



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03840/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 5<sup>th</sup> and 6<sup>th</sup> March 2019  
Written submissions on the 12<sup>th</sup> March 2019

Decision & Reasons Promulgated  
On 10 May 2019

Before

UPPER TRIBUNAL JUDGE COKER  
and  
UPPER TRIBUNAL JUDGE REEDS

Between

IZ  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss B. Asanovic, Counsel instructed by Lawrence and Co  
solicitors

For the Respondent: Mr D. Clarke, Senior Presenting Officer

**DECISION AND REASONS**

**THIS DECISION AND REASONS IS TO BE SERVED UPON THE  
APPELLANT'S SOLICITORS, NOT ON THE APPELLANT DIRECT.**

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure  
(Upper Tribunal) Rules 2008. Unless and until a Tribunal or court directs  
otherwise, the Appellant is granted anonymity. No report of these

**proceedings shall directly or indirectly identify him. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.**

**Background:**

1. On 28<sup>th</sup> July 2015 IZ made a claim for international protection. He was interviewed, and his claim refused by the respondent. His statutory appeal to the First-tier Tribunal was dismissed by First-tier Tribunal Judge Adio for reasons set out in a decision promulgated on 24<sup>th</sup> February 2017. He was refused permission to appeal to the Upper Tribunal, that decision being quashed on judicial review, following which permission to appeal was granted by the Upper Tribunal. For reasons set out in a decision made by Mr Justice Lane and Upper Tribunal Judge Reeds, promulgated on 21<sup>st</sup> November 2017, the Tribunal found an error of law in the decision of the First-tier Tribunal judge such that the decision was set aside to be remade. There is no extant appeal based on the refusal of recognition as a refugee; the appeal is against the refusal of his Article 3 claim for international protection.
2. At the commencement of the hearing, the parties agreed that the issues to be addressed by us, to which the evidence and submissions were directed, are as follows:
  - (i) Does detention of a gay man in a Lithuanian prison for convicted prisoners result in Article 3 prohibited treatment;
  - (ii) Does detention of a sex offender in a Lithuanian prison for convicted prisoners result in Article 3 prohibited treatment;
  - (iii) Does detention of a person with mental health problems in a Lithuanian prison for convicted prisoners result in Article 3 prohibited treatment;
  - (iv) Does detention of a person with all three characteristics in a Lithuanian prison result in Article 3 prohibited treatment;
  - (v) Does detention in segregation on conviction result in Article 3 prohibited treatment.
3. Various directions were made which, in significant part, were either not complied with by the parties or complied with very late. No reason or satisfactory explanation was offered to us for such non-compliance. The appellant's solicitors were notified in directions made on 10<sup>th</sup> July 2018 that the Tribunal was to be notified in writing of any special measures that were required on the basis of the appellant's asserted vulnerability. None were notified save that Ms Asanovic stated at the commencement of the hearing that if the appellant gave oral evidence, regular and frequent breaks were requested. We agreed that if the appellant gave oral evidence, he would be treated as a vulnerable witness and breaks given.
4. Eventually we were provided with a bundle of documents amounting to 1307 pages, some of which were provided during the course of the hearing. In so far as our attention was drawn to specific documents, we have referred to these in our decision. We have of course had regard to all of the material, whether we make specific mention of it or not.

5. We were provided with a bundle of authorities and, during the course of the hearing, we were also handed *AM (Zimbabwe)* [2018] EWCA Civ 64 and a decision of Westminster Magistrates Court *Zuolys* dated 12<sup>th</sup> October 2018. Ms Asanovic objected to the production of this latter case, submitting that it was not binding or even persuasive in our decision-making process. We admitted the decision, noting that her objection could be developed further in submissions if she wished to pursue it, but that we were aware that as a decision of a Magistrates Court we were not bound by it (or indeed the decision of the High Court in the extradition appeal of IZ).
6. Despite her initial indication to the contrary, Ms Asanovic stated that the appellant would not be giving oral evidence and that no special measures were required for the duration of the hearing because of the appellant's vulnerable status. Ms Asanovic then decided to call IZ to give oral evidence, which he gave with the assistance of an interpreter, after which we heard from Professor Katona and Professor Morgan. IZ was cross examined by Mr Clarke; there was no re-examination and we did not have any questions of the appellant. No concerns were raised by Ms Asanovic and we are satisfied that the appellant's evidence was freely given without any difficulties.
7. In reaching our findings on the evidence we have borne in mind the Joint Presidential Guidance Note No. 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant ("the guidance note") and also the Practice Direction, First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses.
8. We emphasised to the appellant that he was free to leave the hearing room at any time. He remained in the hearing room during Professor Katona's evidence and for part of Professor Morgan's evidence. We indicated our surprise, just before Mr Clarke commenced his closing submissions, that the appellant had remained in the hearing during Professor Katona's evidence which included considerable discussion of possible suicide risk. We were surprised that neither Ms Asanovic nor Professor Katona sought to discuss with the appellant the advisability of him remaining in the hearing room during that evidence. Ms Asanovic confirmed she would again discuss the matter of him remaining during submissions. He left the hearing room during Mr Clarke's submissions.
9. **At the request of Ms Asanovic, with no objection from Mr Clarke, we confirmed that our decision and reasons would be served upon his solicitors rather on him direct. The appellant was aware of these arrangements so that service upon his solicitors only will constitute good and effective service of the decision of the Upper Tribunal.**
10. We received skeleton arguments from both representatives and heard oral submissions from Mr Clarke but, because of the time, it was agreed that we would receive written submissions from Ms Asanovic. She agreed to send her written submissions to Mr Clarke who agreed to indicate whether he wished to reply and if so whether a written response was adequate, or whether he wished us to reconvene. We subsequently received his confirmation that he did not wish to make any response, written or oral.

