Neutral Citation Number: [2019] EWHC 272 (Admin)

Case No: CO/1645/2018 & CO/1383/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2019

Before :

LORD JUSTICE BEAN
And
MR JUSTICE OUSELEY

- -

Between :

VELI YILMAZ and ERKAN YILMAZ	**Appellants**
- and -	
GOVERNMENT OF TURKEY	**Respondent**

- -
- -

David Josse QC and **Ben Keith** (instructed by **Ronald Fletcher Baker LLP**) for the **Appellant Veli Yilmaz**
David Josse QC and **Joel Smith (**instructed by Criminal Defence Solicitors) **for the Appellant Erkan Yilmaz**
Richard Evans (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 30 January 2019

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Approved Judgment

Lord Justice Bean:

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

2. The Appellants are sought by the Turkish authorities for the prosecution of offences committed in 2010 in Turkey described as "plunder", "torment" and "restriction of freedom of person by using coercion, threat or deceit imputed on the suspect". The factual allegations include kidnapping, threats to kill and serious ill treatment of a victim being held against his will. The maximum sentences for the alleged offences in Turkish law are up to 15 years imprisonment for "plunder", 5 years for "torment" and 7 years for the offence involving restriction of the victim's freedom. It is sufficient for present purposes to say that these are allegations of serious offences and that the Appellants if convicted would be likely to spend a substantial period of time in prison.

3. Both the Appellants were arrested and brought before Westminster Magistrates' Court on 12 May 2017. The case was heard over three days between 4th and 7th December 2017 by District Judge Vanessa Baraitser. The case was then adjourned to enable the Turkish government to respond to a recently served expert report and for final submissions to be made in writing. In the event no further information was received from the Turkish authorities and, after final written submissions had been lodged, the judge issued a written decision dated 20 February 2018.

4. The judge rejected all the grounds of challenge put forward on behalf of the Appellants. These were (1) a contention that extradition was barred under section 81 of the 2003 Act by reason of extraneous considerations, namely that the requests for extradition were motivated by reason of the Appellants' Kurdish ethnicity or their political opinions; (2) that if extradited the Appellants would be exposed to a real risk of being subjected to a flagrant denial of justice in Turkey so as to render extradition incompatible with Article 6 of the ECHR; and (3) that extradition would expose them to a real risk of being treated in a manner which breached their rights under Article 3 of the ECHR by reason of prison conditions in Turkey. The District Judge accordingly decided to send the Appellants' case to the Secretary of State. A Minister of State signed an extradition order in respect of both Appellants on 17 April 2018.

5. The Appellants applied for permission to appeal to this court. Permission was initially refused on the papers by Elisabeth Laing J on 3 October 2018. On a renewed oral application, Garnham J granted permission solely in relation to the ground based on Article 3 and refused it on all other grounds. He directed the matter to be listed for an appeal hearing before a Divisional Court.

The hearing and decision in the Magistrates' Court

6. DJ Baraitser had before her reports from Professor Rod Morgan, an experienced and respected expert witness on the subject of prison conditions. Professor Morgan noted that Turkey had signed and ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment in early 1998. Since then the Committee for the Prevention of Torture and Inhuman or Degrading Punishment ("the CPT") have raised concerns about an allegedly widespread use of torture by the police and a

dramatic increase in the prison population resulting in overcrowding and poor conditions, although Turkey has constructed new prisons in order to attempt to deal with the overcrowding issue. If remanded pending trial it was likely that the Appellants would be remanded in the prison closest to where the alleged offences occurred, namely Bursa "E-Type" Prison.

