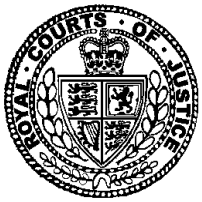

Neutral Citation Number: [2019] EWHC 3504 (Admin)

Case No: CO/3734/2018, CO/3739/2018 AND CO/3737/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before:

LORD JUSTICE IRWIN
MR JUSTICE SUPPERSTONE

- -

Between:

(1) ARMINAS BARTULIS	**Appellant**
- and -	
PANEVEZYS REGIONAL COURT (LITHUANIA)	**Respondent**
(2) KASTYTIS KMITAS	**Appellant**
- and –	
PROSECUTOR GENERAL'S OFFICE (LITHUANIA)	**Respondent**
(3) ANDRUIS OSTAPEC	**Appellant**
- and –	
PROSECUTOR GENERAL'S OFFICE (LITHUANIA)	**Respondent**

- -
- -

Jonathan Hall QC and Malcolm Hawkes (instructed by **Oracles Solicitors**) for the **First Appellant**
Jonathan Hall QC and Saoirse Townshend (instructed by **Oracles Solicitors**) for the **Second Appellant**
Jonathan Hall QC, Florence Iveson, Saoirse Townshend and Malcolm Hawkes (instructed by **Oracles Solicitors**) for the **Third Appellant**
Helen Malcolm QC and Hannah Hinton (instructed by **The Crown Prosecution Service**) for the **Respondents**

Hearing date: 16 October 2019

- -

Approved Judgment

Lord Justice Irwin:

Introduction

1. This is a judgment of the Court to which we have both contributed. The three appeals before the Court concern five extradition requests from Lithuania. In each case, the Appellant is a Lithuanian national sought to be returned pursuant to a European Arrest Warrant ["EAW"] to undergo trial or serve sentences for crimes in respect of which sentences have already been passed. This is a judgment of the Court to which we have both contributed.

2. The Appellants and the EAWs have helpfully been presented in tabular form by the Respondents as follows:

Name	Issuing Authority	EQW Bundle Reference	CO Number
BARTULIS, Arminas Lithuanian b.7/7/1994	Panevezys County Court	Conviction EAW	CO/3734/2018
(as above)	Prosecutor General's Office	Accusation EAW	(as above)
KMITAS, Kastytis Lithuanian b.15/5/1968	Prosecutor General's Office	Accusation EAW	CO/3739/2018
OSTAPEC, Andruis Lithuanian b.15/12/1992	Prosecutor General's Office	Accusation EAW	CO/3737/2018
(as above)	Vilnius County Court	Conviction EAW	(as above)

3. The convictions or allegations are various, including fraud, theft, assault and domestic violence. Nothing turns on the nature of the proven or alleged offending for present purposes.

4. The Appellants' cases came before District Judge Jabbitt in July 2018, and he heard evidence spread over three hearing days. In each case, the point at issue for us is prison conditions and whether those conditions breach Article 3 of the European Convention on Human Rights ["ECHR"], which is for present purposes identical to Article 4 of the Charter of the European Union. In his judgment of 17 September 2018, DJ Jabbitt rejected the Art 3/4 objections to extradition.

5. In the case of the Appellant Bartulis, there is a separate and individual issue raised. He now claims that his mental health is such that there is a valid objection to his extradition pursuant to Section 25 of the Extradition Act 2003 ["the 2003 Act"]. He was given leave to amend his grounds by Julian Knowles J on 6 March 2019.

6. The Appellants' case is that conditions in three of the five prisons, known in Lithuanian terminology as post-conviction Correction Houses, are such as to mean there is a real risk of breach of Article 3, if the Appellants are extradited and called on to serve their sentences in one of three such prisons, namely Alytus, Marijampolė or Pravieniškės.

7. All parties accept that the European Arrest Warrant system under the Council Framework Decision of 13 June 2002 ["the Framework Decision"] and Part 1 of the 2003 Act depends on mutual trust and respect between EU Member States, giving rise to a presumption that each Member State will give effective protection to the Convention rights of extraditees.

8. The Divisional Court has already found that, in relation to pre-trial detention in Lithuania, the presumption has been rebutted (see *Jane v Lithuania* [2018] EWHC 1122 (Admin) (*Jane No 1*)). An assurance of general application was provided dated 7 August 2018 which was considered in *Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 2691 (Admin) (*Jane No 2*). The Appellants were not granted permission to appeal upon the ground of appeal relating to pre-trial detention establishments. The Appellants submit, to adopt the language of European authority, there is cogent, relevant, and reliable evidence in support of the proposition that there is a real risk of detention in inhuman and degrading conditions, if these Appellants are extradited to any one of the three male prisons Alytus, Marijampolė or Pravieniškės. Therefore, the Court is invited to initiate the procedure following the well-known authority of *Aranyosi* and *Caldararu* C-4044/15, [2016] QB 921.

9. This matter was listed initially on 9 July 2019, and an amount of evidence prepared going to the Article 3 issue. However, shortly before that hearing, on 25 June 2019, the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ["CPT"] published a further report on the Lithuanian prison estate ["CPT 2019"]. The Appellants considered this of such significance as to warrant an application to adjourn the hearing and an application that further information should be sought by the Court from Lithuania. We granted the adjournment. The focus of concern in this case is not the widely-litigated question of space available to inmates of prisons, familiar from the case of *Muršić v Croatia* [2017] 65 EHRR 1. However, the physical conditions in the prisons are relevant. The problem here is the risk of violence amounting to breaches of Article 3 by other inmates of these prisons, and whether the prison authorities in Lithuania can provide adequate protection to extraditees in relation to that risk. That is related to a degree to the "dormitory" accommodation, which forms much of the capacity of these prisons.

10. In an Order of 15 July, we made the following request of the Lithuanian authorities:

> "The Court giving consideration to the risks of Article 3 breach said to arise from the material presently before the court, but having as yet made no findings as to those risks, requests further evidence, assurances and/or guarantees, directed to ensuring that none of these Appellants, if extradited, will serve a sentence of imprisonment post-conviction:
>
> i. In a dormitory block, or

> ii. In cell accommodation sharing access to common parts of the prison with other inmates living in dormitory blocks, or
>
> iii. In cell accommodation sharing access to common parts of the prison with inmates who have been re-settled in cell accommodation because they are adjudged to be "inmates, making a negative influence to the other inmates (leaders of informal prison hierarchy and its handymen)", or
>
> iv. In disciplinary punishment cells subject to the "KTP" regime, or
>
> v. In accommodation with a minimum space allocation of no less than 3 square metres per person;"

11. As will become clear in greater detail, further information and assurances had been received from Lithuania by the time the matter came before us on the resumed hearing on 16 October 2019.

The Judgment Below

12. DJ Jabbitt considered the three cases before us, alongside three others, those of Butinavicius, Dauksas and Manovas. For reasons which need not concern us, those other appeals have fallen away. These conjoined cases were gathered together expressly to consider this aspect of prison conditions in Lithuania.

13. In a careful judgment, DJ Jabbitt set out the facts relating to each Appellant and the principal submissions made at that stage. We intend to analyse his judgment fairly fully.

14. As recited by DJ Jabbitt in his useful summary, the individual positions of each of these Appellants is as follows:

> "**Bartulis** is wanted to serve 7 months 28 days outstanding of an 8 month sentence imposed on 30 March 2017. The EAW issued 8/1/18 was certified 11/1/18. The offences he committed on 02-02-2017 and 05-02-2017 were of domestic violence.
>
> **Kmitas** is wanted to stand trial for 21 offences of either fraud or forgery. The framework List is marked, "swindling" and "forgery". The offences were committed between 2005-2010. Total benefit: £818,000. EAW issued 24/5/16 was certified 9/6/16.
>
> **Ostapec** is wanted upon two EAWs.
>
> The first, an accusation warrant issued on 27 January 2017 by the Prosecutor General's Office is based on a ruling of the Vilnius District Court dated 2 September 2016, described as "ruling to change coercive measure – written pledge not to leave and seizure of documents" (box b). EAW 1 is an accusation warrant in respect of 2 offences, arising out of conduct said to

> have occurred on 4 April 2015. The RP is alleged to have been involved in a serious joint enterprise assault on a named complainant (box e). The offences have been categorised pursuant to Lithuanian law as "violation of public order" and "non-severe Health impairment" (box e), with maximum sentences of 2 years and 5 years respectively (box c). The framework list has not been ticked.
>
> The second warrant is a conviction warrant. He has an 8-month sentence to serve. EAW 2 was issued on 30 January 2017 by a judge of the Vilnius Regional Court. The EAW is a conviction warrant and is based on a judgment of the District Court of Vilnius City dated 24 April 2015 imposing a suspended sentence and a ruling of the same court, dated 11 May 2016, activating the sentence. The RP has been convicted of one offence of stealing a number of electronic items on 14 August 2014 from a named person's apartment, to a total value of €630,61… FWL ticked for "illegal restraint", "organised or armed robbery" and "extortion"."

15. The District Judge noted that all of these Appellants are said to be fugitives. Mr Bartulis is a fugitive having breached the terms of his suspended sentence; Kmitas breached a written pledge not to leave the country and failed to report to the police station as required. He is said to have used various Lithuanian identities to avoid detection. Ostapec is said by the Lithuanian Judicial Authority to have "gone into hiding by violating the measures of constraint – a written obligation not to leave". He is said to be "well-aware about the on-going court trial (summons to court were personally served upon him) and hid from it by his intentional actions".

16. DJ Jabbitt noted the findings made in *Jane No 2*. In particular he noted that "it is clear from the judgment the court was not critical of prison establishments generally but of remand institutions".

17. DJ Jabbitt went on to summarise the assurances given by the Lithuanian authorities up to June 2018. He noted that earlier assurances, given in March 2013, to the effect that the named individuals then sought would be held exclusively in Kaunas Remand Prison or Kaunas Juvenile Remand Prison Correctional Facility, were revoked in 2016.

18. DJ Jabbitt reviewed the relevant authority setting down the principles concerning assurances, principally citing *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1, as applied in *Elashmawy v Italy* [2015] EWHC 28 (Admin). No point is taken as to the principles there identified.

