Neutral Citation Number: [2018] EWHC 1762 (Admin)

Case No: CO/2071/2017
CO/2754/2017
CO/4461/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2018

Before :

THE RIGHT HONOURABLE LORD JUSTICE SINGH
THE HONOURABLE MRS JUSTICE CARR

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Between :

(1) EMANUEL SHUMBA
(2) ROBIN BECHIAN
(3) CIPRIAN HENTA **Appellants**

- and -

(1) PUBLIC PROSECUTOR IN NANTERRE COUNTY COURT, FRANCE
(2) PUBLIC PROSECUTOR OF BOBIGNY COUNTY COURT, FRANCE
(3) FIRST INSTANCE COURT OF BOBIGNY, FRANCE **Respondents**

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Ms Alison Macdonald QC and Ms Saoirse Townshend (instructed by **BSB Solicitors Ltd**) for the **First Appellant**
Ms Alison Macdonald QC and Ms Emilie Pottle (instructed by **McMillan Williams Solicitors Ltd**) for the **Second Appellant,**
Ms Alison Macdonald QC and Ms Emilie Pottle (instructed by **National Legal Service Ltd)** for the **Third Appellant**
Mr Ben Lloyd and Mr Richard Evans (instructed by **the Crown Prosecution Service**) for the **Respondents**

Hearing date: 24 May 2018

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Judgment Approved

Lord Justice Singh and Mrs Justice Carr :

Introduction

1. There are three appeals before the Court. The First Appellant, Mr Shumba, is subject to a conviction European arrest warrant ("EAW") issued by the Public Prosecutor in Nanterre on 2 November 2016, which was certified by the National Crime Agency

("NCA") on 29 November 2016. The Second Appellant, Mr Bechian, is subject to a conviction warrant issued by the Public Prosecutor of Bobigny County Court on 11 January 2017, which was certified by the NCA on 7 February 2017. The Third Appellant, Mr Henta, is subject to a conviction warrant issued by the First Instance Court in Bobigny on 11 April 2014, which was certified by the NCA on 6 January 2017.

2. The order for extradition in the case of the First Appellant was made by District Judge Bayne on 23 June 2017. The order for extradition of the Second Appellant was made by District Judge Zani on 5 June 2017. The order for extradition of the Third Appellant was made by District Judge Inyundo on 22 September 2017.

3. Permission to appeal was granted to the First Appellant by Dove J on 22 January 2018. On 23 January 2018 Dove J granted permission to appeal to the Second and Third Appellants.

4. All three appeals raise a common ground of appeal: that in each case their extradition would breach the Appellant's rights under Article 3 of the European Convention on Human Rights ("ECHR"), contrary to section 21 of the Extradition Act 2003 ("the 2003 Act"). Accordingly it is submitted that each Appellant should have been discharged by the District Judge under section 26 of the 2003 Act.

5. That is the only ground of appeal in the case of the Third Appellant. However, the First and Second Appellants have additional grounds of appeal: first, under section 14 of the Act (passage of time); secondly, under section 21 of the Act (breach of Article 8 of the ECHR). The generic issue in this case (which concerns Article 3 of the ECHR) does not depend on the facts of the individual cases. We will consider the particular facts of the First and Second Appellants' cases when we turn to their additional grounds of appeal later in this judgment.

6. At the hearing before this Court we heard oral submissions from Ms Alison Macdonald QC (who appeared with Ms Saoirse Townshend and Ms Emily Pottle on behalf of the Appellants) and Mr Ben Lloyd (who appeared with Mr Richard Evans on behalf of the Respondents). We are grateful to them all.

Article 3: the main European case law

7. Article 3 prohibits not only torture but also inhuman and degrading treatment or punishment. This case is not concerned with the prohibition on torture, so we will say no more about that. The Appellants do place reliance on the prohibition on inhuman and degrading treatment. Article 3 is absolute: it is not a qualified right, unlike those contained in Articles 8-11 of the ECHR. Since the prohibition on inhuman and degrading treatment in Article 3 is absolute, other matters, such as the conduct of the Appellants, are irrelevant.

8. Article 4 of the European Union ("EU") Charter on Fundamental Rights and Freedoms is in similar terms to Article 3 of the ECHR and is relevant where a matter falls within the scope of EU law. Extradition falls within the scope of EU law because the system of European Arrest Warrants was created by the EU Council Framework Decision 2002/584/JHA, as amended by Framework Decision 2009/299/JHA. The explanations

relating to the Charter (OJ 2007 C 303, p.17) make it clear that, by virtue of Article 52(3) of the Charter, Article 4 of the Charter has the same meaning and same scope as Article 3 of the ECHR.

9. For ease of exposition we will refer in this judgment to Article 3 of the ECHR but, unless the context indicates otherwise, that should be taken to include reference to Article 4 of the EU Charter.

10. We did not understand there to be any substantial dispute between the parties as to the relevant legal principles which can be derived from the main European authorities on Article 3 as it applies to prison conditions.

11. For present purposes the first important decision is that of a Chamber of the European Court of Human Rights in *Ananyev v Russia* (2012) 55 EHRR 18. In that case the Court considered Article 3 at paras. 139-166 of its judgment. First, the Court reiterated that Article 3 of the Convention enshrines one of the most fundamental values of a democratic society and that:

> "It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour."

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.

12. It is not always necessary that there must be actual bodily injury or intense physical or mental suffering. However, even in the absence of these, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as "degrading" and so fall within the prohibition of Article 3.

13. In the context of deprivation of liberty, the Court has consistently stressed that, to fall under Article 3, the suffering and humiliation must in any event

> "go beyond that inevitable element of suffering and humiliation connected with the detention. The state must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured."

14. The Court then turned to specific aspects of the prison environment. First, it considered overcrowding. The Court noted that the general reports published by the European

Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") do not appear to contain an explicit indication as to what amount of living space per inmate should be considered the minimum standard for a multi-occupancy prison cell. However, from individual country reports by the CPT and its recommendations it appeared that the desirable standard and the objective to be attained should be the provision of $4m^2$ of living space per person in pre-trial detention facilities. The Court was of the view that, while that is the desirable standard, it has found that where the applicants have at their disposal less than $3m^2$, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3. In some cases the number of detainees exceeded the number of sleeping places in the cell and insufficiency of floor space was further aggravated by the lack of an individual sleeping place so that inmates had to take turns to sleep.

15. Accordingly, at para. 148 of its judgment, the Court said that, in deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court should have regard to the following three elements:

(a) each detainee must have an individual sleeping place in a cell;

(b) each detainee must have at least $3m^2$ of floorspace; and

(c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items.

16. The absence of any of those three elements creates in itself "a strong presumption" that the conditions of detention amount to degrading treatment.

17. On the facts of the cases before it the Court found that there had been a breach of Article 3. At para. 166 the Court concluded that the applicants were afforded less than $3m^2$ of personal space. They remained inside their cell all the time, except for a one hour period of outside exercise. They had to have their meals and answer the call of nature in those cramped conditions.

18. More recently the Grand Chamber of the European Court of Human Rights considered *Ananyev* in *Muršić v Croatia* (2017) 65 EHRR 1. As the Court made clear at para. 91 of its judgment, it took the opportunity "to clarify the principles and standards for the assessment of the minimum personal space per detainee in multi-occupancy accommodation in prisons under Article 3 of the Convention." In recapitulating general principles at paras. 96-101 the Court said at para. 100:

> "… it is incumbent on the respondent Government to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties."

