that in the event of Mr D being detained during the pre-trial investigation phase he would be held at "K" prison. As regards conditions of detention – cell size, lighting, temperature, ventilation, nutrition and maximum permitted prison population (336) – the letter simply refers to the relevant requirements of domestic Lithuanian law. In a further response dated 5 February 2018 there is a general, unparticularised assertion that –

> "*… the conditions of Lithuanian prisons (both remand prisons and correctional institutions) meet at least minimal* [sic] *international standards.*"

This was supplemented by a second letter, dated 5 February 2018, from the Ministry of Justice. This stated that it was not possible to indicate the penal institution in which Mr D would be accommodated if convicted. This letter contradicted its predecessor of 29 January 2018 by making the same statement relating to Mr D's pre-trial remand detention. Finally, it claimed that all prisoners in Lithuania enjoyed "*living space*" which was "*close to or exceeds 4 square metres*".

[19] A further inspection of certain Lithuanian prisons by CPT members in September 2016 gave rise to the publication of a second report on 1 February 2018 (a month after the first of the four judgments of Belfast County Court). This report records that it was compiled following the fifth periodic visit of a CPT delegation to Lithuania. The institutions visited included the "A" and "M" Prisons noted at the outset of this judgment.

[20] The findings and assessments of the delegation, as expressed in the report, included in particular the following: no continuing concerns of substance relating to the ill treatment of prisoners; enduring shortcomings in access to a lawyer and a doctor; inadequate minimum standards of living space per adult sentenced prisoner; allegations of ill treatment and excessive physical force by prison officers in "A" and "M" Prisons; escalating inter-prisoner violence at the same prisons; a continuing need for modernisation of prisons; an absence of programmes and meaningful activities for more than half of sentenced prisoners; continuing inadequate health care facilities; an escalation in illicit drug consumption; the absence of a multi-disciplinary programme for the prevention of transmissible diseases; inadequate staffing levels; an improvement in prison visits and telephone facilities; and unacceptable material conditions in several disciplinary cells. The report also contains the delegations' findings from a renewed visit to a psychiatric hospital, a first visit to a mental health centre and a first visit to a social care facility.

[21] The response of the Lithuanian government to the second CPT report was published on the same date, 1 February 2018. Once again this took the form of a point by point reply. This detailed a series of measures which, variously, consisted of the completed, the continuing and the foreseen or planned. This response also purported to reply to a series of specific CPT requests for information. It also documents certain contemplated changes in specified Lithuanian laws. These included, for example, a project examining alternatives to custodial sentences. It claims that in accordance with a new programme the Lithuanian prison estate would complete a major overhaul by 2022, when there would be six modern penitentiary institutions consisting of four newly constructed prisons and the partial reconstruction of "A" and "M" Prisons. The reply further asserted that since 2010 the number of convicted prisoners had been reduced by 28% and the number of remand prisoners had decreased by 55%. This had a bearing on several of the expressed CPT concerns – prison overcrowding, cell size, inter-prisoner violence, the supervision of prisoners and staffing levels among others.

[22] Chronologically, the next development was a letter dated 10 March 2018 from the Lithuanian Prosecutor General's Office directed (though not addressed) to Belfast County Court. This was stimulated by a further request for information, evidently approved by the court, in the wake of the two earlier Lithuanian responses noted in [18] above. Properly analysed this contains only one concrete statement, namely (contradicting the second of the earlier letters) that Mr D would be detained in Kaunas Remand Prison pre-trial.

[23] This prompted a further request for information from Belfast County Court dated 27 March 2018. This comprised 12 specific questions, compiled initially by the legal representatives of Mr D. The Lithuanian Ministry of Justice reply dated 13 April 2018 contains the following assertions: in the three named remand prisons detainees enjoy a minimum of 3.6 square metres of personal living space; as a result of the introduction of alternatives to imprisonment, the convicted prisoner population in Lithuania was decreasing; there was no extant overcrowding in Lithuanian remand prisons and no risk of this occurring; an acknowledged "*problem*" of failing to re-distribute detainees within all remand prisons in order to counter overcrowding had been "*already eliminated*"; and (in substance) overcrowding had not been a problem in any type of Lithuanian prison since 2015.

[24] From its third (June 2019) report (*infra*) it emerges that the CPT delegation, having completed its further visit between 20 and 27 April 2018, (which, notably, was unannounced) made an "*urgent request*" of the Lithuanian authorities by a letter dated 4 May 2018 containing the delegation's preliminary observations. This requested the Lithuanian authorities –

> "*… to provide ….. **within three months** … a detailed action plan, comprising precise deadlines and an indication of the responsible organs and the required financial and human resources, to fight against drug trafficking in prison, inter-prisoner violence and the power of informal prisoner hierarchies and to address the problem of the spread of HIV and Hepatitis C in prisons.*"

[25] On 27 September 2018 the Lithuanian Minister of Justice formally approved the following:

> "*ACTION PLAN ON IMPLEMENTATION OF RECOMMENDATIONS PROVIDED BY THE* [CPT] *AFTER ITS VISIT TO LITHUANIA IN* [sic] *20–27 APRIL 2018*".

This document was attached to a letter sent by the Lithuanian Ministry of Justice to the CPS the following month. This unfolded in the context of an exchange of correspondence between these two agencies (which, in the evidence before this court, may be incomplete). This letter is of some importance. It is a response to a CPS request for "*provision of guarantee*". It states without equivocation that "*… the requested assurances and/or guarantees cannot be provided ….*" It is clear that the terms of the latter were that all surrendered persons "*… will not be accommodated in the cells which include the possibility of contact with inmates accommodated in dormitory blocks of* [the A, M and P Prisons]". It describes these three prisons as "*the main establishments for placement of sentenced adult males*". It explains:

> "*Provision of the requested assurances and/or guarantees would*

> *lead us to have no place for accommodation of persons surrendered to the Republic of Lithuanian from the United Kingdom on the grounds of the European Arrest Warrant in future.*

The letter then repeats the previously provided assurance that all such surrendered persons "*… will be guaranteed a minimum space allocation of no less than 3 square metres per person …*"

[26] The AP of 27 September 2018 followed. This is a seven page document consisting of seven columns per page namely:

(i) Title of task/action.

(ii) Aim of action.

(iii) Description of action.

(iv) Deadline of implementation.

(v) Budget allocated for implementation of the task.

(vi) Institutions responsible for implementation of the task.

(vii) Implementation.

As noted above the Lithuanian authorities had previously received the "*preliminary observations*" of the CPT delegation and its letter of 4 May 2018 containing a "*urgent request*", both arising out of the visit in April 2018 culminating in the third and final CPT report (subsequently published on 25 June 2019: *infra*).

[27] Bearing in mind the contours of the appellants' Article 3 ECHR challenge, and the court having considered the AP in full, it suffices to highlight the following aspects of this superficially impressive document:

(i) It detailed a total of 15 measures – a mixture of the practical, administrative and legislative – to be taken. While on the face of the document all of the measures were assigned to future implementation, it is evident from earlier evidence that some of them – for example, reduction in the prison population, were continuing in nature.

(ii) Approximately half of the proposed measures were identified as requiring no additional budget.

(iii) The total financial expenditure projected was *circa* €80 million. Around

one half of this would be consumed by the construction of a new remand prison (at Siauliai).

(iv) While projected expenditure of €1.7 million was identified in respect of the discrete task of increasing preventive measures regarding dangerous transmissible diseases, the "Implementation" column stated:

> "*As no additional budget was allocated and current funds are insufficient to significantly increase the scale of HIV treatment and Hepatitis C screening and treatment, the implementation of this measure is not possible. Currently, approximately 53% of patients receive HIV related treatment. HIV treatment and Hepatitis C screening and treatment are prescribed considering the medical indications.*"

We shall at [37] *infra* juxtapose this passage with what was later stated by the Lithuanian Ministry of Justice in a letter of October 2019 to the CPS.

[28] To complete the chronology in respect of the year 2018, in summary:

(i) There was a letter of 21 June 2018 and attachment emanating from the Lithuanian Prosecutor General's Office and the Ministry of Justice containing a generalised assurance of compliance with Article 3 ECHR in relation to all persons surrendered from the United Kingdom.

(ii) A further letter dated 26 June 2018 from the Lithuanian Ministry of Justice, one of a collection of several documents bearing this date, asserted that everyone detained in Siauliai Remand Prison enjoyed "*average living space*" of four square metres.

(iii) By a further letter dated 26 June 2018 the Prosecutor General's Office provided data of EAWs issued and persons surrendered in respect of the period 2015 to June 2018. This letter repeatedly employed the terminology of EAWs issued "*for the purpose of criminal prosecution*" (see chapter VI *infra* of this judgment).

(iv) Next, by its letter dated 13 August 2018 directed to Belfast County Court the Lithuanian Ministry of Justice reiterated:

> "*…. All persons surrendered to the Republic of Lithuania from the United Kingdom under the European Arrest Warrant for the purpose of execution of sentences will be detained in correctional institutions where detention conditions are in conformity with the provisions of*

Article 3 of the Convention …"

(v) This is to be considered in conjunction with a contemporaneous letter of 7 August 2018 addressed to the CPS , which states:

> *"1. All persons surrendered under an accusation warrant from the United Kingdom will be held in* [K, L or S] *Remand prison, whereby they will be guaranteed a minimum space allocation of* ***no less than 3 metres per person*** *in accordance with Article 3* [ECHR]*".*
>
> *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 ….*
>
> *3. All persons held in* [L or S] *…….. will only be held in the refurbished parts or renovated parts of the prisons and in compliance with Article 3 …"*

We have highlighted the words "*no less than 3 metres per person*" for the purpose of comparing and contrasting this with other communications from the Lithuanian Government considered above. This was followed by another letter from the Lithuanian authorities to Belfast County Court, dated 13 August 2018. This mentions, but does not enclose, the AP and describes certain improvements in prison conditions, some completed and others a work in progress.

[29] The next development was the second judgment of Belfast County Court on 25 March 2019. The judge considered *inter alia* the evidence noted immediately above, together with the second CPT report. The judge also noted the available expert evidence. In a key passage the judge stated at [35]:

> "*The situation in respect of Mr* [D] *is that the specific questions posed by this court have not been answered by the requesting state. The response is general, makes no mention of the allocation rules or the specific issues arising out of the expert report or my judgment and provides no information as to the likely prison in which he will be held either on remand, or upon conviction. Furthermore, the court now has the benefit of the 2018 CPT report.*

The court determined that specific assurances would be sought of the Lithuanian authorities having regard to "*… issues regarding overcrowding caused by the allocation rules, inadequate medical facilities and programmes resulting in contraction of HIV, serious inter-prisoner violence in the absence of proper supervision and the inappropriate use of restraint beds …*", all of which the court considered to generate a real risk of violating

Article 3 ECHR.

[30] The specific assurances sought were threefold, in these terms:

> *"In light of the concerning information, the following specific assurances are necessary to ensure the protection of the requested person's article 3 rights:*
>
> - *He will not be detained at any time in Alytus and Marijampole Prisons. Although the good faith of the requesting state is acknowledged, as are efforts and plans for improvement, until such time as these improvements are completed assurances are necessary particularly against the background of earlier, unreliable assurances having been given.*
>
> - *Furthermore, in respect of Lukiskes , the court requires a guarantee that those extradited will be held only in the refurbished parts of the prison (as guaranteed in Guy Jane)*
>
> - *The requested person will not be held in cells containing restraint beds in Lukiskes, Panevezys and Kaunas Prisons."*

In thus determining the judge observed:

> *"… There is ample evidence that general guarantees regarding prison conditions have been shown to be unreliable and the 2018 CPT report indicates deterioration rather than improvement in a number of respects."*

[31] The Lithuanian Vice-Minister of Justice replied by letter dated 17 April 2019. This letter does not engage with the judge's request for an assurance in respect of A and M prisons. Nor does it engage with the second of the court's requests, whereby an assurance in respect of L Prison was sought. As regards the third request for an assurance in respect of three specified prisons the letter replied in general terms that restraint beds "*… could be applied only in exceptional cases ….*" The letter does contain what it describes as (the repeated) "*general guarantee*" of Art 3 ECHR compliance.

[32] Next, according to the third of the five judgments of Belfast County Court – there was what the judge described as a "*final hearing*" in May 2019. There are no details of this hearing in the voluminous materials before this court. The parties are agreed that this event occurred on 25 October 2019, followed by the third (of five) judgment on 14 November 2019. We return to this discrete subplot in [38] *infra*.

[33] On 25 June 2019 the CPT published its third and final report, based on a further inspection of certain Lithuanian detention facilities between 20 and 27 April 2018, evidently on an unannounced basis. The report records, in general terms, that many of the previous recommendations had not been implemented. It noted the receipt of an unspecified number of "*credible*" allegations of physical ill treatment at A, M and P Prisons "*… in the context of staff interventions to stop inter-prisoner violence.*" There were also numerous allegations of the mass physical ill treatment of prisoners during a general search of 'A' Prison punishment block on a specific date, 5 July 2017. The ensuing investigation was not considered effective. No prosecutions ensued. The delegation observed "*truly extraordinary levels of inter-prisoner violence, intimidation and exploitation*" at the A, M and P prisons, conveying the "*strong impression*" that the main detention areas in these prisons were out of control.