19. DJ Jabbitt summarised the evidence before him as to prison conditions. The first witness he addressed was the defence expert, Mr Karolis Liutkevicius. At that stage Mr Liutkevicius had prepared five reports, either for these proceedings or cited in these proceedings, at least one of those being prepared in relation to the Appellant Jane. Liutkevicius is the Chief Legal Officer of the Human Rights Monitoring Institute, a non-profit-making, non-governmental organisation focusing on political and civil rights and Mr Liutkevicius's current focus is on the Lithuanian criminal justice system, including prison conditions. At the hearing below Mr Liutkevicius's most recent visit

had been to Lukiškės Prison, in March 2018. This prison has two wings, one for convicted and one for accused persons. DJ Jabbitt noted that the Appellant Bartulis is wanted on a conviction warrant. He is likely to be sent to Lukiškės initially, and then to any one of the five correctional facilities. At the time of the hearing below, Bartulis had also been served with a further accusation warrant in respect of which he might be sent to a remand prison for initial procedural matters, most likely Siauliai. Kmitas faced accusation warrants from four different courts, so the witness could not predict where he would be sent.

20. Mr Liutkevicius did consider the CPT report of 2016 and the issue of prisoner violence. This issue was already well known to the Court. DJ Jabbitt summarised his relevant evidence as follows:

> "30. With regard to Alytus and Marijampole prisons, a new strategy and training was called for to address prisoner violence, but he was not aware of any action being taken.
>
> 31. The CPT report [a reference to the 2016 CPT Report] called for large capacity dormitories to cease being used, they are in place in most, if not all, correction houses, and he is not aware of any changes.
>
> 32. The CPT made an unannounced visit to Lithuanian prisons in April 2018, but the witness, unlike previous occasions was not contacted in advance.
>
> 33. The CPT report (page 26, para 44) stated that prisoners in Marijampole and Alytus would choose solitary confinement to avoid violence. The witness confirmed the problem of prisoner violence. He had visited Lukiskes and met a prisoner, who wanted to be transferred to another prison because of the violence between prisoners in Lukiskes, this was several years ago.
>
> 34. With regard to the caste system in the prison estate, he was not aware of any steps taken by the prison authorities to address this issue."

21. Mr Liutkevicius addressed the position of the Lithuanian ombudsman. His evidence was that the ombudsman is –

> "supposed to monitor prison conditions … but the office is severely understaffed. The most recent report was in September 2016 … the ombudsman has not published any reports in the last year but a report is expected shortly".

22. Mr Liutkevicius accepted that the Lithuanian ombudsman "functions as a resource" of prison conditions and that the ombudsman had the capacity to make unannounced visits and then report, but the reports were not binding. He was unaware of any other body that could perform a monitoring function. His own organisation collates information

from case law, from international bodies like the CPT, from contact with defence lawyers, and from complaints with prisoners. His own prison visiting was limited.

23. It will be noted from the above that the parties and the Court were aware there had been a further CPT visit to Lithuania in 2018, in respect of which the Court had seen no outcome, in the form of a Report.

24. Mr Liutkevicius was recalled to the witness box following production of his updated report on 20 July 2018. In this report Mr Liutkevicius noted that there were a large number of decisions of Lithuanian domestic courts as a consequence of complaints from prisoners. The national courts had made a number of adverse findings in relation both to overcrowding and to privacy violations, during 2018. He reaffirmed his evidence that if the Appellant Bartulis (for example) was extradited and held in either Lukiškės or Siauliai Remand Prisons, there would be a real chance that he would be held in conditions in violation of national law and international human rights standards. He agreed that prisoners have access to the national courts, make declarations as to who would declare any breach of national standards or of Article 3 standards and he agreed that a prisoner dissatisfied with his domestic remedy had the right to go to the CJEU. Asked about the commitment on the part of the Lithuanian authorities to human rights, he agreed that there was some progress but it was "on a case by case basis". He noted there had been legislation in 2015 to reduce overcrowding, particularly in relation to remand prisoners. As to the reliability of assurances advanced by Lithuania, Mr Liutkevicius agreed that in evidence in 2013 he had said there was no reason to believe that assurances given would not be honoured. However, he noted that that case concerned Kaunas prison, which "was then Article 3 compliant". In the instant case:

> "He does not have confidence that the prisons concerned are compliant. The court decisions show prisoners are frequently moved and conditions can differ from prison to prison."

25. DJ Jabbitt heard evidence from the Appellant Bartulis. He confirmed that he had been a remand prisoner in Siauliai until late 2013, and then had been a convicted prisoner until March 2016. The Appellant referred to the "caste system" existing in Lithuanian prisons. He himself was in a lower caste at both Pravieniškės and Siauliai prisons. He was "not aware if the prison staff knew of the system, they were not aware of the beatings he received". He had been conscious of suicides and self-harm in the prisons and the suicides were "brushed under the carpets". He himself had self-harmed. At Pravieniškės, the Appellant said there were 25 prisoners to each dormitory:

> "There was no point in complaining. He could have tried to be put in isolation, but he was afraid of the impact on his mental health."

26. DJ Jabbitt heard evidence from a witness called Janusevicius, who had been a serving prisoner at Marijampolė and Alytus for significant periods. The witness said that "one has to be strong in prison, there are sub-cultures and you cannot make your own decisions, because other prisoners rule the institution". He was not a ruling prisoner. Prisoners could be forcibly injected with drugs by other inmates. In Marijampolė, the dormitories were large, with 30-40 prisoners in bunk beds. The guards would only enter if there was a problem "and you could not complain to the guards about your treatment because you would go to the bottom of the three tiers". In cross-examination

the witness agreed that his extradition had been ordered in November 2017 and he was still in custody awaiting return to Lithuania. He did not wish to go back.

27. DJ Jabbitt considered a short statement and evidence from a serving prisoner in Alytus prison, named Tarasovas. In the course of his evidence via video-link he said:

> "118. The Caste system and violence between prisoners continues. He has seen prisoner abused by fellow prisoners and guards. He has himself been mentally abused. There was an incident where prison guards attacked prisoners with batons but the case did not reach the court in Lithuania.
>
> 119. He said prison conditions had got worse not better."

28. The District Judge reviewed the decisions in *Jane v Lithuania*, bearing on remand prison conditions. He noted the submissions made on the basis of *Jane (No 2)* to the effect that the decision in that case:

> "131. … was the culmination of a long-standing international consensus in regard to systemic issues within the Lithuanian prison estate from multiple EAW states, including Germany, Malta and Ireland.
>
> 132. There was evidence in this case, together with the established position for remand prisoners, that rebuts the presumption of compliance for convicted persons. Therefore, the first stage of *Aranyosi* is triggered and the court is obliged to seek specific information, which was confirmed in the recent CJEU decision of *ML*."

29. DJ Jabbitt noted in particular the following:

> "138. In *Jane*, the Court also had evidence from the Lithuanian Seimas Ombudsman that "Lithuania not only violates human rights but also pays out immense sums adjudged to convicts because of extreme imprisonment conditions" and that "the ECHR is considering launching a case against Lithuania owing to systemic human rights violations in prisons" (Bartulis, Tab 26, 12 January 2017). On 31 January 2018, the Ombudsman stated that "Lithuania is losing ground for poor prison conditions before national courts and the ECHR" (Bartulis, Tab 31)."

30. DJ Jabbitt also noted specifically the submissions based upon the 2018 CPT report:

> "1. The CPT's 2018 report concerned visits to two of the four main Correction Houses for male convicted prisoners, Alytus and Marijampole. Cramped "large-capacity dormitories" at Alytus and Marijampole promoted "offender subcultures", entailing "a high risk of inter-prisoner intimidation and violence", so should be replaced (tab 32, para 37, 44).

> 2. The CPT had made recommendations to Lithuania to move away from this type of accommodation, but the 2018 report shows that it has failed to do so. Furthermore, the minimum standards of living space were not being respected in the dormitories at Marijampole."

31. DJ Jabbitt noted that the Appellants submitted the assurances relating to pre-trial detention then available were ineffective. However, he went on to note that there had been further assurances since the earlier hearing and he considered that his focus should be on the final assurance, dated 7 August 2018, the last part of which is most germane to the current issue. This he included in his judgment as follows:

> "151 …"The Director General of the Prisons Department under the Ministry of Justice of the Republic of Lithuania hereby assures and guarantees that the below stated conditions will be applied to all persons surrendered to the Republic of Lithuania from the United Kingdom on the grounds of the European Arrest Warrant ("EAW") for the purpose of a criminal prosecution or execution of a sentence of imprisonment during their detention:
>
> > 1. All persons surrendered under an accusation warrant from the United Kingdom will be held in Kaunas Remand Prison, Lukiskes Remand Prison-Closed prison or Siauliai Remand Prison, whereby they will be guaranteed a minimum space allocation of no less than 3 square metres per person in compliance with Article 3 of the European Convention on Human Rights.
> >
> > 2. Persons surrendered under a conviction warrant that may spend a maximum of 10 days at one of the remand centers set out in clause 1, will be subject to the same guarantees and will be housed in cells with a minimum space allocation of no less than 3 square metres per person in compliance with Article 3 of the European Convention on Human Rights.
> >
> > 3. All persons held in Lukiskes Remand Prison-Closed prison or Siauliai Remand Prison as per clause 1 and 2 above, will only be held in the refurbished or renovated parts of the prisons and in compliance with Article 3 of the European Convention on Human Rights"."

32. DJ Jabbitt went on to note that Mr Liutkevicius had not changed his position in response to this latest assurance. He noted the points made by the Appellants that the reference to "refurbished or renovated parts of the prisons" was vague and there would be problems of oversight. It was also said that the assurances, including the latest, were "silent about … violence emanating from a dangerous caste system".

33. In respect of these submissions from the Appellants, DJ Jabbitt noted that the judicial authority emphasised the fact that the Divisional Court in *Jane (No 1)* had decided that the evidence was sufficient to rebut the presumption of compliance with Article 3 in

respect of Lukiškės Remand Institution, but not in respect of other remand institutions, and not in respect of the correctional facilities for convicted prisoners. The Divisional Court –

> "did not express any concerns about conditions at Kaunas Remand Centre or record any concerns about any other facilities holding convicted persons, sufficient to hold that the general presumption of Article 3 compliance had been rebutted".

