Neutral Citation Number: [2022] EWHC 1094 (Admin)

Case No: CO/3234/2020 & CO/818/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2022

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE SWIFT

- -

Between:

OLEGAS BAZYS	**1st Applicant**
ARTŪRAS BESAN	**2nd Applicant**
- and –	
THE VILNIUS COUNTY COURT, REPUBLIC OF LITHUANIA	**1st Respondent**
PROSECUTOR GENERAL'S OFFICE, LITHUANIA	**2nd Respondent**

- -

Jonathan Hall QC and Saoirse Townshend (instructed by **Taylor Rose MW**)
for the **1st Applicant**
Jonathan Hall QC and Louisa Collins (instructed by **Dalton Holmes Gray**)
for the **2nd Applicant**
Hannah Hinton and Stefan Hyman (instructed by **the CPS Extradition Unit**)
for the **Respondents**

Hearing dates: 9, 10 February 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:00 on Wednesday 11 May 2022.

Lord Justice Holroyde:

1. Each of these cases raises issues as to prison conditions in Lithuania, and as to the reliability of assurances given by the Republic of Lithuania in the context of extradition proceedings pursuant to Part 1 of the Extradition Act 2003 ("the Act"). Although otherwise unconnected, they have for that reason been listed for hearing together. For convenience, I shall refer to the individual Applicants by their names, and to the Respondent judicial authorities collectively as "the Respondents".

A. Introduction

(1) The criminal proceedings in Lithuania

2. It is sufficient, for present purposes, to note the following.

3. Mr Bazys, now aged 24, was convicted in Lithuania on 16 February 2015 of an offence of rape. Whilst subject to a suspended sentence for that offence he committed an offence of robbery, of which he was convicted on 5 December 2016. His final total sentence was 4 years 9 months' imprisonment, of which all but one day remains to be served.

4. Mr Besan, now aged 25, is accused of offences of swindling, unlawful connection to an information system and unlawful use of an electronic means of payment or data. Those offences are said to have been committed in early 2018. The charges carry maximum sentences of 3 years', one year's and 6 years' imprisonment respectively.

(2) The extradition proceedings

5. A conviction European Arrest Warrant ("EAW") was issued against Mr Bazys by the District Court of Vilnius City on 13 April 2017. It was certified by the National Crime Agency ("NCA") on 25 April 2017. Mr Bazys was arrested on 18 October 2018, but the extradition case was adjourned because he was then subject to criminal proceedings in this country which ultimately resulted in a prison sentence. He has remained in custody since completing that sentence. On 4 September 2020 his extradition was ordered by District Judge (Magistrates' Courts) ("DJ") Blake.

6. One of the issues raised before the DJ by Mr Bazys was that his extradition was barred by section 21 of the Act and article 3 ("art. 3") of the European Convention on Human Rights ("ECHR"), on the basis that he faced a risk of reprisals in prison from non-state actors, and a risk that the conditions in which he would be detained in Lithuania would infringe his right under art. 3 not to be "subjected to torture or to inhuman or degrading treatment or punishment". It was submitted on his behalf that conditions in Lithuanian prisons had worsened since they were considered by a Divisional Court (Irwin LJ and Supperstone J) in *Bartulis v Lithuania* [2019] EWHC 3504 (Admin) (*"Bartulis"*), to which I will refer later in this judgment. In a detailed and careful judgment, the DJ set out the evidence and submissions at length, considered Mr Bazys' "vulnerabilities and fragile mental health", and concluded that there was no real risk that Mr Bazys' art. 3 rights would be infringed. The DJ accepted that there were legitimate concerns with regard to prison conditions in Lithuania, but he noted that Lithuania had addressed the concerns and did not accept the submission that there was any need to seek further information from the requesting judicial authority. He accepted that an assurance given

in April 2020 (to which also I refer below) was sufficient to meet any concerns as to the treatment of Mr Bazys.

7. An accusation EAW was issued against Mr Besan by the Prosecutor General's Office of the Republic of Lithuania on 29 April 2019. It was certified by the NCA on 12 November 2020. Mr Besan was arrested on 12 November 2020 and has remained in custody since that date. On 3 March 2021 DJ Bristow ordered his extradition.

8. Before the DJ, Mr Besan did not raise any issue under art. 3.

(3) The applications to this court

9. Mr Bazys' application for leave to appeal against DJ Blake's order was refused on the papers on 3 December 2020. His application was renewed to an oral hearing, but then stayed to await the outcome of another appeal, *Bernotas v Lithuania*, to which I shall refer shortly. Directions were subsequently given that the renewed application be listed for a rolled-up hearing, with the appeal to follow if leave be granted.

10. Mr Besan applies for leave to appeal against the decision of DJ Bristow. In his case also, directions have been given for a rolled-up hearing.

11. Both applicants seek to rely on fresh evidence. Those applications are opposed. If they succeed, the Respondents apply to rely on fresh evidence in response. That application is not opposed.

B. The legal framework, and the relevant assurances

12. Before coming to the grounds of appeal, it is convenient to summarise the relevant legal principles and then refer, so far as possible in chronological order, to the most important of the case law to which this court was referred, and the relevant assurances which have been given by Lithuania. In considering those assurances, it is necessary to distinguish between remand prisons, which hold those awaiting trial in Lithuania and may also hold, for a period of up to 10 days, an offender who has very recently been convicted; and "correction houses", in which convicted adult males serve sentences of imprisonment. Many of the convicted prisoners serving their sentences in correction houses are accommodated in dormitory-type blocks rather then cells.