[34] The report noted that while works of reconstruction and refurbishment in prisons were a mixture of the partly completed and continuing, overcrowded large capacity dormitories remained; remand prisoners were still locked up for up to 23 hours daily; under-resourcing of health care facilities continued; the system of recording prisoners' injuries remained "*poor*"; drugs remained omnipresent in the prisons; the transmission of HIV and Hepatitis C continued; and staffing levels remained very low. The report described in general terms "*a number of serious and urgent concerns in Lithuania's penitentiary establishments*". It noted that an "*Action Plan*" (the "*AP*") had been provided "*…. to combat drug trafficking in prisons, inter-prisoner violence and to address the problem of the spread of HIV and Hepatitis C in prisons*". The CPT observed that if properly and energetically implemented this "*could help address*" some of the serious and urgent concerns assessed.

[35] Chronologically, the next development consisted of a letter dated 8 July 2019 from the Lithuanian "Prison Department under the Ministry of Justice" to the CPS. Under the rubric "Provision of Guarantee" the author stated that the Director General of his department –

> "*… hereby assures and guarantees that the below stated conditions will be applied to all persons surrendered …….. for the purpose of a criminal prosecution or execution of a sentence of imprisonment during their detention.*"

The five specific guarantees which follow are a minimum cell space of no less than three square metres per person, that any sentenced surrendered persons would not be detained at any of the unrenovated parts of A, M or P Prisons, that all surrendered persons "*… will be detained in conditions reducing a risk to* [sic] *inter-prisoner violence/disease transfer and drug influences*", that all such persons "*… will be guaranteed the protections of the* [ECHR]" and that they "*… will be housed in cell-type accommodation, where possible*". This letter further asserted that the M and P Prisons each had a renovated block, with specified capacities, dating from 2016 and 2018 respectively.

[36] The main thrust of the second of the next Lithuanian Government communication, that dated 16 August 2019, was that the assurances and guarantees requested by the CPS could not be provided. The assurance which had been requested was that all surrendered persons –

> "*… will not be accommodated in the cells which include the possibility of contact with inmates accommodated in dormitory blocks of* (A, M and P Prisons)."

The reason proffered for the Lithuanians Government's inability to provide the assurance requested was that these three prisons are "*the main establishments for placement of sentenced adult males*" and that dormitory type blocks must be utilised by reason of the capacity of the three prisons and the numbers of sentenced prisoners.

[37] The third of the 2019 trilogy of communications is dated 17 October 2019. It purports to be a response to a request for further information. The request was evidently made by the CPS recipient of the second communication noted in [36] above. This contains a series of representations relating to facilities for prisoner's complaints, prisoner's requests for isolation, the prevalence of inter-prisoner violence, sanctions for such violence, attempts to reduce drug consumption by prisoners, drug treatment and educational measures and, finally, the use of segregation as a sanction. This letter further addresses the discrete issue of the transmission of communicable diseases, in the form of three statements. First, there is preventive screening and, where required, timely medical treatment is provided, together with educational activities. Second:

> "*Since Spring of 2018, all HIV infected persons are subject to HIV treatment and since May 2019 all persons ill with serious communicable diseases are included in the national health system, i.e. their medical treatment is financed with the Compulsory Health Insurance Funds.*"

This is to be compared with what was stated in the AP on this subject: see [26] *supra.*

[38] Chronologically, the next material development was the third of the judgments of Belfast County Court, dated 14 November 2019. The judgment of Her Honour makes specific reference to the first of the three aforementioned documents only. The judge acceded to the application on behalf of the Lithuanian State to adjourn the proceedings on the ground that a relevant decision of the English Administrative Court in a series of conjoined appeals was pending. This decision was promulgated soon thereafter, on 20 December 2019: see *Bartulis v Lithuania* [2019] EWHC 3504 (Admin).

[39] This was followed by:

(i) The arrest of Mr M on 12 December 2019 pursuant to the EAW.

(ii) The decision in *Bartulis and Others v Lithuania* [2019] EWHC 3504 (Admin) on 20 December 2019.

(iii) A further letter from Belfast County Court dated 18 February 2020 requesting the following information: whether there had been any complaint that Lithuania had breached any assurance given to any EU Member State; specified particulars of any such breaches; the number of people surrendered to Lithuania and any EU Member States refusal to extradite to Lithuania on account of Article 3 ECHR non-compliant prison conditions.

(iv) The response of the Lithuanian State dated 7 February 2020, stating that there had been two refusals, one in a Maltese case in July 2017 and the other in *Lithuania v Campbell* [2013] NIQB 19. The letter asserts, in terms, that each of these cases had been overtaken by more recent events. It further suggested that according to a published EU tool of measurement Lithuanian prisons were not overcrowded.

[40] It is convenient to outline, before considering, the other main milestones of the year 2020. These were, sequentially:

(i) The so-called "Covid caveat" letter of 3 April 2020.

(ii) The decision in *Gerulskis and Others v Lithuania* [2020] EWHC 1645 (Admin), on 26 June 2020.

(iii) The two judgments and orders of Belfast County Court, of 27 November 2020 and 30 November 2020.

V. The April 2020 Lithuanian Assurance

[41] This is a discrete topic of some importance which requires to be set out in appropriate detail. It concerns a letter dated 3 April 2020 from the Director General of the Prison Department of the Lithuanian Ministry of Justice to the CPS. It is apparent on its face that this letter does not form part of a course of correspondence. It is properly described as unsolicited. The previous letter emanating from this agency was that dated 17 October 2019, noted above.

[42] This is a single communication consisting of two parts, namely a letter and an attachment. The subject matter of the letter is "Guarantees Applicable to Persons Surrendered from the UK to Lithuania under EAW". The introductory paragraph of the letter states that by reason of the Covid pandemic "*... the management of Lithuanian correctional system could be encumbered in the nearly* [sic] *future*".

The next two paragraphs describe the consequences of the foregoing:

> "*Thus avoiding any infringements of the guarantees of 07 August 2018 and 08 July 2019 which regards* [sic] *specific detention conditions for the persons surrendered to the Republic of Lithuania from the United Kingdom on the grounds of the* [EAW]. *We have to notify you that above mentioned guarantees will not be further applied from the moment of signing this letter …*
>
> *In order to ensure resultative process of surrender cases in the judicial institutions of the United Kingdom, please find a new guarantee, prescribing specific conditions which will be applied for the persons surrendered to the Republic of Lithuania from the United Kingdom on the grounds of the EAW* ***for the purpose of a criminal prosecution****. Please note that this guarantee will not be revoked (if necessary) without informing the Crown Prosecution Service in written form.*"

We shall address the significance of the highlighted words *infra*.

[43] The document attached to the letter bears the same date and is also addressed to the CPS. It begins:

> "*The Director General of the Prison Department under the Ministry of Justice for 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* [EAW] ***for the purpose of a criminal prosecution*** *during their detention: …*"
>
> [Our emphasis.]

This is followed by three numbered guarantees:

> "1. *All persons surrendered from the United Kingdom will be guaranteed a minimum space allocation of no less than 3 square metres per person and held in compliance with Article 3* [ECHR].
>
> 2. *All persons concerned in the United Kingdom, if held in the Siauliai Remand Prison, will only be held in the refurbished or renovated parts of the prison and in compliance with Article 3* [ECHR].
>
> 3. *All persons surrendered from the United Kingdom, if convicted, that may spend a maximum of 10 days at*

> *Siauliai Remand Prison will be subject to the same guarantees as contained in clause 1 and 2.*
>
> *We also draw to your attention that due to the 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 work of Lithuanian institutions is encumbered, which might have impact on the implementation of the assurance.*"

[44] From a careful reading of the letter and enclosure as a whole and noting in particular the language of the third paragraph of the letter, we consider it reasonably clear that the main impetus for the letter was an assessment of the Lithuanian Ministry of Justice that by reason of the recently materialised Covid circumstances infringements of the August 2018 and July 2019 guarantees were foreseen. What specific guarantees were hereby being rescinded?

[45] To answer this it is necessary to recall the contents of the two communications in question:

(i) The "Provision of Guarantee" letter dated 7 August 2018 contains the three fold "*assurances and guarantees*" that (a) all "accusation warrant" surrendered persons would be detained in one of two named remand prisons (one being Siauliai) with a guaranteed minimum space allocation of 3 square metres, (b) all persons surrendered under a "conviction warrant" could be detained at one of the same remand facilities for a maximum period of ten days with the same minimum space allocation and (c) all surrendered persons held in either of the said remand facilities "*… will only be held in the refurbished or renovated parts of the prisons and in compliance with Article 3* [ECHR]."

(ii) The second of the two communications under scrutiny is also a "Provision of Guarantee" letter, dated 8 July 2019. This is another apparently unprompted letter. Like its predecessor it applies to both types of EAW. It contains five "*assurances and guarantees*". One of these simply repeats the minimum cell space assurance. It also contains a generalised assurance of providing the ECHR protections. It contains three new assurances/guarantees viz all surrendered persons (a) would be detained in "*conditions reducing a risk to* [sic] *inter-prisoner violence/disease transfer and drug influences*" (b) would be "*housed in cell-type accommodation, where possible*" and (c) would not be accommodated in any of the <u>unrenovated</u> blocks of the A, M or P prisons.

[46] The immediately preceding exercise yields the analysis that in its later communication of 3 April 2020 the Lithuanian Government was continuing to offer the earlier assurances provided relating to minimum cell space and being

accommodated in renovated prison wings only. In short, only two of the previous assurances were being maintained. The rescinded assurances were those relating to the exclusion of the unrenovated blocks at the A, M and P prisons, detention in conditions reducing the risk of inter-prisoner violence, the transmission of diseases and drug influences and detention in cell-type accommodation were possible.

VI. The April 2020 Assurance Construed

[47] We shall at this juncture identify a key issue. One of the important questions thrown up by the Lithuanian letter of 3 April 2020 and attachment is whether it applies to the entire cohort of persons surrendered to Lithuania from the United Kingdom pursuant to an executed EAW i.e. to both the "accusation warrant" group and the "conviction warrant" group. As already noted the case of Mr D belongs to the former group whereas that of Mr M is a member of the latter group.

[48] The title of the letter of 3 April 2020 makes no distinction between the two groups. However, in the body of the letter the language employed is "persons surrendered ... **for the purpose of a criminal prosecution**" (our emphasis). This language is repeated verbatim in the attachment. This consistent thread is continued in the language of the second of the three new assurances, which relates exclusively to a remand prison (Siauliai). We consider that consistency is also identified in the third of the three new assurances which, construed in plain and unsophisticated terms, simply means that a surrendered person under an accusation warrant who is later convicted will continue to enjoy the benefit of the first and second of the new assurances for up to ten further days. The reason for this is, as the letter states, that such persons may continue to be detained at the Siauliai Remand Prison during this maximum period.

[49] To summarise, within the text of the letter and its attachment there are several strong pointers to the assessment that the three new guarantees, which of course replace all previous guarantees, relate to surrendered persons who become remand detainees only. The first is the unequivocal language of the text. The second is that the only detention facility identified is of the remand type. The third is that there is no mention, express or implied, of any of the Lithuanian prisons which accommodate convicted persons.

[50] The next pointer to this being the correct assessment is the liberal references to the A, M and P prisons in earlier communications from the Lithuanian authorities. It is from these communications that these are the three main detention facilities for convicted persons in Lithuania. Linked to this is another, namely the unambiguous statement in the Ministry of Justice letter of 16 August 2019 to the CPS – noted in [36] above – that "*convicted persons*", including those surrendered by the United Kingdom, are, in their totality, exposed to the possibility of being accommodated in dormitories. Explicitly, the assurance which could not be provided was that all surrendered persons would be accommodated in conditions excluding the possibility of contact with prisoners accommodated in the dormitory blocks of these

three named facilities.

[51] There is a further indicator of the correctness of the court's suggested construction of the letter of 3 April 2020 and attachment. As our rehearsal of the history above demonstrates, the letters from the Lithuanian authorities throughout the period under scrutiny consistently made a clear distinction between remand prisoners (i.e. accusation warrants – "*detainees")* and convicted prisoners (i.e. conviction warrants – "*inmates*"). The phrase "*for the purpose of criminal prosecution*" is repeated. Other phraseology such as "*pre-trial detention …. suspected of committing a crime …* [and] *… remand prison*" are used. Notably, they are used particularly in communications relating to Mr D. These formulations are to be contrasted with "*for the purpose of execution of sentences*" used repeatedly in the letter dated 13 August 2018 to Belfast County Court – see [28] above – where one finds also the language of "*serve his sentence …* [and] *… the type of the committed crime*".

[52] We have reflected on whether there might conceivably be a translation gremlin of some kind. The court is satisfied that this possibility is convincingly defeated by the analysis undertaken and factors highlighted in the preceding paragraphs. To this we would add that the quality of the English translations in the entirety of the documents under scrutiny is consistently high. While in some of the passages quoted we have (by the insertion of "*sic*") drawn attention to certain aspects of the text these consist of minor linguistic, syntactical and grammatical errors, none of which renders the individual document unintelligible. To the foregoing we would add that our assessment is not questioned by any expert evidence. Quite the contrary, we consider it reinforced by the two expert reports generated on behalf of Mr D in the County Court proceedings and which we have considered.