This, it was said, was in accordance with the historical position as resolved by Jay J in *Aleksynas v Lithuania* [2014] EWHC 437 (Admin): see paragraph 103.

34. The District Judge recorded his conclusions on the Article 3 evidence in the following terms:

> "208. I am unable to conclude that this evidence, together with the evidence presented to the Divisional Court, amounts to clear, cogent and compelling evidence or powerful evidence, plainly not amounting to something like an international consensus of the type envisaged by the Divisional Court in *Brazuks and others v Prosecutor General's Office, Latvia* [2014] EWHC 1021 (Admin), to rebut the presumption that Lithuania possesses as a Member of the Council of Europe.
>
> 209. Thus, I do not find that the requested persons have adduced sufficient evidence to rebut the presumption of compliance retained by Lithuania, in respect of conviction prisons.
>
> 210. That is not to say that I did not find the evidence base put forward by the defence to be strong and persuasive and the detailed and careful submissions equally persuasive, but I consider this court to be bound by the decision in *Jane*, in relation to conviction prisons, and the evidence of the prisoners at Alytus and Pravienniskes, current and former, was insufficient in terms of the *Brazuks* criteria to rebut the presumption of compliance in favour of the JA."

35. As to the assurance of 7 August 2018 bearing on the space for occupation by those prisoners returned pursuant to these EAWs, DJ Jabbitt found the assurance adequate and sufficient to satisfy the *Othman* criteria. The Court then went on to consider the individual Article 8 and other individual considerations and in each of these cases ruled against any bar to extradition.

CPT 2019

36. As we have said, the CPT is a committee formed under the European Council, the governing instrument being the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2002 (ETS 126) ["the Convention"]. The CPT is not a court and its reports are not judgments. It is a highly respected body which, as the Respondents have termed it, "exists to prevent the ill-treatment of prisoners through constructive dialogue with states". Following relevant enquiries and

inspections, a CPT report is passed confidentially to the authorities in the Member State. Reports remain confidential until either they are published with the consent of the state concerned or, potentially, by means of a punitive mechanism following non-compliance (see Articles 10 and 11 of the Convention). Public statements by the CPT as to the contents of a Report have been very rare and there have been none in relation to Lithuania. We return to this below when considering disclosure.

37. There have been a series of reports from the CPT regarding prison conditions in Lithuania. The CPT conducted a visit to Lithuania between 27 November and 4 December 2012. That report was published, alongside a detailed response from the Lithuanian government, on 4 June 2014 ("CPT 2014"). There was a further visit between 5 and 15 September 2016, which was published, again alongside a detailed response from the government, on 1 February 2018 ("CPT 2018"). It was this Report and Response which were available to DJ Jabbitt.

38. As Mr Liutkevicius had told the Court below, there was a further visit by the CPT between 20 and 27 April 2018, which was published alongside a government response on 25 June 2019 ("CPT 2019"), and which therefore became known to the Appellants' representatives very shortly before the hearing listed in July.

39. The executive summary of this Report contains some pertinent remarks:

> "The aim of the 2018 ad hoc visit was for the CPT to assess the implementation of its long-standing recommendations concerning the Lithuanian prison system. In this respect, the CPT regrets to note that many of those recommendations have still not been implemented. This concerns, in particular, the situation at Alytus, Marijampolė and Pravieniškės Prisons. … The CPT must stress that if no progress is made to implement its recommendations, it will be obliged to consider having recourse to Article 10, paragraph 2, of the Convention.
>
> The delegation received no recent and credible allegations of physical ill-treatment of inmates by staff at Lukiškės and Vilnius Prisons, or at the Prison Hospital. By contrast, a number of credible allegations of physical ill-treatment, some of them corroborated by medical evidence, were heard at Alytus, Marijampolė and Pravieniškės Prisons; the ill-treatment alleged consisted essentially of use of excessive force (punches, kicks and truncheon blows) in the context of staff interventions to stop inter-prisoner violence.
>
> The delegation also received numerous allegations of mass physical ill-treatment of prisoners in the course of a general search carried out in the punishment block (KTP) of Alytus Prison by members of the special intervention group from the Prison Department on 5 July 2017.
>
> …

> Furthermore, as had been the case during previous visits, in Alytus, Marijampolė and Pravieniškės Prisons the delegation observed truly extraordinary levels of inter-prisoner violence, intimidation and exploitations. It gave the delegation a strong impression that the main detention areas in these three prisons were unsafe for inmates, and that the only parts of the establishments under full control of the administration were the punishment blocks which were frequently used and constantly filled to capacity, mostly by inmates seeking protection from other prisoners and being punished for refusing to stay in their ordinary units."

40. Following the CPT request, the Lithuanian authorities developed an action plan to address the problem of inter-prisoner violence which the CPT welcomed and considered would "help address" a number of their concerns if "properly and energetically implemented".

41. The CPT noted that there was considerable reconstruction and refurbishment in all the prisons visited, but were also concerned that –

> "the remaining overcrowded large-capacity dormitories still facilitate inter-prisoner violence. The CPT recommends that the Lithuanian authorities continue the conversion of large-capacity dormitories into cell type accommodation…"

42. The CPT were also concerned by what they described as the "omnipresence of drugs in prisons", and by the serious risk of prisoners becoming drug-dependent and contracting HIV and hepatitis C in prison by sharing injecting equipment. They noted that there had been 58 new HIV infection cases in Alytus prison in the course of 2017, an increase on the period January 2015 to September 2016. There was a considerable level of concern at the "highly unsatisfactory" staffing levels in prison. The CPT –

> "reiterates its view that inadequate staff complements can only increase the risk of violence and intimidation between prisoners; this has been demonstrated very clearly again during the 2018 ad hoc visit."

43. In the body of the report appear some further details which flesh out the summary. Those with whom the CPT delegation spoke in the prison service acknowledged that the 2014 government programme for the modernisation of prisons was not being duly implemented, due to lack of financial resources "… and the authorities were in the process of reassessing the programme so as to adapt it to the resources available" (paragraph 13).

44. The report noted that there had been credible allegations of physical ill-treatment in Alytus, Marijampolė and Pravieniškės prisons consisting essentially of the use of excessive force by staff to try to prevent or stop inter-prisoner violence. The CPT were also concerned about the effectiveness of the investigation into the most serious episode in July 2017 (paragraphs 19 and 20). In relation to inter-prisoner violence, the CPT noted the level of the problem and that it was of long-standing:

> "22. As had been the case during previous visits to Lithuania, the delegation observed – especially in the three penitentiary establishments with predominantly dormitory-type accommodation i.e. *Alytus, Marijampolė and Pravieniškės Prisons* – truly extraordinary levels of inter-prisoner violence, intimidation and exploitation.
>
> The delegation was again inundated with allegations of prisoners having been subjected to violence (including violence of a sexual character and forcing fellow prisoners to perform slave labour) from the members of informal prisoner hierarchies, whose power was reportedly linked with the omnipresence of illicit drugs and alcohol (as well as mobile telephones and dangerous objects including bladed weapons) and facilitated by a very low prison staff presence (as well as, at least to a certain degree, staff collusion and corruption).
>
> It should be added that the examination of relevant medical registers, prisoners' medical files and other documentation in the three prisons (*Alytus, Marijampolė and Pravieniškės*) revealed – despite the generally poor and even worsening quality of medical records – the presence of numerous injuries, sustained by prisoners inside the accommodation and work/activity areas, the character of which clearly suggested their violent origin."

45. Evidencing the concern as to low staffing levels, the report gave examples in footnote 36:

> "There were only 12 custodial staff present on any given shift at Vilnius Prison (population 453), 12 in Sector 2 (population 1,066) of Pravieniškės Prison, 17 at Alytus Prison (population 973) and 27 at Marijampolė Prison (population 931). It is noteworthy that there was no night-time permanent custodial staff presence at Alytus, Marijampolė and Pravieniškės Prisons (custodial officers came to the detention blocks approximately every 2 hours)."

46. The report noted that the problem of inter-prisoner violence was "acknowledged to a large degree by the prison directors". The delegation received a –

> "strong impression that the main detention areas in the three prisons were unsafe for inmates, and that the only parts of the establishments under the full control of the administration were the punishment blocks (KTP) which were almost invariably frequently used and constantly filled to capacity". (Paragraph 23)

Inmates seeking protection were spending months, if not years, in small, often dilapidated cells with an impoverished regime. Their situation –

> "was rendered worse by the … absence of provisions permitting the segregation of prisoners from those in the main accommodation on the grounds of their own security. The only legal possibility, at least in the view of prison directors, was to use disciplinary provisions (punishing the prisoners concerned, …. for their refusal to stay in their "normal" units)." (Paragraph 23)

The CPT report characterised this as "prisoners asking for protection received instead isolation and punishment" (paragraph 23).

47. In September 2017, the Lithuanian authorities communicated their plans to address this problem. These plans included technology, tasers, telescopic truncheons and body cameras, segregation of prisoners who had a "negative influence" on other inmates, by transferring some 200 prisoners to different prisons and placing them in KTP blocks. The proposals also included raised salaries for custodial staff and further training.

48. Having received the CPT report in mid-2018, the government of Lithuania responded in a letter to the CPT of 9 October 2018, reporting that a "precise action plan" with deadlines and the "required financial resources" had been adopted by ministerial Order on 27 September. Attached to the letter is the action plan, including the following provisions. Legal changes were being made to permit the "isolation of persons making negative influence to other inmates" and to reduce the total number of the prison population. Implementation dates were given from September 2018 to January 2019. Officers from the Public Security Service were being deployed to Alytus, Marijampolė and Kybarti correction houses to assist with security. 200 inmates in total, defined as "leaders of informal prison hierarchy and its handymen" were to be resettled to different institutions and kept in "cell-type premises". Pre-trial investigation was to be started regarding each case of inter-prisoner violence and the action plan included a proposal "to develop extra material conditions for isolation of inmates making a negative influence to the other inmates". Prison staff were to be increased, in particular by reducing the administrative staff and reallocating them to positions in prison wards; four correctional institutions to be "unified into two institutions", again reducing administrative staff, and by a plan to introduce extra shifts; all to increase capacity of hands-on prison staff on the ward. Specific salary increases are set out in the plan with dates of implementation, ranging between October 2018 and the third quarter of 2019. Specific sums are allocated in the budget to underpin those changes.