19. Having considered whether it should depart from its earlier judgments, the Court concluded, at para. 110, that it would confirm that the requirement of $3m^2$ of floorspace per detainee in multi-occupancy accommodation should be maintained as the relevant minimum standard under Article 3.

20. At para. 114, the Court said that the in-cell sanitary facility should not be counted in the overall surface of the cell. On the other hand, calculation of the available surface area should include space occupied by furniture. What is important in this assessment is whether detainees have a possibility to move around within the cell normally.

21. At para. 123 the Court said that the question whether there has been a violation of Article 3 "cannot be reduced to a numerical calculation of square metres allocated to a detainee." Nevertheless, at para. 124, the Court said 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."

22. At para. 125 the Court said that the "strong presumption" test should operate as a weighty but not irrebuttable presumption of a violation of Article 3. In particular this means that, in the circumstances, the cumulative effects of detention may rebut that presumption. The starting point is a strong presumption of a violation of Article 3. It then falls to the respondent to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space.

23. At para. 128 the Court said:

> "Once a credible and reasonably detailed description of the allegedly degrading conditions of detention, constituting a prima facie case of ill-treatment, has been made, the burden of proof is shifted to the respondent Government who alone have access to information capable of corroborating or refuting these allegations. They are required, in particular, to collect and produce relevant documents and provide a detailed account of an applicant's conditions of detention. Relevant information from other international bodies, such as the CPT, on the conditions of detention, as well as the competent national authorities and institutions, should also inform the Court's decision on the matter."

24. The Court summarised the relevant principles and standards for the assessment of prison overcrowding at paras. 136-141 of its judgment:

> "136. In the light of the considerations set out above, the Court confirms the standard predominant in its case-law of $3m^2$ of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under art.3 of the Convention.
>
> 137. When the personal space available to a detainee falls below $3m^2$ of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of art.3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space.

> 138. The strong presumption of a violation of art.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;
>
> (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and
>
> (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.
>
> 139. In cases where a prison cell – measuring in the range of 3-4m² of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of art.3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements.
>
> 140. The Court also stresses that in cases where a detainee disposed of more than 4m² of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention referred to above remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under art.3 of the Convention.
>
> 141. Lastly, the Court would emphasise the importance of the CPT's preventive role in monitoring conditions of detention and of the standards which it develops in that connection. The Court reiterates that when deciding cases concerning conditions of detention it remains attentive to those standards and to the Contracting States' observance of them."

25. The final case which it is necessary to refer to is the decision of the Grand Chamber of the Court of Justice of the European Union in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] QB 921.

26. In *Aranyosi* the Court had to consider in what circumstances the executing state may or must refuse to execute a European Arrest Warrant on the ground that there is "solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular with Article 4 of the Charter": see para. 74 of the

judgment. The Court reiterated that the principle of mutual trust between Member States and the principle of mutual recognition are of fundamental importance in EU law. However, the Court also observed that the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights as enshrined in the Charter.

27. At paras. 88-89 of its judgment the Court said:

> "88. It follows that, where the judicial authority of the executing member state is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing member state, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by article 4 of the Charter (see *Melloni's case* [2014] QB 1067, paras 59 and 63 and *Opinion 2/13* [2015] All ER (EC) 463 point 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing member state of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.
>
> 89. To that end, 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. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the Court of Human Rights, judgments of 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 UN."

28. At para. 104 the Court summarised the relevant principles which it had set out earlier in its judgment in the following way when answering the questions referred by the national Court:

> "104. It follows from all the foregoing that the answer to the questions referred is that articles 1(3), 5 and 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing member state 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 executing judicial authority must determine, specifically and precisely, whether there are substantial grounds

> to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing member state, to a real risk of inhuman or degrading treatment, within the meaning of article 4 of the Charter, in the event of his surrender to that member state. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing member state, under article 7 of the Framework Decision, 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."

Article 3: domestic case law

29. *Aranyosi* was considered and applied by the Divisional Court in *Yaser Mohammed v Comarca de Lisboa Oeste* [2017] EWHC 3237 (Admin), which concerned the extradition of a person pursuant to a conviction European Arrest Warrant in circumstances where he would be returned to Lisbon Central Prison in Portugal. The main judgment was given by Beatson LJ, with whom Sir Wyn Williams agreed. Beatson LJ first considered what the CJEU had said at para. 89 in *Aranyosi*. He concluded, at para. 51 of his judgment, that there was information which was objective, reliable, specific and up-to-date of deficiencies affecting Lisbon Prison and of a real risk of inhuman or degrading treatment by reason of conditions of detention in parts of that prison. Accordingly, this Court was obliged to move to the second stage of the *Aranyosi* test, set out at para. 92 of the CJEU's judgment, which requires this Court to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.

30. In the circumstances of *Yaser Mohammed*, and in accordance with paras. 95-96 of *Aranyosi*, this Court considered that it was necessary to ask the Portuguese authorities for supplemental information. This Court then set out a number of questions and asked for those questions to be answered within 28 days of receipt of the request for further information.

31. In *Yaser Mohammed (No 2)* [2018] EWHC 225 (Admin) this Court then dealt with the case in the light of the further information which was filed on behalf of the requesting State. On this occasion the main judgment was given by Sir Wyn Williams, with whom Beatson LJ agreed. Having considered the supplementary information, this Court was of the view that there remained a real risk of inhuman or degrading treatment should the appellant be detained in Lisbon Central Prison: see paras. 18-19 of the judgment.

32. Each case must of course turn on its own facts. However, on behalf of the Appellants in the present case, Ms Macdonald invites this Court to follow the procedure which was adopted in *Yaser Mohammed* should this Court not be minded to accept her primary submission, which is that the Appellants should be discharged at this stage.

Summary of the principles relating to Article 3 in the context of extradition

33. The following principles can be derived from the above line of authority.

34. Article 3 can in principle apply where a Contracting State proposes to extradite a person to another state, whether or not that other state is itself a party to the ECHR. As it happens France is, like the United Kingdom, a party to the ECHR.

35. There must be substantial grounds for believing that, if extradited, the Appellant faces a real risk of being subjected to inhuman or degrading treatment.

36. Once such evidence has been adduced by the Appellant it is for the requesting state to dispel any doubts about it: see *Saadi v Italy* (2009) 49 EHRR 30, at paras. 129 and 140.

37. There is a presumption that parties to the ECHR, such as France, are willing and able to fulfil their obligations, in the absence of "clear, cogent and compelling" evidence to the contrary. However, that presumption can be rebutted where that evidence comes from an internationally recognised source or is specific to an individual.

38. There may also be a duty on the Court in this jurisdiction to request further information from the state concerned where this is necessary to dispel any doubts.

39. In the context of prison overcrowding, there will be a strong presumption of a breach of Article 3 if any of the following criteria are absent:

    (1) a private sleeping place within a prison cell;

    (2) at least $3m^2$ of floorspace per prisoner; and

    (3) an overall surface area of the cell which is such as to allow the detainees to move freely between the furniture items.

40. Where a detainee is allocated between 3 and $4m^2$ of personal space, a violation of Article 3 will be found if there are other aspects of inappropriate physical conditions: in particular, regard will be had to access to outdoor exercise; natural light or air; availability of ventilation; adequacy of room temperature; access to private toilet facilities; and compliance with basic sanitary and hygiene requirements.