[53] Mr McGleenan QC, on behalf of the requesting state, correctly reminded the court that one of the optional courses at our disposal is the transmission of a further request for information to the Lithuanian Government by the invocation of Article 15(2) of the Framework Directive. This confers a power which may be of considerable utility and importance in a given case. In the broader panorama of the history of these appeals it was repeatedly invoked by both Belfast County Court and the English Divisional Court. The qualifying condition is that "*…the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender."* Out of an abundance of caution this court exercised its power to seek further information from Lithuania. The response, dated 13 May 2021, confirmed unequivocally the correctness of our tentative construction of the April 2020 assurances.

VII. The November 2020 Assurances

[54] As already noted the two final judgments of Belfast County Court were provided on 27 and 30 November 2020 respectively. The preceding judgment, in sequence, was the short ruling of 14 November 2019 acceding to the adjournment application of the requesting state. The "Covid Caveat" letter of course, had intervened at approximately the mid-point of the intervening period. By letter dated 30 June 2020 Belfast County Court made a further "*request for information*". As appears from the letter, by this stage the number of requested persons cases before the court had swollen to 11. One of the named persons was Mr D. While Mr M was not named, it is evidently common case that this was a simple oversight.

[55] By this letter Judge Smyth sought three specific assurances, namely (i) that the requested persons would not be detained at any time in the A and M prisons until the completion of improvements, (ii) that the requested persons, if detained in Lukiskes Remand Prison, would be thus detained only in refurbished accommodation and (iii) that the requested persons would not be held in cells containing restraint beds in three named prisons. The letter then notes the "Covid Caveat". Next, having quoted in full the "*We also draw to your attention ….*" final paragraph of the attachment to the letter of 3 April 2020 – see [42 - 43] *supra* – the letter continues:

> "*Please state in what respects the work of Lithuanian institutions has been encumbered, is envisaged may be encumbered* [and] …
>
> *What impact on the implementation of the assurance given to this court has occurred to date* [and] *is envisaged may occur.*"

This is followed by a reference to a published CPT "Statement of Principles", dated 20 March 2020, relating to the treatment of detainees in the pandemic circumstances. The letter continues:

> "*The court would be obliged to have a copy of the account of the concrete measures taken by the Lithuanian authorities in the context of the Coronavirus disease (Covid-19) pandemic in prisons that was requested to be sent to the CPT by 30 April 2020.*"

The specific question raised in the remainder of the letter may be disregarded for the purposes of these appeals.

[56] At [8] of her final judgment in the case of Mr D the judge states that the Lithuanian state provided a response dated 19 August 2020. This would appear to be the document dated August 2020 (no specific date) from Kaunas Regional Court addressed to the Lithuanian International Liaison Office. This document has two

components. The first describes quarantine measures, apparently in the form of absolute isolation, applied to all detained persons in Lithuania between specified dates in March and June 2020, followed by slightly diluted but nonetheless heavy continuing isolation measures. The second part of the communication relates exclusively to a question raised regarding the treatment of an identified Lithuanian person.

[57] Stated succinctly, this communication (a) barely engages at all with the specific requests concerning Lithuanian prison conditions and (b) contains absolutely no response to the request concerning the CPT statement of principles, both contained in the Belfast County Court communication of 30 June 2020.

VIII. Legal Framework

[58] The material provisions of the Extradition Act 2003 (the "*2003 Act*") are reproduced in Appendix 3 to this judgment. In brief compass:

(i) A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since the alleged commission of the extradition offence or becoming unlawfully at large: **section 14**.

(ii) Where the requested person is unlawfully at large or has not been convicted the court must decide whether the person's extradition would be compatible with the Convention rights under the Human Rights Act 1998: **section 21(1)** and **section 21A(1)(a)**.

(iii) In the case of an accused requested person the court must also decide whether the person's extradition would be disproportionate taking into account, so far as the court considers it appropriate, any or all of the matters specified in **section 21A(3)**.

(iv) In the case of an accused requested person the court must order the person's discharge if it decides that the extradition would not be compatible with the Convention Rights and would be disproportionate: **section 21A(4)**.

(v) Where the court considers that the physical or mental condition of the requested person is such that it would be unjust or oppressive to extradite him, it must either (a) order the person's discharge or (b) adjourn the extradition hearing until it appears to the court that this is no longer the case: **section 25**.

(vi) **Section 29** regulates the powers of the High Court in cases where the appellant is the requesting state, challenging the order of the judicial

> authority discharging the requested person at the extradition hearing. By subsection (5) if this court allows the appeal it must quash the discharge order and remit the case to the lower court with directions.

[59] By Article 15(1) of the Framework Decision the executing judicial authority must decide whether the requested person is to be surrendered. The facility established by Article 15(2) was of particular significance in the proceedings before Belfast County Court. This paragraph provides:

> "*If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information … be furnished as a matter of urgency and may fix a time limit for the receipt thereof …*"

Article 15(3) also had a role at certain stages of the extensive inter-state communications rehearsed above. This paragraph provides:

> "*The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.*"

[60] On appeal to this court, the appeal may be allowed only if two specified conditions are satisfied namely that (a) the first instance court ought to have decided a question differently and (b) if it had decided such question in the way it should have done, it would have been required to order the appellant's discharge: **section 27(2)** and **(3).** Alternatively, the court may allow the appeal if the new issue/new evidence conditions in **section 27(4)** are satisfied.

[61] Thus section 27 establishes two gateways for a successful appeal. The first of these gateways arises in both appeals to this court. The second arises in the appeal of Mr M only.

[62] The Framework Decision has its origins in one of the main objectives enshrined in the TEU namely the creation of an area of freedom, security and justice. Within this general objective there is a series of constituent principles which have featured with regularity in the jurisprudence of the CJEU and the leading United Kingdom cases since the Framework Decision replaced the European Convention on Extradition (1957). The key principles which have been identified are those of a high level of mutual trust and confidence between EU Member States and mutual recognition. Recital (6) of the Preamble to the Framework Decision describes the latter principle as the "*cornerstone*" of judicial co-operation in criminal matters. Article 1(2) gives effect to this by providing that Member States are in principle obliged to execute an EAW: see, amongst other cases, *Melloni v Ministerio Fiscal (Case C-399/11)* and *Minister for Justice and Equality v Lanigan (Case C-237/15)* at [36].

[63] While the duty of a requested state to give effect to the execution and surrender provisions of the Framework Decision is very much the norm, it is not absolute. This is so because of, firstly, recital (10) in the Preamble which states that the implementation of the EAW mechanism is capable of being suspended, but only in the event of serious and persistent breach by one of the Member States of the principles enshrined in Article 2 EU and in accordance with the procedure prescribed in Article 7 EU. Furthermore, the jurisprudence of the CJEU has recognised that limitations to the principles of mutual recognition and mutual trust and confidence may be appropriate in "*exceptional circumstances*": See Opinion 2/13 (EU:C:2014:2454) at [191]. The Charter of Fundamental Rights of the EU is another limiting measure. Article 1(3) of the Framework Decision provides, in substance, that its procedures and arrangements operate in the context of the unmodified obligation of Member States to respect fundamental rights contained in *inter alia* the Charter.

[64] The interaction between the governing principles and the aforementioned limitations was addressed by the CJEU in its landmark decision in *Criminal Proceedings against Aranyosi and Caldararu* (Joined Cases C-404/15 and C-659/15 PPU) ("*Aranyosi*"). The essential question raised in these combined preliminary references was the duty of the requested state in a case where there is evidence that detention conditions in the requesting state are incompatible with fundamental rights, in particular Article 4 of the Charter (Article 3 ECHR).

[65] The following are the main tenets of the decision of the Grand Chamber:

(i) There is, in substance, a presumption that all Member States comply with EU law and particularly the fundamental rights recognised by EU law, save in exceptional circumstances: see [78] and [82].

(ii) There is a "*binding*" obligation on Member States to comply with the "*absolute*" provisions of Article 4 of the Charter: [84] – [85].

(iii) "*It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State …* [it] *is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European Arrest Warrant*" [88].

(iv) Where there is such evidence, the first task of the executing judicial authority is to consider "*information that is objective, reliable, specific and properly updated*" on the detention conditions prevailing in the requesting state: [89].

(v) If, having performed this task, the executing judicial authority finds that there is a real risk in the foregoing terms, this cannot *per se* warrant

a refusal to surrender the requested person: [91].

(vi) Rather, where such a finding is made, a second task for the executing judicial authority crystallises, namely to make "*a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State*": [92] – [94].

(vii) In performing this second task, the executing judicial authority "*must*" invoke Article 15(2) by requesting of the requesting state the provision of "*all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State*": [95] – [97].

(viii) "*If, in the light of the information provided pursuant to Article 15(2) … and any other information that may be available to the executing judicial authority, that authority finds that there exists, for the individual* (concerned) *…. a real risk of inhuman or degrading treatment … the execution of that warrant must be postponed but it cannot be abandoned*": [98].

(ix) At this stage, two possibilities arise. First, where the executing judicial authority, having considered all available information, discounts the existence of a real risk of a violation of Article 4 it must make a surrender decision: [103]. Second, "*if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end*": [104].

[66] As the judgment in *Aranyosi* demonstrates, there is a fusion of Article 4 of the Charter and Article 3 ECHR and, in substance, an adoption by the Grand Chamber of the Article 3 tests and principles which have been developed in the jurisprudence of the ECtHR. This observation is apposite having regard to the decision of the latter court in *Othman v United Kingdom* [2012] 55 EHRR 1. One of the issues which arose in this case, which concerned the proposed deportation of the applicant to Jordan for the purpose of being tried for alleged terrorist offenses, was whether this would infringe his rights under Article 3 ECHR. This entailed consideration of the "*Soering*" test namely whether there was sufficient evidence of a cogent nature to establish substantial grounds for believing that the applicant would be at real risk of being subjected to treatment proscribed by Article 3 (*Soering v United Kingdom* [1989] 11 EHRR 439). Where such a risk is demonstrated, an implied obligation arises under Article 3 not to deport the person concerned. Furthermore, given the absolute prohibition enshrined in Article 3, the reasons advanced for the expulsion are immaterial. In *Othman* the Strasbourg Court observed, at [186], that in cases where the requested state seeks and receives assurances from the requesting state, the task of the court is "*… to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill treatment*." The court elaborated at [187]:

> "*In any examination of whether an applicant faces a real risk of ill treatment in the country to which he is to be removed the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider.* ***However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment.*** *There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.*"

[67] Continuing, the court observed at [188], that cases in which the general human rights situation in the receiving state would preclude the attribution of any weight at all to assurances given would be rare. The judgment then provides the following guidance, at [189]:

> *"More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:*
>
> *(1) whether the terms of the assurances have been disclosed to the Court 81 ;*
> *(2) whether the assurances are specific or are general and vague 82 ;*
> *(3) who has given the assurances and whether that person can bind the receiving state 83 ;*
> *(4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them 84 ;* ****59***
> *(5) whether the assurances concerns treatment which is legal or illegal in the receiving state 85 ;*
> *(6) whether they have been given by a Contracting State 86 ;*
> *(7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances 87 ;*
> *(8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers 88 ;*

> *(9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible 89 ;*
> *(10) whether the applicant has previously been ill-treated in the receiving state 90 ; and*
> *(11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State."*

[68] We have already adverted to the symmetry between Article 3 ECHR and Article 4 of the Charter, clearly discernible in *Aranyosi*. In addition there is a clearly identifiable correlation between the detailed guidance in [189] of *Othman* and the albeit less prescriptive approach of the Grand Chamber in [89] – [98] of *Aranyosi*.

[69] There is an important decision of the ECtHR dealing directly with one discrete, but significant, aspect of the subject matter of these appeals. On 8 December 2015 judgment was given in *Mironovas and Others v Lithuania* [2015] ECHR 1074. These seven cases concerned Lithuanian nationals who had been detained on remand or imprisoned following conviction in various institutions: the Lukiskes Remand Prison, the "M" Prison and the "P" Prison. All of the applicants complained of overcrowding in *inter alia* prison dormitories and other aspects of prison conditions with descriptions ranging from the inadequate to the deplorable. They had all brought proceedings, successfully, in the Lithuanian courts, securing judgments upheld on appeal by the Supreme Administrative Court and recovering non-pecuniary damages measured in hundreds of euros.

[70] The evidence recounted in the judgment of the ECtHR enlarges the CPT history noted above. The first of the CPT delegation visits to Lithuania was conducted in 2008, giving rise to a report published on 25 June 2009. The problem of overcrowding in prisons generally had previously been highlighted by the CPT in its second General Report [CPT/INF(92)] and in subsequent annual reports. The 2009 report records that the CPT had previously published reports on conditions in Lithuania in 2000 and 2004. The 2009 report was followed by a further CPT report published on 19 July 2013. This followed inspections of the Siauliai and Kaunas Remand Prisons, the mixed remand/post-sentence Lukiskes Prison and the "A" Prison. This report *inter alia* urged "*vigorous efforts*" to combat prison overcrowding. The official standards of minimum living space, namely 3.1 and 3.6 square metres for dormitories and multi-occupancy cells respectively, were condemned as too low. The report noted persisting problems of disrepair, dilapidation, lack of hygiene, inadequate equipment and inadequate heat and light.