7. Professor Morgan had no information concerning the then level of occupancy of that prison nor the conditions there. The most recent inspection of an E-Type prison by the CPT had been in 2013 when they visited three prisons (not including Bursa) of which two had overcrowding and poor conditions. He expressed the opinion that Bursa prison was likely to be overcrowded too. He wrote:

> "5.3 Bursa is Turkey's fourth largest city (population 2.35 million) in NE Anatolia on the sea of Marmara and lies approximately 100 miles south of Istanbul by road. Bursa has a large E-Type prison with a stated capacity for 1000 prisoners. It is reasonable to assume that Veli Yilmaz will be held on remand at Bursa prison.
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> 5.4 I have never been to Bursa prison and neither has the CPT. I know of no reliable information regarding the current occupancy of Bursa prison or of conditions there. Further, as indicated above, we have no very up to date [reports] from the CPT regarding prisons in general and E-Type prisons in particular due to the failure of the Turkish authorities to authorise publication of recent CPT reports. It follows that I have no alternative but to fall back on rather old CPT data regarding E-Type prisons other than that at Bursa and draw some conclusions from my visits to Maltepe Prisons 2 and 3 [L-Type prisons] in 2015 and 2017.

8. As to overcrowding in Turkish prisons generally, Professor Morgan wrote:-

> "4.5 We appear now to have entered a new dark phase. The last CPT report to be published was in January 2015 for a visit undertaking by the CPT in June 2013. Since then, there have been four CPT visits (in June 2015, April 2016, August 2016 and May 2017). None of which reports to date have been published. It is not unreasonable to speculate why that should be the case. The August 2016 CPT visit, for example, was specifically to monitor what the Turkish authorities were doing with the thousands of persons (estimates vary between 35,000 and 70,000 arrested following the failed coup on 15 July 2016). The CPT press release for the August 2016 visit included the information that the Committee had, *inter alia*, been to a "basketball court" which was being used to detain arrestees.
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> 4.6 The new coyness on the part of the Turkish authorities to reveal what is happening in custodial sites includes their refusal to grant me access in the present case, in marked contrast to the permission granted in March 2015 in the case of *Ross Charles v*

> *Turkey* and coincides with what I learned about NGOs' access to prisons when I was in Turkey in early 2017."

9. Professor Morgan cited an interim report by Mr Neils Melzer, the UN Special Rapporter on Torture, who visited Turkey from 27 November to 2 December 2016. Mr Melzer recorded that he was permitted to see everything he asked to see and acknowledged the stresses placed on the Turkish authorities as a result of the failed coup and the mass arrests that followed it. On prison overcrowding Mr Melzer's interim report stated:-

> "A major concern is that all visited facilities (except closed prison no.9 of the Silivria Penitentiaries Campus) were significantly overcrowded with occupancy ranging from 125% to more than 200% of the actual capacity. In some institutions the overcrowding appeared to result from the recent influx of inmates following the massive arrests after the failed coup. However, in other locations, the overcrowding as alleged to have been persistent for several years. This overcrowding has had a significant negative impact on prompt access to medical care as well as on recreational activities, working opportunities, training activities and the frequency of family visits."

10. Professor Morgan's conclusion (at paragraphs 7.3) was as follows:-

> "I conclude that there is a substantial risk that if Veli Yilmaz is extradited to Turkey he will be held in conditions breaching Article 3. I also conclude that the Turkish authorities have provided no information and have refused inspection access, such that the known existence of this substantial risk might be dispelled."

11. Professor Morgan gave oral evidence before the District Judge. He said that he was unable to comment on the likelihood of maltreatment of the two Appellants. The only time he had visited a Turkish prison in an extradition context was when he inspected the Maltepe prisons in 2015 and 2017 in connection with the requested extradition from the UK of Mr Ross Charles, a gay man. He had been surprised on that occasion to find that special provision was in fact made available for LGBT prisoners. He was allowed on each visit to conduct a proper inspection, including interviewing prisoners alone. He accepted that the UN Special Rapporteur had been given access to certain Turkish prisons in November and December 2016 and added that it would have been a serious matter for this access to have been refused. He noted that none of the three inspection visits from the CPT since the July 2016 coup had yet resulted in a published report.

12. On the Article 3 issue, the District Judge, having referred to the decisions of this court in *Elashmawy v Italy* [2015] EWHC 28 (Admin) and of the Strasbourg court in *Mursic v Croatia* (2017) 65 EHRR 1, held:-

> "52. It is for the Requested Persons to establish that there are substantial grounds for believing that, if extradited, each will face a real risk of being treated in a manner which breathed his Article 3 right. The Requested Persons submit that the test set

out above is met. I reject this submission for the following reasons:

53. First, Turkey is a member of the Council of Europe and has the benefit of a presumption that the Turkish authorities will protect prisoners from breaches of Article 3.

