Neutral Citation Number: [2018] EWHC 1122 (Admin)

Case No: CO/5183/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/05/2018

Before:

LORD JUSTICE HICKINBOTTOM
and
MR JUSTICE DINGEMANS

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Between:

	Guy Jane	**Appellant**
	- and -	
	Prosecutor General's Office, Lithuania	**Respondent**

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Mark Summers QC and Mary Westcott (instructed by **Dalton Holmes Gray Solicitors**) for the **Appellant**
James Hines QC and Hannah Hinton (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 25th April 2018

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Judgment Approved **Mr Justice Dingemans:**

Introduction

1. This is the hearing of an appeal against the judgment of Deputy Senior District Judge Ikram ("the DSDJ") dated 3 November 2017. The DSDJ had ordered that the Appellant Guy Jane ("Mr Jane") should be extradited to Lithuania to face a trial for alleged criminal conduct.

The alleged conduct

2. The Prosecutor General's Office in Lithuania seeks the extradition of Mr Jane pursuant to an accusation warrant issued on 30 July 2015 certified by the National Crime Agency ("NCA"). It is alleged that between July 2010 and June 2011 Mr Jane, then a director and shareholder of a limited company, stole monies from the company, withdrew funds

when the company was facing insolvency, fraudulently managed the company accounts, conspired with others to entice individuals to enter agreements with a sham company, produced forged documents and purported to transfer liabilities between companies. Mr Jane denies any wrongdoing.

Judgment of the DSDJ

3. The DSDJ identified when the passage of time would render it "unjust or oppressive" within the meaning of section 14 of the Extradition Act 2003 to extradite the requested person, referring to the principles set out in *Kakis v Government of Cyprus* [1978] 1 WLR 779 and *Gomes v Government of Trinidad and Tobago* [2009] UKHL 21; [2009] 1 WLR 1038. Those principles were not in dispute before the DSDJ or before this Court. The DSDJ noted that unjust was directed to prejudice for the requested person and oppressive was directed to hardship from changes in circumstances. The gravity of the offence was relevant to whether changes in circumstances would render a return to stand trial oppressive. The test would not be easily satisfied. The DSDJ noted that the allegations dated back to 2010-2011, involved a number of persons and defendants, and represented an organised fraud with a large number of victims. This meant that the allegations would take time to investigate. It was noted that Mr Jane could not be found and had been declared wanted in 2015. Taking all matters into account the DSDJ was not persuaded that it would be unjust or oppressive to extradite Mr Jane.

4. In relation to the issue of threats of violence and prison conditions the DSDJ summarised the law relating to article 3 of the ECHR and recorded that Mr Jane needed to demonstrate substantial grounds to believe that he would face a real risk of being subjected to torture or inhuman or degrading treatment if surrendered. The DSDJ also noted that there was a strong presumption that member states of the Council of Europe are able and willing to fulfil their obligations under the ECHR. Clear, cogent and compelling evidence was required to rebut that presumption. The DSDJ recorded that the presumption was stronger still in the case of member states of the European Union.

5. In relation to the threat of violence the DSDJ recorded that Mr Jane claimed that he was at risk from a non-state agent called Ashley White. The DSDJ noted alleged incidents in a car park, confirmed by Mr Jane's son, and an alleged threat at gun point. The DSDJ also recorded unchallenged evidence that Mr Jane's sister had been contacted by Mr White and received threatening phone calls demanding contact details. The DSDJ said that he had no reason to doubt what he was told and went on "this was back in 2011 and nothing further has been heard from Mr White. I am not satisfied that the suggested risk to the RP [the requested person, i.e. Mr Jane] today exists. In any event, I have not been persuaded that, even if such a risk existed, the Lithuanian authorities could and would not provide *reasonable protection* to ensure the RP's safety".

6. In relation to prison conditions the DSDJ stated that "I apply the test as to whether there is a `real risk' of the RP being subjected to article 3 ill treatment whilst being detained in Lithuania. The starting point in this case is that … I can assume that they will comply with their obligations as per the Convention." The DSDJ noted the case of *Rackauskas v Lithuanian Judicial Authority* [2017] EWHC 1358 (Admin) and said that the High Court "has taken the view that prison conditions in Lithuania do not offend article 3 and that is the case, even without any assurance". The DSDJ referred to a case from Malta, which he said was fact specific, and a case from Germany, holding that "the 2017 High Court

decision here confirms that the English courts have not been persuaded of risks as regards article 3 on the evidence of conditions that now prevail in Lithuania".

