Case No: CO/5863/2017

Neutral Citation Number: [2018] EWHC 1630 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2018

Before :

LORD JUSTICE IRWIN
MR JUSTICE JULIAN KNOWLES

- -

Between :

	ROBERT GRANT	**Appellant**
	- and -	
	PUBLIC PROSECUTOR OF ARGENTAN, FRANCE	**Respondent**

- -
- -

Tim Moloney QC and Graeme Hall (instructed by **JFH Law**) for the **Appellant**
Ben Lloyd and Catherine Brown (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 20 June 2018

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Judgment**Lord Justice Irwin :**

Introduction

1. This is the judgment of the court to which both of us have contributed.

2. This is an appeal with the permission of William Davis J from the decision of District Judge Zani ("the Judge") who, by a decision of 14 December 2017, ordered the

Appellant's extradition to France.

3. The Appellant's extradition is sought to face trial for two offences allegedly committed between 13 August 2013 and 16 July 2014. He is accused under the French Penal Code of: (i) possession of an image of a minor "with pornographic connotation"; and (ii) broadcast of an image of a minor "with pornographic connotation" using an electronic communications network. The offences carry a maximum term of imprisonment of seven years.

4. The sole ground of appeal concerns the suggestion that there is a real risk of breach of the Appellant's rights under Article 3 of the European Convention on Human Rights ("the ECHR") if he is imprisoned in France, due to alleged inhuman and degrading conditions arising from a lack of personal cell space in one of the prisons in which the Appellant says he may be incarcerated if he is extradited.

5. We are aware that the Divisional Court (Singh LJ and Carr J) recently heard argument in three conjoined appeals relating to French prison conditions, and judgment is awaited. However, the prisons involved in those cases are different to the two prisons involved in this appeal, and neither party suggested we should adjourn to await the outcome of those other cases.

The facts

6. The Appellant's extradition is sought by the Public Prosecutor of Argentan, France. The European Arrest Warrant ("EAW") was issued on 13 September 2016 and certified by the National Crime Agency on 1 February 2017. The Appellant was arrested on 14 March 2017, and the initial hearing took place on 15 March 2017. The Appellant was granted bail.

7. It is alleged that between 13 August 2013 and 16 July 2014, in Saint Fraimbault, Orne County, France, the Appellant downloaded six video recordings of minors "implicated in pornographic scenes". The Applicant also "proposed" four videos. His home address was searched, which uncovered 296 videos and 5017 photographs "involving minors implicated in pornographic scenes".

8. After some delay, the extradition hearing was set for 28 July 2017. The bars to extradition relied on by the Appellant were that extradition would violate Articles 3 and 8 of the ECHR, on the basis of prison conditions in France and his family circumstances, respectively, and thus that extradition was barred by s 21A of the Extradition Act 2003 ("EA 2003").

9. The hearing was adjourned part-heard so that the Respondent could provide further

information on the likely prison conditions which the Appellant would face if extradited.

10. The first response to a request for further information was received on 11 May 2017. This addressed the arrest and interview of the Appellant, confirmed that his IT equipment had been interrogated, and confirmed that he and his partner had then left France.

11. The second tranche of further information was dated 29 May 2017. This confirmed that the Appellant's presence in France was required for questioning and preliminary procedures in France. It further addressed the prospect of incarceration as follows:

> "It is too early to know where he would be imprisoned for prevention purposes should such be the case. In practice, the prisons of Caen or Le Mans are used for preventive incarcerations" and that "No commitment [can] be taken as to the place of [the Appellant's] possible incarceration, regardless of the stage of the procedure."

It appears this information was not served until 21 July 2017.