The Appellants' submissions on Article 3 as it applies to the facts of the present cases

41. The Appellants submit that it is likely that, if they are extradited to France, they will be detained at one of four prisons: Villepinte, Fresnes, Nanterre or Fleury-Mérogis.

42. The Appellants submit that they have provided objective, reliable, specific and properly updated evidence which demonstrates that there is a real risk of inhuman or degrading treatment if they are extradited to France, in particular at those four prisons. They rely on a number of reports in the last few years, to which we will return in more detail.

43. The Appellants focus in particular on four matters: (i) overcrowding, (ii) material conditions of detention, (iii) other aspects of the prison regime and (iv) the risk of inter-prisoner violence.

44. The Appellants also place reliance on the fact that the European Court of Human Rights has found there to be a breach of Article 3 in respect of conditions in French prisons. The same has also been found by the French Administrative Tribunal.

45. Furthermore, the Appellants rely upon the decision of the District Court of Amsterdam on 30 May 2017, which held that the first stage of the test in *Aranyosi* had been met on the basis of the CPT report as well as the response of the French Government "which did not indicate that this situation is no longer valid." That Court required further information from the French authorities pursuant to Article 15 of the Framework Decision. The Court similarly sought further information in another case on 17 August 2017.

46. Finally the Appellants submit that the Respondent has not provided any evidence in response, although it was first put on notice of this issue on 29 June 2017, in Mr Shumba's notice of appeal.

47. The Appellants submit that it would not be appropriate to delay these proceedings further by giving the Respondent yet more time to respond to their evidence on the Article 3 ground. They therefore ask this Court to discharge them.

The Respondent's submissions on Article 3

48. On behalf of the Respondent Mr Lloyd submits that the evidence adduced by the Appellants does not establish substantial grounds for believing that there is a real risk that they will be subjected to treatment prohibited by Article 3 if extradited to France. In particular, it is submitted that there is no real risk of a violation due to the conditions at Fresnes and Villepinte. The evidence adduced by the Appellants is said not to be specific. It does not state in which prisons personal space might fall below $3m^2$ or for how long it has fallen below that area.

49. Moreover, Mr Lloyd submits that the evidence is not always up to date. It is observed that, for example, the CPT report is 2½ years old.

50. Further, it is submitted that the decision of the District Court of Amsterdam dated 17 August 2017 identified that, in fact, all detainees in Villepinte and Fresnes now do have a minimum of $3m^2$ of individual cell space.

51. It is also submitted that the Appellants have not provided any objective, specific or properly updated evidence that detainees are unable to move freely between furniture items in their cells.

52. Accordingly, the Respondent submits that these appeals should be dismissed on the Article 3 ground. In the alternative, the Respondent submits that the Court should follow the procedure recommended in *Aranyosi* and permit the Respondent sufficient time to respond to such enquiries as the Court may request to be made.

53. In order to assess the rival submissions on Article 3 we must now turn to the evidence which is before the Court relating to prison conditions in France.

The evidence on prison conditions in France

54. As we have mentioned, the Appellants' submissions relate to four prisons. Fresnes opened in 1895; Fleury-Mérogis opened in 1968; Villepinte opened in 1990; and Nanterre opened in 1991.

55. There is before the Court a legal opinion by Dominique Tricaud, an *avocat* in Paris, who was asked by the Appellant's lawyers to produce a legal opinion in response to a certain number of questions regarding criminal procedure and its application in France. He is a lawyer who has specialised in criminal law in France since 1981. At para. 8 of his opinion he states that Mr Shumba could be incarcerated at Nanterre, while Mr Bechian and Mr Henta could be detained at Villepinte. He is also of the opinion that Mr Shumba, Mr Bechian and Mr Henta could be assigned to the following prisons: Villepinte, Fresnes, Nanterre and Fleury-Mérogis.

56. The most recent and most comprehensive document which the Court has before it concerning prison conditions in France is a report from February 2018 by the Inspector General of Places of Deprivation of Liberty (CGLPL), Ms Adeline Hazan. The Inspector General is an independent administrative authority created by the law of 30 October 2007 pursuant to the adoption by France of the optional protocol to the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment.

57. The report by the Inspector General of 7 February 2018 (to which there is no response from the French Government to date) was based upon visits to 70 prisons over the last three years, including (we were informed) Nanterre, Fresnes and Villepinte.

58. At p.6 of the report the Inspector General said that the findings were not exhaustive and were not confined to the specific establishments mentioned in the report. To the contrary she said that:

> "The findings made appear illustrative of a general problem".

As we have mentioned, at the hearing before this Court we were informed that three of the four prisons where the Claimants contend they are likely to be held were the subject of visits by the Inspector General over the last three years. In the circumstances therefore we take the view that this Court can and should assume that the findings in the report are material to the prisons with which this case is concerned.

59. At p.34 the Inspector General said:

> "In most French prisons these criteria are not respected [that is the criteria relating to living space of at least $3m^2$]; it is common in fact that three people occupy a single cell and that, in addition, a mattress is placed on the floor in addition to the installed bed, effectively hinder[ing] all movement inside the cell."

60. At p.35 the Inspector General observed that, in France, the distinction made by the CPT between living space per person and the annexed sanitary area is not taken into account in the cell area calculation method. She said that, without knowing precisely the dimension of the sanitary corner of the cells, the concept of living space remains undefined, rendering an assessment of the French situation in regard to the CPT recommendation "impossible". On behalf of the Respondent Mr Lloyd submits that no detailed figures are given in that context by the Inspector General.

61. The report continued that, if the French standard model of single cell – which it is possible to discern from the successive establishment construction programmes since the 1990s as a $9m^2$ area cell – corresponds well to the standards set by the CPT, it appears, on the other hand, that the placement of two people in an individual cell, which in fact describes the situation in prisons, "has them living in a very much smaller space than the European norm, well below the minimum living space ($10m^2$), especially as the cell area of $9m^2$ also includes the sanitary section."

62. At p.8 of the report the Inspector General observed that:

> "At Nanterre prison, in September 2016, cells for two have been occupied by three, even four people."

63. At p.3 the Inspector General said that the Director of Villepinte prison had decided (in an extremely rare event) "to no longer receive new arrivals because of the overcrowding of the establishment for which she was responsible". In March 2017 the judicial authorities of Paris and Bobigny had received an email from the Director of Villepinte prison, which was revealed in the daily newspaper *Le Monde*, in which it was stated that the occupancy rate had reached 201% for adults rendering it physically impossible to receive more inmates.

64. On 7 April 2017 there was published a report on France by the CPT and also the reply of the French Government to that report.

65. On 30 May 2017 the District Court of Amsterdam gave an interim decision when considering an application for the execution of a European Arrest Warrant in respect of persons requested by France. The *Maisons d'Arrêt* (remand prisons) concerned were Fresnes and Villepinte (with which the present case is potentially concerned) and also Nîmes. The Court in Amsterdam took account of the report of the CPT and the reply of the French Government. It noted that the report states that in the three establishments concerned detainees in multi-persons cells have less than $4m^2$ of living space, usually $3m^2$ or even less. It observed that:

> "The reply from the French Government does not indicate that the situation is no longer valid."

66. The Court was of the view that the CPT report contains evidence of a real risk of a violation of Article 3 of the ECHR with regard to the three named institutions. Therefore the Court decided to reopen its investigation and request the French authority to answer two questions:

(1) Would the person sought be expected to be placed in any of the three named institutions? If the answer to that is yes:

(2a) How much individual cell space will be available to him?