54. Second, taking into account Professor Morgan's evidence it is reasonable to assume the Requested Persons will be held on remand at Bursa prison. This court has no reliable information regarding conditions or current occupancy in Bursa prison. Professor Morgan has never been to Bursa prison and neither has the CPT (see paragraph 5.4 of his report).

55. Third, the published evidence from the CPT regarding conditions within a Turkish prison estate is now likely to be out of date. The most recent available CPT report relates to a visit in 2013. There have been no published CPT reports since this visit.

56. Fourth, whilst I accept Bursa prison is an E-Type prison, old CPT data regarding E-type prisons in my view does not assist this court in understanding the current conditions at Bursa prison. Equally, evidence regarding Maltepe Prisons 2 and 3 (L-Type prisons) does not assist.

57. Fifth, it is not currently known where the Requested Persons will be held if detained following conviction, as Professor Morgan deals only with their remand awaiting trial. This court is therefore being asked to determine this issue on the basis of findings about the Turkish prison system as a whole rather than in relation to identified prison establishments. There is very limited up-to-date information before this court on conditions across the whole estate.

58. Sixth, references to "overcrowding" do not specify the personal space available to a detainee. Professor Morgan, on the basis of May 2017 data suggests the prison estate is now at least 9.2% overcrowded (see paragraph 7.2 of his report). These statistics do not by themselves indicate that the personal space available to a detainee falls below 3 sq. m in multi-occupancy accommodation. In addition according to Professor Morgan there is a maldistribution of prisoners between institutions, depending on where people have been arrested and held, and where they wish to be held. Overcrowding will therefore vary from prison to prison.

59. Seventh, I note Professor Morgan's view that the Requested Persons' ethnicity is "potentially" highly significant. However, Professor Morgan links this issue with their "known" political engagement with the Kurdish independence movement. I have

set out above the limited evidence regarding the Requested Persons' political activity. There is no evidence that either Requested Persons support armed struggle, the PKK or any other proscribed organisation.

60. Eighth, the most recent reliable, objective information regarding the conditions within the Turkish prison estate therefore comes from Mr. Melzer, the UN Special Rapporteur on Torture following his visit in November/December 2016. Mr. Melzer did not visit Bursa prison.

61. Mr. Melzer did visit prisons in Ankara, Diyarbakir, Sanlurfa, Istanbul and two police stations in Esenler. During this visit he and his team enjoyed "unrestricted access to all places where people are deprived of their liberty", he was able to interview inmates in private. He found the overall conditions of detention in the places visited to be "satisfactory or at least acceptable" (paragraph 5 of his report). Regarding the sanitary conditions he observed, "sanitary and hygienic conditions observed and facilities are generally satisfying, but also affected by the overcrowding" (paragraph 5 of his report).

62. Regarding post-coup arrests, after an initial phase marked by arbitrariness, ill-treatment appears to have ceased. Apart from occasional verbal threats, the team received no allegations and collected no evidence of currently ongoing torture or ill-treatment with respect to those inmates, male or female, who were arrested for reasons related to the attempted coup.

63. Regarding "the situation in the South-East", Mr. Melzer noted a resurgence in violent clashes between the Turkish army and the PKK since July 2015. He noted troubling testimonies of torture and other forms of ill-treatment from both male and female inmates suspected to be members or sympathisers of the PKK during arrest and interrogation. However, his team generally received no allegations and collected no evidence with regards to currently ongoing torture or ill-treatment (paragraph 4 of his report). More importantly, there is no suggestion the Requested Persons are either members of the PKK or sympathise with this organisation.