Test for allowing an appeal

7. It is established that when considering what approach to take to a challenge to a District Judge's findings about real risks of infringement of human rights the Court must have "a very high respect for the findings of fact", "we must also have respect for the DJ's evaluation of the expert evidence", and "the decision of the DJ can only be successfully challenged if it is demonstrated that it is `wrong'", see *United States of America v Giese (No.1)* [2015] EWHC 2733 (Admin) at paragraph 15 and *Dzgoev v Russian Federation* [2017] EWHC 735 (Admin) at paragraphs 23 and 24. The respect for findings of fact made by judges at first instance is because those judges will have seen and heard the witnesses and will have assessed all of the evidence together, and because duplicating findings on facts increases costs and delay.

Issues on appeal

8. The issues on the appeal have been refined by Mr Summers QC and Mr Hines QC and I am grateful to them and their legal teams for their assistance. The following matters are in issue: (1) whether the DSDJ was wrong to find that it would not be oppressive or unjust, within the meaning of section 14 of the Extradition Act 2003, to extradite Mr Jane; (2) whether the DSDJ was wrong to find that there was no real risk that threats of violence made against Mr Jane would infringe his rights guaranteed by article 3 of the European Convention on Human Rights ("ECHR"); (3) whether the DSDJ was wrong to find that there was no real risk that remand prison conditions in Lithuania generally would infringe the rights of Mr Jane guaranteed by article 3 of the ECHR; (4) the position in the light of the further evidence adduced by both parties on appeal; and (5) whether, if on the available evidence the Court would find that extraditing Mr Jane would expose him to a real risk of inhuman and degrading treatment such that his extradition would breach the United Kingdom's obligations under article 3 of the ECHR, the appeal should be stayed to give the Lithuanian authorities an opportunity to provide an assurance that would satisfy us that Mr Jane will not be exposed to that risk.

9. The main focus of the submissions to the Court was article 3 of the ECHR, which is addressed by issues (3) and (4). I can deal with issues (1) and (2) first, shortly, before turning to the article 3 issues (3) and (4).

Issue 1 - DSDJ entitled to reject section 14 claim

10. Mr Summers submitted that Mr Jane had been living openly in the UK, that there was no good reason for the delay, and that as his family life was unusual his domestic situation had changed. Mr Summers said that the allegations against Mr Jane required detailed consideration and it would be difficult for Mr Jane to defend himself after this period of time. All of this meant that it would be unjust and oppressive to extradite Mr Jane.

11. In my judgment the DSDJ was entitled to reject the claim that Mr Jane's extradition would be oppressive or unjust, for the reasons he gave. The DSDJ applied the relevant principles of law. The relevant factors were set out and considered. These are serious

charges and a proper investigation was going to take time to be carried out in Lithuania. There is nothing to show that the DSDJ's decision on section 14 was wrong.

Issue 2 - DSDJ entitled to reject the claims based on risk of violence

12. Mr Summers submitted that the evidence showed that Mr Jane had been threatened by and on behalf of an identified person. He noted that the DSDJ had expressly accepted the evidence of the threats made regarding Mr Jane. Although Mr Jane had lived openly and safely in the UK, the position would be very different in Lithuania and there was a real risk that he would suffer impermissible treatment.

13. However, in my judgment the DSDJ was entitled to find that there was no current risk of violence against Mr Jane given the evidence that Mr Jane had lived openly in the UK and that nothing had occurred since 2011. Further the DSDJ was justified in finding that there was no evidence to suggest that Lithuania would not meet its obligations to take proper steps to protect Mr Jane.