(2b) What are the other detention conditions?

67. In a letter dated 7 September 2017 from the office of the Public Prosecutor to the Crown Prosecution Service in this country, additional information has been provided in the case of Mr Bechian. It states in relation to the prison of Villepinte that "the cells are of a minimum surface area of $9m^2$ that does not have more than three persons". It is not made clear whether that includes or excludes a toilet area. There is reason to suppose, based on the Inspector General's report, that it may include the toilet area. If that is the case, that would give less than $3m^2$ per person. In any event it would give a little over $3m^2$ per person.

68. The report of the CPT which was published on 7 April 2017 was based on an inspection which took place between 15 and 27 November 2015. It was not published until April 2017 because it is customary to allow the Government concerned to publish its response to a CPT report at the same time that it is published.

69. In the executive summary at p.5 the CPT said:

> "The Committee is concerned that a number of important long-standing recommendations have not yet been implemented, including the physical conditions of detention in police establishments, prison overcrowding as well as conditions in which the transfer and care of persons detained in hospitals take place. Above all, the Committee considers that poor conditions of detention in prisons, particularly in the prisons of Fresnes and Nîmes, combined with overcrowding and lack of activities, could be considered as inhuman and degrading treatment."

70. As Mr Lloyd points out before this Court, that is of a fairly general character; indeed, it is not concerned only with prisons but also with police stations and hospitals. Further, the only specific prison with which we are concerned that it mentions is Fresnes. As we have already mentioned, the report is based on an inspection which took place nearly three years ago. It does not set out a great deal of detail about specific problems of overcrowding or other prison conditions. Finally the conclusion is only that there "could" be inhuman and degrading treatment, not that that is the opinion of the CPT.

71. At p.6 the CPT said that French prisons have been experiencing worrying overcrowding for several years, with some establishments having occupancy rates approaching or even surpassing 200%. The three prisons visited by the CPT (Fresnes, Nîmes and Villepinte) had occupancy rates of between 150 and 180%. Many detainees were housed in groups of two or three in cells of less than $10m^2$ and sometimes had to sleep on mattresses placed on the floor. The CPT called on the French authorities to guarantee to each detainee a minimum of $4m^2$ of living space in a collective cell and an individual bed in all penitentiary establishments.

72. At p.23 the CPT observed that at the institutions it visited, including Fresnes and Villepinte, "most of the cells normally provided for one person were less than $10m^2$ (including toilets) and accommodated two or even three detainees." In Fresnes the occupancy rate was 150%. In Villepinte the occupancy rate was over 160%. About 10 prisoners slept on mattresses on the floor. The CPT said that in many cases "the detainees placed in the collective cells had less than $4m^2$ each, usually $3m^2$ or even less." At the hearing before this Court we were informed that the updated figures for occupancy in April 2018 were at Fresnes 197.1% and at Villepinte 190.4%.

73. In its reply to the CPT report the French Government stated that the problem of overcrowding at Fresnes illustrated the difficulties of "atypical prison renovation." It said that since 1998 there had been a major renovation programme in France and that only the Fresnes site had seen no major renovation. It mentioned that, for example, Fleury-Mérogis saw restructuring in 2017. The report acknowledged that, although single-cell occupancy is effectively applied in the majority of establishments where sentences are being served and in juvenile detention units, the same does not apply for *Maisons d'Arrêt*, which bring together individuals in pre-trial detention and individuals serving short sentences. The Government said that its real estate effort would focus on the *Maisons d'Arrêt* "as a priority".

74. However, as Ms Macdonald submitted before this Court, there is no guarantee that this will happen in the near future. In a speech given on 8 March 2018 President Macron reaffirmed that the Government of France has a programme to build 15,000 additional prison spaces but this is going to be impossible even over a five year period: the most that could be managed was 7,000.

75. In October 2016 the Inspector General conducted a visit to Fresnes in particular. It noted that all the cells are almost identical. These are individual cells of an approximate size of $10m^2$. However, there are only 296 cells occupied by a single person, 350 occupied by two people and 421 cells occupied by three people. As a result it is only about 13% of the prison population who benefit from an individual cell, about 31% who share a cell for two and almost 56% who live three to a cell. Furthermore, the report observed that, in the cells of a surface area of under $10m^2$, once the footprint of the beds, toilets and table has been deducted, three people have to live in a space of around $6m^2$. The toilets, which are not completely separated from the rest of the room, the dilapidated estate and deplorable hygiene, make confinement "even more intolerable". Of course, as we have noted earlier, the furniture, such as the bed and table, should not be deducted from the floor space although the toilet area should be. Nevertheless, this evidence does give rise to concern that there is a real risk that a person extradited and detained at Fresnes will have an intolerable amount of living space. The Inspector General's report concluded on this that:

> "Overcrowding is of course not unique in French penitentiary establishments, but at Fresnes, its massive and durable character confers upon it a particularly shameful character."

76. Following on from that report a report into conditions at Fresnes dated 15 September 2017 was compiled by an NGO, the International Observatory of Prisons (French Section). That report noted that "the disastrous situation of the Fresnes men's prison has also been sharply criticised several times by Administrative Courts in the last 12 months." The report referred in particular to a judgment of 26 July 2017 by the Council of State which included the following passage:

> "The men's prison of the Fresnes penitentiary centre, which is under-sized, reached an occupancy rate of 214% as at 18 April 2017, which implies three to a cell in cells designed for two inmates. Moreover, it is clear from the emergency recommendations made on 18 November 2016 by the Inspector General of Places of Deprivation of Liberty, that the establishment, obsolete by reason of its age and lack of renovation, is confronted on a repeated basis with the presence of pests and particularly bedbugs in the beds of the inmates. Furthermore, the inmates also suffer from a lack of light in the cells and the dampness of the latter. Therefore, these detention conditions, marked by a lack of privacy and lack of intimacy, are of a nature detrimental to the private life of the inmates, to an extent exceeding the inherent restrictions of detention, that has exposed them to inhuman or degrading treatment, this seriously undermining two fundamental freedoms."

77. The report also made reference to orders of the Administrative Tribunal of Melun, which had ordered the administration to carry out a certain number of measures with a view to the improvement of the detention conditions within Fresnes, on 6 October 2016 and again on 28 April 2017. However, the report said that it was impossible to confirm whether the injunctions had been respected by the administration.

78. As we have mentioned, the second matter on which the Appellants rely is the material conditions in the prisons concerned. There is plenty of evidence before this Court about the intolerable conditions at Fresnes in particular. These include the CPT report, which however we note is based on an inspection which took place almost three years ago, in November 2015: see in particular pp. 28-29. See also the references to bedbugs and rat infestation, which had to be addressed by orders of the Administrative Tribunal at Melun, to which we have referred above. The most recent order of which we are aware by that Tribunal dates from April 2017.

79. See also the Inspector General's report making emergency recommendations on 18 November 2016 in relation to Fresnes. At para. 1.2 this report said that:

> "Unsuitable premises and disastrous hygiene present proven risks to the health of the detainees and the prison guards."