12. On 11 October 2017, the Respondent served a third response, in the form of answers to the questions formulated following the decision of the European Court of Human Rights ("ECtHR") in *Muršić v Croatia* (2017) 65 EHRR 1, which established that where a prisoner is held in a cell affording him less than $3m^2$ of personal space, excluding sanitary facilities, then (subject to a few very narrow exceptions) there will be a strong presumption of a breach of Article 3 of the ECHR. This decision was discussed in the domestic extradition context in *Grecu v Cornetu Court, Romania; Bagarea v Caras Severin Tribunal, Romania* [2017] 4 WLR 139. This further response can be summarised as follows. The Respondent stated that on 2 October 2017, Le Mans prison was at 131% capacity. The smallest cells are $11m^2$, which house two prisoners. The largest cells are $14m^2$, which house three prisoners. On 5 October 2017, Caen prison was at 179% capacity, holding 398 prisoners as against a supposed capacity of 222 prisoners. It was described as "a somewhat 'mature' building and fails to offer incarcerate conditions up to 2017 standard*s*". There are 202 cells. 121 are $10m^2$, 71 are $11m^2$, 4 are $13m^2$, 5 are $16m^2$, and 1 is $22m^2$. The number of prisoners per cell *"*varies between 1 and 5. Nevertheless, a majority of cells are occupied by two persons". The response states that it was difficult to provide general information on time spent out of cells as the schedule varies for each prisoner. The response concludes with the information that "prisoners are preferably sent to Le Mans prison, the establishment in Caen being keep (*sic*) for residual purposes".

13. The Respondent's fourth and final response was dated 12 December 2017. The Judge

declined to admit this response in evidence. It was received after the extradition hearing had concluded and shortly before he handed down his decision on 14 December 2017. However, both parties to this appeal invited us to take this response into account and both relied upon it in support of their arguments on the appeal. We have therefore taken it into account in reaching our decision.

14. In the fourth response the Respondent amplified a number of matters. First, the response stated that the calculation of cell size in Caen prison had included sanitary facilities in the cell measurements. The significance of this is that in *Muršić* the ECtHR made clear at para 114 that sanitary facilities must be excluded in the calculation of personal cell space. The response went on to explain that the reference in the previous response to Caen prison not offering "conditions up to 2017 standards" meant that the prison "was not built in 2017 and thus does not provide exactly the same comfort guarantees as a more modern establishment like Le Mans". This response also clarified that the final decision on where the Appellant would be detained would be made by an independent

"Remand and Freedom Judge" and thus no final assurance could be given that the Appellant would be held in Le Mans prison and not Caen prison. However, the response concluded (*sic*):

> "In practice, it should be noted that for the jurisdiction of Argentan, the prison of Le Mans is generally used.
>
> The Public Prosecutor in Argentan shall duly entreat the Remand and Freedom Judge in that it would be preferable to observe this allocation priority.
>
> Such appeal should be easy to accept in light of the reason already mentioned."

Other evidence before the Judge

15. Before the Judge the Appellant relied on broader evidence, namely evidence from the *Controleur General des Lieux de Privation de Liberté* (CGLPL) and from the Council of Europe's Committee for the Prevention of Torture (CPT). Before us, Mr Moloney QC for the Appellant also relied upon it as "context" for his specific submissions in relation to the prisons where the Appellant may be incarcerated.

The CGLPL Report

16. The CGLPL is an independent public body set up 2007 to inspect and report on places of detention in France. Its remit appears to be similar to that of Her Majesty's Chief Inspector of Prisons in England and Wales. The report before the judge from 2016 was based upon visits made in that year.

17. Chapter 6 of this report traces prison numbers in the context of trends in offending, over a number of decades. The report itself makes the point that general figures are of limited utility (para 1.7):