Issue 3 – DSDJ wrong to reject claim based on prison conditions

14. I turn next to consider the main issues in this appeal, which concern prison conditions in Lithuania.

Relevant principles of law relating to prison conditions and article 3 of the ECHR

15. It is necessary first to set out relevant principles of law.

16. It is unlawful for the United Kingdom to extradite Mr Jane where he is at real risk of being subjected to treatment contrary to the right in article 3 of the ECHR not to "be subjected to torture or to inhuman or degrading treatment or punishment". Detention for more than a few days in space measuring less than 3 square metres without more is likely to be such degrading treatment, see *Ananyev v Russia* (2012) 55 EHRR 18 and *Florea v Romania* [2014] EWHC 2528 (Admin); [2015] 1 WLR 1953 at paragraph 9, as is a lack of proper toilet facilities, see *Georgiev v Bulgaria* [2018] EWHC 359 (Admin). A failure to protect a prisoner from violence may give rise to a real risk of inhuman or degrading treatment.

17. Because of the principle of mutual trust between member states, membership of the Council of Europe is a highly relevant factor in deciding whether an extradited person would, in fact, be likely to suffer treatment contrary to article 3 if extradited to another member state, see *Targosinki v Poland* [2011] EWHC 312 (Admin) at paragraph 5. There is a general presumption that a member state will comply with its international obligations, including those arising from article 3 of the ECHR. That presumption may be rebutted by clear, cogent and compelling evidence, something approaching an international consensus, see *Krolik v Poland* [2012] EWHC 2357; [2013] 1 WLR 490 at paragraph 3. For example, if there has been a pilot judgment of the European Court of Human Rights ("ECtHR") against the requesting state identifying structural or systemic problems the presumption will be rebutted. Such judgments have recently been issued against states including Italy and the Russian Federation. Where the presumption is

rebutted, the burden of proof shifts to the requesting state, which must, on the basis of clear and cogent evidence, satisfy the Court that, in the case of the requested person, extradition will not result in a real risk of inhuman or degrading treatment.

18. Prison conditions are unlikely to be static and to make a conclusion about the real risk test the Court has to examine the present and prospective position as best as it can on the materials available, see *Elashmawy v Italy* [2015] EWHC 28 (Admin) at paragraph 90. The view of any Court, including the ECtHR on prison conditions in a country can only be definitive at the time that the view is expressed; although, where it has been established that there is an international consensus that prison conditions in a certain state do not comply with article 3 of the ECHR, then in the absence of evidence that there has been a material change in those conditions, a court is likely to consider itself bound by that earlier finding. In any event, once the initial presumption of compliance has been rebutted, then clear and cogent evidence adduced on the part of the requesting state may demonstrate that the previous view about the prison conditions generally or a particular prison can no longer be maintained, see *Elashmawy* at paragraphs 90 and 91.

Consensus that pre-trial prison conditions in Lithuania involve a real risk of treatment infringing article 3

19. Mr Summers submitted that the DSDJ had misapplied the judgment in *Rackauskas v Lithuanian Judicial Authority* which was not authority for the proposition that Lithuanian prison conditions were compatible with article 3 of the ECHR. Mr Summers also submitted that the DSDJ had failed to take proper account of the judgments from Malta and Germany and that they, properly analysed, established that it was now for the Lithuanian authorities to show clear and cogent evidence that pre-trial prison conditions would not infringe article 3. Mr Hines submitted that, to the contrary, Lithuania was now entitled to the presumption that it would comply with its international obligations set out in the ECHR.

20. It is necessary to set out some background about prison conditions in Lithuania, as disclosed by the authorities which were placed before us. It should be noted, as a matter of fairness to the DSDJ, that not all of these authorities were before him. These authorities show that there has been a consensus that in some pre-trial detention prisons, namely Lukiskes and Siauliai, there is a real risk to prisoners of impermissible treatment contrary to article 3 of the ECHR. A particular issue was overcrowding, which was compounded by the need to segregate prisoners. The structure of the prisons meant that segregation produced a particular problem with overcrowding in some parts of the prisons. However, the remand prison of Kaunas has not been the subject of the same criticism, and has been recognised to be compliant with article 3. As a result, the Lithuanian authorities gave a general assurance that those extradited to Lithuania to face charges, if remanded in custody, would be detained in Kaunas ("the Kaunas assurance"), which obviated the need to determine the compliance of the other remand prisons. However, in 2016 the authorities in Lithuania declared that the problems with the Lukiskes and Siauliai prisons had been resolved, and the general Kaunas assurance was withdrawn. As a result, in later judgments various courts had to consider whether someone extradited to Lithuania, who may be held in Lukiskes or Siauliai prison, would face a risk of conditions that would breach article 3.