The cumulative conditions at Fresnes led the Inspector General to conclude that the situation there was comparable to that which the European Court of Human Rights had considered to be a violation of Article 3 in *Canali v France* (Judgment of 25 April 2013), where it was found that the conditions of detention amounted to degrading treatment. The Inspector General also expressed the opinion that the conditions at Fresnes contravened Article 22 of the Penitentiary Act of 24 November 2009, which guarantees to every detained person respect for his dignity and rights.

80. However, as Mr Lloyd points out to this Court, the evidence in relation to those material conditions is specific to Fresnes and cannot necessarily be taken to be representative of other prisons, such as the other three with which this case is concerned. See also the report of 15 September 2017 of the International Observatory of Prison (French Section), which also was specifically concerned with Fresnes.

81. The third matter about which Ms Macdonald complains is the nature of the prison regime to which detainees may be subjected. There is evidence before the Court, again particularly in relation to Fresnes, that inmates may be confined to their cells for 22 out of 24 hours: see the report of the Inspector General of 18 November 2016 and the report of the International Observatory of Prisons in September 2017.

82. The fourth specific matter of which Ms Macdonald complains is the risk of violence from other prisoners, not least because of the overcrowding. This was referred to most recently in the Inspector General's report of February 2018: see particularly pp.15-18.

83. In the CPT report based on inspections which took place in November 2015, at p.6, it was said that the CPT was concerned about the high number of credible allegations of insults, excessive use of force and deliberate beating by some supervisors at the prison at Fresnes. Moreover, some allegations of excessive use of force and insulting remarks were collected in the other three prisons which it visited which included Villepinte. The Committee made specific recommendations to the French authorities to prevent such acts.

84. At p.46, at para. 84, the CPT said that the most worrying situation concerned the prison at Villepinte. Prison personnel were insufficient in relation to the number of detainees. The Committee recommended that the French authorities should take the necessary measures to ensure the effective presence at all times of a sufficient number of trained personnel to ensure normal operation in the prisons of Fresnes, Nîmes and Villepinte.

85. At p.31, at para. 50 of its report, the CPT expressed concern about the situation at Villepinte, where there was an atmosphere where the detainees said they were "in control." Management was aware of this phenomenon, which seemed to have its roots in a lack of personnel and too frequent turnover of management in recent years.

86. There is similar evidence of tension and violence at Fresnes: see the report of the International Observatory of Prisons, summarising what had been said by the Inspector General and the CPT in relation to "the climate of tension and violence prevailing within the Fresnes men's prison": see para. 33.

Conclusions on Article 3

87. In our view, the crucial evidence in the present case relates to *overcrowding* in the four prisons with which we are concerned. In relation to those four prisons, we are satisfied on the evidence that there may be substantial grounds for believing that the Appellants face a real risk of inhuman or degrading treatment if they are extradited.

88. However, even in relation to those prisons, the evidence before this Court is only that the Appellants "could" be detained there if they are returned to France. Furthermore, it is not clear to us how much space they would have and, in particular whether it would be less than $3m^2$ or indeed between $3m^2$ and $4m^2$.

89. We therefore do not accept Ms Macdonald's primary submission that the Appellants should be discharged immediately on Article 3 grounds. However, in the circumstances of this case, we have come to the conclusion that there is sufficient evidence before the Court to require this Court to make a request of the French authorities setting out certain questions on which we need specific information before this Court could permit the extradition of these Appellants to France. Those questions are set out at the end of this judgment.

90. After the hearing in the present appeals had finished, another Divisional Court (Irwin LJ and Julian Knowles J) heard the case of *Grant v Public Prosecutor of Argentan, France* [2018] EWHC 1630 (Admin) and delivered judgment on 28 June 2018. Mr Lloyd has drawn that judgment to our attention by way of update. Brief written submissions have been filed on behalf of the Appellants and in response by the Respondent. However, it seems to us that each case must turn on its own facts. We note in particular that that case concerned two prisons which are not in issue in the present cases: Le Mans and Caen. We also note that, at para. 5 of its judgment, the Court referred to the fact that judgment was pending in the present case but observed that:

> "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."

In the circumstances therefore we do not consider that reference to the decision in *Grant* takes the arguments further one way or the other in the present appeals.

91. The conclusion we have reached on Article 3 renders the additional grounds relied on by Mr Shumba, the First Appellant, and Mr Bechian, the Second Appellant, at least potentially relevant to the outcome of their appeals. We therefore turn to consider those additional grounds (under section 14 of the 2003 Act and Article 8 of the ECHR) in those two cases. Ms Macdonald emphasised that the additional grounds are not mere makeweights but rather of independent substantive merit such as to justify allowing the appeals in favour of Mr Shumba and Mr Bechian in any event.

Section 14 and Article 8: a summary overview

92. Mr Shumba and Mr Bechian contend that in each of their respective cases the District Judge was wrong to find:

(a) that extradition was not oppressive due to the passage of time for the purpose of section 14 of the 2003 Act ("section 14"); and/or

(b) that extradition was a proportionate interference with their right to respect for private and family life pursuant to section 21 of the Act and Article 8 of the ECHR ("Article 8").

Section 14

93. Section 14 provides:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have:
>
> (a) committed the extradition offence (where he is accused of its commission), or
>
> (b) become unlawfully at large (where he is alleged to have been convicted of it)."

94. The burden is on the Requesting Judicial Authority to prove (to the criminal standard) that an individual is a fugitive (and so not entitled to rely on the passage of time under section 14), and on the Requested Person to prove (to the civil standard) that it would be unjust or oppressive to extradite him.

95. This Court has held recently that the effect of section 14(b) and the words "if (and only if)" is that in a conviction case the only passage of time on which reliance may be placed as barring extradition under section 14 is that arising since the person became unlawfully at large (see *Wisniewski and others v Poland* [2016] EWHC 386 (Admin); [2016] 1 WLR 3750, at para. 51). Whether or not someone is "unlawfully at large" in a conviction case depends on whether he is in contravention of a lawful sentence under the applicable legal system. This is an "objective state of affairs to which his knowledge and understanding are irrelevant" (see *Wisniewski* at para. 54]. Sir Wyn Williams (sitting as a High Court Judge) adopted with approval the approach of *Wisniewski* in *Konecny v District Court Czech Republic* [2017] EWHC 2360 (Admin) (at para. 19)[1] after having considered previous authorities, including the judgment of Blake J in *Rahman v County Court of Boulogne sur Mer, France* [2014] EWHC 4143 (Admin).

[1] In *Rahman* Blake J concluded that the period of delay to be considered for section 14 purposes in that case ran from the earliest date of the offending and not the date of sentence. We are told that permission to appeal to the Supreme Court has been granted in the case of *Konecny*.

96. It is common ground that any delay in the commencement or conduct of extradition proceedings brought about by the accused fleeing the requesting country, concealing his whereabouts or evading arrest cannot (absent the most exceptional circumstances) be relied upon as a ground for holding it to be unjust or oppressive to return him: see *Gomes v Trinidad & Tobago; Goodyear v Trinidad & Tobago* [2009] UKHL 21; [2009] 1 WLR 1038, at para. 29; and *Wisniewski* (supra), at para. 59.

97. Whether or not extradition would be unjust or oppressive by reason of the passage of time requires an overall judgment on the merits on a case by case basis (see *La Torre v The Republic of Italy* [2007] EWHC 1370 Admin (at para. 37). Relevant factors may include the length of time in question, the seriousness of the offence and the impact on family members. Culpable delay on the part of the state can tip the balance in favour of the accused in borderline cases where the accused is not to blame: see *Gomes v Trinidad & Tobago; Goodyear v Trinidad & Tobago* (supra), at paras. 23-27.