13. I consider the following principles to be well established by case law including *R(Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, *Dorobantu v Romania* (case C-128/18) ("*Dorobantu"*), *ML* [2018] EUECJ C-220/18PPU, [2019] 1 WLR 1052 and *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14, [2021] 1 WLR 2569 (*"Zabolotnyi"*). Extradition will be refused if there are substantial grounds for believing that the requested person, if returned to the requesting state, faces a real risk that he will be subjected to inhuman or degrading treatment in prison such as to infringe his art. 3 rights. However, if the requesting state is a signatory to the ECHR and a member of the Council of Europe, there is a strong presumption that it will comply with its obligations under art. 3. That presumption may be rebutted by clear, cogent and compelling evidence, amounting to something approaching an international consensus, for example in a pilot judgment of the European Court of Human Rights ("ECtHR") which identifies structural or systemic failings. If the benefit of the presumption is lost as a result of such internationally authoritative evidence, the requesting state must show

by cogent evidence that there will be no real risk of a contravention of art. 3 in relation to the particular requested person in the prisons in which he is likely to be detained. An assurance as to the circumstances in which the requested person will be held may be sufficient to exclude any such risk. Where an assurance is given or endorsed by the requesting judicial authority, it must be relied on by the executing judicial authority unless there are specific indications that the detention conditions in a particular prison in which the requested person is likely to be held will infringe art. 3. Where (as in this case) the assurance is provided by a non-judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority. There is no rule requiring evidence of any particular type or quality, or setting out any hierarchy of the factors listed in *Othman v UK* (2012) 55 EHRR 1 (*"Othman"*), in carrying out such an assessment.

(1) Jane (no.1)

14. In *Jane v Lithuania* [2018] EWHC 1122 (Admin) ("*Jane (no 1)"*) the appellant appealed against an order for his extradition pursuant to an accusation EAW. He had contended that there was a real risk that his rights under art. 3 would be infringed because of a threat of violence by a non-state agent and/or because of conditions in Lithuanian remand prisons generally. The Divisional Court (Hickinbottom LJ and Dingemans J, as he then was) reviewed previous case law which showed that there was an international consensus that there was a real risk of treatment contrary to art. 3 in Lukiškės and Šiauliai remand prisons, principally because of overcrowding and very bad living conditions. It therefore became incumbent upon Lithuania to demonstrate by clear and cogent evidence, that prison conditions had improved to such an extent that the previous view should not prevail.

15. The Divisional Court held that the DJ had fallen into error because Lithuania had failed to adduce any such evidence. It considered fresh evidence, including the evidence of a Lithuanian lawyer Mr Liutkevičius (who is the Chief Legal Officer of the Human Rights Monitoring Institute, and has conducted extensive research into the protection of human rights in the Lithuanian criminal justice system), and a report published in 2018 by the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") on conditions in remand prisons. The Divisional Court concluded that, although Lithuania had taken commendable steps to improve conditions in remand prisons, there remained a real risk that a surrendered person held in Lukiškės or Šiauliai remand prison would suffer inhuman or degrading treatment contrary to art. 3. The appeal was then stayed, in accordance with the procedure laid down by the Court of Justice of the European Union ("CJEU") in *Criminal proceedings against Aranyosi* (Case C-404/15) [2016] QB 921 (*"Aranyosi"*), to enable Lithuania to put forward further assurances.

16. Further assurances were given. By a letter to the Crown Prosecution Service ("CPS") dated 7 August 2018, the Director General of the Prison Department under the Ministry of Justice of the Republic of Lithuania issued an assurance and guarantee applicable, during their detention, to all persons surrendered from the United Kingdom pursuant to an EAW for the purpose of a criminal prosecution or the execution of a sentence. It said:

> "1. All persons surrendered under an accusation warrant from the United Kingdom will be held in Kaunas Remand Prison,

> Lukiškės Remand Prison-Closed Prison or Šiauliai Remand Prison, whereby they will be guaranteed a minimum space allocation of no less than 3 square metres per person and held in compliance with Article 3 of the European Convention on Human Rights.
>
> 2. Persons surrendered under a conviction warrant that may spend a maximum of 10 days at one of the remand centres set out in clause 1 will be subject to the same guarantees and will be housed in cells with a minimum space allocation of no less than 3 square metres per person in compliance with Article 3 of the European Convention on Human Rights.
>
> 3. All persons held in Lukiškės Remand Prison-Closed Prison or Šiauliai Remand Prison as per clause 1 and 2 above will only be held in the refurbished or renovated parts of the prisons and in compliance with Article 3 of the European Convention on Human Rights."

(2) Jane (no.2)

17. Mr Jane's appeal then came back before the Divisional Court. In *Jane v Lithuania* [2018] EWHC 2691 (Admin) (*"Jane (no 2)"*) the court concluded that the appellant was likely to be detained on remand at Lukiškės Remand Prison, and held that the terms of the August 2018 assurance sufficed to show that there would be no real risk that the appellant would there be subjected to impermissible treatment.