21. The first relevant decision was *Lithuania v Liam Campbell* [2013] NIQB 19, where the

High Court in Northern Ireland dismissed an appeal by Lithuania against a decision to refuse an extradition because of the real risk of impermissible treatment in remand prisons in Lithuania. The Court noted "compelling and uncontradicted evidence relating to conditions" which showed that there was a real risk that the requested person would be subjected to impermissible treatment contrary to article 3 of the ECHR. This included expert evidence from Professor Morgan who had visited prisons in Lithuania and who highlighted reports from the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") into prison conditions in Lithuania.

22. A second decision was *Minister for Justice v McGuigan* [2013] IEHC 216 where the High Court of the Republic of Ireland refused to order the extradition of the requested person because of pre-trial prison conditions in Lithuania. The High Court specifically noted that the case did not have precedent value and represented only a decision on the evidence before the Court.

23. In *Aleksynas v Minister of Justice, Lithuania* [2014] EWHC 437 (Admin), this court considered remand prisons in Lithuania and, having considered the decisions from Ireland and Northern Ireland and the evidence before the Court, held in paragraph 49 that prison conditions in Lukiskes "are so egregiously bad that persons detained there would suffer a real risk of a violation of their article 3 rights". However, an assurance in the individual case that the requested person would be kept in Kaunas meant that there was no need to assess conditions in Siauliai remand prison.

24. In *Atraskevic v Prosecutor General's Office, Republic of Lithuania* [2015] EWHC 131 (Admin); [2016] 1 WLR 2762 the background to the provision of the Kaunas assurance was set out in paragraphs 51 to 54. Kaunas assurances continued to be accepted, see *Antonov v Prosecutor General's Office, Lithuania* [2015] EWHC 1243 (Admin).

25. The European Court of Human Rights considered the issue in *Mironovas and others v Lithuania* [2015] ECtHR 1074. This was not a pilot judgment but the judgment reported the historic problems with remand prisons in Lithuania, recorded the attempts to address it including the state's proposal to close Lukiskes, but also noting the fact that remedial measures had not yet had effect, see paragraphs 105 and 106.

26. In *DL* the Saarbrucken Higher Regional Court in Germany in a judgment dated 5 October 2016 refused the extradition of a requested person to Lithuania. The Lithuanian authorities had relied on general provisions in the Constitution and Code of Criminal Procedure and reported that overcrowding had reduced since earlier reports by the CPT. This had not been sufficient to avoid the real risk of impermissible treatment identified by the Court in that case, which refused the extradition.

27. The next relevant authority is *Rackauskas*, cited at paragraph 6 above. In that case, no Kaunas assurance was offered. However, it was recorded that the "territorial principle" in Lithuania based on Order number V.121 of the Lithuanian Director of Prisons Department Official Gazette No 56 (i.e. that a remand prisoner will be generally held in the remand prison nearest his home) applied, and that the requested person would in fact be held in Kaunas. No specific Kaunas assurance was therefore required. However, with respect to the DSDJ who held otherwise, *Rackauskas* is clearly not authority for the proposition that conditions in Lukiskes or Siauliai remand prisons are now compliant

with article 3 of the ECHR.

28. The next authority in time was *Spiteri v Attorney General of Malta* a decision of Constitutional Court of Malta dated 18 July 2017. The Constitutional Court decided that the civil Court had been entitled to refuse an extradition request because detention in remand prisons created a real risk of impermissible treatment contrary to article 3 of the ECHR. The Civil Court noted the CPT report which had documented the conditions in Lithuania which then infringed article 3 of the ECHR.

29. The evidence before the District Judge also included information from Lithuania as to the revocation of the earlier general Kaunas assurance. It was said that the assurance was revoked because the number of arrested persons had been reduced; the remand prisons were no longer overcrowded because prisoner numbers had dropped; and there were living conditions that complied with article 3 of the ECHR. However, the evidence did not address all of the structural problems at Lukiskes prison identified in earlier CPT reports showing that although prisoner numbers were below the official capacity of the prison, overcrowding could occur because of the need to segregate certain groups of prisoners.