Article 8

98. Article 8 provides materially that everyone has the right to respect for his private and family life and, in para. (2), that:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

99. In *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; [2013] 1 AC 338, at para. 8, Lady Hale confirmed that the crucial question is whether the interference with the private and family lives of the extradite and other family members is outweighed by the public interest in extradition. That public interest would always carry great weight but that weight would vary according to the nature and seriousness of the crime. Delay could diminish it and at the same time increase the impact of extradition on private and family life. The public interest in extradition would probably outweigh Article 8 rights unless the consequences of interference would be "exceptionally severe" (although there is no separate test of exceptionality). At paras. 15 and 33 Lady Hale emphasised that, in cases involving a child's rights, the best interests of the child must be a primary consideration. It should not be assumed that the public interest in extradition is almost always strong enough to outweigh harm to the child's interests. The overall length of any delay may be relevant to the Article 8 question, even if the requested person has fled in order to avoid prosecution (see para. 46). In short, there is an overall balancing exercise to be carried out, weighing the nature and gravity of the interference against the importance of the aims pursued (see para. 30). In *Celinski and others v Polish Judicial Authorities and others* [2015] EWHC 1274; [2016] 1 WLR 551, at paras. 15-17, this Court advocated the adoption of a "balance sheet" approach, setting out the "pros" and "cons" of extradition.

100. Finally, guidance as to the correct approach on appeals from Article 8 decisions can be found in *Celinski* (supra), at para. 24. The single question is whether or not the district

judge made the wrong decision. Only if the appellate court concludes that he/she did, applying the approach set out by Lord Neuberger in *Re B (A Child) (FC)* [2013] UKSC 33; [2013] 1 WLR 1911, at para. 93, can the appeal be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected.

Mr Shumba

Facts and chronology

101. Mr Shumba is now 35 years old. He is subject to a "conviction" EAW issued by the Public Prosecutor in Nanterre on 2 November 2016, certified by the National Crime Agency ("NCA") on 29 November 2016.

102. The EAW is a warrant to serve 1 year 10 months of a 2 year prison sentence (see Box C). Mr Shumba was convicted on 7 September 2007 at the Correctional Court in Nanterre (see Box B). The framework list indicates "illicit trafficking in narcotic drugs and psychotropic substances".

103. Box D of the EAW states that Mr Shumba did not appear at trial. He was not summonsed to trial but by other means received official information of the scheduled date and place. He had not been personally served with the decision but would be entitled to a re-trial. Box D.4 states that Mr Shumba was informed during the judicial investigation that notices or documents to be served would be sent to his declared address and that he had to notify the authorities of any changes of address. A summons by a bailiff had been sent to his or her last declared address, mentioning the date, time and cause of the summons so that he was deemed to be informed of the scheduled trial and that a decision could be made in his absence.

104. Box E indicates that Mr Shumba was convicted of four offences of "acquisition, transport, retention, offer or sale of cannabis resin between June 1st 2005 and February 2nd 2006 as co-perpetrator". Details of his offending are then set out. Mr Shumba was implicated by another man arrested with five blocks of cannabis in his possession. Box E goes on to confirm that a judicial investigation was opened on 6 February 2006, which investigation revealed the existence of an illicit narcotic drugs business in which Mr Shumba actively participated as a supplier. Mr Shumba was placed in pre-trial detention on the same day that he was placed under judicial examination and he was released under judicial supervision on 6 April 2006. He did not appear at the hearing on 7 September 2007.

105. Mr Shumba was arrested on the EAW on 10 March 2017 and brought before Westminster Magistrates' Court that day. He was granted conditional bail. The District Judge asked the CPS to make enquiries of the French authorities in relation to the delay in issuing the EAW. The hearing fixed for 27 April 2017 was adjourned to 22 June 2017. The District Judge heard evidence from Mr Shumba. Judgment was handed down on 23 June 2017. All bars to extradition were rejected and extradition was ordered. In relation to section 14, the District Judge found that Mr Shumba was a fugitive. In relation to Article 8, she concluded that the consequences of extradition for Mr Shumba would not be exceptionally severe.

Section 14

106. Mr Shumba challenges the District Judge's finding that he was a fugitive and so not entitled to rely on section 14.

107. The District Judge recorded that Mr Shumba was arrested in February 2006 and held in pre-trial detention until April 2006 when he was placed under judicially controlled temporary release. He was required to provide an address and informed that all official correspondence would be served on this address. He was told that he had an obligation to notify the authorities of any change of address. Formal notice of the hearing was delivered by a bailiff to the address provided and it was established that Mr Shumba was no longer resident. He had not notified the authorities that he had changed address.

108. The District Judge stated that Mr Shumba accepted that there were restrictions on his liberty and that his release was due to his father's illness. He initially went to his father's address but had to leave when his father died. She recorded his assertion that he informed the police that he was moving to Paris to stay with friends. That address became unavailable to him and so he wrote to the Judge requesting permission to move to the UK. He was initially told that the Judge could not provide an immediate response. He claimed that the police told him that it would be acceptable for him to move as long as they were provided with an address. When he heard nothing further he assumed there was no objection to a move to the UK and he arrived in May 2006. He heard no more about ongoing procedures and had renewed his travel documents without difficulty. He had travelled to Spain and Madagascar without incident. He had spent time in custody in the UK in 2010 with no mention of a conviction in France.

109. The District Judge found Mr Shumba's evidence to be "vague and evasive about his movements after he was released". He purported to claim that he had entered into correspondence with the examining Judge but was not able to provide any documentation to corroborate his account. It was "inherently incredible" that the police would have assured him that he could leave the jurisdiction when he was being judicially supervised. She went on as follows:

> "36. On the evidence I am satisfied that he left the jurisdiction because he did not want to go back to prison – something he actually stated when he was giving evidence.
>
> 37. I do not believe him when he says he told the authorities about his various changes of address. The EAW makes it clear that he did not and I prefer this evidence. I am satisfied that the JA made several attempts to trace him and to serve the requisite summons on him and I am satisfied that, when he left, he was well aware he would be required to attend court at some stage. It was incumbent upon him to remain proactive insofar as the ongoing prosecution was concerned. Instead he made no subsequent attempts to establish whether he was of ongoing interest to the JA."

110. The District Judge was fully entitled to conclude that Mr Shumba had failed to notify the authorities of his changes of address as required. There was evidence of an address requirement: the Appellant had been released on remand because of his father's ill-

health and Box D.4 recorded the requirement in terms. The District Judge was then entitled to find that Mr Shumba breached that requirement by failing to inform the authorities about his changes of address based on the EAW and despite his protestations to the contrary. As set out above, she did not find Mr Shumba to be a credible witness. Significantly, there was no corroborating evidence of any such information being provided at any stage by Mr Shumba. His version of events in relation to police assurances was "inherently incredible". Mr Shumba fled the jurisdiction to avoid going back to prison. In failing to comply with the notification requirement, Mr Shumba had put himself beyond the reach of the legal process.