64. I accept that Mr. Melzer reports that all visited facilities except for one were significantly overcrowded with occupancy ranging from 125% more than 200% of the actual capacity. I note his visit took place within four months following the failed coup of July 2016 and he attributes the overcrowding in some institutions to the result of recent influx of inmates following the mass arrests after the failed coup. In relation to other locations the report makes a general comment that overcrowding was alleged to have been persistent for several years but provides no

> details regarding the degree of overcrowding, including cell space allocated to detainees, within these prisons.
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> 65. Ninth, regarding the "openness" or otherwise of the Turkish authorities in relation to allowing inspections of their prisons, in my view the picture is a mixed one. I accept Professor Morgan's evidence that the Turkish government has not published reports from four recent CPT visits (June 2015, April 2016, August 2016 and May 2017). It is concerning that Professor Morgan was told, in early 2017, by a prison monitoring human rights group (the Turkish Centre for Prison Studies) that access to visit prisons to monitor aspects of the regime has been denied since 2015. However, the Turkish government did publish the CPT report dated January 2015 for a visit undertaken in June 2013. In addition, the Turkish authorities allowed Mr. Melzer, the UN Special Rapporteur on Torture to visit the prison estate, over the period of a week between 27 November and 2 December 2016. As noted above, Mr. Melzer was granted unrestricted access to all places where people are deprived of their liberty. This recent and unrestricted access by the Special Rapporteur is not indicative of a regime refusing to grant access to the international committee to their prison estate.
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> 66. For these reasons I am satisfied that there is insufficient evidence to find that the Requested Persons' extradition is incompatible with Article 3 of the ECHR."

The presumption of compliance and the evidence required to rebut it

13. Since Turkey is a member state of the Council of Europe and there is currently no pilot judgment of the European Court of Human Rights in force relating to conditions in its prisons, the starting point for examination of the Article 3 issue is the presumption that a member state will comply with the Convention; and the burden is on the fugitive to displace the presumption.

14. Mr Evans relied on *Krolik v Polish Judicial Authorities* [2013] 1 WLR 490; [2012] EWHC 2357 (Admin) in which Sir John Thomas PQBD said*:*

> 1. These six extradition appeals have been listed together as in each case the sole issue is the same, namely whether to extradite the Appellants under either accusation or conviction European Arrest Warrants would be a breach of Article 3 of the Convention by reason of prison conditions in Poland. In four of the appeals this issue was raised before the District Judge; in two of them it was not. It is not necessary to set out the facts relating to each Appellant.
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> 2. The purpose of hearing the six appeals together was to enable the court (1) to consider whether, in the light of the very large number of cases [of Polish extradition appeals] to which we refer at paragraph 8 below, the evidence adduced before this

court raises any issue which has not already been considered; (2) to consider whether it is the type of evidence that is anywhere near sufficient to establish a case under Article 3; and (3) to set out the way in which this court will deal with any further appeals raising the issue relating to Polish prison conditions in the future.

The legal principles

3. The law is clear. First, the circumstances in which this court as appellate court can be provided under s.29(4) of the Extradition Act 2003 with evidence which was not adduced before the District Judge is set out in the judgment of this court in *Szombathely City Court v Fenyvesi* [2009] EWHC 231. If there is an intention to rely before this court, which is an appellate court, on evidence that was not adduced before the District Judge, then a statement must be served explaining the circumstances.

4. Second, it is very clear from a long line of authority in this court that Poland, as a Member State of the Council of Europe, is presumed to be able and willing to fulfil its obligations under the Convention, in the absence of clear, cogent and compelling evidence to the contrary. It is not necessary for this court to restate the position. It is well summarised in *Targonsinski v Judicial Authority for Poland* [2011] EWHC 312 (Admin) and *Agius v Court of Magistrates Malta* [2011] EWHC 759 (Admin) at paragraphs 12 to 20. In such a case it would have to be shown that there is a real risk of the requested person being subjected to torture or to inhuman or degrading treatment: see *R(Ullah) v Special Adjudicator* [2004] 2 AC 323 at paragraph 24.