30. In my judgment, these cases demonstrate that there was an international consensus that prison conditions in some remand prisons in Lithuania – and certainly in Lukiskes, which the evidence showed was where Mr Jane was likely to be in custody on remand – would lead to a real risk of a detained individual suffering inhuman or degrading treatment; and would thus infringe article 3 of the ECHR. In those circumstances if prison conditions had improved as contended by Lithuania, the burden lay on Lithuania to demonstrate to the DSDJ by clear and cogent evidence that the previous view about prison conditions should not prevail, see *Elashmawy* at paragraphs 90 and 91.

31. However, in my view, in this case Lithuania adduced no such evidence. Further, as already noted, *Rackauskas* was no authority for the proposition that remand prison conditions in Lithuania had altered so that they were generally compliant. Lithuania asserted that the position has changed; but it had not seriously undertaken – let alone discharged – the burden of showing, by bringing forward cogent evidence, that there was no real risk that Mr Jane would suffer impermissible treatment in Lukiskes.

32. In those circumstances, in my judgment, the DSDJ was wrong to conclude that there was no real risk of impermissible treatment contrary to article 3 of the ECHR arising out of the prison conditions in Lithuania, because there was no cogent evidence that conditions in the remand prisons were now compliant with article 3 of the ECHR.

Issue 4 – the position in the light of the further evidence

33. Both parties have adduced further evidence on appeal, which it is common ground should be admitted as fresh evidence because most of it post-dates the judgment of the District Judge.

34. This further evidence includes recent decisions of courts in Lithuania making adverse findings about conditions in the remand prisons. There is an expert report from Karolis Liutkevicius, a lawyer who worked in the Human Rights Monitoring Institute in Vilnius,

Lithuania who gave expert evidence in the *Spiteri* case. This showed continuing problems at the remand prisons. A Parliamentary Ombudsman report dated 6 March 2015 was exhibited showing problems with Siauliai prison.

35. There was also evidence adduced of a further judgment from the Republic of Ireland. This was a judgment of Donnelly J. in the High Court following a hearing in October 2017. Donnelly J. concluded that there was a real risk of the requested person suffering impermissible treatment at Lukiskes prison. The case had been adjourned so that the giving of assurances might be considered by the Lithuanian authorities.

36. Reference was also made to the CPT report of 2018. This takes the position up to 2016. The CPT recorded that it "regrets to note that many of its long-standing recommendations … have still not been implemented". Kaunas was reported to be compliant with article 3 of the ECHR. The infrastructure at Lukiskes was noted to be a problem. The CPT acknowledged the ongoing efforts made by Lithuania to improve the situation for remand prisoners, the renovations and the reduction in prisoner numbers.

37. Lithuania relied on materials showing planned modernisations and a reduction of numbers. A space of 4 square metres on average per prisoner was identified, although the evidence showed that this did not appear to have prevented overcrowding in certain cells.

38. Lithuania also relied on the judgment of the ECtHR in *Aleksandravicius and others v Lithuania* (Applications number 32344/13 and others). At paragraph 37 the ECtHR noted that according to the CPT "the material conditions at Lukiskes … varied considerably from one part of the prison to another which means that overcrowding and other conditions were not the same in every part of the prison. Although the Court cannot apply the presumption of overcrowding automatically, it has, however, already accepted the conclusions of the CPT that overcrowding in Lukiskes remand prison was further aggravated by deplorable conditions on account of dilapidated and dirty cells and furnishings, a lack of sufficient heating in winter, and poor ventilation …" (emphasis added). Mr Hines relied on the underlined parts to show that any presumption about non-compliant conditions in Lukiskes was no longer being applied by the ECtHR. I do not accept that submission. This is because *Aleksandravicius* was concerned with individual violations alleged by prisoners in respect of conditions that they had experienced at Lukiskes. The prisoners were not therefore able to rely on a real risk of impermissible treatment in the future contrary to article 3 of the ECHR; they had to prove that they had suffered such treatment. In fact the prisoners did that and were awarded damages, see paragraphs 53 and 54 of the judgment of the ECtHR. This authority, properly analysed, shows that conditions in Lukiskes infringed article 3 of the ECHR, although as a matter of fairness to Lithuania it should be recorded that the violations in that case had occurred in 2013.