111. As for the criticism of the District Judge's finding that the authorities made "several" attempts to trace Mr Shumba and serve him, there was at least one such attempt made, as stated on the face of the EAW: a summons was sent to his last declared address (as reflected in para. 11 of the District Judge's ruling). Any error as to the number of attempts made was immaterial to the finding that Mr Shumba was a fugitive. We were also taken by Ms Macdonald in reply to a letter dated 21 April 2017 from Mr Shumba's French *avocat to* Mr Shumba. However, that letter appears to focus on an alleged failure to notify Mr Shumba of the court's decision, a different issue not raised before us, rather than on an alleged failure to send a summons to Mr Shumba's last declared address. Even if it does relate to the summons referred to in the EAW, the District Judge was entitled to accept the statement in the EAW that the bailiff had served a summons as there declared.

112. In short, there is no proper basis on which this Court should on an appeal interfere with the conclusion of the District Judge, who had seen and heard Mr Shumba in the witness box, that Mr Shumba was a fugitive.

Article 8

113. The District Judge recorded that Mr Shumba had been resident in the UK since 2006. He had a son here, born in 2012. He did not live with the child's mother, from whom he had separated in 2015, but they shared their son's care. The son spent half his time with each parent. Mr Shumba had trained as a chef but was not currently in full time employment. The Article 8 rights of both Mr Shumba and his son were engaged.

114. Although the District Judge did not expressly set out a "balance sheet" approach, she clearly carried out a proportionality exercise, having considered the correct authorities (as is accepted for Mr Shumba). She carried out the exercise of balancing the competing interests of the lawful extradition process and the Article 8 rights. The relevant factors can be discerned without difficulty in her judgment (again, as is accepted for Mr Shumba). On the one hand:

(a) Mr Shumba's Article 8 rights had been accumulated by him in the full knowledge of his precarious situation;

(b) there was a weighty public interest in ensuring that the UK met its international obligations and that those accused of criminal behaviour did not find unwarranted safe haven in the UK;

(c) the offences alleged were extremely serious;

(d) Mr Shumba had deliberately sought to evade prosecution by fleeing the jurisdiction. He had done nothing over the years to regularise his position;

(e) Mr Shumba is required to serve the balance of a 3 year sentence of imprisonment. (As is apparent from above, the reference to a 3, as opposed to a 2, year sentence was an error.)

115. On the other hand:

(a) the offences were committed 11 years ago;

(b) Mr Shumba shared the care of his son who would be distressed if his father were removed.

116. As for the son, the District Judge was not persuaded that he would be left destitute in the absence of Mr Shumba being the sole carer. There was no risk of the permanent severance of ties.

117. We are not persuaded that the District Judge's conclusion at the end of the balancing exercise was wrong. She exercised her judgment on the basis of the correct principles as applied to the facts of the case.

118. It is suggested that the District Judge failed adequately to consider the context of Mr Shumba's offending, namely as a young man getting into trouble with an acquaintance, and that she made no reference to the significant age of the offences. However, the District Judge made express reference to the age of the offences, identifying it as a factor militating towards discharge. She would have been well aware of Mr Shumba's evidence as to his youth and behaviour. As to Mr Shumba's position more generally, she again referred expressly to his family position and his training as a chef. Any force in Mr Shumba's submissions is weakened by the fact that Mr Shumba deliberately sought to flee the jurisdiction, as the District Judge was entitled to find.

119. In so far as the District Judge may have made a substantive error in relation to the balance of sentence outstanding, Mr Shumba (on the correct factual basis) still had a significant term of imprisonment outstanding to serve. Further, the shorter the balance of term to serve, the less the degree of interference with the rights in Article 8, and harm to the child in particular. In relation to delay, the District Judge was fully aware of the background chronology and passage of time, not least given her previous ruling in relation to section 14. As for the suggestion that the District Judge "set the bar too high" by referring to the fact that the son would not be left "destitute", the use of that word was perhaps infelicitous but the question has to be determined as a matter of substance and having regard to the circumstances of the case taken as a whole. The District Judge was in effect doing no more than weighing up the best interests of the son separately and as a primary consideration against the factors militating in favour of extradition. She was entitled to conclude that there was no risk of the severance of ties and that, despite the son's Article 8 rights, extradition would not amount to a disproportionate interference.

120. We therefore are not persuaded that the District Judge made the wrong decision on Mr Shumba's Article 8 challenge to extradition in striking the balance as she did.

121. For these reasons, we dismiss Mr Shumba's appeals in relation to the District Judge's findings both in relation to section 14 and Article 8.

Mr Bechian

Facts and chronology

122. Mr Bechian is now 39 years old. He is subject to a "conviction" EAW issued by the Public Prosecutor of Bobigny County Court on 11 January 2017, certified by the NCA on 7 February 2017. The EAW seeks Mr Bechian's return to serve a sentence of 30 months' imprisonment, of which 28 remain outstanding, following his conviction on 29 November 2016 for offences of fraud and using falsified cheques committed between October 2006 and October 2007. The offences involve 56 cases of serious fraud across France and involving some 890,000 Euros. Mr Bechian was arrested and produced at Westminster Magistrates' Court on 9 February 2017. Following a hearing in March 2017, extradition was ordered on 5 June 2017.

123. Given the nature of the arguments raised on behalf of Mr Bechian, it is necessary to set out the earlier procedural chronology in a little detail:

February 2009	Convicted and sentenced in his absence to 3 years' imprisonment. EAW issued
January 2011	Arrested in Belgium and surrendered to the French authorities. Two months in Villepinte prison
March 2011	Procedure declared a nullity and Mr Bechian released
December 2011	Investigation judge refers a "supplementary indictment" to the criminal court
February 2014	Convicted and sentenced in his absence to 3 years' imprisonment. EAW issued
March 2015	Arrested and granted conditional bail
April 2015	Application to set aside 2014 conviction and a new trial date is set
April 2016	Extradition hearing adjourned for further information as to whether Mr Bechian was to be treated as an accused or convicted person
June 2016	Extradition hearing resumes. The EAW is discharged for lack of particularity
29th November 2016	Convicted and sentenced in his absence to 3 years' imprisonment
December 2016	Notice of appeal

124. Thus this is the third time that Mr Bechian has been convicted of these offences, and this is the second EAW (to the UK) in respect of them. He has an outstanding appeal against conviction. He married in 2001 in Romania, although had not lived with his wife until 2013 (in the UK). He came to France at the beginning of 2007 for work, having previously worked in France and Portugal. He came to the UK in the autumn of the same year and lived in Milton Keynes for 3 years. He travelled to visit family in 2011 and was arrested pursuant to the first EAW whilst passing through Belgium from

where, after 2 weeks in custody, he was sent to France, there spending another 2½ months in prison. He lost his job and accommodation in the UK as a result. He was released in March 2011 upon his convictions being declared a nullity. He went to Italy. Neither he nor his French solicitor were informed of the resumption of French criminal proceedings against him. In September 2013 he returned to the UK, with his wife joining him shortly afterwards, and they settled here, he working as a lorry driver and she as a part-time hairdresser. He has no children. He only became aware of his second conviction in France after his arrest in March 2015.

125. In his judgment of 5 June 2017 the District Judge rejected all challenges to extradition, including by reference to section 14, an issue raised for the first time at the final hearing before him, and Article 8. He declared himself "entirely satisfied to the necessary standard" that there were no bars to extradition.