18. By a further letter to the CPS, dated 8 July 2019, the Deputy Director of the Prison Department provided a general assurance applicable to all persons surrendered to Lithuania from the United Kingdom for the purpose of a criminal prosecution or execution of a sentence of imprisonment:

> "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 of the European Convention on Human Rights.
>
> 2. All persons surrendered will not be required to serve any part of their sentence at unrenovated premises (blocks/wings) of Alytus Correctional House, Marijampolé sector (subdivision) of Marijampolé Correctional House and sector no 1 and no 2 of Pravieniškės Correctional House-Open Prison Colony.
>
> 3. All persons surrendered from the United Kingdom will be detained in conditions reducing a risk to inter prisoner violence/disease transfer and drug influences.
>
> 4. All persons surrendered from the United Kingdom will be guaranteed the protections of the European Convention on Human Rights.

> 5. Persons surrendered will be housed in cell-type accommodation, where possible."

(3) Bartulis

19. In *Bartulis* the Divisional Court heard three appeals against orders for extradition to Lithuania pursuant to accusation or conviction EAWs. Their grounds of appeal related to what were said to be inhuman and degrading conditions at three male prisons, namely Alytus, Marijampolé and Pravieniškēs Correction Houses, and in particular to whether the Lithuanian authorities could adequately protect extraditees against the risk of violence by other prisoners. Such violence had been prevalent because of a dangerous "caste system" which formed part of the prisoners' sub-culture, and was at least partly related to the use of dormitory-style accommodation in the correction houses.

20. The court considered a report on the Lithuanian prison estate published by the CPT in June 2019, following visits to Lithuanian prisons in April 2018, which found – amongst other very unsatisfactory features - "truly extraordinary levels of inter-prisoner violence intimidation and exploitation", and incidents of excessive force being used by prison staff. The court also considered an action plan, approved on 27 September 2018, which the Lithuanian government had developed in response to the CPT's findings. It considered further information and assurances from Lithuania, and fresh evidence as to prison conditions, including a report dated 13 September 2019 by Mr Liutkevičius.

21. The court concluded, at [118], that the problems of the "caste system" and of inter-prisoner violence were real, not fanciful. The nature of the accommodation in correction houses was important, because unofficial hierarchies are better able to operate in dormitory-style accommodation, particularly when (as was the case) staffing levels were low. Lithuania had, however, responded positively to the CPT 2019 report. Although the steps thus far taken, or in hand, had not abolished the problem completely, the court at [121] considered that they constituted an adequate response. The court referred in particular to the allocation of specific funding; the increase in front-line staffing; the existing and planned refurbishments; the displacement of ring-leaders and their assistants; the reduction in the prison population, which gave the prison authorities more flexibility as to the moving of prisoners; the ready access by prisoners to lawyers and the domestic courts; and the heightened focus on the problem, which meant that Lithuania was well aware of the impact if an extradited person were to suffer serious harm.

22. At [125] – [127] the court concluded:

> "125. There is no consensus amongst Member States that the presumption is lost. There is no evidence that another Member State had declined to extradite to these three correction houses. There is no "pilot judgment' from the ECtHR concerning Lithuanian correction houses.
>
> 126. Taking all these factors together, we conclude, after a careful 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.

> 127. Given our conclusion on the presumption, we are not in the position of seeking to rely on the assurances offered. It is important nevertheless to stress that, once given, they must be adhered to in respect of any prisoner extradited from the UK to Lithuania, since the terms of the assurances are offered expressly to all such. Breach of such assurances might prove significant in future."

23. The appeals based on alleged breaches of art. 3 were therefore dismissed.

24. Lukiškės remand prison was closed in July 2019. Thus for present purposes, the effect of the three decisions to which I have referred is that Lithuania has lost the benefit of the presumption of compliance with art. 3 in relation to the only remand prison where Mr Besan is likely to be held, namely Šiauliai (*Jane (no.1)*), but the August 2018 assurance has been held to be sufficient to exclude any real risk of a breach of art. 3 rights (*Jane (No. 2)*). Lithuania has not lost the benefit of the presumption in relation to detention in a correction house.

(4) The assurance of 3 April 2020

25. Subsequent to the decision in *Jane (no. 2)*, the Director General of the Prison Department informed the CPS, by a letter dated 3 April 2020 that, in view of the danger caused by the spread of Covid-19, the guarantees given on 7 August 2018 and 8 July 2019 would no longer be applied. In their place he issued a new assurance applicable to all persons surrendered from the United Kingdom pursuant to an EAW for the purpose of a criminal prosecution. The material part of this assurance, which remains in force, is in the following terms:

> "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 of the European Convention on Human Rights.
>
> 2. All persons surrendered from the United Kingdom, if held in Šiauliai Remand Prison, will only be held in the refurbished or renovated parts of the prison and in compliance with Article 3 of the European Convention on Human Rights.
>
> 3. All persons surrendered from the United Kingdom, if convicted, that may spend a maximum of 10 days at Šiauliai Remand Prison will be subject to the same guarantees as contained in clauses 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 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."

The final paragraph of that letter has been referred to as "the Covid caveat", and I shall adopt that convenient shorthand term.

26. In Mr Bazys' case, the DJ wrongly understood that that assurance applied not only to those held in remand prisons in Lithuania but also to those serving sentences in correction houses. In May 2021 Lithuania confirmed that the 3 April 2020 assurance applies only to those surrendered pursuant to accusation EAWs: clauses 1 and 2 relate to surrendered persons whilst on remand, clause 3 relates to the same persons when they become inmates following conviction. The assurance does not refer to those surrendered under conviction EAWs. It is therefore relevant to Mr Besan's case but not to Mr Bazys' case.