> "The density for all institutions – 114.6 on 1 January 2015 – has no great significance as the indicator varies a great deal according to the type of institution: 92.2 for detention centres and detention centre quarters, 79.6 for long-stay prisons and long-stay prison quarters, 71.4 for institutions for minors, whilst for remand prisons and remand prison wings the average density was 132.7.
>
> Additionally this average by type of institution includes variations within each category:
>
> - Of the 88 sentencing institutions, only 8 had a density higher than 100, including 3 detention centre wings in overseas territories and 4 day parole centres (2) and centres for reduced sentences (2) in Ile-d-France. In Metropolitan France this over-occupation concerned 469 detainees, i.e. 2.3% of detainees placed in sentencing institutions.
>
> - Of the 135 remand prisons and remand prison wings, 26 had a density lower than or equal to 100 and 108 had a density greater than 100, of which 35 had a density higher than 150. Four remand prisons and remand prison wings exceeded 200, i.e. a population of detainees more than double the number of operational places (two in Metropolitan France and two overseas).
>
> Over-occupation of prison institutions is therefore limited to remand prisons by application of *numerus clausus* to sentencing institutions which are a little below declared operating capacity. For remand prisons, the increase in operational capacity (+2,008 places between 1 January 2005 and 1 January 2015) was less than that of the number of detainees (+3,742) and density is therefore higher in 2015 than in 2005."

The CPT Report

18. The CPT based their report relating to prison conditions on visits to four penitentiary establishments: Condé-sur-Sarthe, Fresnes, Nîmes and Villepinte. These visits took place in November 2016. The Committee found that the conditions at Condé-sur-Sarthe were "very good" but found the other three prisons to be seriously overcrowded.

19. The CPT noted that:

> "… despite the increase of 9,000 places in 15 years, French prisons are in an endemic state of overcrowding. Over the past 20 years, the prison population has increased by more than 11,000 persons." (para 33)

20. The CPT also record that French government prison building plans mean that:

> "…by 2018 France will have 63,500 prison places, 40,600 of which were be built (*sic*) after 1990" (para 34).

21. This compares with a prison population at the time of the 2016 visits of 66,198 detainees, and a historic peak in April 2014 of 68,859. We note that even if the prison population in 2018 (about which the evidence is silent) were assumed to have equalled the historic peak, the overall ratio of detainees to designed capacity would be 108.4%, a figure very much lower than the overall undercapacity reported at the time of the report.

The judgment of District Judge Zani

22. The Judge rejected both challenges based on Article 3 and Article 8. The latter decision is not pursued before us.

23. His decision in relation to prison conditions and Article 3 of the ECHR was expressed with economy, as follows (emphasis in original):

> "**41. Information Received in Respect of Prison Conditions within the French Prison Estate:**
>
> Mr Hall places considerable reliance on the CPT report dated **7th April 2017** which arises from a visit to France between **15th and 27th November 2015**. The report is critical of the state of the French penal estate. It raises and deals with the issue of overcrowding within French prisons and the adverse effects that

this has on the general running of their penal institutions.

> 42. The defence has also produced the **2015 Annual Report** of the **French Controller General (Prison Ombudsman)** which also makes a number of critical comments on the (then) state of the French prison estate. It expresses concerns that '*commitments made after the first visits were either partially upheld, or not at all*'.
>
> 43. Mr Hall has also placed into evidence the French Ministry of Justice Prison Population Statistics dated **1st June 2017**. This demonstrates that a number of prisons in the French prison estate are operating at well over their stated capacity.
>
> 44. The French authorities say that they are not able to definitively confirm which prison Mr Grant would be taken to either before trial or after any conviction. The most likely options appear to be either Caen or Le Mans prisons, both of which are said to be operating well over their stated capacity levels."

24. The Judge went on to recite the essential contents of the further information of 11 October, in particular the percentages of occupation against intended capacity set out above. In addition, he cited, in relation to Le Mans that:

> "… a prisoner '*in isolation*' receives exercise of 2½ hours spread over 'two half days'. It adds that although work and training courses are over-subscribed, '*The amount of educational classes, sports and social & cultural activities generally comply with the actual number of applications*'."

25. In Caen, "time out of the cell … depends on the availability of courses and the like. Each prisoner is entitled to take exercise". Finally, the Judge quoted the conclusion of the further information:

> "I wish to inform you that prisoners are preferably sent to Le Mans prison, the establishment in Caen being left for residual purposes."