Section 14

126. There is no suggestion that Mr Bechian has been a fugitive and so is disentitled from relying on section 14. What is submitted for Mr Bechian is that the "logic" of *Wisniewski* (supra), namely that in a conviction case whether or not someone is unlawfully at large depends on whether he is in contravention of a lawful sentence under the applicable legal system, an objective state of affairs, should lead us to conclude that Mr Bechian has been "unlawfully at large" from the date of his first conviction (in 2009). Otherwise there is intrinsic unfairness in circumstances where there have been, as here, successive convictions. The significant culpable delay since conviction in 2009, caused by repeated "bungling of the proceedings" on the part of the authorities, renders Mr Bechian's extradition now oppressive.

127. Perhaps because of the lateness of an objection based on section 14 being raised, neither the parties nor the District Judge appear to have focussed on the question of when the relevant period of time would begin to run for section 14 purposes. Rather, in his judgment, the District Judge focussed on the question of oppression in the round. He described the offending as being a "complex conspiracy" which would have a taken a considerable amount of time to unravel. He recorded that Mr Bechian had two previous foreign convictions (in France: immigration offences; in Romania: illegal people-trafficking). Although the offending dated back nearly 10 years, he did not consider that there had been delay such as would render extradition oppressive.

128. We are unable to accept Mr Bechian's central submission that he has been unlawfully at large for the purpose of section 14 since the date of his first conviction in 2009. We are dealing with the lawfulness of this particular EAW, which is based on a particular conviction, namely that of 29 November 2016, and not that of 2009. We note also that Mr Bechian's first conviction has been declared a nullity.

129. However, we accept Mr Bechian's "fall-back" submission that the full chronological picture, including any delay on the part of the authorities, is nevertheless relevant for Article 8 purposes. This position also meets Mr Bechian's "fairness" objections, as anticipated by the court in *Wisniewski* (supra) at para. 56. There the Court recognised that its interpretation of s. 14(b) might lead to cases in which a requested person would be, for reasons unconnected with his conduct, unable to rely on section 14 because he

had not been unlawfully at large. The Court referred to Article 8 then providing "a safety net which would permit the effect of passage of time to be brought into account".

130. On that basis, considering the passage of time since 29 November 2016, it cannot be said that extradition would be unjust or oppressive. This is not a borderline case, nor one where there has been any material (or culpable) delay. Mr Bechian's challenge based on section 14 must fail.

Article 8

131. In relation to Article 8, the District Judge carried out a clear "balance sheet" exercise, concluding that it would not be a disproportionate interference for Mr Bechian to be extradited. Factors in favour of granting extradition were the strong and continuing public interest in the UK abiding by its international obligations and the serious of the offences in respect of which Mr Bechian had been convicted, with an outstanding sentence of 28 months' imprisonment. Factors against extradition were that Mr Bechian had been settled in the UK since September 2013, he was in regular employment with fixed rented accommodation where he resided with his wife. He had concerns as to how she would cope in his absence. He had led a law-abiding life in the UK and is not a fugitive from justice. The District Judge appreciated that there would be hardship caused to Mr Bechian and his wife but that of itself was not sufficient to prevent extradition being ordered. There were no dependent children and Mr Bechian had only relatively limited ties to the UK.

132. On behalf of Mr Bechian Ms Macdonald submits that the District Judge failed to take account of two material factors:

(a) delay on the part of the Respondent authorities since the commission of the offences;

(b) the fact that a substantial part of that delay was culpable. This is said to be the single most important countervailing factor in the case. It is said that there have been several important changes to Mr Bechian's private and family life which would not have come about had he been prosecuted diligently and expeditiously. He has now settled with his wife in the UK, both with jobs. Further, the impact of extradition is more pronounced in terms of stress and upset because of the protracted nature of the proceedings.

133. The District Judge said in terms that he had carefully considered all the evidence, oral and documentary, and the submissions before him. He was fully aware of the procedural passage of events, having set them out clearly in the context of section 14. He took express account of the personal circumstances, including the employment and accommodation position, of Mr Bechian and his wife. There is no challenge to the District Judge's finding that Mr Bechian had only relatively limited ties to the UK. Even in the face of some culpable delay, the gravity of the offending, the length of outstanding sentence and the importance of upholding international obligations were factors that could properly be said to outweigh the detriment, upset and distress consequent upon extradition.

134. We therefore are not persuaded that the District Judge made the wrong decision on Mr Bechian's Article 8 challenge to extradition in striking the balance that he did.

135. For these reasons, we also dismiss Mr Bechian's appeals against the District Judge's findings both in relation to section 14 and Article 8.

Conclusion

136. For the reasons we have given above, we dismiss the appeals of the First and Second Appellants insofar as they are based on section 14 of the 2003 Act and Article 8 of the ECHR.

137. In relation to the Article 3 ground, which arises in all three of these appeals, we consider that it is necessary to make a request to the relevant French authorities to answer certain questions before we reach a final determination on it. Normally, as in the case of *Yaser Mohammed*, this Court would be minded to request a response to its questions within 28 days. However, in view of the time of year, we propose to request a response by 7 September 2018.

138. We invite individual answers to the individual questions posed separately in relation to each of the three Appellants:-

"Shumba

1. In which part of which institution or institutions will Emanuel Shumba be detained if he is returned to France?
2. Will Emanuel Shumba be accommodated in a cell which provides him with at least $3m^2$ of personal space (excluding any in-cell sanitary facility) at all times throughout his detention? If the answer is Yes, will he have between $3m^2$ and $4m^2$?
3. Will the overall surface of the cell allow Emanuel Shumba to move freely between the furniture items in the cell at all times throughout his detention?
4. What will the other detention conditions be for Emanuel Shumba throughout his detention, including whether he will be accommodated in a cell where he or someone he is sharing with is sleeping on a mattress on the floor, what sanitary facilities there will be and whether the toilet will be fully partitioned from the rest of the cell, how many hours a day he will be allowed out of his cell, what meals he will receive and whether there remains a serious problem with rats and bedbugs at the prison?"

"Bechian

1. In which part of which institution or institutions will Robin Bechian be detained if he is returned to France?
2. Will Robin Bechian be accommodated in a cell which provides him with at least $3m^2$ of personal space (excluding any in-cell sanitary facility) at all times throughout his detention? If the answer is Yes, will he have between $3m^2$ and $4m^2$?

3. Will the overall surface of the cell allow Robin Bechian to move freely between the furniture items in the cell at all times throughout his detention?
4. What will the other detention conditions be for Robin Bechian throughout his detention, including whether he will be accommodated in a cell where he or someone he is sharing with is sleeping on a mattress on the floor, what sanitary facilities there will be and whether the toilet will be fully partitioned from the rest of the cell, how many hours a day he will be allowed out of his cell, what meals he will receive and whether there remains a serious problem with rats and bedbugs at the prison?"

"Ciprian Henta

1. In which part of which institution or institutions will Ciprian Henta be detained if he is returned to France?
2. Will Ciprian Henta be accommodated in a cell which provides him with at least $3m^2$ of personal space (excluding any in-cell sanitary facility) at all times throughout his detention? If the answer is Yes, will he have between $3m^2$ and $4m^2$?
3. Will the overall surface of the cell allow Ciprian Henta to move freely between the furniture items in the cell at all times throughout his detention?
4. What will the other detention conditions be for Ciprian Henta throughout his detention, including whether he will be accommodated in a cell where he or someone he is sharing with is sleeping on a mattress on the floor, what sanitary facilities there will be and whether the toilet will be fully partitioned from the rest of the cell, how many hours a day he will be allowed out of his cell, what meals he will receive and whether there remains a serious problem with rats and bedbugs at the prison?"