(5) Gerulskis

27. The assurance of 3 April 2020 was considered by a Divisional Court in *Gerulskis v Prosecutor General's Office of the Republic of Lithuania* [2020] EWHC 1645 (Admin) ("*Gerulskis*"). The appellants in that case argued that the court could not have any confidence in assurances provided by Lithuania, having regard to evidence that assurances had been breached in particular cases, including that of Mr Jane, and having regard also to the Covid caveat. The court (Dingemans LJ and Garnham J) rejected those submissions, and concluded that there was nothing to suggest a real risk of treatment contrary to art. 3 if the appellants were extradited to Lithuania.

28. It was held, at [52], that the only proven breach was that Mr Jane had been held at a remand prison other than those identified in the assurance dated 7 August 2018. However, the most material part of the assurance, that relating to personal space, had been honoured, and Mr Jane had not suffered treatment in breach of art. 3. In those circumstances, the breach of the assurance was not such as would justify the court ignoring the assurances given by Lithuania.

29. As to the Covid caveat, Dingemans LJ at [58] expressed concern that the wording of a letter dated 3 April 2020 suggested that Lithuania did not feel bound to honour assurances given to the courts of England and Wales, but concluded that the general assurance given on that date confirmed the most material assurances (as to personal space and as to extradited persons only being held in the refurbished or renovated parts of Šiauliai remand prison) and showed that there was no real risk of impermissible treatment contrary to art 3. There was nothing to suggest that the assurances provided by the Prison Department of the Ministry of Justice should be either discounted or ignored.

30. Dingemans LJ went on to say, at [60], that -

> "… Lithuania's practice of providing general assurances, and then replacing them as prison conditions improve, risks creating problems of technical breaches of assurances. An assurance about an individual prisoner, once given, must be complied with until the expiry of the prisoner's sentence of imprisonment."

31. However, on the facts, the court concluded that there was nothing to suggest a real risk of impermissible treatment contrary to art. 3 if Mr Gerulskis, or another appellant whose appeal was heard at the same time, were extradited to Lithuania.

32. In a letter dated 8 February 2021, the Prison Department gave an assurance that Mr Bazys, and a number of other men whose extradition from the United Kingdom was sought pursuant to convictions EAWs, would not serve their sentences in Šiauliai remand prison if surrendered. This was because of a national regulation which provided that only persons who had been sentenced to more than 10 years' imprisonment could be allocated to serve their sentences in Šiauliai remand prison.

33. The appellant in *Bernotas v Lithuanian Judicial Authority* [2021] EWHC 1410 (Admin) (*"Bernotas"*) was one of those named in the letter of 8 February 2021. It was submitted on his behalf that there was a real risk that he would suffer treatment in breach of art. 3, because that letter did not rule out a convicted extraditee being sent to a remand prison for up to 10 days after his surrender, before being allocated to a correction house. There was therefore a real risk that the appellant would serve part of his sentence at Šiauliai Remand Prison. Chamberlain J rejected that submission: he held that the assurance given in that letter was an assurance that the appellant would not serve any part of his sentence at Šiauliai, "not even a few days at the start".

34. In a letter of December 2021, Lithuania reiterated that persons surrendered pursuant to a conviction EAW, sentenced to less than 10 years' imprisonment, will not be allocated to serve their sentences in Šiauliai remand prison.

(6) Zabolotnyi

35. In *Zabolotnyi* the Supreme Court confirmed, at [44], that even if a requesting state which is a party to the ECHR and a member of the European Union has lost the benefit of the general presumption that it will comply with its obligations under article 3 in relation to its prison estate as a whole, "it will still normally enjoy a presumption that it will comply with specific assurances given in individual cases."

36. At [46] Lord Lloyd-Jones, with whom the other Justices agreed, added that –

> "In deciding whether an assurance can be relied upon, evidence of past compliance or non-compliance with an earlier assurance would obviously be relevant. A state's failure to fulfil assurances in the past may be a powerful reason to disbelieve that they will be fulfilled in the future. … The weight to be attached to a previous breach of assurance would be likely to vary from cases to case depending on all the circumstances, including how specific the previous assurance was and whether the breach was deliberate or inadvertent."

Lord Lloyd-Jones made clear that a past breach of an assurance is relevant, whether the assurance concerned was given to the United Kingdom or to a third state. The important question is whether the evidence of previous breach(es) is "sufficiently cogent to rebut the presumption" that the assurance under consideration can be relied upon: see [63].

(7) Michailovas

37. This court's attention was also invited to *Michailovas v The Republic of Lithuania* [2021] NIQB (*"Michailovas"*), a decision of the High Court of Justice in Northern Ireland. The court in that case conducted a detailed review of evidence relating to

prison conditions in Lithuania and of the case law (including the English cases which I have summarised above). It held, at [94], that the effect of the assurances given on 3 April 2020 was that those whose return was requested pursuant to a conviction EAW were excluded from the new guarantee and would not have the benefit of any of the assurances or guarantees which had previously been given by Lithuania.

38. The court concluded, at [117], that there were substantial grounds for believing that surrender of the appellant to Lithuania pursuant to a conviction EAW would expose him to a real risk of inhuman or degrading treatment in breach of art. 3:

> "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 communications, the Lithuanian Government, from April 2020, has found itself in the position of being unable to provide any 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."

(8) The actions of non-state agents

39. Turning to the issue of harm caused by other prisoners, it is clear from the decisions of the House of Lords in *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 2 AC 668 and of the Supreme Court in *Lord Advocate (representing the Taiwanese Judicial Authorities) v Dean* [2017] UKSC 44, [2017] 1 WLR 2721, that it is not sufficient, to bar extradition, to show a real risk of such harm. The test is whether the state has failed to provide reasonable protection against harm inflicted by non-state agents.