[71] The evidence considered included the CPT report of June 2014: see [14] *supra*. All of the applicants alleged violations of Article 3 ECHR. The court ruled that six of

the seven applicants had received "*plainly insufficient*" compensation from the Lithuanian courts and, thus, retained their victim status. At [101] it set about the task of providing the Lithuanian authorities with "*certain guidance on preventive remedies*". Such remedial measures would include constructing new prisons and devising new laws providing alternatives to imprisonment for persons convicted. In this context the court said, notably, at [106]:

> "*As to building new prisons, the Government promised to close the Lukiskes Remand Prison as earlier as in their response to the CPT in 2009 ….*
>
> *That prison is still operational ...*"

This, we observe, falls to be considered in the context of the more recent evidence relating to this particular establishment and the broader issue of the failure of the Lithuanian authorities to honour their assurances.

[72] At [115] – [116] the court provided the following formulation of general principle:

> "*(b) General principles on compliance with Article 3*
>
> *The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see, for example, Labita v. Italy [GC], no. 26772/95, § 119, ECHR 2000-IV). Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, Ireland v. the United Kingdom, 18 January 1978, § 162, Series A no. 25).*
>
> *116. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 (see Ananyev and Others, cited above, § 140, with further references).*"

The court turned to the specific subject of Article 3 and detention conditions:

> *"117. In the context of deprivation of liberty the Court has consistently stressed that, to fall under Article 3, the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with detention. The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured (see Kudła, cited above, §§ 92-94; and Popov v. Russia, no. 26853/04, § 208, 13 July 2006).*
>
> *118. When assessing conditions of detention, account has to be taken of the cumulative effects of those conditions, as well as of specific allegations made by the applicant (see Dougoz, cited above, § 46; Ramirez Sanchez, cited above, § 119). The length of the period during which a person is detained in the particular conditions also has to be considered (see Alver v. Estonia, no. 64812/01, § 50, 8 November 2005)119. Extreme lack of space in a prison cell weighs heavily as a 'central factor' to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see Karalevičius v. Lithuania, no. 53254/99, §§ 36 and 39, 7 April 2005; and, more recently, Vladimir Belyayev v. Russia, no. 9967/06, § 30, 17 October 2013)."*

[73] The court next, having noted previous decisions that Article 3 had been breached where prison inmates had less than three square metres of personal surface in a cell where they were locked most of the time, and noting that it had thitherto refrained from prescribing a minimum, continued at [122]:

> *"122. Applying this approach, the Court has found that the strong presumption that the conditions of detention amounted to degrading treatment in breach of Article 3 on account of a lack of personal space were refuted by the cumulative effect of the conditions of detention. These included the brevity of the applicant's incarceration (see, for example, Fetisov and Others v. Russia, nos. 43710/07, 6023/08, 11248/08, 27668/08, 31242/08 and 52133/08, § 138, 17 January 2012, and Dmitriy Rozhin v. Russia, no. 4265/06, § 53, 23 October 2012) or the freedom of movement afforded to inmates and their*

> *unobstructed access to natural light and air (see, for example, Shkurenko v. Russia (dec.), no. 15010/04, 10 September 2009).”*

[74] There followed a cautionary qualification: on the other hand, even in cases where the inmates appeared to have sufficient personal space at their disposal and where a larger prison cell was at issue - measuring in the range of three to four square metres per inmate - the court noted other aspects of physical conditions of detention as being relevant for the assessment of compliance with Article 3. It found a violation of that provision since the space factor was coupled with an established lack of ventilation and lighting (see, for example, *Vlasov v. Russia*, no. 78146/01, §§ 81 and 84, 12 June 2008) and a lack of outdoor exercise (see *Longin v. Croatia*, no. 49268/10, §§ 60-61, 6 November 2012).

[75] The decision of the ECtHR in *Mironovas and Others* is important in these appeals for two main reasons. First, it forms a significant part of the history and evidential matrix considered in Chapter IV above. Second, it is, unusually, an Article 3 decision specially designed to transcend the boundaries of the individual cases wherein it was made.

[76] We return at this point to the series of leading CJEU decisions. On 25 July 2018 the CJEU gave judgement in *ML* [2018] EUE CJC – 220/18 PPU. The court, in the context of a preliminary reference in a case concerning the proposed extradition by Germany of a person to Hungary, the central concern was the real risk of exposure to inhuman or degrading treatment by reason of prison conditions in the requesting state. The court addressed the specific issue of assurances given by the requesting state, at [108] – [117]. It stated at [112]:

> “(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*** (infringe Article 3 ECHR)”.
> [emphasis added]

The court added: where there are indications of conditions infringing Article 3 ECHR or where the assurance has not been provided or endorsed by the issuing judicial authority, it is incumbent upon the executing judicial authority to undertake “*an overall assessment of all the information available to it*”: see [114].

[77] The themes and principles addressed so extensively by the Grand Chamber in *Aranyosi* resurfaced in its more recent decision in *Dorobantu* [Case C-128/18), in which judgement was given on 16 October 2019. Once again this decision was generated by the preliminary reference mechanism. It involved a case in which the requesting state was Romania and the requested state was Germany. The questions

referred related to the minimum standards for custodial conditions prescribed by Article 4 of the Charter in the context of the EAW and surrender procedures. The ruling of the Grand Chamber, at [85], was in four parts:

> *"Article 1(3) of Framework Decision 2002/584 , read in conjunction with art.4 of the Charter, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment within the meaning of art.4 of the Charter, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the *210 absence of any specific indications that the conditions of detention infringe art.4 of the Charter of Fundamental Rights."*

(ii) *"As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under art.3 of the ECHR , as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell."*

(iii) *"The executing judicial authority … The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of his detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions."*

(iv) *"A finding, by the executing judicial authority, that there are*

substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial co-operation in criminal matters and to the principles of mutual trust and recognition."

[78] Noting its earlier decisions (*ML et al*) the court provided the following convenient summary of their effect at [50]:

> "*… Subject to certain conditions, the executing judicial authority has an obligation to bring the surrender procedure … to an end* ***where surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter*** *…"*
> [Emphasis added.]

A second notable feature of this decision is the focus on the actual prison in which the requested person is expected to be detained: see [66]. The rationale of this is distilled from [62] – [65], namely the inter-related requirements that the assessment of the court of the requested state must be "*specific and precise*" and, further, must not be "*limited to obvious inadequacies only*". A further striking feature of the Grand Chamber's decision is its reiteration of *ML* (at [92]) that in cases where the personal space available to a detained person is less than three square metres in multi-occupancy accommodation, this will operate as a "*strong presumption*" of a violation of Article 3 ECHR: see [72].

[79] Continuing, at [75], the court, drawing on the jurisprudence of the ECtHR, added that even where this minimum space requirement is satisfied, it may nonetheless be a relevant factor to be weighed in conjunction with other aspects of "*inappropriate physical conditions of detention*" – such as lack of outdoor exercise, natural light or air, poor ventilation, inadequate room temperaments *et al* – in determining whether a violation of Article 3 is established: see [75] – [76]. A final notable feature of this decision is the court's identification at [79] of one specific option available to the requested state, namely it may –

> "*… make the surrender to the issuing Member State of the person concerned by a European Arrest Warrant subject only to compliance with* (Article 4 of the Charter)".

The court's expressed rationale for formulating this option was that of avoiding compromise of the efficacy of the Framework Decision by fortifying the principles of mutual trust and recognition upon which it is based.

IX. The Recent English Decisions

[80] These appeals are illustrations of the circumstances in which judicial decisions may acquire the status of adjudications and evidence. As our resume of the assurances/guarantees evidence in [V] – [VII] above demonstrates, the various communications from the Lithuanian Government were addressed to both Belfast County Court and appropriate English agencies, in particular the CPS. The interaction between the English agencies and the Lithuanian Government evidently occurred under Article 15(2) of the Framework Decision, in the context of pending appeals in certain extradition cases before the English Divisional Court. The exercise of considering these decisions in chronological sequence facilitates identification of which elements of the evidence considered above were available to the court at the time of each successive judicial decision. It further enhances the task of assessing the evolution of the broader evidential framework.

[81] The first case belonging to this discrete cohort is that of *Jane v Prosecutor General's Office, Lithuania*. This case generated two decisions of the Divisional Court, separated by some five months: see [2018] EWHC 1122 (Admin) and [2018] EWHC 2691 (Admin). The EAW in play in this case was of the "accusation" variety. The court's focus was, therefore, on the likely conditions which the appellant would encounter in a Lithuanian remand prison. At [20] the court identified the two Lithuanian remand prisons which feature prominently in the evidence which we have considered, taking as its starting point that as regards these two establishments:

> "*… there is a real risk to prisoners of impermissible treatment contrary to Article 3 of the ECHR.*"

[82] This assessment, notably, was based on a series of judicial decisions, beginning with *Lithuania v Campbell* [2013] NIQB 19, followed by several decisions of the English High Court, one of the Irish High Court and one of the Constitutional Court of Malta spanning the period 2013 to 2017. The next step which the court took was to examine certain fresh evidence which it admitted. This consisted of an expert report (considered both at first instance and by this court in these appeals), the CPT report of 2018, a more recent Irish High Court decision, critical Lithuania Parliamentary Ombudsman's Report and certain recent decisions of Lithuanian courts making adverse findings about conditions in remand prisons. Certain further evidence from the Lithuanian Government was also considered. The court's assessment of all of this evidence was as follows, at [41]:

> "*… there remains a real risk that a person who is sent to remand conditions will suffer inhuman or degrading treatment contrary to Article 3 of the ECHR. This is because although it is apparent that Lithuania has taken many commendable steps to improve the position of remand prisons, there is at present no clear and cogent evidence from Lithuania to show that there is no real risk that the impermissible treatment which has been*

> *suffered by remand prisoners will no longer be suffered. The court determined to exercise its power under Article 15(2) to give Lithuania an opportunity to provide further assurances sufficient to dispel the risk identified.*"

[83] The course taken by the Divisional Court provided the impetus for the second of its judgments, some five months later. The second judgment records that in the wake of the first seven further assurances were provided by the Lithuanian Government, in June 2018 and a further assurance dated 7 August 2018. (We would observe, albeit with some degree of caution, that these assurances appear to be in the materials before this court.) The court, referring to these assurances and the CPT reports, stated at [11]:

> "*… while there remains a real risk of impermissible treatment in remand prisons other than Kaunas, Lithuania continues to make considerable efforts to improve conditions in its remand prisons. The evidence of the* [assurances] *shows that Lithuania has engaged with the issues raised by this court about the real risk of impermissible treatment of Mr Jane. It is now for this court to assess whether the assurance dated 07 August 2018 removes any real risk of impermissible treatment if Mr Jane were to be extradited.*"

The court reiterated its earlier assessment that the appellant, if surrendered, would probably be accommodated in Lukiskes Remand Prison. The Lithuanian further assurance of 7 August 2018 had the following components: the appellant would be accommodated in a cell (to be contrasted with a dormitory); the cell would have minimum dimensions of 3 square metres; he would be accommodated only in one of the renovated cells; and his accommodation and treatment would be compliant with Article 3 ECHR. Acting on these assurances the court dismissed the appeal. It concluded that there was no longer a real risk of the appellant suffering proscribed treatment: see [18] – [19]. Notably, the court described overcrowding as the "*main problem*" which the assurances had addressed.

[84] The second member of the cohort of recent English decisions is *Bartulis v Prosecutor General's Office Lithuania* [2019] EWHC 3504 (Admin). These conjoined appeals concerned three Lithuanian nationals resisting surrender to their state of origin pursuant to five EAWs, a mixture of the "accusation" and "conviction" species. The appellant's case is encapsulated in [8] of the judgment:

> "*The appellants submit that ……. there is cogent, relevant and reliable evidence in support of the proposition that there is a real risk of detention in inhuman and degrading conditions if these appellants are extradited to any of the three male prisons* [A, M and P]."

The next paragraph of the judgment makes clear that the central plank of the appellant's Article 3 case was:

> "*… the risk of violence amounting to breaches of Article 3 by other inmates of these prisons and whether the prison authorities in Lithuania can provide adequate protection …….*"

The court noted that the dormitory style accommodation forming much of the capacity of these three prisons was a factor in the asserted risk. The evidence considered by the court included the CPT reports and the expert report noted above. In passing, at first instance, the author of this report had given oral testimony: see [24]. The AP, considered in [26] – [27] above, was also available to the court, as were certain assurances: see [47] – [57].