26. The Judge went on to review the law bearing on the Article 3 challenge. He noted the decision in *Elashmawy v Court of Brescia, Italy* [2015] EWHC (Admin) which confirmed the earlier decision in *Krolik v Several Judicial Authorities in Poland* [2013] 1 WLR 490 which stated that:

> "6. … the type of evidence necessary to rebut the presumption and establish a breach was made clear by the Luxembourg Court – a significant volume of reports from the Council of Europe, the UNHCR and NGOs about the conditions for asylum seekers…"

27. The Judge emphasised that the presumption was stronger in the case of EU Member states.

28. The Judge noted the decision of the Court of Justice of the European Union in *Re Criminal Proceedings against Aranyosi and Caldararu* [2016] 3 CMLR 13 as establishing that (i) the Article 3 prohibition is absolute; (ii) where the executing judicial authority is in receipt of evidence said to demonstrate a real risk of a breach of Article 3, that evidence "must be assessed"; (iii) objective information, such as documents produced by the Council of Europe, as well as judgments from other member states, are to be considered; (iv) if a real risk is identified, there must be a further assessment to ascertain if the defendant will be exposed to that risk, and (v) in the course of that assessment, the executing and issuing judicial authorities must request and provide any further relevant information.

29. The Judge recorded the critical arguments on behalf of the Respondent in the following terms:

> "59. … the CPT Report relied upon by the requested person: (i) Relates to a visit to certain French prisons (but not those situated in Caen or Le Mans) back in **November 2015**. (ii) States that detainees usually receive 3 sq m of personal space each. Furthermore she adds that there have not been any pilot decisions from the ECHR in respect of French prisons. Additionally there has been no finding of the High Court that extradition to France would breach Article 3 by reason of the prison conditions that exist within the French prison estate."

30. In summarising his conclusions, the Judge said:

    a. There is no ECtHR pilot judgment procedure against France (para 60);

    b. Domestic courts have not refused extradition to France due to prison conditions (para 61);

    c. It is very likely that the Appellant will be detained in Le Mans or Caen prison (para 62);

    d. The CPT report does not relate to Le Mans or Caen (para 63);

    e. The French government is committed to investing in the French prison estate, including creating additional prison places (para 64);

    f. In relation to Le Mans prison, there is no real risk of a breach of Article 3 as each prisoner receives at least $3m^2$ of personal space. Any other criticisms of the prison "are not such that … extradition should be refused" (para 66);

g. In relation to Caen prison:

(i) The further information provides “a reasonable inference” that “it is much less likely” that the Appellant will be detained there;

(ii) Only a limited number of cells would provide less than $3m^2$ (para 67).

31. The Judge went on to find that there was no real risk that the Appellant’s Article 3 rights would be breached, and thus he rejected this challenge to extradition.

The parties’ submissions to this Court

32. The parties are largely in agreement as to the law governing this issue. The steps in the process, as outlined in *Aranyosi* and summarised above, are agreed. The standard set in *Muršić* is quoted by each. Detentions with lesser space must be short, occasional and limited in their extent, accompanied by significant freedom of movement outside the cell and prison conditions must generally be satisfactory.

33. The parties accept the relevance of the decision of this Court in *Grecu* applying the requirements of *Muršić*.

34. The parties also agree that the question for us is whether the Judge’s decision is “wrong” in the sense explained in *Love v Government of the United States of America* [2018] 2 All ER 911, para 26.

35. The Appellant relies on the decision in *Grecu*, emphasising that the presumption that Member states will comply with their ECHR obligations can be displaced where there is evidence that prisoners are detained with less that $3m^2$ space per individual. In their submissions they expressly rely on a passage from para 48 of the judgment of Irwin LJ in *Grecu*:

> “48. I recognise the force of the presumption of compliance by a member state, and the requirement for ‘something approaching international consensus’, in the language of the court in *Owda* quoted above. However, it appears to me that it is hard to apply a ‘presumption’ in the face of the lucid test set out in *Muršić*.”