49. Further training was planned, including training in management of conflict and in self-defence. The proposal includes the cancellation of prison officer rotas "to be on watch alone inside the prison", and if that proved impossible, their security is to be ensured through video surveillance equipment. Again, budgetary sums are allocated to those changes. There are plans for equipment to "decrease the flow of drugs and other illegal stuff" into prisons. The frequency of drug testing of inmates is to be raised, more education and training as to the effect of drugs and the spread of transmissible diseases and a proposal to increase the number of prisoners who can be "transferred to rehabilitation centres". Anti-viral therapy is to be stepped up and made more immediate and similarly proposals for the increase in testing for hepatitis C with speedier treatment where results are positive. The proposals included a plan to make legal changes so that the healthcare of inmates is to be covered from the national health insurance fund, rather than coming from the budget of the prisons.

50. Specific plans to adapt, reconstruct and extend the prisons are set down with budgets attached. Implementation dates in the plan range from 2018 to 2022. In cooperation with the Norwegian authorities, training packages for staff are planned with a budget figure attached.

51. The broad position of the parties to the 2019 CPT report and the government response can be summarised shortly. The Appellants say that the picture painted by the CPT report is compelling as to the existence of a real risk from significant inter-prisoner violence sufficient to amount to a breach of Article 3. The plans formulated and adopted by the Lithuanian government cannot be held to abrogate or abolish the risk: the history of Lithuanian failure to carry through previous plans makes it so. The Respondent submits that in respect of the correction houses, the Article 3 presumption of compliance has not been lost and indeed should be retained. There is no pilot judgment from the European Court of Human Rights criticising Lithuania, nor is there any international consensus in respect of these institutions that they are unsafe. There are good grounds for concluding that prisoners will be afforded "reasonable protection", given the remedial action proposed and implemented. The observations of the CPT are not only 18 months old, but have been superseded.

Assurances by the Respondent

52. Over the period from July 2019 until the hearing before us, successive further assurances have been given by the Lithuanian government. On 8 July, the Director General of the Prison Department "assures and guarantees that the below stated conditions will be applied to all persons surrendered to the Republic of Lithuania". Those conditions include a minimum space allocation of no less than $3m^2$ per person in compliance with Article 3; "all persons surrendered will not be required to serve any part of their sentence at unrenovated premises … of Alytus … Marijampolė … and Sector No. 1 and No. 2 of Pravieniškės Correctional House". It is guaranteed that all persons surrendered "from the United Kingdom will be detained in conditions reducing a risk to inter-prisoner violence/disease transfer and drug influences". All persons surrendered are to be guaranteed the protections of the European Convention on Human Rights. Further, "persons surrendered will be housed in cell-type accommodation, where possible". The letter of guarantee goes on to draw specific attention to the renovated block in Marijampolė with 87 places in cells, a fully renovated sector in Pravieniškės Correctional House, with capacity of 360 places in cells and in addition notes that all of the correctional institutions have "a small number of cells, where surrendered inmates could be detained isolated and without any risk". We take the last to be a reference to the KTP disciplinary-type accommodation conditions.

53. It will be recalled that the Court requested further information at the adjournment of the case in early July in terms set out above in paragraph 10. The Government responded by assurances dated August. In a letter of August 2019, the prison department gives a guarantee in the following terms:

> "all persons surrendered … from the United Kingdom … will not be accommodated in the cells which include the possibility of contact with inmates accommodated in dormitory blocks of Alytus Correctional House, Marijampolė … and Sector No. 1 and No. 2 of Pravieniškės Correctional House… We inform you that convicted persons being imposed a custodial sentence are

> placed in dormitory-type blocks (convicted persons serving sentences in prison regime or serving sanctions in cell-type premises excluded) and the establishments you have listed are the main establishments for placement of sentenced adult males. Provision of the requested assurances and/or guarantees would lead us to have no place for accommodation of persons surrendered to the Republic of Lithuania from the United Kingdom on the grounds of the European Arrest Warrant in future."

54. In a further letter which appears to have come in late August, and which is expressed to be in addition to the assurance of 7 August which "remains in force", the Lithuanian authorities have provided further information, essentially derived from the action plan. The letter makes reference to the isolation of the individual prisoners thought to be "making negative influence" to the improvements in staffing, shift arrangements and administrative structures. The letter asserts:

> "Thereby, there is no potential risk for inmates, accommodated in dormitory type premises of correctional institutions to be in contact with leaders of informal prison hierarchy and its handymen and other inmates, making a negative influence to the other inmates."

55. The letter goes on to indicate that the average number of beds in shared bedrooms is 18-20, to summarise the living conditions and time for exercise and socialisation and then finally states "security measures (inmates are locked at night in blocks; electronic surveillance of shared premises, prison guards 24/7)". At the conclusion of the letter, the guarantee is repeated that surrendered inmates will have a minimum space of 3m², that they will not be "accommodated at unrenovated premises …. of correctional institutions" and that:

> "Surrendered inmates will be detained separately, where possible, and excluding or minimising the contacts with inmates making a negative influence to the other inmates, leaders of informal prison hierarchy and its handymen, reducing a risk of inter-prisoner violence/disease transfer and drug influences, etc."

56. A further letter of October 2019 has been provided to the Court. This addresses the implementation of the action plan and sets out the procedure under the Penal Sanctions Enforcement Code ["PSEC"], Article 100, facilitating complaints by inmates. Article 70.6 of PSEC provides a power to the director of the correctional institution to transfer an inmate to cell-type accommodation otherwise than as a sanction. This letter continues:

> "2. … As for the inter-prisoner violence, we would like to assure that the prison staff does not tolerate any forms of violence and inappropriate treatment among inmates. The main duties of criminal intelligence units, which are established in all correctional institutions, are to monitor psychological climate among inmates, identify and prevent possible threats or criminal

> acts. In case an inmate is suffering inappropriate behaviour, menace or any form of discrimination from other inmates or feels insecure, he/she has a right to submit a complaint to the administration of the correctional institution. Please be informed that in all such cases the internal investigation is launched and an inmate is immediately isolated from the alleged perpetrators (e.g. is accommodated in a single cell) during the whole period of investigation of his/her complaint. Provided such inmate's statements are confirmed, he/she is transferred to another cell or sector of the correctional institution or another correctional institution.
>
> 3. Seeking to reduce the drug use in correctional institutions their illegal supply should be combated. Different ways are used: inspection of persons and employees incoming to/outgoing from correctional institutions, a search of accommodation premises, use of technologies and engineering devices, dog handlers with dogs, an inspection of visitors, etc. Furthermore, every correctional institution is implementing approved plans on prevention of smuggling of forbidden items into correctional institutions, that set forth the correctional institution-specific measures of their implementation.
>
> 4. Seeking to encourage inmates to receive drug treatment educational activities are carried out at correctional institutions, inmates are promoted to participate in social rehabilitation programs and offered methadone substitutional treatment.
>
> 5. Seeking to reduce the spread of communicable diseases in correctional institutions preventive screening for communicable diseases is carried out and, if identified, timely medical treatment is provided; educational activities on giving up addictive habits are carried out and information on protection from communicable diseases is provided. Since spring of 2018, all HIV infected persons are subject to HIV treatment, and since 1 May 2019 all persons ill with serious communicable diseases are included in the national health system, i.e. their medical treatment is financed with the Compulsory Health Insurance funds."

57. The same letter goes on to emphasise that inmates may be placed in cell-type premises for a sanction, or for temporary isolation. The information is not kept as to how often this occurs. The writer emphasises the prison department's intention to respect Article 3. The letter goes on "since July 2019 (implementing the CPT recommendations) time in cell-type premises was significantly reduced and this measure is used as the *ultima ratio* to the most dangerous ones". There is said to be no current overcrowding in Alytus, Marijampolė, or Pravieniškės. The letter records that "the data on the number of complaints re physical violence … addressed to the … ombudsman is not accumulated". The prison service is not aware of all these complaints since they are confidential. As to disease, the letter records that 30 new HIV cases in correctional institutions were registered in 2018. Cases of acute hepatitis C are rare. Cases of

chronic hepatitis C were not registered. The number of HIV positive cases "is going down". A majority of such cases are identified on admission. The letter concludes:

> "The in-house spread of HIV cases in correctional institutions in 2018-2019 was not identified. The decrease of HIV spread was affected by the amendments to legislation re HIV treatment."

The letter is then signed by the Director General of the prison service.

Fresh Evidence: **Liutkevicius**

58. Mr Liutkevicius was asked to respond to the CPT 2019 report and to the action plan supplied by the Respondents. We have his further report of 13 September 2019. He emphasises that the report had to be completed in a very limited time and for practical and legal reasons he has not based his report on any further prison visits. Equally, he was not able to make freedom of information requests "in all instances where necessary" and therefore his further opinion is based on his accumulated knowledge and understanding.

59. In this report Liutkevicius gives figures about the numbers and proportions of cell-type accommodation in the relevant prisons, produced following freedom of information requests made between January and August 2019. According to these figures, Alytus correction house has 31 cells capable of holding up to 267 people. Alytus held an average of 819 prisoners in the year 2018 and Mr Liutkevicius extrapolates that cells "can at best hold up to a third … of the prison population". Marijampolė correction house has 51 cells with capacity of up to 163 prisoners. This prison held an average of 957 prisoners in the year 2018 and by extrapolation Marijampolė can house up to around 17% of its population in cell-type accommodation. Pravieniškės has 114 cells, holding up to 360 inmates. On average, Pravieniškės was holding 2113 prisoners in 2018 and by extrapolation this prison also could hold up to about 17% of its population in cell accommodation. Vilnius correction house has no cells for prolonged accommodation of convicted prisoners, having only 34 cells used for punishment isolation. Mr Liutkevicius makes the point that Vilnius correction house had an average of 468 inmates in the year 2018, but the number is likely to increase following closure of Lukiškės remand prison in Vilnius in July 2019.

60. Mr Liutkevicius emphasises that the remainder of the population of the correction houses lives in dormitory accommodation and it follows that even if the cell accommodation were fully occupied, the majority of correction houses' population would still be living in dormitories.