C. The grounds of appeal

40. Mr Bazys contends that the DJ fell into error because the Respondent allowed him to reach his decision in the belief that the assurance of 3 April 2020 applied to a person returned pursuant to a conviction EAW. Since it did not, the DJ should have found that extradition was barred by section 21 of the Act and art. 3, because there is a real risk that if extradited to Lithuania and held in a correction house Mr Bazys would be subject to inhuman and degrading treatment, particularly in the light of his mental health difficulties. It is Mr Bazys' case that he would be at high risk of being attacked by prisoners associated with two men whom he fears, named as Janus Buchel and "Sasha".

41. Mr Besan did not raise any issue in relation to art. 3 before the DJ, but now contends that fresh evidence shows that his extradition would not be compatible with his art. 3 rights.

42. Both Applicants contend that there is a real concern that the assurance dated 3 April 2020 cannot be relied upon because Lithuania has acted in breach of assurances in relation to other requested persons.

D. The fresh evidence applications

43. The Applicants seek to rely on five new matters. The first is a statement dated 30 March 2021 by Guy Jane (the appellant in *Jane (nos 1 & 2)*), who describes the very poor conditions which he says he experienced both in Šiauliai remand prison and Pravieniškės correction house, and says that inter-prisoner violence was a daily event.

44. Secondly, they seek to rely on replies given by Aivaras Skudris and Tomas Ovsianikovas, each of whom was extradited to Lithuania, to questionnaires drafted by Mr Bazys' solicitors. Each complains of very poor conditions and frequent inter-prisoner violence at Šiauliai remand prison.

45. Thirdly, they seek permission to rely on further documents provided by Mr Ovsianikovas relating to the complaints he says he made to the governor of Šiauliai remand prison (about conditions generally) and to the Seimas Ombudsmen (about conditions in a small cell to which he was moved in October 2021). As a result of an oversight in the solicitors' office, this material was only served on the day of the hearing.

46. Fourthly, they seek to reply on the annual report for 2020 (published on 15 March 2021) of the Seimas Ombudsmen's Office of the Republic of Lithuania, which is the National Human Rights Institution monitoring human rights, including those of prisoners, in Lithuania. This report, at p38, noted serious problems affecting the prison estate generally: although the reduction in the number of persons held in prison facilities reflected positive efforts made by the State to address detention problems, inadequate detention conditions and insufficient efforts to modernise prison facilities remain a serious problem for the country. The Ombudsmen referred to Šiauliai remand prison as being in extremely poor condition, and said that their investigations there into a complaint made in 2019 found numerous breaches of public health and safety regulations.

47. Lastly, the applicants seek permission to rely on a report dated 13 October 2021 by Mr Liutkevičius, who is relied on as an expert witness. This was originally prepared in relation to the appeal of another requested person, whose appeal was subsequently withdrawn, and has been made available to those representing the Applicants.

48. Mr Liutkevičius acknowledges at the start of his report that –

> "I have limited first-hand knowledge and experience of conditions in penitentiary institutions: I have conducted visits to several police arrest-houses across Lithuania, and to Lukiškės Remand Prison, in 2018. My expert's knowledge and this report relies first and foremost on information gathered from witnesses and legal practitioners' accounts (in the form of complaints, interviews and informal conversations), court decisions, press reports, state agencies' reports, freedom of information requests, and reports and accounts of non-governmental organisations."

49. Mr Liutkevičius states that a person extradited to Lithuania pursuant to a conviction EAW would initially be held, for up to 10 days, in a cell in a remand prison, and would then serve his sentence in a correction house. He describes what are reported to be very

poor living conditions at Šiauliai remand prison and says that national courts "routinely" find violations of conditions of detention at that prison. These principally involve unhygienic conditions (including complaints of mould on the walls, lack of light, high humidity, inadequate heating, a foul smell and in some cases crumbling plaster on the walls) and a lack of privacy (due to lavatories being inadequately partitioned). Mr Liutkevičius refers to such findings continuing into 2020. He also refers to reports of poor living conditions at all the correction houses, and says that the number of complaints by prisoners detained in correction houses has steadily increased between 2016 and 2020. He refers to reports of a high incidence of inter-prisoner violence in correction houses, giving examples of particularly severe assaults, and says that press reports describe some prison officers assisting to enforce the caste system. He goes on to describe the difficulty he has experienced in trying to assess the extent to which the September 2018 action plan has been implemented, and expresses scepticism as to whether the planned measures will be sufficient to curb the caste system.

50. In response to these applications, the Respondents seek to rely on:

i) Further information provided in October 2021 by the Director General of the Prison Department, Virginijus Kalikauskas, which challenges in detail the allegations made in Mr Jane's statement.

ii) Further information provided by Mr Kalikauskas in December 2021, which challenges in detail the allegations made by Messrs Ovsianikovas and Skudris.

iii) The action plan approved on 27 September 2018, as updated in preparation for a visit by the CPT in December 2021.

iv) Supplementary information provided on 5 January 2022 in response to a schedule in which the Applicants listed all allegations of breach of assurances which had not previously been answered.