36. Accordingly, the submission by Mr Moloney QC for the Appellant is in essence very simple. He focussed his submissions on Caen prison, accepting that the evidence shows that Le Mans prison affords sufficient cell space. But he submits that there is a real risk that the Appellant will be sent to Caen prison, not Le Mans prison. If so, he may be in a prison where he has less than $3m^2$ of individual space in his cell. Mr Moloney submits that such a finding of fact was within the findings of the extradition judge (see para 67 of his judgment, summarised in para 29(g) above). Mr Moloney submits that the judge should therefore have found that there is a real risk of a violation of Article 3. In the

event that we were to agree, Mr Moloney submitted we ought not to afford the Respondent further time to afford further assurances (which was the course taken in *Grecu* following this Court's decision that there was a real risk of detention in less than $3m^2$ of cell space).

37. The Respondent's principal arguments can be summarised as follows. General information as to the overcrowding in the French prison estate is of limited relevance beside the specific information as to the institution or institutions where the Appellant is likely to be detained. Moreover, the Respondent asks the Court to consider that the base information in these reports is dated, since the relevant inspections were in 2015. Further, the French government has made public commitments to invest in their prison estate so as to reduce the mismatch between prisoner numbers and capacity.

38. Mr Lloyd points out that there is no pilot decision of the ECtHR against France on prison conditions, and nothing approaching a consensus, amongst other Member states, that conditions in the French prison estate are such that there is real risk of a breach of the Appellant's rights under Article 3 of the ECHR. Nor has the EU Commission taken any steps in relation to French prisons. Since the CPT views $4m^2$ as the minimum standard there is a mismatch between their stance and the $3m^2$ adopted in *Muršić*.

39. He submits that the evidence advanced by the Appellant does not establish substantial grounds for believing that there is a real risk that he will be subjected to treatment prohibited by Article 3. In particular, there is no real risk of a violation of Article 3 due to the conditions in the French prison estate generally nor in relation to either of the two prisons that have been identified, namely Le Mans or Caen. Specifically in relation to Caen, Mr Lloyd submits that the Judge was too generous to the Appellant in his conclusion that some of the cells afforded less than $3m^2$. But, in any event, he submits that the evidence taken in combination that Le Mans is the usual remand prison for the region in question; that the prosecutor will seek a remand into Le Mans prison, and that this request should be "easy" for the judge to accept; coupled with the presumption that France will comply with its ECHR obligations, all mean that the Judge was right in his conclusion and that it is not necessary for the Respondent to supply a further specific assurance (for example, from the relevant prison governor) that the Appellant will be accommodated in a cell which affords him at least $3m^2$. Alternatively, in the event that we do consider that he invites us to allow the Respondent time to supply the necessary assurance.

Discussion

Legal principles

40. Given the broad agreement between the parties we can set out the relevant legal

principles more briefly than we would otherwise do.

41. Section 21A(4)(a) of the EA 2003 provides that the judge must order the defendant's discharge if s/he concludes that extradition would not be compatible with the defendant's Convention rights. In *Soering v United Kingdom* (1989) 11 EHRR 439 the ECtHR held that it will violate a defendant's right not to be subjected to inhuman and degrading treatment or punishment if there are substantial grounds for believing that there is a real risk that he will be subjected to such treatment or punishment in the requesting state following extradition.

42. The conditions of imprisonment in the requesting state may result in a violation of Article 3 if they are sufficiently severe. Article 3 imposes "absolute" rights, but in order to fall within the scope of Article 3 the conditions must attain a minimum level of severity. In general, a very strong case is required to make good a violation of Article 3. The test is a stringent one and it is not easy to satisfy. However, as we have already said, individuals facing closed, semi- or open prison conditions must be granted at least $3m^2$ of personal cell space, unless a series of cumulative mitigating factors are shown by the issuing judicial authority to be present. If prisoners are not afforded this space then a violation of Article 3 will likely result. This is the effect of the decision in *Muršić*, where the Grand Chamber of the ECtHR reviewed its earlier jurisprudence on personal space in prisons and established a "bright-line" rule that Article 3 requires that prisoners must have at least $3m^2$ of personal cell space. The decision was summarised in the following terms in *Grecu* at paras 25 – 26:

> "25 The court went on to emphasise that "a strong presumption of a violation of article 3 arises when the personal space available to a detainee falls below $3m^2$ in multi-occupancy accommodation" (para 124): the "strong presumption" test should operate as a weighty but not irrebuttable presumption of a violation of article 3. This in particular means that in the circumstances, the cumulative conditions of detention may rebut that presumption. It will, of course, be difficult to rebut it in the context of flagrant or prolonged lack of personal space below 3m2 (para 125). When it has been established that a detainee disposes of less than 3m2 of floor surface, then it: "remains for the respondent government to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space. The cumulative effect of those conditions should inform the court's decision …" (para 126). Further, the court noted: "in the light of its post-*Ananyev* case law, that normally only short, occasional and minor reductions in the required personal space will be such as to rebut the strong presumption of a violation of article 3" (para 130).
>
> 26 In a critical passage, the court went onto say, at para 138:

> ‘The strong presumption of a violation of article 3 will normally be capable of being rebutted only if the following factors are cumulatively met: (1) the reductions in the required minimum personal space of 3m2 are short, occasional and minor (see para 130 above): (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see para 133 above); (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see para 134 above).’”

43. Member states of the Council of Europe are presumed to be able and willing to fulfil their obligations under the ECHR, in the absence of clear, cogent and compelling evidence to the contrary. That evidence must show that there is a real risk of the requested person being subjected to torture or inhuman or degrading treatment or punishment. This presumption is of even greater importance in the case of Member states of the EU. In such cases there is a strong, albeit rebuttable, presumption that EU member states will abide by their ECHR obligations. Each Member state is entitled to have confidence that all other EU states will abide by their Convention obligations: *Elashmawy*, para 50.

44. In *Elashmawy* at para 90 the Court said this:

> “90. The art 3 test in the context of extradition is whether there are substantial grounds for believing that there is a real risk that the person extradited would be subjected to inhuman or degrading treatment or punishment by reason of the prison conditions upon his return and (if convicted) during any imprisonment. To make a conclusion based on this test the court has to examine the present and prospective position as best it can on the materials now available. In “prison condition” cases the factual position is unlikely to be static. There may be new evidence about the conditions in a country generally or a particular prison where the position has already been considered by a court. The view of any court, even the ECtHR, on prison conditions in a country or a particular prison at any time is only definitive at the time that the view is expressed. If cogent evidence is adduced which demonstrates that the view a court took previously about prison conditions generally or in a particular prison can no longer be maintained, then the court must review again the evidence about the relevant prison conditions. Evidence is unlikely to be treated as cogent unless it demonstrates something approaching an international consensus that the position has changed. To adopt a lower threshold would introduce an unacceptable degree of uncertainty in the area. But, an obvious example where the test may well be satisfied is where the Strasbourg or Luxembourg courts have held a Contracting or Member State to be in breach of its art 3 obligations

regarding prison conditions, has required that remedial measures be undertaken, which have then been implemented and upon which the Committee of Ministers or the ECtHR have then indicated views."

45.

The sort of evidence which domestic courts have found sufficient to rebut this presumption include pilot judgments of the ECtHR concerning systemic overcrowding in the prison estate of the requesting country. The ECtHR introduced the "pilot judgment" procedure (which was codified in the new Rule 61 of the Court's Rules in 2011) to deal with situations "where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given or may give rise to similar applications": r 61(1). Rule 61(3) stipulates that if the ECtHR decides to adopt the pilot judgment procedure in a particular case then in the pilot judgment itself the court must "identify both the nature of the structural or systemic problem or other dysfunction as established" and it must also identify "the type of remedial measures which the Contracting Party concerned is required to take at the domestic level" as a result of the judgment.