[85] The court considered its task to belong to two stages, first, to consider "*the level of risk and the initial issue of the presumption together*", before "*considering the assurances*": see [114]. The court considered the problem of inter-prisoner violence to be real, not fanciful: [118]. Next it considered the CPT reports to be objective, reliable, specific and up to date: [119]. Next the court's assessment of the steps taken by the Lithuanian authorities, with specific reference to the AP, was one of "*an adequate response*". At [122] it reckoned the factor of "*ready access to lawyers and the domestic courts*", together with the low incidence of murder and crimes of serious assault. Finally, at [124] – [125] the court adverted to the clear awareness on the part of the Lithuanian authorities of their legal obligations in the extradition context and the absence of any consensus among EU Member States that the presumption had been displaced. The omnibus conclusion of the court was expressed in the next succeeding paragraph, at [126]:

> "*Taking all these factors together, we conclude, after a balancing exercise, that the presumption of compliance has not been displaced. Without the Action Plan and the evidence of implementation, real if incomplete, our decision might have been otherwise.*"

The following paragraph [126] makes clear that, in light of this conclusion, the court did not proceed to the second stage of considering the Lithuanian Government's assurances.

[86] The last of this trilogy of English Divisional Court decisions is *Gerulskis v Prosecutor General's Office of Lithuania* [2020] EWHC 1645 (Admin). This decision was promulgated on 26 June 2020. Here the court dismissed two appeals against orders for extradition to Lithuania. The appeals raised a common issue concerning prison conditions in Lithuania and assurances given by the Lithuanian authorities. In each case the EAW was of the "accusation" variety. The appellant's Article 3 ECHR objection to extradition arose for the first time on appeal and was based on evidence of Lithuanian prison conditions and Lithuanian Government assurances not

considered at first instance. The appellants contended *inter alia* that the Lithuanian Government's assurance in the case of Mr Jane (*supra*) had been breached and that the same had occurred in the case of another extradited Lithuanian national. While the court found a partial breach of the assurance regarding Mr Jane, relating to the prison where he had been detained post-extradition, it nonetheless held that the most important aspect of the assurance, namely the provision of a minimum of 3 square metres of cell space had been honoured. The court found that there had been no breach of assurance in the other case.

[87] At [58] – [60] the court gave specific consideration to the "Covid Caveat" letter of 3 April 2020 and the further information of 29 May 2020 and 9 June 2020. It described the Covid Caveat as demonstrating "*both transparency and a proper regard for the importance of communicating … in accordance with the principles of the Framework Decision*". It highlighted the continuing two fold assurances that surrendered persons would be guaranteed a minimum of 3 square metres of cell space and would be detained only in the renovated parts of the Siauliai Remand Prison, concluding:

> "*This shows that there does not exist a real risk of impermissible treatment contrary to Article 3 of the ECHR.*"

Next the court pronounced itself satisfied that the Lithuanian assurances should be neither discounted nor ignored.

X. The First Instance Decision in Mr M's Case

[88] When the first instance court gave judgment in the case of Mr M the bars to extradition advanced by him had extended beyond Article 3 ECHR to include Article 8 ECHR, based on medical health, contrary to ss 14 and 21 of the 2003 Act and the unjust/oppressive bar enshrined in s 25. The judgment records, at [6], the submission on behalf of Mr M that:

> "*… there has been obvious culpable delay in that given the questionable regime that he might be returned to, the passage of time in the general sense, the life he has built for himself and his tenuous medical condition, the court should determine that it would be disproportionate to extradite him and order his discharge.*"

The judge addressed the medical evidence, together with the issue of Mr M's family circumstances at [22] – [23] particularly. At [17] ff the judge considered the legal tests for delay in the context of a fugitive from justice such as the appellant. Noting that these grounds of resistance equated with the statutory bars contained in sections 14, 21 and 25 of the 2003 Act, the judge concluded at [28] that "*… the evidence in respect of these bars, either individually or collectively, falls far short of that which would be required to refuse an order for extradition*".

[89] The judge noted the concession on behalf of Mr M that he was a "*fugitive from justice*" until the discharge decision of Westminster Magistrates' Court on 13 February 2013. The judgment continues at [8] – [9]:

> "*[8] The defendant concedes that he was a fugitive from justice up until he was discharged on the earlier defective warrant. Thereafter, he submits that he was entitled to conclude that he was no longer sought by the RS, particularly given the delay in issuing the current warrant in September 2016, and the delay in executing the warrant until December 2019.*
>
> *[9] The requesting state submits that he had no basis for concluding that he was no longer sought by the RS and that the reason for the delay in executing the warrant was because the information available in 2016 was that he lived in Ilford and his whereabouts were in fact unknown until his arrest in Northern Ireland."*

The judgment also notes what is described in the papers as "*brief medical document*". It is dated 9 June 2020. It originates from a health centre and appears to be a computerised printout of this appellant's medical records. It discloses the following information in particular: the appellant was registered with the practice in February 2017; on 1 March 2017 there is an entry in the terms "*Stroke and cerebro vascular accident unspecified*", with a reference to "*ischaemic stroke 2002, 2008, residual left sided weakness*"; on 12 March 2018 "*chronic kidney disease stage 3*" was noted; and, finally, he was in receipt of medication during an unspecified period, last prescribed on 28 November 2019.

[90] The judgment considers in some detail this appellant's complaint of delay on the part of the Lithuanian State. At [21] the judge formulated the following self-direction:

> "*Whether or not the requesting state might have acted more expeditiously in issuing a valid* [EAW]*, the question is whether extradition would be oppressive or unfair. Unfairness in the context of section 14 relates to the ability to have a fair trial after the period of delay. Since this is a conviction warrant, that factor is not applicable. The only possible ground upon which section 14 may be said to arise is on the basis of oppression.*"

The judge then summarised Mr M's assertions relating to family circumstances and personal health. At [25] the judge stated:

> "*There is no evidence in this case which could satisfy the test of hardship, never mind oppression, which is a much higher*

standard."

At [26] – [27] the judge turned to consider Article 8 ECHR in conjunction with section 21 of the 2003 Act, formulating the 'balance sheet' in the following terms:

> *"[26] Approaching this case from the point of view of section 21 and article 8 in particular and considering the factors for and against extradition in order to arrive at a decision on proportionality as the court in Celinski v Poland [2015] EWHC 1274, approved by the Northern Ireland Court of Appeal in Gorny v Poland [2018] NIQB 50 recommended, the factors in favour of extradition are:*
>
> *(1) This is a conviction warrant for a lengthy custodial sentence in respect of serious offences.*
>
> *(2) The public interest in extradition in honouring extradition arrangements*
>
> *(3) The public interest in persons convicted of crimes being punished*
>
> *(4) The importance of ensuring that Northern Ireland is not a safe haven criminals.*
>
> *[27] The factors against extradition are:*
>
> *(1) The defendant has lived in Northern Ireland since 2016 and has made it his home.*
> *(2) He has health issues albeit there is no evidence they cannot be adequately treated in Lithuania."*

The court concluded at [28]:

> *"The court concludes that the evidence in respect of these bars, either individually or collectively, falls far short of what would be required to refuse an order for extradition."*

[91] The remainder of the judgment comprises the court's consideration and determination of Mr M's Article 3 ECHR case. This is the generic issue noted at the outset of this judgment and, being generic in nature, the judge, unsurprisingly, dismissed it in the same terms as those contained in her judgment in the case of Mr D.

XI. The Article 3 ECHR Appeal

[92] On behalf of Mr M, Mr Macdonald QC and Mr Sean Devine (of counsel) placed particular weight on the Article 3 assessments of the judge in the first two judgments, noted above. These submissions further highlighted the consonance between the expert report and the CPT reports, the repeated opportunities afforded to the Lithuanian authorities to provide information which would assuage the court's concerns and the multiplicity of inadequate and evasive responses.

[93] The primary submission advanced to this court on behalf of Mr M involved a new argument not deployed at first instance. The first element of this submission, namely that the effect of the "Covid Caveat" letter is to rescind all previous Lithuanian Government guarantees in respect of all surrendered persons, is uncontentious. The second element of this submission is that the replacement guarantees relate to persons surrendered pursuant to accusation warrants only i.e. actual or putative remand prisoners.

[94] At [41] – [53] above we have examined the Lithuanian Government's letter of 3 April 2020 and attachment in some detail. We have analysed these documents in their surrounding context, including previous communications from the same source. We have further considered the latest communications from the Lithuanian authorities *(infra*). Based on all of the foregoing we have concluded that the new guarantees apply to remand prisoners only. This, of course, is the cohort of the prison population to which persons surrendered to Lithuania pursuant to an "accusation" EAW and thereafter detained will belong until completion of their prosecution. We consider it abundantly clear that those such as Mr M, whose surrender will be pursuant to a "conviction" EAW, are excluded from the new guarantee. Furthermore, they will not have the benefit of any of the assurances or guarantees which have been forthcoming from the Lithuanian Government from time to time. Thus we accept the new submission on behalf of Mr M.

[95] In advance of the hearing, the court required that Mr M's new submission be reflected in an amended Notice of Appeal, which was duly provided. Under s.27(4)(a) of the 2003 Act a new issue may be raised on appeal. For the reasons explained *infra*, we have determined that Mr M may do so and, further, we grant permission to amend his grounds of appeal.

[96] As our interim judgment delivered on 19 March 2021 explained, the court was mindful of its power under Article 15(2) of the Framework Decision to seek further information from the Lithuanian Government. The test is whether this court "*… finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender …*" We indicated that if we considered this test satisfied, a matter of evaluative judgement, we must ("*shall*") request the "*necessary supplementary information*". We decided to exercise this power in both appeals.

[97] At this juncture it is necessary to identify clearly what the task of this court is

in its resolution of the Article 3 ECHR ground of appeal. This exercise is essential having regard to the decisions of the Grand Chamber in *Aranyosi*, *ML* and *Dorobantu*. In *Aranyosi* the Grand Chamber provided detailed, prescriptive guidance on the role of the court of the requested state. We consider that this guidance clearly prescribes two stages. At the first stage, the court must make an assessment of whether there is a real risk of inhuman or degrading treatment infringing Article 4 of the Charter (Article 3 ECHR). We consider it clear from *Aranyosi*, particularly at [88] – [89], that at this stage the court's enquiry belongs to the general level, i.e. it is focused on detention conditions generally without specific reference to the circumstances of the requested person. This enquiry may, inexhaustively, be directed to "*systemic or generalised*" deficiencies or deficiencies affecting certain groups of people or deficiencies affecting certain places of detention. The information on which this initial assessment is made must be "*objective, reliable, specific and properly updated on the detention conditions ….*": see [89]. In passing, the judgment in *Aranyosi* is silent on the question of whether recourse to the requested state's powers under Article 15(2) is appropriate at <u>this</u> stage. Having regard to the breadth of the terms in which this power is couched and the nature of the judicial decision to be made it would be surprising if Article 15(2) could not be invoked at this initial stage.

[98] It would appear that the requested state's court's initial enquiry, with or without recourse to Article 15(2), can in principle yield only one of two possible outcomes, namely a conclusion, or "*finding*" per *Aranyosi* at [91], that there is – or is not – "*a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing member state …*". If the court concludes that there is no such risk no further stage of judicial enquiry arises.

[99] However, where the court concludes that there <u>is</u> such a risk, a second stage arises. It is at this stage that the distinction between the general and the particular becomes especially clear. Notably, the Grand Chamber does not frame the task of the court at this, the second, stage in the terms of discretionary options. Rather, the judgment states unequivocally, at [95], that the court of the requested state at this stage <u>must</u> direct a request or requests to the judicial authority of the requesting state under Article 15(2). This request must focus on "*the particular circumstances of the case …. the individual concerned …*" *Aranyosi* also prescribes the terms in which this second stage request is to be formulated. It <u>must</u> seek "*all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State*": see [95]. A request in these terms is <u>obligatory</u>. *Aranyosi* further makes clear that this request may <u>optionally</u> relate to the existence of any procedures and mechanisms for the monitoring of detention conditions in the requesting state: see [96]. On receipt of this request the issuing judicial authority is subjected to a <u>duty</u>: it is "*obliged*" to provide the information sought: see [97].

[100] Pausing, there is no indication in any of the CJEU decisions that the inter-state interaction at the second stage is confined to a single request and a single response. We consider that in every case it will be for the court of the requested state to make

an assessment of the point at which this interaction is complete. At this point the court finds itself asking precisely the same question which it addressed at the first stage, namely whether –

> "*… there exists, for the individual …., a real risk of inhuman or degrading treatment* (contravening Article 4 of the Charter)"
>
> (See [98]).

[101] It is clear from [98] – [104] of *Aranyosi* that, in common with the first stage, the second stage gives rise to two possible outcomes. The first possible outcome is a finding by the court that the aforementioned risk exists. Where this occurs, *Aranyosi* states unambiguously, at [98], that the execution of the EAW "*… must be postponed while it cannot be abandoned …*" Where postponement occurs the requested state must inform Eurojust, per Article 17(7) of the Framework Decision. Does *Aranyosi* prescribe clearly what is to happen thereafter? We shall examine this discrete issue by revisiting firstly the *Aranyosi* – related CJEU decisions.