39. Lithuania also relied on reports from Eurojust, which was a compilation of replies from various member states of the Council of Europe showing whether those states had extradited persons to Lithuania. These reports showed that extradition requests from Lithuania had been accepted and requested persons had been extradited. However the reports did not show whether the Kaunas assurance had been provided by Lithuania, and there was some material to suggest that some of the extraditions had been dependent on such an assurance.

40. Having considered all of this evidence, I do not consider that it materially affects the position: on the evidence as a whole, I consider that 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. Indeed, as I understood his submissions, although he stressed that there was evidence that the Lithuanian authorities had taken substantial steps to improve their remand prison estate, in the course of the hearing before us, Mr Hines was all but driven to accept that was the case.

41. For the sake of completeness, I should say that the evidence shows that the Kaunas assurance is still sufficient to show that there will be no such risk of impermissible treatment.

Issue 5 - Lithuania to be given opportunity to provide an assurance

42. It was suggested by Mr Hines that if the Court came to a different conclusion from the DSDJ about the real risk of impermissible treatment contrary to article 3 of the ECHR – as I have – Lithuania would be willing to provide an appropriate assurance that would ensure that Mr Jane would not be subject to that risk. Mr Summers objected to any stay or adjournment to allow Lithuania more time to consider and give any such assurance at this stage, noting that Lithuania had made a deliberate decision to withdraw the general Kaunas assurance offered to the United Kingdom, and that it would not be just to permit them to offer an assurance at this late stage. This was particularly so in the light of the existing delays and the strain of the proceedings on Mr Jane and his family.

Relevant principles relating to assurances

43. Even where there is evidence that there is a real risk of impermissible treatment contrary to article 3 of the ECHR the requesting state may show that the requested person will not be exposed to such a risk by providing an assurance that the individual will be held in particular conditions which are compliant with the rights guaranteed by article 3 of the ECHR. Such assurances form an important part of extradition law, see *Shankaran v India* [2014] EWHC 957 (Admin) at paragraph 59. The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in *Othman v UK* [2012] 55 EHRR 1 at paragraphs 188 and 189 and those principles have been applied to assurances in extradition cases in this jurisdiction, see *Badre v Court of Florence, Italy* [2014] EWHC 614.

44. An assurance is not evidence as such: it is not evidence about actual conditions, but merely a diplomatic assurance that a particular individual will be detained in circumstances in which the court can be satisfied that no risk of impermissible treatment will arise. In *United States of America v Giese (No.2)* [2015] EWHC 3658 (Admin); [2016] 4 WLR 10 there was consideration of the powers of the Divisional Court to allow

an appeal on the basis of a new assurance. It was held at paragraph 14 that an assurance was an "issue" and not "evidence" for the purpose of section 106(5)(a) of the Extradition Act 2003, meaning that an assurance may be provided for the first time on appeal. Thus, the Court may consider undertakings or assurances at any stage of the proceedings, including on appeal, see *Florea v Romania* [2014] EWHC 2528 (Admin); [2015] 1 WLR 1953 and *USA v Giese (No.1)*; and the Court may consider a later assurance even if an earlier assurance was held to be insufficient, see *Dzgoev v Russia* [2017] EWHC 735 (Admin) at paragraph 68 and 87.

45. For Lithuania which is a category 1 state for the purposes of the Extradition Act, the Framework Decision provides at article 15(2) that 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 should request supplementary information be furnished as a matter of urgency and may fix a time limit for receipt thereof. As noted in relation to Romania (*Grecu v Cornetu Court (Romania)* [2017] EWHC 1427; [2017] 4 WLR 139 at paragraph 50), "there is the greatest incentive to foster the extradition system". Therefore, whilst it is essential to ensure that there is no real risk that Mr Jane will be subjected to treatment contrary to the ECHR, it is also an important principle of international comity and trust between nations that the system of extradition set out in the Framework Decision is supported.

46. The correct approach to such assurances was set out by the CJEU in *Criminal proceedings against Aranyosi and Caldarau* (Case Nos C-404/15 and C-659/15PPU); [2016] QB 921 ("*Aranyosi*") which held, at paragraph 104, that where there was a real risk of impermissible treatment:

> "… the executing judicial authority must request that supplementary information be provided by the issuing judicial authority… which must send that information within the time limit specified in the request. 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. 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".