46. An example of a pilot judgments concerning prison conditions is *Torreggiani and others v Italy* (2009) App No 43517/09. There, the ECtHR found that there was prison overcrowding in Italy of a "structural and systemic nature", resulting from a "chronic malfunction" of the Italian penitentiary system. The court gave Italy one year to instigate effective "internal remedies", by which it meant a system whereby any prisoner whose complaint was of overcrowded prison conditions in breach of Article 3 could have an effective remedy. The ECtHR noted that there was no effective remedy at present because, although a prisoner could complain to the sentencing judge under articles of the Law concerning the prison service, that appeal was ineffective because "it does not make possible a quick end to imprisonment in conditions contrary to art 3 of the Convention": see paras 55 and 97. Nor could prisoners who suffered non-compliant imprisonment obtain any form of compensation for the infringement suffered: para 97.

47.

Badre v Court of Florence, Italy [2014] EWHC 614 (Admin) followed *Torreggiani*. At para 43 McCombe LJ said that the judgment provided, in relation to prison conditions in Italy and compliance with Article 3, "… a very clear rebuttal of the presumption that might otherwise apply to this court's view of extradition to Italy as a member state of the Council of Europe and the EU". He added, at 44, that when there was evidence that the risk of a breach of art 3 existed, "it was for the requesting state to dispel any doubts", referring to para 129 of *Saadi v Italy* (2009) 49 EHRR 30.

48. Other examples of pilot judgments on prison conditions are *Ananyev v Russia* (2012) 55 EHRR 18; *Varga v Hungary,* Application 14097/12, 10 March 2015; and *Rezmives v Romania,* Application 61467/12, 25 July 2017. There has been no pilot judgment in respect of French prison conditions.

49. In *Aranyosi* the CJEU considered the approach to be adopted where it is argued that prison condition in the requesting EU Member state would infringe Article 4 of the Charter of Fundamental Rights of the European Union ("the Charter"), which is in the same terms as Article 3 of the ECHR. In light of the obligations imposed by the EAW Framework Decision (that is, the EU Council's Framework Decision on the European Arrest Warrant and Surrender Procedures (2002/584/JHA, 13 June 2002 2002/584) the CJEU was asked to determine whether a national court might refuse to execute an EAW where there was solid evidence that detention conditions in an issuing Member state were incompatible with fundamental rights, or whether it might make the surrender of the defendant conditional on evidence of satisfactory detention conditions.

50. The effect of this decision was conveniently summarised by Beatson LJ in *Mohammed v Comarca De Lisboa Oeste, Instancia Central De Sintra, 1a Secção Criminal, Portugal* [2017] EWHC 3237 (Admin), para 15:

> "15. In *Aranyosi,* the CJEU decided that the consequence of the execution of an EAW must not be that the requested person will, if returned, suffer inhuman or degrading treatment. At [88] – [89], [91] – [92], [95] and [98] the CJEU set out the procedure that must be followed where the judicial authority of a member state is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the state that has issued the EAW.
>
> *Stage 1* of the procedure involves determining whether there is such a risk by assessing objective, reliable, specific, and properly updated evidence. I deal further with the the type of evidence and what assessment is required at [50] – [51] below. A finding of such a risk cannot lead, in itself, to a refusal to execute the EAW. Where such a risk is identified, the court is required to proceed to stage 2.
>
> *Stage 2* requires the executing judicial authority to make a specific assessment of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. To that end it must request the issuing authority to provide as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained.
>
> *Stage 3* deals with the position after the information is provided. If in the light of that, and of any other available information, the executing authority finds that, for the individual concerned, there is a real risk of inhuman or degrading treatment, execution of the warrant must be postponed but cannot be abandoned."

51. At para 50 of his judgment Beatson LJ dealt with the qualities that the evidence must

have before it can be said to demonstrate the risks identified in Stage 1:

> "50. In *Aranyosi* at [89] the Grand Chamber of the CJEU stated that:
>
> > 'the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing member state and that demonstrates that there are deficiencies which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention.'
>
> The CJEU stated that the information may be obtained from *inter alia* judgments of international courts, courts of the issuing member state, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations."