61. Mr Liutkevicius gives what can fairly be described as sceptical views about the implementation and the effects of the action plan. He was unaware of the action plan before receiving a copy as a consequence of the case. He says that little information was made public about the action plan or implementation of the measures. He had been aware of only one newspaper piece, issued by the prison department concerning the relocation of 50 prisoners in Pravieniškės, in an effort to combat the prison sub-culture. Other news items had suggested relocation of around 300 prisoners in Pravieniškės.

62. Mr Liutkevicius gives his opinion that the measures contained in the action plan may well be insufficient to curb the caste system. The correction houses hold large numbers of prisoners and Mr Liutkevicius suggests:

> "the caste system is prevalent, thus targeting and isolating fraction of prisoners is unlikely to suddenly stop a social system that has been thriving for years. Even if the relocated prisoners were the 'ring-leaders', it is more likely for new leaders to take position in their absence rather than the caste system going away… Doubt remains whether isolating these prisoners is sufficient to prevent them from exerting their influence within the prison."

63. Mr Liutkevicius reports a news story from a Lithuanian website concerning a number of the relocated prisoners in Pravieniškės in July 2019 who, it is reported, barricaded themselves in their cells in protest at their relocation and –

> "…only agreed to speak with a local administration officer without the presence of any 'outsider', to which the latter complied. This has cast doubts, whether there are informal and illicit agreements between inmates and local administration officers".

64. Mr Liutkevicius notes that the action plan refers to the intention to construct a new prison in Siauliai by 2022 and that outline plans are published on the prison department website. However, he also noted that in December 2018, media reported that work on the new prison construction had stopped, that statements had come from the Prison Department and Ministry of Justice expressing doubt whether any new prison was necessary, and that in a statement in February 2019 "the prison department confirmed that there are no funds allocated for the construction of the new prison this year".

65. Mr Liutkevicius accepts that the measures in the action plan, if implemented, would improve conditions in Lithuanian prisons, but in essence concludes that they would be insufficient to deal with the problem of inter-prison violence effectively. Finally, Mr Liutkevicius emphasises the point that to his knowledge:

> "there are no legal rules nationally requiring preferential or special treatment of prisoners … previously surrendered to Lithuania … Nor there are special mechanisms or bodies in Lithuania dedicated to ensuring that such guarantees are upheld".

Further Evidence: Dr Sakalauskas

66. In the course of the Order in which permission to appeal was given, Julian Knowles J granted the Appellants leave to rely on the report of Dr Sakalauskas of 17 October 2018 "for matters of fact only. Leave is refused on any opinions which he gives …" We have that report, which has been "blue pencilled" following the Judge's Order. There is also a second report from Dr Sakalauskas, dated 30 September 2019 to which we will return shortly.

67. Dr Sakalauskas is a senior academic lawyer with a doctorate focussing on imprisonment in Lithuania. He has since 1997 been attached to the Lithuanian Institute of Law, where he has been the chief researcher in the criminology department since 2011. He is an Associate Professor at Vilnius University.

68. In his first report, Dr Sakalauskas analyses the statistics for death and causes of death in Lithuanian prisons over the years 2004 to 2017. Over those years the great preponderance of deaths were from illness. Suicide fluctuates between 4 in the lowest and 14 in the highest of those years. 2016 represented the high point at 14 suicides. 2017 showed a marked decline to 5. Homicides in prisons varied between zero to a high point of 4, that figure relating to 2007. For the last two years of the statistics there has been a single murder in each year. Dr Sakalauskas makes the point that the prison population decreased by some 27% (11,770 to 8,612) between 2012 and 2017 and thus stable figures represent, at least to some degree, an increasing proportion of the population.

69. Dr Sakalauskas tabulates the criminal offences registered in Lithuanian prisons over the period 2007 to 2017. We reproduce the figures for the last three years in that period. It will immediately be noted that the sub-categories do not make up the total number of offences recorded.

	2015	**2016**	**2017**
Criminal offences recorded by Prison Department of which:	274	260	331
Murders	3	0	2
Grievous Bodily harm	2	2	8
Actual bodily harm	313	24	31
Resisting a public official	12	2	5
Related to narcotic or psychotropic drugs	157	153	182
Thefts	4	10	6
Fraud cases	2	5	0
Criminal damages	3	1	4

70. Dr Sakalauskas quotes research from another social scientist (Vaiciuniene) analysing the sub-culture in Lithuanian prisons. The researcher's conclusion is that the sub-culture is:

> "an essential determinant of the life of prisoners … In other words, sub-culture and unwritten prisoner interaction rules are far more important than formal rules, the unwritten prisoner rules

> are respected, and sanctions including violence are imposed by prisoners for non-compliance."

71. Dr Sakalauskas indicates that Lithuania has lost one case before the European Court of Human Rights arising out of inter-prisoner violence, where it was found that the administration failed to take the necessary protective measures: see *Česnulevičius v Lithuania* (Petition 13462/06) Decision 10 January 2012. Dr Sakalauskas also notes that there was "a similar event in 2013… when a Romanian citizen was murdered as a result of non-compliance with the rules of sub-culture in the Pravieniškės prison". Survey results show that a considerable proportion of prisoners considered there was high, or very high, tension in the prisons: 28% felt unsafe in the day and 30% at night. 24% were in fear because of threats, 22% feared violence, 21% said they were the subject of "real threats from other prisoners". In response to an open question, four prisoners suggested they were in fear of being killed. 680 adult prisoners were interviewed in this survey.

72. Dr Sakalauskas evidences concern on the part of the "National Audit Office" that the Prison Department and its subordinate institutions may not be able to ensure that funds "intended for the renovation of the buildings are used economically and in accordance with the law". The concern is suggested to derive from management problems and corruption.

73. Echoing a reference in the CPT report and in the evidence of Mr Liutkevicius, Dr Sakalauskas notes that there have been a considerable number of complaints to the ombudsmn, to national courts in Lithuania and in some instances to the European Court of Human Rights as to prison conditions (see *Mironovas and Others v Lithuania* ECHR 8 December 2015, statement number 40828/12 etc.)

74. Dr Sakalauskas points out that there is an effective monitoring system in Lithuania, both at an institutional level in the prisons and an external level to the ombudsman. He makes the point that despite the monitoring systems, "breaches of human rights in Lithuanian prisons continue".

75. Bearing on the conditions under which prisoners are kept, Dr Sakalauskas gives further detail of the powers of prison governors. Paragraph 6 of Article 70 of the Penal Enforcement Code permits a governor, if in receipt of a request from a prisoner to be isolated from other prisoners, to transfer the prisoner to cell-type premises, either alone or together with other similar prisoners, without the implication of punishment or discipline.

76. Dr Sakalauskas has provided a further report of 30 September 2019. This report has not been subject to a "blue-pencil" exercise. However, as we indicated at the hearing, we will approach this report in a consistent fashion to that ordered by Julian Knowles J in respect of the witness's first report. Thus, we consider the factual content but not the opinions. In paragraph 613 of the report, Dr Sakalauskas notes a high level of concern about conditions in Lithuanian prisons from the Human Rights Monitoring Institute, the Lithuanian Prisoner Welfare Society and the organisation "Caritas", which "has established a prison counselling and social assistance network … particularly in Vilnius and Kaunas".

77. In paragraph 6.4, Dr Sakalauskas notes that there have been no reports of the ombudsman on Lithuanian prisons so far in 2019, since the ombudsman has focussed on other topics. However, the ombudsman continues to receive a large number of complaints from prisoners. Examples of complaints are set out in the report, dating from 2019 and from different correction houses. However, none of these bear directly on the question on inter-prisoner violence.

78. Dr Sakalauskas gives some examples of press reporting of disputes between prisoners, in some instances bearing on inter-prisoner violence and on the caste system. Some of the reporting suggests continuing staff shortages within the prisons. There are also reports of disorderly episodes in prisons and poor working conditions for medical and other prison staff.

79. The witness updates the figures for offences committed in prison and we here reproduce the last three years' figures, taking matters up to August 2019.

	2017	**2018**	**2019 8 months**
Offenses recorded by the Department of Prisons, of which:	331	430	284
Murders	2	1	1
Grievous Bodily harm	8	1	2
Actual bodily harm	31	28	22
Causing physical pain and actual bodily harm	29	65	36
Threats to kill or seriously impair health, bullying	7	9	6
Resisting an officer on duty	5	13	9
Related to narcotic or psychotropic drugs	182	239	155
Theft	6	6	1
Extortion	9	14	5
Fraud	0	1	2
Destruction or damage to property	4	4	1

80. In paragraph 6.9, Dr Sakalauskas addresses the closure of Lukiškės remand prison and the impact on the other prisons in the country. Following transfer of prisoners from Lukiškės to the other prisons, there was an upturn in complaints from prisoners. He notes the government decision not to build a new prison. From official figures, Dr Sakalauskas also tabulates the flow of prison population. The figure for newly-incarcerated prisoners in 2018 was 25% higher than in 2017, indicating that by the end of 2019 there will be a higher overall total of prison population in the prison estate.

81. We have looked with care at the evidence from both Liutkevicius and Sakalauskas. We have also been provided with an extensive range of media articles, individual decisions by the ombudsman and decisions of the national courts of Lithuania. However, in his oral submissions to us, Mr Hall made it clear the CPT report and, perhaps to a lesser extent, the reports of the two witnesses, were at the heart of his case and essentially encapsulated what might be drawn from the broader material in the papers. We agree, and so we do not engage in any further analysis or summary of the underlying material. We now turn to remind ourselves of the proper legal approach to the question in hand.

The Law

82. The legal approach to Article 3 risk arising from prison conditions is by now relatively familiar. The landmark case was *Aranyosi and Another*. In relation to the remand prisoners in Lithuania, that approach was followed by the Divisional Court in *Jane (No. 1)* and *Jane (No. 2*).

83. Conveniently, in a Grand Chamber judgment of 15 October 2019, the CJEU has reviewed and summarised the law and process to be adopted by courts who are called on to consider Article 3 prison cases: see case C-128/18 *Dorobantu v Romania*. This judgment represents a comprehensive restatement and exegesis of the law. Although the legal approach has been well developed, the judgment provides an authoritative benchmark. We summarise the key points for convenience. Paragraph references now following are to the *Dorobantu* decision.