47. This approach has been applied by this Court in, e.g., *Georgiev* at paragraph 8(ix) and (x).

An assurance may be provided

48. Applying these principles to this case, I consider that it is appropriate to give the Lithuanian authorities an opportunity to consider and, if it considers it appropriate, provide an assurance sufficient to dispel the risk that I have identified. In my view it is noteworthy that, in the light of the findings of the DSDJ as to general remand prison conditions, Lithuania had not been required to do so – and, in fact, has not done so – to date.

49. Mr Hines suggested that Lithuania would be prepared to give a Kaunas assurance. The decision about whether to give an assurance– and the form of any assurance – is of course a matter for the Lithuanian authorities; but, it may not be the only way of

satisfying the Court that Mr Jane will not face a risk of impermissible treatment (e.g. on the evidence before us, it may be possible to provide specific assurances showing that Mr Jane will be detained in certain parts of Lukiskes where the conditions will comply with article 3 of the ECHR), it is apparent from the above that a Kaunas assurance would meet that risk.

Conclusion

50. In these circumstances, I would stay this appeal to give Lithuania an opportunity to provide further assurances.

Lord Justice Hickinbottom

51. For the reasons given by my Lord Dingemans J, I agree that this appeal should be stayed. I would add only a few words of my own concerning the burden of proof.

52. As Dingemans J has described (see paragraph 17 and following above), before a requested person can be extradited, the court must be satisfied that he will be at no risk of being subjected to inhuman or degrading treatment in prison contrary to article 3 of the ECHR. That is the ultimate question. However, where the requesting state is a signatory of the ECHR and a member of the Council of Europe, there is a strong presumption that that state will comply with its own obligations under article 3, i.e. a presumption that its prison conditions will generally not expose a prisoner to such a risk. That presumption may, however, be rebutted by evidence amounting to something approaching an international consensus that it may not comply with its general international obligations with regard to the general prison estate and conditions. Where the prison estate is old, and was built at a time when the standards of acceptability were very much lower, it may be difficult for a state to comply with modern article 3 standards, at least immediately. There have been a number of recent examples where various members states have been found to have failed in this regard. Where the presumption is lost, the burden lies on the requesting state to show that, in respect of the particular extradited person, there will be no such risk.

53. The requesting state can seek to do so in a number of ways, as Dingemans J has indicated. It may seek to show that a past failure has now been rectified, and the court can have confidence that the general prison conditions are now compliant. A state can only discharge the burden on it in that way by adducing clear and cogent evidence. However, it may seek to discharge its burden by giving an assurance, or assurances, as to the circumstances of the detention of the requested person that satisfies the court that there will be no real risk. Mr Summers submitted that, in these circumstances, the burden on the requesting state is similarly onerous.

54. I am not persuaded that that is a helpful, or even entirely accurate, analysis. Even if a state's prisons are such that, as a general proposition, compliance with article 3 cannot be guaranteed – often despite the considerable efforts of that country to improve prison conditions and comply – although the presumption of compliance with the article 3 obligations may be lost in that particular respect, that will not necessarily bear upon the reliability of that state in complying with a specific assurance it gives to this court as to (e.g.) where a prisoner will be detained. The nature of such a straightforward assurance

is very different from that of the general obligation that lies upon a state in relation to it prison conditions in general. Similarly, the assessment of the risk of non-compliance will usually depend upon different factors.

55. In my view, in these circumstances, the starting point is that such a state is entitled to a presumption that it will comply with such a straightforward solemn assurance, even if it has lost the presumption in relation to its prison estate as a whole. Its general failures may, depending on the facts, bear upon its reliability in relation to an assurance; but that reliability will usually be tested in other ways, e.g. by its previous compliance (or non-compliance) with similar assurances. Where a state has made obvious substantial efforts to improve its prison conditions, even where it has as yet failed to raise them sufficiently to show that there will be no risk of treatment that does not comply with article 3, that may be evidence of good faith and thus positive evidence of the state's reliability in ensuring that a specific assurance is met.

56. In any event, as I have indicated, subject to further representations as to timing, this appeal will be stayed for 42 days. Within that period, the Respondent should notify Mr Jane and the Court of any assurance that it is prepared to give; and the matter will then be restored to the list. We shall give permission to apply in relation to the wording of any assurance, and the final disposal of this appeal.