52. It is against this background that we must review the decision of District Judge Zani in order to determine whether it can be characterised as wrong.

Analysis

53. Despite Mr Moloney's typically focussed and economical submissions, we conclude that the Judge was not wrong in his conclusion that the evidence which he considered did not demonstrate a real risk that the Appellant will be detained in a multi-occupancy cell where he will be afforded less than $3m^2$ of personal space (excluding sanitary facilities). We are reinforced in that view by the fourth response of December 2017 which the Judge did not take into account, but which we have.

54. The evidence clearly demonstrated that the Judge was only concerned with two prisons: Le Mans and Caen. Mr Moloney accepted that the focus of his submissions was Caen prison, and the personal cell space if the Appellant were to be remanded to that prison. He accepted that Le Mans prison would provide the Appellant with the required space.

55. Mr Moloney made a number of criticisms of the French responses and what he said was insufficiently detailed evidence about the regime in prison, including time out of cells, activities, etc. But it is important to emphasise, again, that the starting point is the strong presumption that an EU Member state will abide by its obligations under the Charter and the ECHR. It was and is for the Appellant to show, by reference to evidence of the quality we have described, that the presumption should not apply. In the absence of such evidence, issuing judicial authorities in EU Member states should not be drawn into having to justify, explain or defend their prison regimes. The Appellant's complaint related to lack of space only, and our focus, like the Judge, is on that question. As Julian Knowles J observed during argument, we are not concerned with a general

audit of the French prison estate.

56. In our view the evidence from the CGLPL and the CPT – what Mr Moloney described as "context evidence" - does not advance the Appellant's case very far, if at all. This quantity of information is necessarily either general as to the French prison estate, or specific as to the particular penal institutions which were inspected and/or considered in the reports, which do not include the prisons at Caen or Le Mans. It therefore lacks the quality of specificity which the necessary evidence is required to have.

57. As to the specific evidence relating to Caen prison, we consider that there is force in Mr Lloyd's submission that the Judge was perhaps being over-generous to the Appellant when he concluded at para 67 of his judgment that "only a limited number of cells would provide less than $3m^2$". This conclusion cannot be inferred from the bare statistics relating to cell sizes at Caen prison. We have set out the relevant figures in para 11 above. Even allowing for some reduction in the available space for sanitary facilities (which the fourth response made clear had been included in the specified cell sizes), having regard to the fact that at the relevant time Caen prison held 398 prisoners, it does not follow necessarily that there *must* be some cells where those incarcerated have less than $3m^2$ of personal space. Therefore, in our judgment, the evidence does not reliably or objectively justify this conclusion, which is a fundamental and necessary part of the Appellant's case.

58. Furthermore, and in any event, we consider that the fourth response shows that, in reality, there is no real risk that the Appellant will be detained in Caen prison. The issuing judicial authority has gone as far as it properly can under the French system for allocating prison places to show that the Appellant will be detained in Le Mans prison. The issuing judicial authority has stated that it will make that request of the relevant judge, and it does not foresee any difficulty in the request being granted. Whilst it is not precisely the same, this evidence is akin to the sort of evidence that is often encountered in extradition cases, for example in relation to re-trial rights, where the relevant authority in the requesting state says that *it* cannot give an assurance that a re-trial will be granted, because that is for a judge to decide, but that it cannot see any reason why such a request would be denied. This sort of evidence has regularly been held to be sufficient to secure the relevant right: see eg *Nastase (aka Soloman) v Office of the State Prosecutor, Trento, Italy* [2012] EWHC 3671 (Admin); *Lodhi v Governor of HM Prison Brixton* [2001] EWHC (Admin) 178; *Re Peci*, 5 November 1999 (CO/1368/99). Hence, although the Judge did not take this evidence into account, had he done so, he would have been fortified in his conclusion at para 67 that the evidence he did consider showed there was "a reasonable inference" that "it is much less likely" that the Appellant will be detained at Caen prison.

Disposal

59. For these reasons, we conclude that the Judge was right to conclude as he did and the

appeal is dismissed.