[102] *ML* is, in sequence, the second of the trilogy of CJEU decisions considered above. The essential question raised in this Article 267 reference was where the executing judicial authority has information showing systemic or generalised deficiencies in the detention conditions in the prisons of the requesting state, that authority may exclude a real risk that the requested person will be subjected to treatment proscribed by Article 4 of the Charter simply on account of the availability in the requesting state of a legal remedy enabling the subject to challenge the conditions of his detention. At [58] – [66] the First Chamber repeated almost verbatim the corresponding passages in *Aranyosi*. The court answered the essential question referred at [75]:

> " *Therefore, even if the issuing Member State provides for legal remedies that make it possible to review the legality of detention conditions from the perspective of the fundamental rights, the executing judicial authorities are still bound to undertake an individual assessment of the situation of each person concerned, in order to satisfy themselves that their decision on the surrender of that person will not expose him, on account of those conditions, to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter."*

[103] The second element of this preliminary ruling indicates that the duty of the requesting state to respond to requests for information by the executing states, in substance, subject to considerations of relevance, proportionality and expedition. Requests for information which are not harmonious with these values, moreover, are not compatible with the duty of sincere co-operation enshrined in Article 4(3) TEU: see [103]–[104]. At [111] the court stated that where the requested state provides an

assurance that the requested person will not suffer inhuman or degrading treatment in detention cannot be disregarded by the requested state. Elaborating, the court added at [112] that the requested state "*… must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter*".

[104] Next the court gave consideration to the question of an assurance emanating from the requesting state which has neither been given nor endorsed by the issuing judicial authority. The court appeared to indicate that such assurances carry less weight. An assurance of this kind "*… must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority*": see [112] – [114]. Finally, the judgment makes clear that the scope of the requested state's enquiry is confined to the place of detention where "*… according to the information available to it, it is likely that the person will be detained, including on a temporary or transitional basis*": see [117].

[105] We have reconsidered the third of the three CJEU decisions in question, *Dorobantu*, from the particular perspective of whether it modifies in any way the two-stage approach and other procedural prescriptions specified in *Aranyosi*. It appears to us from the relevant passages in *Dorobantu*, paragraphs [45] – [55], the court evidently considered it unnecessary to do so. This is perhaps unsurprising having regard to the central thrust of the questions referred, which sought guidance on the extent and scope of the review which the executing judicial authority must conduct when it is in possession of information demonstrating systemic or generalised efficiencies in the detention conditions of the prisons in the requesting state. It is clear from the judgment that this enquiry belongs to the second of the two stages established by *Aranyosi*. The short point emerging from this discrete and focused reconsideration of the three CJEU decisions is that the two-stage approach endorsed in *Aranyosi* continues to apply without modification.

[106] We consider that this court must correctly orientate itself in the exercise of identifying what its task is. This court, by virtue of the domestic legal arrangements of the United Kingdom and with specific reference to the jurisdiction of Northern Ireland, is the second court in sequence which has become seized of the fundamental question, namely whether the appellants, or either of them, should be surrendered to the Lithuanian state. The judicial consideration and process which have preceded this court's appellate involvement cannot in our view be detached or disregarded.

[107] The most important feature of the first and second of the judgments of Judge Smyth is the assessment that there was evidence of a real risk of inhuman or degrading treatment in the event of Mr D being surrendered to Lithuania. Given that Mr D's case had the status of lead case, it is not in dispute that this assessment applied to all members of the group. We consider it clear that this assessment belonged to the first of the two *Aranyosi* stages. The assessment was made in the first judgment and the impetus for repeating it in the second was the judge's conclusion that the Lithuanian state had failed to answer the specific questions addressed

following the first judgment and should be required to provide specific assurances in the terms of [35] of the second judgment. We further consider that from the promulgation of the first judgment everything which unfolded culminating in the final two judgments of Belfast County Court belonged to the second of the *Aranyosi* stages.

[108] We consider that the following question of some importance arises: in cases where the court of the requested state completes the two stages described above and answers the "*real risk*" question in the affirmative, is postponement of the execution of the EAW the only course available to the court? Furthermore, if the answer to this question is affirmative, what is the court to do thereafter? At first blush and superficially, paragraph [98] of *Aranyosi* appears to state that where the executing judicial authority, having completed the two stages, considers that there is a real risk of inhuman or degrading treatment regarding the detention conditions in which the requested person is expected to be accommodated, the court must postpone execution of the EAW. However, in both the conclusion expressed in [104] and in the operative part ("*dispositif*") of its judgment, the court states unequivocally:

> "*If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.*"

The question which arises is whether in the passages under scrutiny the Grand Chamber is expressing itself in different ways, to the extent that there is a disparity which this court must attempt to resolve.

[109] In paragraph [98] of *Aranyosi* the operative sentence is followed by "*See, by analogy,* ***Lanigan's*** case …." This is a reference to *Minister for Justice and Equality v Lanigan* [C-237/15 PPU]. This case was concerned with the effect of the expiry of the time limit specified in Article 17 of the Framework Decision, which contemplates a maximum period of 90 days for judicial decision following the arrest of the requested person in a contested case. This time limit is subject to "*exceptional circumstances*" and observance of a specified related procedure involving Eurojust. The Grand Chamber provided a twofold response to the questions referred by the Irish High Court:

(i) Where the time limits prescribed by Article 17 have expired the executing judicial authority remains under a duty to make its decision on surrender.

(ii) The continued detention of the requested person in such a situation does not contravene the Framework Decision.

It is in this context that we turn to consider what the court stated in [38] of its judgment:

> "*That interpretation is corroborated by the fact that the EU*

> *legislature expressly envisaged, in Article 17(7) of the Framework Decision, the situation in which a Member State finds itself unable to observe the time-limits stipulated in Article 17, without providing that the executing judicial authority would thus no longer be able to adopt the decision on the execution of the European arrest warrant or that the obligation to carry out the execution procedure of the European arrest warrant would, in that case, be removed. Article 17(7) of the Framework Decision refers, moreover, to the occurrence of repeated 'delays … in the execution', which shows, therefore, that the EU legislature considered that, in a situation in which those time-limits have not been observed, the execution of the European arrest warrant is postponed, not abandoned."*

[110] We consider that the purpose of the reference in [98] of *Aranyosi* to *Lanigan*, paragraph [38], was to remind executing judicial authorities that they are not absolved of their duty to make a decision on surrender in cases where the time limits prescribed by Article 17 have expired. It makes perfect sense that the Grand Chamber would do so when one considers the context, namely the prescription of a series of steps to be observed in making a final decision on whether the surrender of a requested person might in certain circumstances violate such person's rights under Article 4 of the Charter. The procedure which the Grand Chamber laid down for the second of the two stages obliges the executing judicial authority to exercise its powers under Article 15(2) of the Framework Decision. There is no suggestion that the judicial authority can have recourse to this power only once. Furthermore, in a context where the possible breach of a person's fundamental rights is in play and taking into account the enhanced vigilance thereby required of the judicial authority of the executing State the Grand Chamber must have contemplated the possibility that the interaction between the judicial authority and the requesting state under Article 15 might entail several exchanges.

[111] Finally, in this context, we consider that two of the principles underlying the Framework Decision must have some purchase, namely those of a simplified procedure and expedition. See especially recital [5] of the Framework Decision and the decision in *Melloni* [C-399/11] at [37], a passage which is worth reproducing in full:

> "*Framework Decision 2002/584 thus seeks, by the establishment of a new simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law,* ***to facilitate and accelerate judicial co-operation*** *with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States …*"
> [Our emphasis.]

[112] It follows that, in our judgment, the prohibition on *abandonment* expressed in [98] of *Aranyosi* means that the executing judicial authority cannot abdicate its responsibility to make a final decision on surrender. Second, having regard to the broader context which we have highlighted, in particular the principle of expedited judicial decision making, the antithesis whereof is lengthy and avoidable delay, we are confident that the Grand Chamber's reference to *postponement* of the execution of the EAW in [98] does not constitute an instruction, or even exhortation, to the issuing judicial authority to defer its final decision indefinitely.

[113] This is reinforced by the statement in [104], replicated in the *dispositif* in [105]:

> "*The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk.*"

We consider this to convey clearly that *postponement* of the judicial authority's final decision occurs upon completion of the first stage and as a natural consequence of the authority's determination to proceed to the second stage. This is followed by:

> "*If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.*"

We consider that this statement, again viewed in its broad context, conveys clearly that during the second stage the executing judicial authority must be aware of the Article 17 time limits and the principles highlighted above, with the result that it cannot defer its final decision indefinitely. We further consider that "*brought to an end*" must denote a refusal of the surrender request and the consequential discharge of the requested person since where the existence of the relevant risk "*cannot be discounted*", it seems virtually impossible to envisage that the judicial authority has any other choice at its disposal.

XII. Mr M's Art 3 ECHR Appeal: Our Conclusions

[114] The starting point in Mr M's case mirrors that of Mr D. This first milestone consisted of the assessment of Belfast County Court that there was objective, reliable, specific and properly updated evidence of a real risk of inhuman or degrading treatment in the event of Mr M's surrender to Lithuania.

[115] Mr M has the status of convicted prisoner in Lithuania. As a result the EAW in his case is of the "conviction" species. The resolution of his appeal turns critically on the correct construction of the letter of 3 April 2020 and attachment from the Lithuanian Ministry of Justice. Our provisional construction of this letter, set forth in [47] – [53] above, was that it rescinds in their totality all previous guarantees and assurances emanating from the Lithuanian Government and substitutes a single,

new "*guarantee*" which applies only to persons surrendered by the UK to Lithuania pursuant to an "accusation" warrant. Mr M is not a member of this cohort. This construction was confirmed beyond peradventure in Lithuania's response dated 13 May 2021 to this court's request for further information.

[116] The *Aranyosi* procedure having been fully observed, the question for this court is whether the "stage 1" assessment that there were substantial grounds for believing that Mr M's surrender to Lithuania would expose him to a real risk of treatment proscribed by Article 3 ECHR should be revoked. We consider that it would be inappropriate to answer this question by reference only to the responses of the Lithuanian Government to the succession of Article 15(2) communications from Belfast County Court or, indeed, those responses considered in tandem with the Lithuanian Government's responses to the relevant English agencies in the context of the English cases, to include those communications which we have identified as spontaneous, or unsolicited. Rather this question must be answered on the basis of the totality of all of the evidence bearing on the Article 3 issue. The main reason for this is that all of the inter-state communications must be evaluated together with other material evidence, in particular, but inexhaustively, the CPT reports.

[117] Ultimately, what is required of the national court, the executing judicial authority, in this situation is the formation of a balanced evaluative judgment having considered all material evidence. This is not a fact finding exercise. Approached in the way which we have outlined, this court is impelled to the conclusion that there are extant substantial grounds for believing that the surrender of Mr M to Lithuania pursuant to the "conviction" EAW in his case would expose him to a real risk of inhuman or degrading treatment proscribed by Article 4 of the Charter and Article 3 ECHR. This risk, identified at the beginning of the judicial process in this country, has not been dispelled. The specific ingredients of the proscribed treatment to which Mr M would be exposed are inadequate cell space, inter-prisoner violence and the transmission of HIV and/or Hepatitis C. In the context of a deteriorating situation (per the latest CPT report), preceded by a series of inconsistent, evasive and increasingly unreliable official communications, the Lithuanian Government, from April 2020, has found itself in the position of being unable to provide <u>any</u> assurances or guarantees addressing any of these risks as regards convicted prisoners. Having regard to the history in its totality, the conclusion that the Art 3 ECHR risk pertaining to Mr M in the event of his surrender to Lithuania to complete his prison sentence is irresistible.

[118] In the language of section 27(4)(a) of the 2003 Act, this court concludes that Mr M's appeal is allowed on the basis of an issue not raised at first instance which would have resulted in Belfast County Court deciding the central question differently. It follows that we allow the appeal and, given our duty under section 25(a), this court orders the discharge of Mr M. We shall set forth in detail *infra* our reasons for permitting Mr M to raise this new issue and to amend his grounds of appeal.

Mr M: The Article 8 ECHR and Related Grounds

[119] Mr M's appeal having succeeded on the Article 3 ECHR ground his second ground of appeal, based on Article 8 ECHR and ss 14, 21 and 25 of the 2003 Act, becomes redundant. Given that this was addressed at first instance and in the submissions of the parties to this court we shall nonetheless address it.

[120] At the outset, drawing from Appendix 2 to this judgment, we remind ourselves of some of the milestones in the chronology of Mr M's case. In brief compass, in January 2010 Mr M was convicted and sentenced; in May 2010 his appeal against conviction was dismissed; he was unlawfully at large between May 2010 and November 2012; in December 2011 the first EAW was issued; in February 2013 Mr M was discharged by the London court; in September 2016 the second, operative EAW was issued; on 12 December 2019 Mr M was arrested pursuant to the second EAW; and the proceedings in Belfast County Court were completed on 30 November 2020 by the order requiring his extradition to Lithuania. In short, the EAW process involving Mr M had a total duration of some nine years.

[121] We have noted above the medical evidence forming one aspect of Mr M's Article 8 case. The factual matrix of this case on appeal is unchanged from its first instance incarnation, with the exception that a further period of some five months has elapsed.