84. The principle of mutual trust is of fundamental importance in the area of freedom, security and justice. Each Member State must, save in exceptional circumstances, consider and presume the other Member States to be complying with EU law and with the fundamental rights recognised by EU law (paragraph 46). Save in exceptional circumstances, Member States may not check whether another Member State has in fact, in a specific case, observed the fundamental rights guaranteed by the Union (paragraph 47). This principle is the cornerstone of the European Arrest Warrant system. Refusal to execute is intended to be an exception which must be interpreted strictly pursuant to the Framework Decision (paragraph 48). Other limitations than the express limitations in the Framework Decision may be placed on the principles of mutual recognition and mutual trust only in "exceptional circumstances" (paragraph 49). Subject to certain conditions, an executing judicial authority has an obligation to bring the surrender procedure under the Framework Decision to an end, where surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter: see *Aranyosi* and *Căldăraru* (paragraph 50).

> "51. Accordingly, where the judicial authority of the executing Member State is in possession of information showing there to be a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, in the light of the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter, 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 concerned 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 (judgments of 5 April 2016, *Aranyosi* and *Căldăraru*, C-404/15…"

85. In such a case, 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 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 source of such information may be judgments of domestic or international courts and also "decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations" (paragraph 52).

86. The "mere existence of evidence that there are deficiencies" even if systemic, generalised or affecting certain groups or places of detention "does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment" (paragraph 54).

87. Therefore, in order to ensure observance of Article 4 of the Charter, where the required level of evidence is before the court, then the "executing judicial authority … is … bound to determine, specifically and precisely, whether in the particular circumstances of the case, there are substantial grounds for believing that … he will run a real risk of being subject … to inhuman or degrading treatment" (paragraph 55).

88. Article 4 of the Charter is to be interpreted consistently with "the meaning conferred on Article 3 of the ECHR by the European Court of Human Rights" (paragraph 56). The European Court of Human Rights has stipulated that a party to the ECHR cannot decline extradition on an EAW unless that court has "first carried out an up-to-date and detailed examination of the situation" and has "sought to identify structural deficiencies in relation to detention conditions and a risk that is both real and specific to the individual, of infringement of Article 3" (paragraph 57).

89. If ill-treatment is to fall within the scope of Article 3, it "must attain a minimum level of severity" in 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 individual" (paragraph 59).

90. The review of detention conditions in the requesting state "must be based on an overall assessment of the relevant physical conditions of detention" (paragraph 61). Since the prohibition of inhuman or degrading treatment within Article 4 of the Charter is absolute (see *Aranyosi and Căldăraru*, paragraphs 85-87, and *Jawo*, C163/17 of 19 March 2019, paragraph 78), the respect for human dignity that must be protected "would not be guaranteed if the executing judicial authority's review of conditions of detention in the issuing Member State were limited to obvious inadequacies only" (paragraph 62). The review necessary "must determine, specifically and precisely, whether, in the circumstances of a particular case there is a real risk that [the requested] person will be subjected … to inhuman or degrading treatment" (paragraph 63). "It follows that the assessment … cannot … concern the general conditions of detention in all the prisons in the issuing Member State in which the individual concerned might be detained" (paragraph 64). "… An obligation on the part of the executing judicial authorities to assess the conditions of detention in all the prisons in which the individual

concerned might be detained … would be clearly excessive" and "could thus in fact substantially delay that individual's surrender and accordingly render the operation of the European Arrest Warrants system wholly ineffective. That would result in a risk of impunity for the requested person" (see *Generalstaatsanwaltschaft (Conditions of Detention in Hungary)* C-220/18 PPU, at paragraphs 84 and 85) (paragraph 65).

91. Accordingly, the relevant judicial authority "… are solely required to assess the conditions of detention in prisons in which … it is actually intended that the person concerned will be detained…" (paragraph 66). Accordingly, the executing judicial authority must "request of the judicial authority of the issuing Member State that they be provided as a matter of urgency all necessary supplementary information on the conditions in which it is actually intended that the individual concerned will be detained" (paragraph 67).

92. "When the assurance that the person concerned will not suffer inhuman or degrading treatment … has been given, or at least endorsed, by the issuing judicial authority … the executive judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter (see … *Generalstaatsanwaltschaft (Conditions of Detention in Hungary)* … paragraph 112)" (paragraph 68).

93. "It is therefore only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding an assurance such as that referred to in the preceding paragraph, there is a real risk of the person concerned being subjected to inhuman or degrading treatment within the meaning of Article 4…" (paragraph 69).

Article 3/4: The Appellants' Submissions

94. We have indicated very briefly above (see paragraph 51) the position of the Appellants. The Appellants submit that, in effect, this court, in adjourning the matter for further information in July "can only have refused to extradite because there were … substantial grounds to believe that detention will result in a breach of Article 3". They submit that there is "no difficulty" in ruling that the Article 3 presumption has been lost. The CPT report of 2019 provides substantial grounds for the relevant Article 3 risk. The presumption "has been rebutted by clear, objective and specialist evidence of international standing". The Appellants say that it follows it is for the Respondents to produce "clear and cogent evidence" that the general prison estate has improved sufficiently since the visit of the CPT in 2018 to abrogate or abolish the risk.

95. The Appellants say the Respondents have failed to do so. Reliance on the October 2018 action plan does not amount to clear and cogent evidence. The steps set out in the action plan have not all been taken. Even if they had, they would be an insufficient answer to the systemic and entrenched problems which have afflicted correction houses in Lithuania for many years.

96. The Appellants say that the provision of the action plan cannot, of itself, be clear and cogent evidence of the abolition of the relevant risk. The plan is aspirational only. The only concrete measure which has been established is the removal of 200 individuals considered to be the leaders of the informal prison hierarchy. This is an insufficient step on its own to address an entrenched culture of inter-prisoner violence. The CPT

visits in 2012, 2016 and 2018 demonstrate the continuing pattern. No detail has been provided regarding the outcome of that particular move. There is no detailed evidence showing whether there is a sustained policy of identifying and removing ringleaders from dormitory accommodation. No information is given about the extent to which the prisoners who have been removed for this reason are allowed to mix with those who are in the dormitory style accommodation, for example at mealtimes, in the gym, at exercise, in the library or in workshops. The Appellants commend the view of Mr Liutkevicius in his latest report that the measures taken are insufficient to "curb the caste system". The Appellants make reference to some of the press reports cited by Dr Sakalauskas, showing events involving drug and alcohol abuse, for example, at Pravieniškės. The limited amount of single cell accommodation as quantified by Mr Liutkevicius in his latest report is conducive to the continuation of inter-prisoner violence and the prolongation of the caste system. This issue also bears on the assurances, since the shortage of single cell accommodation makes the assurances impractical and the promised safety in cell-type accommodation "vanishingly unlikely".

97. As to the planned staff changes, there is little detail, say the Appellants. The release of 40 extra staff members following reorganisation and the reduction of administrative roles is, in effect, trivial. The proposed salary increases cannot be assumed to have led to greater retention and better recruitment. There is no direct evidence of that. The 2015 CPT report indicated understaffing of the prisons. This is a long-standing problem. Efforts to improve staff professionalisation were recommended following the CPT report of 2012 but, as a measure of how such processes may be ineffective, the CPT report of 2016 contained concerns about significant staff violence. The provision of video cameras worn on the body, tasers and telescopic clubs may protect staff but will do little to curb inter-prisoner violence.

98. The relevant offending figures and data as to illicit drugs in the prisons show a continuing lack of control by the authorities. The CPT 2019 report expressed "more alarm than ever" as to the prevalence of drugs in the correction houses. Nothing in the evidence since then provides a convincing basis of a real change. The ratio of cell accommodation to dormitory accommodation, combined with the use of cell accommodation, and the doubt about prison renovation plans, provides no real reassurance.

99. As to the assurances, they are general rather than specific. The assurances do not guarantee these Appellants (or other extraditees to Lithuania) places in cell accommodation in any of the three correction houses in question. Even if they did, the extraditees are still at risk of mixing with higher caste criminals in communal parts of the prisons. If the caste system and the leadership of the castes remain in place, then there will be sufficient opportunity for the assertion of power by that leadership. After all, the relevant language in the assurance most central to this point only reads "surrendered inmates will be detained separately, *where possible* [emphasis added] and excluding or *minimising* [emphasis added] the contacts with inmates making a negative influence … *reducing a risk* [emphasis added] of inter-prisoner violence/disease transfer and drug influences…". The Appellants say this assurance is no more than aspirational: the language represents an implied concession that the relevant risk cannot be abrogated.

The Respondents' Submissions

100. The Respondents have helpfully summarised their submissions very succinctly. They say the District Judge was correct in his decision: the Article 3 ECHR presumption was not undermined by the evidence before him. The Action Plan and its active implementation gives a sufficient answer to the concerns raised by the CPT report. It is important to emphasise that a CPT report is not a judgment but provides a desirable benchmark as to Article 3 standards. The Respondents make reference to the conclusion announced in *Muršić* to the effect that failure to achieve all that a CPT report recommends must not be taken to establish a real risk of a breach of Article 3. For those reasons, the presumption of compliance with the European Convention remains intact. It is important to emphasise that before any court concludes that the presumption no longer applies, there must be "objective, reliable, specific and properly updated evidence": see *Purcell and Public Prosecutor of Antwerp* [2017] EWHC 1981 (Admin) at paragraph 18.

101. Further, the Appellants have not adduced evidence of any "international consensus" against extradition to Lithuania, and indeed there is no evidence that any other Member State has declined to extradite to Lithuania as a result of their prison conditions. The information is that 48 people have been returned to Lithuania on EAWs from other Member States. Finally, the undertakings provided by Lithuania are practical and workable, offering a "realistic response to the concerns raised" by the CPT report and by any concerns formulated or advanced to this Court.