5. Third, the presumption is of greater importance in the case of Member States of the European Union in relation to a European Union Instrument. In *N.S. v Secretary of State for the Home Department* (C-411/10 and 493/10, 21 December 2011), the Luxembourg Court in a decision in relation to the removal of an asylum seeker to Greece, held there was a strong but rebuttable presumption that a Member State would abide by the Convention, as the common European asylum system was based on the assumption that states would abide by the Convention and that other states could have confidence in that regard. The court said at paragraph 83:

> "At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European

> Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights."
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> The court drew a distinction between minor infringements and systemic flaws which might result in inhuman or degrading treatment.
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> 6. Fourth, 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 (see paragraph 91 of the decision in *N.S.*). The Luxembourg court also had the decision of the Strasbourg Court in *M.S.S v Belgium and Greece* (21 January 2011) as evidence before it.
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> 7. The reasoning of the decision in *N.S.* is plainly applicable to the Framework Decision which forms the basis of Part I of the Extradition Act 2003. It reinforces the decisions of this court in *Targonsinski* and *Agius*. It also confirms the observations of Mitting J in *Tworskowski v Judicial Authority of Poland* [2011] EWHC 1502 at paragraph 15 as to the type of evidence required, namely that something approaching an international consensus is required, if the presumption is to be rebutted.

Mr Evans emphasised in particular the phrases "clear, cogent and compelling evidence" in paragraph 4 and "something approaching an international consensus" in paragraph 7.

15. We make the following observations about this passage from *Krolik.* Firstly, as Mr Evans rightly accepted, what is required is clear, cogent and compelling evidence showing not that the fugitive *will* be subjected to torture or inhuman or degrading treatment if returned to the Requesting State but that there is a real *risk* that he will suffer such treatment. That follows from the speech of Lord Bingham of Cornhill in *Ullah* to which this court in *Krolik* referred; see also *Elashmawy v Courts of Brescia, Italy* [2015] EWHC 28 (Admin).

16. Second, the language of paragraph 5 of *Krolik* indicates that the presumption is stronger in the case of an EU Member State than in the case of other member states of the Council of Europe: see also *Elashmawy* at paragraph [50].

17. Third, *Krolik* was a judgment in six appeals raising the issue of prison conditions in Poland following a long series of decisions of this court on the same issue. It was not a case in which there was a need to seek assurances or further information from the Requesting State. Such assurances or further information have been sought in several recent cases involving EU countries including, for example, France (*Shumba* [2018] EWHC 1762 (Admin)) and Portugal (*Mohammed* [2017] EWHC 3237 (Admin)), neither of them subject to a pilot judgment. In *Florea v Romania* [2014] EWHC 2528

(Admin) this court observed that the absence of a pilot judgment does not negate the existence of systemic or structural difficulties in the prison estate of the Requesting State.

18. Fourth, although an "international consensus" of a real risk of treatment in breach of Article 3, or something approaching it, is one way of rebutting the presumption, it is not the only way. We note the different wording used by the CJEU in *Aranyosi* [2016] QB 921 as to when it is appropriate to seek assurances or further information from a Requesting State:-

> "88 …[W]here 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, to that effect, judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 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.
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> 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 ECtHR, 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."

19. In *Purcell v Public Prosecutor of Antwerp, Belgium* [2017] EWHC 1981 (Admin) Hamblen LJ said at [17]-[19]:

> "Mr Fitzgerald QC submitted that the process of obtaining further information which is here described involves an evidential threshold which must be satisfied before such a request is made, namely, as referred to in [94], that there is "objective, reliable, specific and properly updated evidence" of a real risk of a breach of Article 3.
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> In my judgment, this is an incorrect interpretation of the *Aranyosi* decision. The case emphasises the importance of the court having "objective, reliable, specific and properly updated evidence" before any determination of a breach of Article 3 is

> made, and in particular information relating to the conditions in which the individual in question will be detained. It is "to that end" that further information is to be sought. The court must obviously be satisfied that there is a need to seek further information but there is no evidential threshold to be crossed before it can do so. There is therefore no implication from the making of the request for further information that the court has found that Article 3 would be breached on the information currently before it, or that a *prima facie* case to that effect has been made out.
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> This is supported by Criminal Practice Direction 50A.1, upon which the Appellants relied, which refers to requests being made "where the issues are such that further information from the requesting authority or state is needed…."