[122] On behalf of this appellant, Mr Macdonald QC identified four factors in the Article 8 equation: Mr M's age (60), his health, the delay in the EAW process and the 19 months which he has spent in sentenced custody in Northern Ireland pursuant to the impugned "conviction" warrant. It is accepted that Mr M cannot rely on the first two years (in round terms) of the overall period, when he was a fugitive from justice. The discrete submissions advanced on behalf of Mr M include the contention that at some unspecified point postdating the London court's order in April 2019 he was entitled to assume that his extradition was no longer being sought and to conduct and plan his affairs accordingly. It is further submitted that the delay on the part of the Lithuanian authorities has been both excessive and culpable. These submissions also grounded Mr M's invocation of specific provisions of the 2003 Act: ss 14, 21 and 25.

[123] The court is mindful that this ground of appeal is not promoted exclusively on the basis of Article 8 ECHR. Rather Mr M also invokes section 25 of the 2003 Act (reproduced in Appendix 3) which provides that his discharge must be ordered if his physical or mental condition "*… is such that it would be unjust or oppressive to extradite him*". The arguments presented, correctly in our view, did not seek to establish that Article 8 ECHR and section 25 give rise to separate, freestanding grounds of appeal in the case of Mr M. Rather, the correct analysis is that they merge and overlap, the reason being that in his particular case section 25(2) contains nothing which Article 8 does not protect. The court acknowledges that section 14 of the 2003 Act establishes a freestanding bar to extradition on the ground that it would be unjust or oppressive

to extradite the subject by reason of the passage of time since, in the case of a "conviction" warrant, he became unlawfully at large. The court is mindful that this operates as a freestanding bar to extradition and we accept that in Mr M's case what is protected by section 14 is not protected by Article 8 ECHR.

[124] The court must also be alert to the two separate limbs of Article 8 ECHR. Having regard to the oral presentation of his case considered in tandem with the lengthy written submissions, including in particular the detailed litany of Mr M's personal circumstances, we consider it clear that his case is advanced on that limb of Article 8 protecting his right to respect for private life.

[125] This brings us to the governing legal principles, which we shall rehearse briefly as they are both well established and not in contention as between the parties. We begin with the general principles relating to the application of Article 8 in the context of extradition proceedings. These are distilled from two decisions of the Supreme Court, *Norris v Government of the USA (Number 2)* [2010] 2 AC 487 and *HH* [2013] 1 AC 338. The first of the main principles, most clearly expressed in *HH*, is that the public interest in giving effect to inter-state extradition arrangements is very high. Second, there is an equally important public interest in discouraging persons from seeking to avail of the UK as a safe haven for fugitives from justice. Third, a proper degree of mutual confidence and respect must be accorded to the decisions of the requesting state's judicial authority requesting a person's extradition. Fourth, the procedures under Part 1 of the 2003 Act, reflecting the Framework Decision, are based on principles of mutual confidence and respect between the judicial authorities of the EU Member States concerned. In this context the requested judicial authority must bear in mind that prosecutorial decisions are normally made independent of the executive. Fifth, issues of culpability or mitigation are normally not matters to be considered by the requested judicial authority. Sixth, the requested judicial authority must normally respect without question the sentencing laws and regimes of the requesting state, eschewing comparisons with those of the requested state. These principles are conveniently rehearsed in the judgment of Lord Thomas CJ in *Celinski and Others v Polish Judicial Authority* [2015] EWHC 1274 (Admin) at [5] – [13].

[126] The role of an appellate court where Article 8 ECHR issues are under appeal has been the subject of much judicial consideration, at both Court of Appeal and Supreme Court levels. The Supreme Court has considered this issue in two children's care cases, *In Re B* [2013] 1 WLR 1911 and by the Court of Appeal, again in children's cases, *In Re G* [2014] 1 FLR 670 and *In Re B – S* [2014] 1 WLR 563, at [75] – [83] particularly. The central theme emerging with most clarity from *In Re B* is the majority view of the Supreme Court that the exercise for the appellate court is to treat the first instance court's determination of the proportionality of an interference with one of the protected Convention rights as an appellate exercise rather than a *de novo* determination: see especially [35] – [36], [83] – [85], [93] – [94] and [205].

[127] The third of these four references is to the judgment of Lord Neuberger PSC which crafted a spectrum of seven points on which the trial judge's determination of proportionality might lie. The sixth and seventh of these points concern cases where the appellate court considers the first instance determination as either wrong or insupportable. The fourth and fifth points in the spectrum concern cases belonging to an intermediate grey area, in which, where appropriate, the reception of oral evidence at first instance will be a telling consideration. The first three points on Lord Neuberger's notional spectrum relate to cases where the appellate court considers the trial judge's determination of proportionality to be the only possible view or a view which the appellate court considers right or a view on which the appellate court, though entertaining some doubts, on balance considers to be the right one.

[128] It follows that cases in which an appellate court may reverse the first instance court's determination of proportionality include those where the court below misunderstood or misapplied the law, failed to have regard to some material fact or factors, took into account something immaterial or reached an irrational conclusion. While these are the touchstones formulated by Aikens LJ in *Re B (child)* [2013] 1911 at [66], they fall to be considered in light of Lord Neuberger's essay in the Supreme Court which envisages a wider role for the appellate court. To summarise, it may be said that the role of the appellate court lies somewhere between the two extremes of mere review and conventional appeal on another notional spectrum, with the inclination leaning more towards the former than the latter.

[129] It is of note that the decisions which we have considered immediately above also featured in *Celinski*, where one can identify a favourable emphasis on Lord Neuberger's formulation, notwithstanding the succeeding concise statement of Lord Thomas CJ at [24]:

> "*The single question therefore for the appellate court is whether or not the district judge made the wrong decision.*"

This sentence cannot be considered in isolation, in view of all that precedes it and what immediately follows:

> "*It is only if the court concludes that the decision was wrong, applying what Lord Neuberger PSC said, as set out above, that the appeal can be allowed.*"

Consistent with all of the foregoing, Lord Thomas added that demonstrated errors or omissions in the decision of the first instance court do not *per se* impel to the conclusion that its decision on proportionality was wrong. Rather (we would add) any aberration of this kind must be qualitatively assessed and then weighed in the context of the decision as a whole.

[130] There is clear authoritative guidance on the correct approach to section 14 of the 2003 Act in *Gomes v Trinidad and Tobago* [2009] UKHL 21, where the House of Lords endorsed fully its earlier decision in *Kakis v Government of Cyprus* [1978] 1 WLR 779. There Lord Diplock, with whom all other members of the judicial committee concurred, stated at page 785:

> *"'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there *783 is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them…*
>
> *As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So where the application for discharge under section 8 (3) is based upon the "passage of time" under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise."*

[131] Lord Diplock also highlighted (at p 784) that the gravity of the offence is relevant to the question of whether changes in the circumstances of the subject which have occurred during the relevant period are such as would render his return to stand his trial oppressive. In *Gomes* Lord Brown stated succinctly, at [31]:

> *"… The test of oppression will not easily be satisfied: hardship, a comparatively common place consequence of an order for extradition, is not enough."*

It would appear that only a deliberate decision communicated to the accused by the requesting state not to pursue him, or some other circumstance instilling a similar sense of security, could properly allow an accused to assert that the effects of further delay were not 'of his own choice and making' within the meaning of Lord Diplock's speech in *Kakis.*

[132] With regard to the discrete issue of delay (section 14 of the 2003 Act), we have the benefit of the recent consideration by this court of the relevant decided cases in *Republic of Ireland v AB* [2019] NICA 59 and the comprehensive summary of the government principles in the judgment of McBride J (with which all members of the court concurred) at [50]:

> "*(a) Delay in seeking extradition may reduce the weight to be attached to the public interest in extradition:- that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentence; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.*
>
> *(b) The public interest always carries great weight although the weight can vary according to the nature and seriousness of the crime or crimes involved.*
>
> *(c) The passage of time may impact on the nature and extent of the private and family life developed by the requested person in this country. The burden remains on the requested person to demonstrate by evidence the actual impact the delay has had on his family and private life.*
>
> *(d) Culpable delay on the part of the Requesting State is not determinative of either section 14 or Article 8. To be discharged under section 14 there must be evidence that the passage of time means that extradition is oppressive or unfair. In the Article 8 proportionality balancing exercise culpable delay is but one of the factors to be taken into account, along with all the other relevant factors which include;- the nature and seriousness of the offence(s), the public interest in extradition and the effect of the delay on the requested person and his family's private and family life.*
>
> *(e) Culpable delay alone cannot be determinative of the Article 8 balance otherwise Article 8 could be used to dilute or circumvent section 14.*
>
> *(f) The public interest in extradition will outweigh the Article 8 rights of the family unless the consequences of the interference will be "exceptionally severe".*
>
> *(g) In borderline cases, where the requested person is not a fugitive from justice, culpable delay on the part of the requesting state can tip the balance against extradition.*

> *(h) The requested court should not engage in what could be an invidious task of seeking to determine whether inaction on the part of the requesting state which resulted in delays was blameworthy or otherwise. It is only in very clear cut cases where there is obvious culpable delay that the court can use this in what is an otherwise borderline case to tip the balance against extradition*,"

[133] We have recognised above both the separate nature and the overlapping effect of the three components of this ground of appeal, namely section 14 of the 2003 Act, section 25 and Article 8 ECHR. As regards section 14, we accept Mr MacDonald's submission that the delay in the EAW process in this case, discounting the first two years and focusing on the ensuing seven years, is excessive. This assessment is based primarily on the *prima facie* inertia of the Lithuanian authorities during the period of some three and a half years which followed the discharge decision of the London court in February 2013. Any delay of these proportions is antithetical to certain of the principles on which the Framework Decision is founded. The same observation applies to a second discrete period of delay, again of over three years dimensions, which elapsed following the issue of the second EAW in September 2016. These delays must be reckoned in the context of the expedition principle, one of the cornerstones of the Framework Decision.

[134] Viewed superficially, this generates a temptation to condemn the conduct of the Lithuanian authorities as reprehensible. However, we consider this inappropriate, for two reasons. First, this court is not sufficiently equipped to make a critical assessment of this kind. We simply do not know the dense detail of the "story" between February 2013 and December 2019. Second, it is not the function of this court to engage in such an exercise in any event as a matter of principle, given that the language of sections 14 and 25 of the 2003 Act directs the attention of the court to the effect of delay on the requested person rather than its causes. This is reinforced unequivocally in the words of Lord Diplock in the binding decision of *Kakis*.

[135] Turning to s 25, one of the central planks of Mr M's case is his ill-health. This court does not underestimate the seriousness of the medical conditions described. However, the limitations of the medical evidence must be recognised. It consists of a single, relatively lean report lacking in assessment and commentary. There is no indication, for example, of anything especially crippling or disabling. There is no suggestion that Mr M's health would be unacceptably compromised in the event of being surrendered to Lithuania. Nor is there any indication that his ill health has either deteriorated during his recent period of incarceration or has had an especially adverse effect on him in prison. In addition there is no suggestion that Mr M would be deprived of any necessary family support should he be extradited. At first instance Judge Smyth concluded on this issue, at [25]:

> "*There is no evidence in this case which could satisfy the test of hardship, never mind oppression, which is a much higher standard.*"

This court agrees, without reservation.

[136] The potent public interest favouring extradition, as we have expounded this above, is the main unifying factor in the individual components which we have identified in this ground of appeal. The "added value" which Article 8 ECHR provides is the right to respect for Mr M's private life, which cannot be as clearly or readily invoked in his reliance upon sections 14 and 25 of the statute. The ingredients in this discrete equation are that Mr M has been living in the United Kingdom for a period of around ten years in total. Most recently, he was residing in Northern Ireland for some three years prior to his arrest. We accept that he has, presumptively, developed certain elements of private life during this period. However, nothing of any particular or unusual nature is identifiable in the evidence. While there is a private life dimension in his apparent geographic proximity to the home of his cousin and his cousin's family, there is no elaboration of this in the evidence. It is clear that he has no private life vis-à-vis a place of work, given the assertion that he has not been employed since 2014. Furthermore there is no indication of any private life in the contexts of, for example, club membership, church connections or community activities. Standing back, in Article 8 terms this is a frail, light weight case.

[137] Taking into account the three components of this ground of appeal there is an overall balancing exercise to be carried out by the court. On one side of the notional scales there is the potent public interest underpinning extradition with its various ingredients – *inter alia* the observance of inter-state extradition arrangements, the discouragement of flight to the United Kingdom on the part of convicted nationals of other states and the imperative of maintaining the rule of law in this jurisdiction. This court must also reckon the principles and values underpinning the Framework Decision. On the other side of the scales are Mr M's age, his impaired health, the delay in the EAW process and the time which he has spent in custody. This attenuated outline of the balancing factors draws attention to the merger and overlap noted above. The task for this court is to stand back and form an evaluative judgement, applying the principles identified above. Reminding ourselves that we undertake this exercise as an appellate court, we consider that this case clearly belongs to the initial points on Lord Neuberger's notional spectrum. Judge Smyth at first instance, having identified the three bars in play by reference to the relevant provisions of the 2003 Act, concluded, at [28] that –

> "*… the evidence in respect of these bars, either individually or collectively, falls far short of what would be required to refuse an order for extradition*"

This court concurs without qualification.