E. The submissions

51. On behalf of the Applicants, Mr Hall QC submits that the assurances currently applicable in each case are inadequate, because of the risk of inter-prisoner violence in dormitory blocks and because of inhumane conditions of detention throughout both the remand and conviction estate. He accepts that it would be unrealistic to invite the court to grant leave to appeal and allow the appeals, but submits that the court should seek further assurances in relation both to prison conditions and inter-prisoner violence, and should request information about how the assurances operate in practice within the Lithuanian prison system.

52. In relation to Mr Bazys, it is submitted that the decision in *Bartulis* should be reconsidered, for two reasons: first, because Lithuania's implementation of the action plan has proved to be insubstantial, and the reliance on it by the court in *Bartulis* was therefore misplaced; and secondly, because the fresh evidence shows that assurances previously given in relation to other requested persons have been breached. Mr Hall contends that what is needed is an assurance that Mr Bazys will only be held in a single cell whilst serving his sentence.

53. In relation to both Applicants, it is submitted that the current jurisprudence relating to assurances, stemming from *Othman*, is inappropriate in the context of EAWs and extradition arrangements between European states. In advancing this submission, Mr Hall acknowledges that in *Zabolotnyi* the Supreme Court applied *Othman* in such circumstances. He submits however that in this context, assurances cannot be viewed as high level undertakings between sovereign states, breach of which would have serious diplomatic consequences. He further submits that, in the absence of a strict monitoring mechanism, and in circumstances where exposure of any breach is likely to be haphazard, it is not possible for the assurances to be objectively verified. Relying on what was said by Dingemans LJ in *Gerulskis* (quoted at paragraph 30 above), Mr Hall submits that a clearer understanding is needed of the role which assurances play in practice in the Lithuania prison system, particularly in view of Lithuania's practice of revising and replacing assurances.

54. As to the suggested breaches of assurances in other cases, Mr Hall makes submissions about the treatment of Messrs Jane, Ovsianikovas and Skudris. He submits that the descriptions which those witnesses give of the condition of the prison buildings and furniture show that an assurance that a requested person will be held in a refurbished or renovated cell is unreliable: either those prisoners were held in un-refurbished cells or, if the assurance was honoured, then the description "refurbished" is not a description to which any significance ought to attach. He therefore submits that this court should require that both Applicants be guaranteed accommodation in a refurbished or renovated cell throughout their detention in Lithuania, with a clear explanation of what is meant by "refurbished or renovated".

55. On behalf of the Respondents, Miss Hinton submits that this court should either refuse leave to appeal, or grant leave but dismiss the appeal, in each case. She submits that there is no reason for this court to depart from the decision in *Bartulis*, or to add to the existing jurisprudence as to the principles applicable to assurances in the context of extradition proceedings. She further submits that the alleged breaches of assurances given by Lithuania in other cases have not been established by evidence sufficient to rebut the presumption of compliance. In particular, she submits that the proposed fresh evidence of the three witnesses is not "objective, reliable, specific" as required by the decisions in *Dorobantu* at [51] and *Zabolotnyi* at [33], and should therefore not be admitted.

56. Miss Hinton submits that the Applicants have not shown strong grounds for believing that they face a real risk of inhuman or degrading treatment, and have not adduced "clear, cogent and compelling evidence" to show that Lithuania will not meet its art. 3 obligations. She argues that there is nothing "approaching an international consensus" that Lithuania cannot or will not do so.

57. I am grateful for the written and oral submissions of counsel. I have summarised them very briefly, but I have considered all the points made.

F. Analysis

58. The Applicants seek leave to appeal pursuant to section 26 of the Act. By section 27(2), this court may allow an appeal only if the conditions in subsection (3) or (4) are satisfied. Those subsections provide:

> "(3) The conditions are that –
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that –
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question that way, he would have been required to order the person's discharge."

59. In the case of Mr Bazys, it is common ground that the DJ had misunderstood the ambit of the assurance of 3 April 2020. However, that misunderstanding (which the Respondent took no step to correct) is not in itself sufficient for Mr Bazys to succeed. In my view, the cases of both Applicants essentially turn on the proposed fresh evidence, which is the foundation of their arguments for a reappraisal of the decision in *Bartulis* in relation to extradited persons serving their sentences in correction houses, and for a reappraisal of the sufficiency of the 3 April 2020 assurance to safeguard extradited persons against infringement of their art. 3 rights whilst held in pre-trial detention.

60. Whether this court should formally admit the fresh evidence must be decided in accordance with the familiar principles established in *Hungarian Judicial Authorities v Fenyvesi* [2009] EWHC 231 (Admin). If it is admitted, it is rightly accepted that the fresh evidence on which the Respondents rely should also be admitted. I have considered all the material *de bene esse*.

61. Mr Jane makes only limited complaints about the conditions at Pravieniskes correction house. In *Gerulskis*, which was heard in June 2020, the only breach which was found of an assurance relating to Mr Jane was that he had been held on remand at a prison other than those listed in the assurance of 7 August 2018. His statement does not in my view take matters any further than that in relation to Pravieniškēs. In early November 2020 he was transferred to Šiauliai remand prison, where he remained until his release 3 months later. His complaints of "awful" conditions, with insufficient heating in the cell, no proper partitioning of the lavatory, hot showers only once per week, lice in the mattresses and "huge issues" with drugs are strongly disputed, and contradicted by the Respondents. They assert that at Šiauliai remand prison, Mr Jane was only held in refurbished cells and that his statement about material conditions is "deceitful". So, too, they assert is his statement relating to drugs: published data show that drug seizures

at that prison have been very low, and the circulation of drugs there is much less than in correction houses.