Fresh evidence

20. On appeal to this court counsel for the Appellants sought to adduce fresh evidence, in particular two items. The first was the full report of the UN Special Rapporteur on his mission to Turkey from 27 November to 2 December 2016. This was presented to the Human Rights Council of the General Assembly at its session between 26 February and 23 March 2018 and was not available to either party before the District Judge, who was only supplied with the interim report. The second is a supplementary report by Professor Morgan dated 19 December 2018.

21. Mr Evans for the respondent did not object to the introduction of the full report of the UN Special Rapporteur, although he argued that the final report does not change any of the conclusions in the interim report which was before the District Judge. He submitted that Professor Morgan's supplementary report ought not to be admitted as it did not satisfy the test in *Hungary v Fenyvesi* [2017] 2381 (Admin*).* Much of the contents of the supplementary report, he submitted, go no further than the original report. Insofar as it gives information about the two prisons at Bursa, that information appears to have been derived from a report published by an NGO in 2017 which was therefore available at the time of the hearing before the District Judge.

22. The additional point made in the supplementary report of Professor Morgan is that he had discovered from the report of the NGO "Platform for Peace and Justice" that:-

> "It is now clear that there are two prisons at Bursa at one of which (Bursa E-Type) custodial conditions are reportedly not overcrowded (though this description is no guide as to whether there is acceptable resort to isolation and other abuses) and at the other (Bursa H-Type) conditions are reportedly grossly overcrowded – possibly over 100% - and very bad.
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> 5.2. I concluded, therefore, that there is a substantial risk that if Veli Yilmaz is extradited to Turkey that he will be held in conditions breaching Article 3. I also conclude that the Turkish authorities have provided no information, and have refused inspection access, such that the known existence of this

> substantial risk might be dispelled. I should emphasise that this lack of information could be easily rectified: the Turkish authorities could publish the most recent CPT reports, they could identify the particular prison in which Veli Yilmaz will, if extradited, be held, and they could allow an independent inspection of the prison they intend employing. The fact that they have done [none] of these things suggests that they have things to hide.
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> 7.4 Finally Veli Yilmaz is of Kurdish ethnicity. If his personal history involves political engagement with the Kurdish independence movement, or if his alleged offence is said to have a political dimension, then in the current political climate in Turkey his vulnerability to maltreatment possibly breaching Article 3 must be judged significant. Veli Yilmaz says that members of his family have been politically involved in the Kurdish independence."

23. The full report of the Special Rapporteur states at paragraph 38 that the facilities he visited (which, as we have noted, did not include the prisons at Bursa) had conditions of detention which were found to be satisfactory or at least acceptable in the circumstances save for the particular problems he went on to identify. One of these was significant overcrowding. He repeated the statistics set out in the interim report. Later in the final report, under the heading "lack of monitoring of detention locations", he welcomed the visit to Turkey by the European CPT in September 2016 and commended "the excellent cooperation shown by the Turkish authorities in his own visit to the country".

24. The Special Rapporteur went on, however, at paragraph 89, to express his concern that "the numerous national bodies that are formally mandated to monitor detention locations do not appear to function properly in practise and thereby fail to assume their crucial role in securing the prevention of prisoner ill-treatment throughout Turkey". A new body called the Human Rights and Equality Institution of Turkey had been established in April 2016 but at the time of his visit at the end of November no commissioners had been appointed to the institution. Prison monitoring boards had been dismantled by decree after the July 2016 coup and at the time of the visit had not yet been reconstituted. Civil society organisations reportedly were not allowed to monitor detention centres and other places of deprivation of liberty. The Special Rapporteur welcomed the appointment of a new Ombudsman by the Turkish Parliament in November 2016 (although the report gives no information as to what that officer's duties or powers would be).

25. We consider that we should formally receive in evidence both the final report of the UN Special Rapporteur and the supplementary information about prisons at Bursa provided by Professor Morgan, and take them into account in reaching our decision. The first was not available at the time of the hearing below except in interim form and is a document of high authority. The second is information which was at all times within the knowledge of the Requesting State's authorities and to which they have offered no response or contradiction. The passage of time since the judgment below, during which

Professor Morgan has not been permitted to visit a Turkish prison, and no report of a post-coup visit to Turkish prisons by the CPT has been published, is an additional reason for admitting the evidence. It would be excessively formalistic on the facts of this case to go through the process of determining first what conclusion we would reach without the fresh evidence, and then whether the fresh evidence would make a decisive difference.