XIV. Procedural Issues

[138] Certain procedural issues arose out of the enquiries raised by the court in the context of Mr M's application to amend his Notice of Appeal to rely on the new ground based on the construction of the letter of 3 April 2020 and attachment. The court has construed these documents in a manner favourable to Mr M: see above. Furthermore, in light of the construction espoused by the court we have determined to allow Mr M's appeal and to discharge him in consequence.

[139] The enquiries raised by the court, in essence, related to the full panoply of powers available to it and the principles to be applied in determining the application to amend taking into account that section 27(4)(a) expressly contemplates that in an appeal under section 26 of the 2003 Act, a new issue may permissibly be raised and this court is empowered to allow the appeal on the basis thereof. The statute is silent on the test, or criteria, to be applied at the threshold stage.

XV. The Appellate Court's Powers

[140] Section 27 specifies only two powers available to the High Court namely to allow or dismiss the appeal. At the hearing the court contrasted this with the notably wider panoply of powers available to the Court of Appeal under section 38 of the Judicature (NI) Act 1978, in particular the power conferred by section 38(1)(b) to remit the appeal in whole or in part accompanied by such declarations or directions as the appellate court considers proper. Counsel for all parties co-operated fully with the court in the matter of providing further written submissions. The court considers that s 27 is properly to be viewed as the *lex specialis*. It is a self-contained jurisdictional provision found in a statutory code which purports to regulate comprehensively the role of the national courts in determining whether to accede to a surrender request in an EAW. This assessment is reinforced by the contrasting provisions in s 29 regarding remittal to the first instance court in cases where the requesting state is the appellant and succeeds before this court. In their further submissions none of the parties contested this analysis.

[141] This has certain consequences. First, in a case where this appellate court exercises its power to permit an appellant to either raise a new issue not canvassed at first instance or adduce new evidence not available at first instance, or both, this court will not have the benefit of the assessment and determination of the first instance court. In passing, where either of these phenomena arises in a case before the Court of Appeal this not untypically provides the impetus for the exercise of that court's statutory power of remittal, staying the appeal in the interim. On the other hand, the absence of a power of remittal furthers the Framework Decision principle of expedition – expressed in *inter alia* recital (5) - and is consonant with the time limits prescribed by Article 17.

[142] The second question raised by the court is directed to the procedural code governing applications for leave to appeal and appeals proper to this court under

sections 26 and 27 of the 2003 Act. The procedural code is contained in the general provisions of Order 55 of the Rules of the Court of Judicature which regulates the subject matter of appeals, references and applications under statutory provisions. The single judge procedure at the stage of applying for leave is prescribed by rule 17. In rule 22 there is a general provision applying Order 59, Rule 10 to extradition appeals to the High Court. By this route this court is endowed with "*… all the powers and duties as to amendment and otherwise of the High Court …*" in such appeals. While the powers of the High Court in relation to amendment, in Order 20, are *prima facie* geared towards actions involving writs and pleadings there is no hint in Order 59 Rule 10(1) that Order 20 does not apply to statutory appeals. We would add that if there were any doubt about this matter resort to the inherent jurisdiction of the High Court would be available, this being compatible with the principle noted in *Re Strojwas* [2012] NIQB 53 at [10].

[143] The next question is whether the court will permit the amendment pursued. We are unaware of any authority binding on this court prescribing any test or criteria for the exercise of this power. It is, plainly, a discretionary power. We consider that the overarching criterion must be the interests of justice, as assessed by the court. It would also be appropriate for this court to take into account any demonstrable prejudice to the respondent requesting state and any available mechanisms for addressing this. In the instant case no issue of such prejudice arises. Finally, in the context of the present case, the court must take into account that fundamental human rights are in play and by virtue of section 6 of the Human Rights Act 1998 this court must not act incompatibly with Mr M's rights under Article 3 ECHR. We must also take into account that section 27 of the 2003 Act does not give this court the option of remitting an appeal to the first instance court for the purpose of adjudicating on the new argument raised. Balancing all of the foregoing factors we exercise our discretion by permitting the amendment sought.

[144] We shall examine in a little more detail the constraints and principles governing the exercise of this court's discretionary power to permit amendment of the grounds of appeal. We consider that six touchstones are readily identifiable. First, by well-established principle, the High Court exercises a broad (though not unfettered) discretion in matters of amendment. Second, we consider that the court should be guided by the overarching principle of the interests of justice. Third, in cases where Convention rights are in play the court must avoid acting incompatibly with its duty as a public authority under section 6 of the Human Rights Act. Fourth, the court will take into account any compromise of the principle of expedition which may be occasioned by allowing an amendment. Fifth, the court will consider whether any real, tangible prejudice to the respondent would result from permitting an amendment. Mere inconvenience or discomfort will not suffice in this regard. Finally, the court must take into account that the applicable primary legislation specifically permits at the appeal stage the introduction of a new issue and/or the adduction of new evidence. It would seem far from fanciful to suggest that the rationale of section 27(4)(a) is at least partly a reflection of the operation of the principle of expedition at first instance which, in the real world of litigation, runs the

risk that a material issue may not be raised or material evidence may not be available at first instance.

[145] We would add, for clarity, that the last of the six touchstones identified in [144] above will not arise in any case where the proposed amendment is unrelated to section 27(4)(a). This would be the case where, for example, an appellant having filed and served his notice of appeal identifies, on further reflection, a new ground for challenging the first instance decision. This analysis also applies to the first limb of section 27(4)(a). In both instances it is appropriate to recall that procedural powers are the handmaidens of justice. They are designed to be exercised to further the ends of justice rather than punish a party or its legal representative.

[146] Balancing everything set forth in [140] – [145] above, we exercise our discretion by permitting the amendment sought. To decline to do so would be manifestly antithetical to the interests of justice, fundamentally as the amendment concerns the centrepiece of Mr M's appeal and would be in dereliction of the court's duty under section 6 of the Human Rights Act.

[147] Having noted in particular the further submissions on behalf of the respondent state, we consider that the appropriate construction of section 27(4)(a) is the following:

(i) The delimiting, or qualifying, words "*that was not available at the extradition hearing*" apply only to the new evidence gateway.

(ii) The first limb of section 27(4)(a) must be considered in conjunction with section 27(4)(b) and (c).

(iii) Thus where the High Court, on appeal, permits an appellant to raise a new issue the court will, ultimately, have to confront and answer two questions. First, would the new issue, if considered at first instance, have resulted in the appropriate judge deciding a question before him differently? Second, if the appropriate judge had decided the question in a different manner, would he have been required to order the person's discharge?

(iv) We consider that it must lie within the discretionary procedural purview of the High Court to adopt one of at least two procedural courses. Selecting the appropriate option will depend on, *inter alia*, certain imponderables: in particular whether the new issue is proactively raised before or the date of the hearing; or arises, unexpectedly from judicial intervention; or is the subject of a pre-hearing direction by the court to formulate the new case by the mechanism of an amendment of the Notice of Appeal or otherwise.

(v) Further to (v), the first procedural course available to the court will be

to make a formal ruling - before, at the outset of or in the course of the hearing – permitting the new issue to be raised. Where this occurs, the court will be neither addressing nor answering either of the two further questions enshrined in section 27(4)(b) and (c).

(vi) Alternatively, there may be cases where, for whatever reason, the "new issue" consideration does not arise until after the hearing. In such cases the court will have at its disposal the option of, subject to observing the requirements of procedural fairness, dealing with the matter in a "rolled up" fashion in its judgment.

(vii) We decline to rule out the possibility that there may be more than the two procedural options identified immediately above.

[148] The parties' diligent further resources have brought to the attention of this court a number of cases in which the first limb of section 27(4)(a) has arisen. These are all decisions of the High Court of England and Wales. We note that these cases do not speak with one voice. Consistent with our breakdown of the correct construction of section 27(4)(a) above and taking into account that none of the English decisions is as a matter of precedent binding on this court:

(i) We prefer the line of authority constituted by *Hoholm v Norway* [2009] EWHC 1513, *Soltysiak v Judicial Authority of Poland* [2011] EWHC 1338 Admin, *Krajewski v Poland* [2011] EWHC 1068 at [13] especially, *Adedji v Germany* [2012] EWHC 3237 and *Troka v Government of Albania* [2020] EWHC 408 (Admin).

(ii) We consider that the main competing decision, that of *Khan v Government of USA* [2010] EWHC 1127 is based on a misconstruction of the relevant statutory provisions. Furthermore, we would reject the austerity of the position espoused in *Koziel v District Court of Kielce Poland* [2011] EWHC 3781 (Admin) at [11].

[149] We are satisfied that the approach which we have adopted above is compatible with the principles of promptitude and expedition. Furthermore it provides a model which can be properly applied so as to ensure that there is no misuse of the appellate process of the High Court.

XVII. Our Conclusions

[150] We take into account that it has been held that this court must have "*a very high respect for the findings of fact*" and the evaluation of the expert evidence of the first instance court. See *United States of America v Giese (Number 1)* [2015] EWHC 2733 (Admin) at [15]. In the same case it was stated that the first instance decision "*… can be successfully challenged if it is demonstrated that it is 'wrong'*". To like effect is the decision in *Dzgoey v Russian Federation* [2017] EWHC 735 (Admin) at [23] – [24].

While neither of these decisions is binding as a matter of precedent on this court, we draw attention to them given our understanding that they espouse the approach which has been generally adopted in this court in appeals under section 26 of the 2003 Act. That said, as an analysis of this judgment will demonstrate, the philosophy which they espouse is of limited application to these two appeals.

[151] We conclude:

(i) The appeal of Mr M succeeds under Article 3 ECHR.

(ii) The appeal of Mr M under sections 14, 21 and 25 of the 2003 Act and Article 8 ECHR is dismissed.

[152] The effect of the foregoing is that Mr M, who is in custody, is entitled to discharge, subject to the statute and further submissions so far as required.

ADDENDUM

[153] Following delivery of this judgment, the appellant applied to the court to certify a question of law of general public importance and to grant leave to appeal to the Supreme Court. Section 32 of the Extradition Act 2003 provides in material part:

> "*(1) An appeal lies to the Supreme Court from a decision of the High Court on an appeal under section 26 or 28.*
>
> *(3) An appeal under this section lies at the instance of –*
>
> *(a) the person in respect of whom the Part 1 warrant was issued;*
>
> *(b) the authority which issued the Part 1 warrant.*
>
> *(3) An appeal under this section lies only with the leave of the High Court or the Supreme Court.*
>
> *(4) Leave to appeal under this section must not be granted unless –*
>
> *(a) the High Court has certified that there is a point of law of general public importance involved in the decision, and*
>
> *(b) it appears to the court granting leave that the point is one which ought to be considered by the Supreme Court.*
>
> *(5) An application to the High Court for leave to appeal under this section must be made before the end of the permitted*

period, which is 14 days starting with the day on which the court makes its decision on the appeal to it.

(6) An application to the Supreme Court for leave to appeal under this section must be made before the end of the permitted period, which is 14 days starting with the day on which the High Court refuses leave to appeal."

[154] By this application the requesting state invites the court to take the twofold course of (a) certifying that the three questions reproduced below are questions of law of general public importance and (b) granting leave to appeal to the Supreme Court.

1. *Did the court err in law in failing to apply the approach outlined by the CJEU in C-128/18 Dorabantu insofar as it gave no weight to the content of the specific assurances provided by the issuing judicial authority on 13th May 2021 in response to the request for further information dated 19th March 2021?*

2. *Did the court err in law and misapply Dorabantu by placing reliance upon the failure to provide assurances in respect of inter-prisoner violence and the transmission of HIV and/or Hepatitis C when such assurances had not been sought from the issuing judicial authority?*

3. *Did the court err in law in the application of section 27(4)(a) of the Extradition Act 2003 in that it should have followed the approach of the court in Khan v Government of USA [2010] EWHC 1127?*

[155] The court considers that the terms in which the three proposed certified questions are couched convey that the challenge mooted by the requesting state belongs to a plateau falling markedly short of that of any question of law of general public importance. Each of the three questions asks, in different ways, whether this court committed an error of law in the fact specific and litigation sensitive context of this appeal.

[156] Furthermore each of the first two proposed questions, by their terms, specifically ask whether this court erred in law in matters of *the attribution of weight* to certain aspects of the fact sensitive matrix of this appeal.

[157] The third of the three proposed questions draws to the attention of this court, for the first time, the decision of the English High Court in *Khan v United States of America* [2010] EWHC 1127 (Admin). It impliedly suggests that this court ought to

have followed the approach in that case and failed to do so. It does so without elaboration or particularisation. It does not suggest that *Khan* is authority for some proposition to which this court, erroneously in law, failed to give effect. It makes no attempt to relate *Khan* to decisions which, as a matter of precedent, are binding on this court. Notwithstanding all of the foregoing, this court has examined the decision in *Khan* having done so, is unable to distil anything therefrom suggestive of any arguable error of law, much less one having the special character of an error entailing a point of law of general public importance, in its decision.

[158] For the reasons given, the court discerns no merit in the application and refuses to certify either in the terms proposed or in other related terms. It follows necessarily that leave to appeal to the Supreme Court is refused.