62. Mr Skudris and Mr Ovsianikovas have not made formal statements: they have provided their information by endorsing a copy of the solicitors' questionnaire with their answers. The completed questionnaires are in my view an unsatisfactory evidential basis for an attack on the reliability of the existing assurances. It is not apparent that they have been signed. They contain no declaration of truth. Furthermore, they were delivered to the witnesses by Mr Bazys, and there is no information as to what passed between him and them as to how they should complete the questionnaires.

63. The complaints made by Messrs Skudris and Ovsianikovas about material conditions at Šiauliai remand prison – namely, cramped conditions, inadequate heating, aging paintwork, poor quality furniture, squatting toilets with foul odours, bedbugs and a general lack of maintenance and refurbishment – are again strongly disputed by the Respondents. The Respondents assert that both men have been held only in refurbished cells at Šiauliai remand prison and that their statements about material conditions there are "deceitful". They say that in 2021, seven inspections of the prison were carried out by the National Public Health Care Centre under the Ministry of Health and no deviations were found from the regulations as to minimum and maximum temperatures in cells. Nor did those inspections record any incidence of bedbugs. As to inter-prisoner violence, which the witnesses say is frequent, the Respondents assert that Šiauliai remand prison is one of the safest custodial establishments in Lithuania: in practice, a pre-trial investigation is started every time an act of inter-prisoner violence is identified, and there have been only four such investigations opened at Šiauliai remand prison since 2019. They suggest this reflects the use of cells (of up to 6 men) rather than dormitories, and the absence of the criminal subculture which is found in correction houses.

64. It is relevant to note that Mr Skudris gave evidence when contesting his extradition and was described by the DJ who heard those proceedings as an unimpressive witness whom he did not believe. Mr Ovsianikovas' credibility is undermined by his bad criminal record both in Lithuania and in this country.

65. I am unable to attach much weight to the further documents produced by Mr Ovsianikovas and relied on as evidence that he has made complaints to the prison governor and to the Ombudsmen: this material was served too late for any investigation by the Respondents, and is in any event incomplete. At most, it provides some evidence that he complained, not evidence that either Applicant is at a real risk of detention in non-compliant conditions.

66. Pausing there, it must be remembered that none of what these three witnesses says has been tested in cross-examination. On the face of the papers, their evidence is unsatisfactory in a number of respects; and it has been rebutted in detail by the further information provided by the Respondents. I am unable to regard it as reliable evidence of specific breaches of an assurance given by Lithuania.

67. The Ombudsmen's report covers all aspects of their work, and contains only limited information about prisons. It provides further evidence of the unsatisfactory conditions in Šiauliai remand prison. It does not however contain clear evidence of systemic failures which meet the threshold for infringement of art. 3. I accept Ms Hinton's

submission that the report reveals nothing which adds to the evidence considered by the court in *Gerulskis*.

68. The report of Mr Liutkevičius contains much which was before the court in *Bartulis*, with comparatively little new content. It does not reflect any first-hand knowledge of recent conditions in any prison at which either Applicant is likely to be held. His most recent visit to a prison appears to have been in 2018 to Lukiškės remand prison, which was closed the following year. He has not visited a relevant prison since the time when he gave evidence in *Bartulis*.

69. I accept that Mr Liutkevičius can demonstrate expertise in matters relating to human rights in general and the human rights of prisoners in particular. He can to some extent give factual evidence about prison conditions based on his own direct knowledge and experience. Much of his knowledge of prison conditions, or at any rate of present prison conditions, is however drawn from other sources, and can only be as reliable as the sources themselves. In the passage at the start of the report, which I have quoted at paragraph 48 above, he himself effectively limits his relevant expertise. It is helpful to the court to have his synthesis of information from different sources, but the provision of it does not in my view qualify Mr Liutkevičius to give opinion evidence as to whether an extradited person will be held in conditions which infringe his art. 3 rights. It is, in any event, for the court to decide whether there are substantial grounds for believing that there is a real risk of such infringement.

70. Although Mr Liutkevičius refers to continuing successful complaints in relation to Šiauliai remand prison, these appear to be complaints to domestic courts concerning violation of domestic rules. His report does not, therefore, provide clear evidence of breach of an assurance given to an extradited person.

71. The 2018 action plan was updated in 2021 in order to summarise what has been done since the CPT's previous inspections. It shows that the progress which has been made since 2018 includes a reduction in the prison population: it should be noted in this regard that Mr Liutkevičius had noted in his report that the average population had reduced from 6616 in 2018 to 5725 in 2020. Miss Hinton provided the court with other material showing a further reduction to 5153 by July 2021. The updated action plan also shows, amongst other things, an increase in the use of cell rather than dormitory accommodation; the transferring to another prison of those who have been a negative influence on other prisoners; increased numbers of prison staff; increased salaries for some prison staff; the provision of personal recording equipment to prison staff who have direct contact with prisoners; and drug testing.

72. In *Bartulis*, the court necessarily based its decision on its findings as to the situation in prisons at that time, not on the situation which would obtain if every aspect of the action plan was implemented within the stated timetable. As I noted at paragraph 21 above, the court found Lithuania's response thus far to be adequate, notwithstanding that it had not abolished the problem of inter-prisoner violence completely. At [126] (quoted in paragraph 22 above), the court specifically referred to the evidence of real, though incomplete, implementation of the action plan. It is true that in the time since *Bartulis* was heard (in October 2019), progress in implementing the action plan has not been as rapid or as extensive as had been intended; but nonetheless, the picture is one of further real progress, not of decline. The Respondents' position in this regard is therefore stronger than it was when *Bartulis* was decided.