The parties' submissions in this court

26. For the Appellant Mr Josse QC, Mr Keith and Mr Smith submitted that the only evidence available to this Court demonstrates persistent and wide ranging flaws in the Turkish prison estate such as to lead to conditions in some prisons breaching Article 3 of the Convention. They complained that the Turkish authorities have refused to engage with the Appellants' case, either through the provision of further information, by identifying the prison(s) in which the Appellants would be detained, or by way of an undertaking; and that the consequence is that the Appellants are to be returned to a prison estate in which Article 3 is routinely breached by overcrowding. This, they argued, presents a real risk that the Appellants themselves would be subject to such mistreatment; and, absent any protection against this risk in the form of assurances or information from Turkey, the Court must discharge the Appellants.

27. For the Requesting State Mr Evans submitted that:

> i. There is no international consensus that prison conditions in Turkey violate Article 3. There is no real risk that the Appellants would be at risk of ill treatment;
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> ii. There is no pilot judgment of the ECHR or any report of the CPT demonstrating a real risk of violation of Article 3.
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> iii. The evidence of Professor Morgan is based primarily on open source material. Although he asserts that prisons are overcrowded, he does not provide any evidence to demonstrate that each of the Appellants would not receive 3 sq.m of person space as prescribed by *Mursic v Croatia* (2016_ App 7334/13;
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> iv. Any assertions that the Appellants may be subject to torture are misconceived. Any allegations relating to the use of torture relates to those alleged to have been involved in the attempted coup d'etat in Turkey in July 2016;
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> v. The case of *Charles v. Turkey* [2017] EWHC 952 (Admin) and *LMN v. Turkey* [2018] EWHC 210 (Admin) are confined to their own facts and relate to the specific circumstances of the Appellants in those cases (namely treatment of LGBT prisoner and those with specific healthcare needs);
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> vi. The fresh evidence should not be admitted as it is not determinative (although it is appreciated that the Court will need to consider it;

> vii. Should the Court find there to be a real risk of violation of Article 3 they are respectfully invited to ask for further information and/or assurances."

Conclusion

28. We agree with the approach taken by this court in *Purcell.* In the present case we need further information in order to have objective, reliable, specific and properly updated evidence of the conditions in which the Appellants would be held in prison in Turkey, before we can decide whether there is a real risk that they would be subjected to inhuman or degrading treatment. It is in the public interest, and the interests of justice in both countries, for the authorities of a Requesting State to assist the UK courts in evaluating an allegation that extradition would breach the fugitive's Article 3 rights because of adverse prison conditions.

29. We have come to this view first because of the final report of the UN Special Rapporteur, and the absence of any published reports by the CPT concerning the state of prisons in Turkey after the attempted coup of 2016 and the consequent large influx of inmates. Second, we also give weight to the expert reports prepared by Professor Morgan. In our view the findings of this highly respected expert, certainly together with the final report of the Special Rapporteur, called for an answer. We note Mr Evans' submissions, but it is still surprising that the Requesting State did not respond to either of Professor Morgan's reports with its own specific and updated evidence.

30. We will therefore ask the Respondent authorities to provide answers to the following questions in relation to each Appellant within 42 days of this judgment:

(1) In which institutions will the Appellant be detained if he is returned to Turkey, both before trial and, if convicted, after conviction?

(2) Will the Appellant always be accommodated in a cell which provides him with at least 3 square metres of personal space (excluding any in-cell sanitary facilities)?

(3) What will the other detention conditions and detention regime be for the Appellant throughout his detention, including sanitary facilities, air, light and time out of his cell?

(4) Is the Requesting Judicial Authority prepared to give assurances in relation to any of the above?

31. We shall adjourn the appeal pending receipt of answers to these questions. Within 28 days after they are received, or after the time for providing them has elapsed, the parties are to file and exchange further written submissions, after which we shall decide whether or not a further oral hearing is required before we give our judgment on the appeal.