102. Amplifying that position, Ms Malcolm QC emphasises the strong presumption of compliance, see *Krolic v Poland* [2012] EWHC 2357. Lithuania has lost the presumption in relation to two of its remand prisons, but none of the evidence or conclusions leading to that position can be the basis of a conclusion that the presumption is lost in relation to the correction houses. There is no "pilot judgment" from the European Court of Human Rights on this issue. Ms Malcolm cites with emphasis the passage from the judgment in *Brazuks v Prosecutor General's Office, Republic of Latvia* [2014] EWHC 1021 (Admin), where the Court held:

> "6. While I do not go so far as to say that the absence of such a judgment will inevitably defeat a claim that there is a real risk of a breach of Article 3, it will be very difficult for any requested person to establish such a risk if the ECtHR has not been persuaded that a systemic problem or similar dysfunction exists. There have been a number of cases decided by the ECtHR dealing with the Article 3 claims in relation to treatment in Latvian prisons. Many have resulted from particular assaults or ill-treatment which were, it was alleged, not properly prevented or investigated. The only possible systemic failure has been the lack of an independent investigation into assaults, whether by prison or police officers or other prisoners. But this does not establish that there is a real risk that such assaults or ill-treatment will occur or that there will be no satisfactory means of protecting vulnerable prisoners. It could only show that if such an assault or ill-treatment occurred it might not be investigated by an independent body rather than by persons subject to control by the prison authority."

103. Ms Malcolm also emphasises that this case is one of those where the risk emanates from non-state bodies. In such circumstances, we must keep in mind the leading speech of Lord Brown of Eaton-under-Heywood in *R (Bagdanavicius) v Secretary of State for the Home Department* [2005] 2 AC 668, where at paragraph 24 he said:

> "24. The plain fact is that the argument throughout has been bedevilled by a failure to grasp the distinction in non-state agent cases between on the one hand the risk of serious harm and on the other hand the risk of treatment contrary to article 3. In cases where the risk "emanates from intentionally inflicted acts of the public authorities in the receiving country" (the language of para 49 of *D v United Kingdom* 24 EHRR 423, 447) one can use those terms interchangeably: the intentionally inflicted acts would without more constitute the proscribed treatment. Where, however, the risk emanates from non-state bodies, that is not so: any harm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in breach of article 3 unless it has failed in its positive duty to provide reasonable protection against such criminal acts."

104. The Respondents emphasise the full panoply of legal remedies available to prisoners in Lithuania, meaning ready access to domestic courts and thus onward to the ECtHR. Full information is provided about the state of the prisons. The active intervention of the ombudsman is of significance. Overall, the Action Plan means there is full acknowledgment of the problem. An active plan to address it and to provide proper protection and thus a proper basis for the preservation of the presumption of compliance. The prison population is decreasing, something of importance in managing the problem in hand.

105. Turning to some matters of detail, Ms Malcolm emphasised that it is clear from the evidence six buildings have been refurbished as part of the work associated with the Action Plan. Throughout the Action Plan funds are allocated to specific purposes, and funds in considerable quantity. For example, the salaries of junior prison employees will have risen some 14% in the course of 2019.

106. The system of CPT reporting and response by government, followed by subsequent publication means that by the time the parties were aware of the report in the summer of 2019, much of the detailed observation by the CPT was at least 18 months old. Much of the response was already in hand: the allocation of funds, the movement of prisoners, the changes in allocation of prison officers between administrative and front-line tasks and the increases in training being good examples.

107. In emphasising the importance of the reduction of the prison population, the Respondents have tabulated the relevant figures from the sources available, which we reproduce here:

> "<u>April 2019</u>
> Total population: 6,440
> *Total capacity: 8,011*

March 2018
Total population: 6,658
Total capacity: 8,104

September 2016
Total population: 7,004

December 2012
Total prison population: 9,754"

If there is any slight upturn in the prison population in very recent times, that cannot be said to bring the prisons back up to total capacity. In regard to the three specific prisons under consideration, they are overall under the legal capacity as confirmed by the October letter from the Lithuanian government. As at April 2019, Alytus prison was at 57%, Marijampolė at 104%, Pravieniškės at 90%.

108. It is a significant advance following the government response to the CPT that healthcare has been shifted from an internal prison system and, as the letter confirms, there has been large advance in the active treatment of HIV and other communicable diseases in the prison estate going alongside the Compulsory Health Insurance Fund. It is clear also from the Action Plan that there are active steps to address drug abuse inside the prisons.

109. The Respondents submit that the concrete steps to break up the informal prison hierarchies by removing the inmates with the most "negative influence" is of real significance.

110. In addressing the evidence of the two expert witnesses, Mr Liutkevicius and Dr Sakalauskas, the Respondents reject the negative views of Mr Liutkevicius. His evidence is necessarily general. He has not been in a position to visit the prisons extensively and much of his evidence is based on media reporting which is inherently unreliable. His response to the assurances is also quite general. He accepts that the steps promised in the Action Plan are relevant and capable of reducing any risk from inter-prisoner violence if implemented.

111. As to the assurances themselves, Ms Malcolm stressed in submissions the breadth and strong terms of the assurances. Ms Malcolm submits that it is an indication of reliability that the assurances do not purport to offer complete guarantee of freedom from any risk of mistreatment: that, she says, is a sign of a realistic and honest attitude and should encourage the court to take the assurances at full value. In the same vein, Ms Malcolm points to the timing of the response by the Lithuanians to the 2019 CPT report. The draft report was with the Lithuanian authorities in December 2018. The response was formulated by May 2019, published in June 2019 and was made available the same day. This is not a sign of a Member State failing to get to grips with the problems identified.

112. There is simply no evidence that assurances given by Lithuania in the past have been other than truthful and realistic, given in good faith, and reliable in their effect. There is no evidence that Lithuania has breached assurances once given.

Conclusions on Article 3

113. Having set out the evidence and the arguments fully, we will attempt to express our conclusions reasonably briefly.

114. We must consider the level of risk and the initial issue of the presumption together, before considering the assurances.

115. There can be no doubt that the post-Soviet problem of the caste system in Lithuanian prisons has been of long-standing, and is of concern. Successive CPT reports evidence the level of concern and the endurance of the problem. The kind of inter-prisoner violence in question, if unchecked and unmediated, would in our view potentially represent a significant risk of breach of Article 3.

116. It seems clear that there are at least four major contributory factors to this problem: the enduring sub-culture among prisoners, the nature and layout of the accommodation in the correction houses, and the orientation and engagement of prison staff. Finally, the sheer size of the prison population made a contribution but it is clear this problem has diminished. Not only does this remove a major contributory factor but it also evidences an active response to the problem from the Lithuanian authorities.

117. The prison estate is important because the more prisoners are left in open dormitory-style accommodation, particularly with low levels of prison staff physically present (or no such presence), the more unofficial hierarchies can operate and maintain authority and influence.

118. Therefore, we begin by acknowledging that the problem of the "caste system" and of inter-prisoner violence is real, not fanciful. If the authorities had not made a positive response to the 2019 CPT report, then that would have been a strong indicator that there was a proper basis for setting aside the presumption. In our view, those circumstances might be regarded as "exceptional".

119. For these purposes we regard the successive CPT reports and the 2019 report as being "objective, reliable, specific" and up-to-date as at the summer of 2018. It cannot, of course, be up-to-date today, nor can that body of evidence accommodate the Action Plan and the steps taken in response to CPT 2019. It is for that reason that we have carefully analysed the evidence from Liutkevicius, and the factual evidence from Sakalauskas.

120. The letters from the Respondent authorities, in fact comprise two elements: an indication of how the Lithuanian authorities have already responded to the problem of inter-prisoner violence and to the CPT report, and assurances for the future.

121. Piecing together the evidence of response to the problem, while it cannot be said that the steps taken, or in hand, abolish the problem completely, we consider they constitute an adequate response. The allocation of specific funding, the increase in front-line staffing, the existing and planned refurbishments taken together seem to us to demonstrate that a significant effort is being made. On its own, the displacement of ring-leaders and their assistants might not be an adequate response, but it does represent a marked step. It is obviously not possible at this remove to gauge closely the effect of the changes made, wing by wing, prison by prison, amongst the three prisons

concerned. We are able to see that prison population density has declined which, combined with the progressive refurbishments and even in the absence of a new prison, must give the prison authorities more flexibility than they have previously had to move prisoners with the intent of displacing those who attempt to exert malevolent authority.

122. Some of the statistical evidence produced from official figures by Dr Sakalauskas puts bounds on the level of Article 3 risk. We begin by noting that there is ready access to lawyers and the domestic courts. This is not a Member State without a functioning apparatus for the investigation and legal vindication of complaints. We are not, of course, so naïve as to imagine that such access abolishes the fear attendant on complaint. But accepting the imperfections of reporting in any prison system, the collected figures of reported criminal offences tabulated in paragraph 69 above provides some bounds to the risk of Article 3 breaches.

123. Offences of murder, and crimes which in this jurisdiction would be classified as assaults occasioning grievous or actual bodily harm, do not generally depend on reporting. These are serious crimes but the incidence is low.

124. It is also relevant to bear in mind the heightened focus on this problem, both domestically and in the context of extradition. The Lithuanian authorities are beyond doubt aware of the eyes of their own press, the domestic courts, the relevant European bodies, and other Member States on this aspect of their prison system. The impact of the assurances offered here, before we consider them as an answer to a system which, it is argued, would be deficient without them, do inevitably mean that the Respondents will be fully aware of the impact if any extradited prisoner were to suffer serious harm.

125. There is no consensus amongst Member States that the presumption is lost. There is no evidence that another Member State has declined to extradite to these three correction houses. There is no "pilot judgment" from the ECtHR concerning Lithuanian correction houses.

126. Taking all these factors together, we conclude, after a careful balancing exercise, that the presumption of compliance has not been displaced. Without the Action Plan and the evidence of implementation, real if incomplete, our decision might have been otherwise.

Assurances

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

The Duty of Candour and Disclosure

128. In the course of argument, the Appellants made vigorous complaint that the Respondents had failed to disclose the CPT 2019 report in advance of its due publication date in June 2019, and that assertions had been made by the Respondents which were in conflict with (and it was said were undermined by) the report. This was

the platform for the initial adjournment of these proceedings. The Appellants maintained the complaint in subsequent submissions.

129. The Respondents responded by emphasising the protocol and arrangements surrounding CPT visits, reports and responses from Member States affected. Ms Malcolm emphasises that this is essentially an administrative and political process, not judicial or quasi-judicial. The process is intended to improve standards, through mutual cooperation, the CPT standard-setting, and the Member State responding. If a CPT report were disclosable in proceedings before the end of the "choreography" between the European body and the Member State concerned and other than with the consent of the latter, then the CPT system would likely break down.