73. Drawing these threads together, the proposed fresh evidence as a whole certainly raises continuing concerns as to prison conditions in Lithuania. In my view, however, it does not support the submission that this court should reappraise the existing case law.

74. So far as the material conditions at remand prisons are concerned, there is no suggestion that Mr Besan will be held pending trial anywhere other than Šiauliai remand prison. Lithuania has lost the benefit of the presumption of compliance with art. 3 in relation to detention at that prison. However, the assurance dated 3 April 2020 has been held in *Gerulskis* to be sufficient to show that an extradited person held in that prison does not face real risk of ill-treatment contrary to art. 3. In my view, there is nothing in the proposed fresh evidence which provides any reason for this court to come to a different conclusion. Although not given or endorsed by a judicial authority, that assurance has been given by the person who is ideally placed to know whether or not it can be fulfilled, and I have no reason to doubt that Lithuania is well aware of the likely adverse consequences for future extradition requests if the assurance is breached in any significant way. Mr Hall was respectfully critical of the willingness of the court in *Gerulskis* to regard a breach of the assurance in the case of Mr Jane as insufficient to justify a conclusion that the assurance could not be trusted; but in my view, there must be at least some margin for a requesting state to depart in an immaterial respect from an assurance, without causing the assurance to be disregarded in all future cases.

75. I would add that I am not persuaded that the approach to assurances based on *Othman* is inappropriate in the context of undertakings given by senior officials of EU member states. As Mr Hall fairly acknowledged, the Supreme Court in *Zabolotnyi* adopted that approach. I note also that in *Ilia v Appeal Court in Athens, Greece* [2015] EWHC 547 the court (Aikens LJ and Nicol J), in considering the factors set out in *Othman*, said at [40] –

> "… it is important also to recall that we are dealing with cases in which the assurance will have been given by the judicial authority or a responsible minister or responsible senior official of a government department of a Council of Europe or EU state. In our view there must be a presumption that an assurance given by a responsible minister or responsible senior official of a Council of Europe or EU state will be complied with unless there is cogent evidence to the contrary."

76. Further, the passage which I have quoted (at paragraph 30 above) from the judgment of Dingemans LJ in *Gerulskis* seems to me to answer the submission that this court should require further information as to how assurances given by Lithuania work in practice. I take the point that it may be difficult to monitor compliance if one assurance replaces another; but in practice, one would expect that an extradited person whose initial assurance was not honoured would complain, even if he had been treated in accordance with a new assurance, and so the breach of the initial assurance would be revealed, with adverse consequences for Lithuania.

77. As to the material conditions experienced by convicted prisoners serving their sentences in correction houses, Lithuania has the benefit of the presumption of compliance. I do not accept the submission that the fresh evidence makes it necessary for this court to

reappraise the decision in *Bartulis*. The decision of the High Court of Justice in Northern Ireland in *Michailovas* naturally has the respect of this court, but it does not constitute anything approaching an international consensus, and in my view is insufficient to displace the presumption. I note also that in *Dusevicius v Lithuania* [2021] NIQB 70 the High Court of Justice in Northern Ireland (similarly constituted) distinguished the appeal on its facts from that of Mr Michailovas, and found, at [152], that Mr Dusevicius would very probably be accommodated for some considerable time in a remand prison, in respect of which appropriate human rights compliance assurances had been given by Lithuania. The court concluded at [153] that, notwithstanding "substantial misgivings about the quality and adequacy of the information provided by the Lithuanian authorities in response to successive requests by the courts of this state", there were on the facts no substantial grounds for believing that Mr Dusevicius faced a real risk of ill-treatment contrary to art. 3.

78. As to inter-prisoner violence, there is clear evidence of a high incidence of such violence in correction houses, but an absence of evidence pointing to a failure by the state to take reasonable care to protect extradited persons against the risk of harm caused by non-state agents. That is especially so in relation to the two men and their associates who are said to be a threat to Bazys: there has been no clear indication of a failure by the Respondents to protect Mr Bazys against the risk that he will be attacked, and no convincing reason shown why he should be guaranteed a single cell. In those circumstances, there is in my view no evidence of a real risk that either Applicant will be exposed to violence amounting to a breach of his art. 3 rights.

79. For these reasons, I think it unnecessary for this court to seek further information, whether pursuant to article 15(2) of Council Framework Decision 2002/584/ JHA or via the CPS. I conclude that the proposed fresh evidence cannot meet the criterion of decisiveness, and should not be admitted. There is therefore no basis for departing from the existing case law. It remains the case that there is a real risk of ill-treatment contrary to art. 3 in relation the general accommodation conditions of those held at Šiauliai remand prison, but the assurance of 3 April 2020 is in my view sufficient – as it was in *Gerulskis* – to exclude any real risk in Mr Besan's case. So far as extradited persons held in correction houses are concerned, it remains the case that Lithuania is presumed to comply with its obligations under art. 3, and there is no clear, cogent and compelling evidence to rebut that presumption. The DJ was therefore not wrong to conclude that there was no real risk of ill-treatment contrary to art. 3 in Mr Bazys' case.

80. It follows that neither appeal can succeed. I would accordingly refuse leave to appeal.

Mr Justice Swift

81. I agree.