130. Arising out of that debate, we requested submissions from the parties stating the position more broadly as to disclosure obligations by requesting states and as to the means of communicating and enforcing such obligations. We are grateful for those submissions, and for the care and thought which has gone into them. However, after careful reflection on what has been written, we have concluded that it may not be helpful to express wider views, than those we now record.

131. The obligations of a requesting state were summarised by Mitting J in *Wellington v Governor of Belmarsh Prison* [2014] EWHC 418 (Admin), in a formulation endorsed by the Privy Council in *Knowles v Government of USA* [2009] 1 WLR 47. Mitting J wrote:

> "(1) It is for the requesting state alone to determine the evidence upon which it relies to seek a committal.
>
> (2) The requesting state is not under any general duty of disclosure similar to that imposed on the prosecution at any stage in domestic criminal proceedings.
>
> (3) The magistrates' court has the right to protect its process from abuse and the requesting state has a duty not to abuse that process. That is no different from saying that the requesting state must fulfil the duty which it has always had of candour in making applications for extradition.
>
> (4) In fulfilment of that duty, the requesting state must disclose any evidence which would render worthless the evidence on which it relies to seek committal.
>
> (5) It is for the person subject to the extradition process to establish that the requesting state is abusing the process of the court.
>
> (6) The requested state may be given power to request further evidence under the relevant Order in Council but, in the absence of evidence of abuse, the court is entitled to, and should generally, refuse to request the UK authorities to exercise that power or to adjourn to permit it to be exercised." (paragraph 26)

132. That approach was endorsed and re-stated by the Divisional Court in *R (Gambrah) v CPS [2013] EWHC 4126 (Admin)* as follows:

> "8. The duties of the requesting state and of the CPS can, in my view, be summarised as follows: the duty of the requesting state includes, pursuant to its duty of candour and good faith, the obligation to disclose evidence which destroys or very seriously undermines the evidence on which it relies. The CPS has independently a similar duty. It also has a duty to ensure that the requesting state fulfills its duty. Finally, it has a duty to withdraw from the proceedings if it finds itself put in the position where its duty to the court conflicts with its duties to the requesting state. That is, I believe, a full and accurate statement of the law as expounded in Raissi."

133. We accept the broad points made by the Respondents as to the nature of the CPT system of inspection and response. We do not conclude that a Member State has an obligation to disclose a CPT report, or the state's response, in advance of the point when it would otherwise become available. To impose such an obligation would be likely to frustrate the CPT process. However, the duty of candour must also mean that evidence or assertions should not be advanced which are inconsistent with the factual position known to the requesting state. That basic component of the duty of candour must arise in relation, for example, to concerns raised by a CPT inspection, not yet published as a report, which are either accepted or cannot be contradicted by the requesting state. As often in such matters, there will frequently be room for argument as to what can and cannot properly be said. But in our view the principle is clear: a requesting state cannot in candour advance a position which the representatives of the state know to be false or misleading, on the basis of a CPT inspection or as yet unpublished report, or otherwise.

134. We do not intend to engage in a detailed examination of what was said to be misleading by the Appellants. We have reached no conclusion that the Lithuanian authorities set out to mislead, and we are not convinced there is the basis for such a conclusion. There is no basis for saying there was any deliberate or undue delay in the publication of the CPT 2019 report. It is of significance that the parties and the District Judge were fully aware of the 2018 inspection, of the earlier reports, and of the issues which arose from them.

135. We intend to make no more general observations on disclosure in cases such as this, save to emphasise that it is the obligation of the Crown Prosecution Service when assisting a requesting state to ensure that state is alerted to their duty of candour, including the matters we have spelled out above.

136. For these reasons the appeals relating to Article 3 risk are dismissed.

Section 25 Extradition Act 2003: Bartulis

137. Bartulis seeks to raise a new issue in the appeal, namely that his extradition should be barred on account of his mental health condition, pursuant to s.25(a) of the 2003 Act, arising from the inhuman and degrading treatment he endured, when last in prison in Lithuania.

138. On 6 March 2019, following a hearing on 20 February 2019, Julian Knowles J granted Bartulis leave to amend his grounds of appeal to include a s.25 challenge.

139. DJ Jabbitt had evidence of Bartulis's mental health before him (see Decision at para 58), but no s.25 argument was advanced.

140. The reason that Bartulis has given for not raising his mental health condition earlier is provided by Ms Gitana Megvine, his current solicitor, in her statement dated 5 October 2018. Ms Megvine states (at para 5):

> "I also noted that Mr Bartulis stressed how he feels embarrassed and ashamed to talk about his experience in custody of being beaten and abused, especially with women. I note that, until very recently, all of the solicitors and counsel involved in his case have been female. …"

141. Mr Hall submits (at para 33 of his written submissions on s.25) that "for these particular reasons… his evidence about his history of self-harm and attempted suicide could not, with reasonable diligence, have been obtained earlier".

142. That explanation, as Ms Malcolm observes, seems inconsistent with the statement of Ms Megvine in which she explains that he volunteered his fears to her over the telephone on 5 October 2018. Further, his proof of evidence referred to these matters (see para 146 below).

143. No medical evidence was produced in the court below. Bartulis now applies to admit the psychiatric report of Dr Andrew Forrester dated 16 December 2018. Dr Forrester examined him on 30 November 2018. In his opinion Bartulis "currently presents with diagnosis of post-traumatic stress disorder (PTSD) and single episode oppressive disorder" (para 2.1). At paragraph 11 of his report Dr Forrester records what he was told by Bartulis about his time in prison in Lithuania, the violence against him and the injuries he sustained. Bartulis described "cutting his wrists 'more than once'" (para 11.12), that he came "quite close to killing [himself]" (para 11.13), and that events involving two other persons (see paras 11.17 and 11.18) "pushed [him] towards suicide" (para 11.19). Dr Forrester noted (at para 11.33):

> "I asked him if he had experienced any recent thoughts of self-harm or suicide and he replied to say: 'not now… I don't know what would happen if I was being deported… they would put me in prison… I think it would be the same like before… maybe even worse'. He said that he believes he will feel worse than he does now, that he will have 'nobody to support me' and that his life would be at risk, 'I am certain about that'. He said that he believes he will become suicidal within this context because I do not want to suffer same things like before."

144. Later Dr Forrester noted (at para 11.41): "Although he reported that he did not have any suicidal ideas, he did say that he had some thoughts of smashing his head against a wall".

145. It is Dr Forrester's opinion that the symptoms Bartulis experiences have, in all probability, arisen as a psychological consequence of the abuse he said he received in prison (para 12.3). However, Dr Forrester makes clear that the facts on which his opinion is based come, as Julian Knowles J observed in his judgment at para 17, almost entirely from Bartulis.

146. Two points, in particular, are to be noted from Dr Forrester's detailed report of what he was told by Bartulis when he examined him. First, what he told Dr Forrester adds little, if anything, of significance to what he said in his proof of evidence dated 1 July 2018 (at paras 13-17) about his detention in Lithuania. In his proof of evidence (at para 15) he said that he "saw a few people who hanged themselves, cut their wrists and throats", that "life in prison… deeply affected [him] psychologically", and that if he would be extradited and detained again he "would not be able to cope too as [he] was tortured and humiliated a number of times during the previous detention". He said: "I would kill myself and would not allow others to torture me". Second, Bartulis did not tell Dr Forrester what Ms Megvine records he told her that "he has attempted suicide on two occasions since then, by cutting his wrists and by hanging" (para 3 of her statement). (The words "since then" appear to relate to the period since he left prison in Lithuania).

147. In *Turner v Government of the USA* [2012] EWHC 2426 (Admin) at para 28, Aitkens LJ summarised the approach the court should adopt to s.25 (and s.91) of the 2003 Act as follows:

> "(1) The court has to form an overall judgment of the facts of the particular case.
>
> (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him.
>
> (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition were to be made. There has to be a 'substantial risk that [the appellant] will commit suicide'. The question is whether, on the evidence the risk of the appellant succeeding committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression.
>
> (4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition.
>
> (5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression?
>
> (6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those

> authorities can cope properly with the person's mental condition and the risk of suicide?
>
> (7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind."

148. In *Wolkowicz v Regional Court at Bialystok, Poland* [2013] EWHC 102 (Admin) at para 10, Sir John Thomas P and Burnett J, as he then was, stated:

> "…when the requested person is received by the requesting state in the custodial institution in which he is to be held, it will ordinarily be presumed that the receiving state within the European Union will discharge its responsibilities to prevent the requested person committing suicide, in the absence of strong evidence to the contrary… In the absence of evidence to the necessary standard that calls into question the ability of the receiving state to discharge its responsibilities or a specific matter that gives cause for concern, it should not be necessary to require any assurances from requesting states within the European Union. It will therefore ordinarily be sufficient to rely on the presumption. It is therefore only in a very rare case that a requested person will be likely to establish that measures to prevent a substantial risk of suicide will not be effective."

149. In our judgment

i) There is no proper basis for this court to grant permission to raise a new ground of appeal which could have been raised on Bartulis' evidence before the lower court (see para 146 above).

ii) Bartulis could have produced medical evidence before the lower court to corroborate the injuries he says he sustained and his mental health condition, but he did not do so. What Bartulis told Dr Forrester adds little, if anything, of significance to his evidence before the lower court. That being so, we do not consider Dr Forrester's report to be admissible.

iii) In any event, if it were to be admissible, we do not consider that it would be decisive (see *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin). Dr Forrester is of the opinion that it is very unlikely that Bartulis' mental health condition can be effectively treated in prison in Lithuania "because the original physical and psychological traumas that lie behind these conditions were experienced in that same environmental context" (para 12.9). However, Bartulis will not be returning to the "same environmental context". The premises to which he will be returned have been renovated, and the prison conditions have materially changed.

iv) Lithuania is presumed to provide adequate health care; and the evidence filed in the appeal by the Respondent has confirmed (6/8/19):

> "Full medical care is also guaranteed for inmates under the law. Services of general practitioner, psychiatry and

> odontology doctors are ensured in each correctional institution. If necessary, inmates can get other medical services in Central Prison Hospital or public healthcare institution."

There is no reason to consider that Bartulis will not be provided with adequate healthcare, if required; and there is no evidence that the Lithuanian authorities do not provide appropriate preventative measures.

150. For all these reasons permission to appeal pursuant to s.25 of the 2003 Act is refused.