11. For some extraordinary unexplained reason, Ms Asanovic agreed with Professor Katona that, prior to his oral evidence, he would talk to the appellant to make observations on the appellant's oral evidence that had been given earlier that day. She did not provide Professor Katona with a transcript of IZ's evidence given earlier that morning that had led to her arranging that discussion but gave him her oral summary of that evidence. There was no interpreter. She remained in the consulting room during that discussion. She did not notify either Mr Clarke or the Tribunal that she proposed that Professor Katona have a consultation with the appellant and nor did she agree what information Professor Katona would be provided with about the appellant's evidence. Professor Katona was not present during the appellant's evidence. Although there is nothing objectionable *per se* in an expert witness having a consultation with an appellant, in this case in these circumstances we consider this to be an error of judgment. She subsequently apologised for what she accepted was an error of judgement on her part for permitting such an exchange.

*Background to IZ's claim*

12. The background to the appellant's claim is not disputed and is as follows:
13. IZ is a Lithuanian citizen born on 25<sup>th</sup> February 1977. He is gay and was, until recently, in a relationship in the UK. That relationship has now broken down.
14. In 1999 he was assaulted while walking in a street in Vilnius, where he lived and worked, by individuals who also abused him verbally as being gay. He did not report that attack to the police.
15. In 2007<sup>1</sup> IZ came to the UK for three months. In unchallenged oral evidence before us, IZ said he was "not an open person" and he hoped to meet someone in the UK. He returned to Lithuania because his parents, who are disabled, needed his financial assistance and he found communication difficult in the UK.
16. After his return to Lithuania, he was employed as a train guard which included monitoring the sleeping section of the train. In 2010 he was charged with sexual assault on a sleeping passenger on 21<sup>st</sup> December 2010. He left Lithuania on 10<sup>th</sup> June 2011, returning in January 2012 for his trial. He returned to the UK on 15<sup>th</sup> January 2012 prior to sentencing.
17. He was convicted of unlawfully performing oral sex on a sleeping passenger and the Third District Court of Vilnius City sentenced him to 1-year imprisonment on 24<sup>th</sup> January 2012. His appeal to the Vilnius County Court on 26<sup>th</sup> April 2012 was dismissed in his absence. His appeal to the Lithuanian Supreme Court was dismissed on 11 December 2012. He continues to deny he committed the offence for which he was convicted. There is no submission before us that the judicial system of Lithuania is such as to render the conviction unsafe.
18. A European Arrest Warrant was issued by a judge of Vilnius County Court on 5<sup>th</sup> March 2014 and certified on 10<sup>th</sup> April 2014. He was arrested in the UK on 9<sup>th</sup> October 2014 and, after a contested hearing, District Judge Snow ordered his

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<sup>1</sup> Lithuania joined the EU in 2004

extradition on 2<sup>nd</sup> February 2015. The decision reached was that there was no risk that the appellant would be held in conditions that would breach Article 3 of the ECHR. His appeal against that order was heard and dismissed by the Lord Chief Justice and Mr Justice Mitting on 14<sup>th</sup> July 2015 (reported at [2015] EWHC 2335)

*Appellant's evidence*

19. IZ said that his parents were still alive, and he continued to support them financially by sending money. He said that after the trial and the publication of details in the newspapers, his name was known, and his neighbours became aware of him and that he was not strong enough to be able to handle that. When asked if he had lived openly in Lithuania as a gay man and whether he had a boyfriend he said that he only had sex partners; he didn't go from "man to man" and felt safer meeting up with married men. When asked whether he wanted to live openly as a gay man in Lithuania he said he wanted to kill himself because of the life he was living. This reflects what he said in his 2016 witness statement, namely that as long ago as 10 years previously, he had thought of committing suicide. He said he had not left Lithuania earlier because he had no offers of work or accommodation in the UK.
20. In his witness statement dated 7<sup>th</sup> February 2017 (a handwritten letter from him), the appellant denied that he committed an offence; he says he was flirting with the man and it was when the man's companion woke up that he was accused of sucking the man's penis. He denied he had been doing that. His explanation for his previous statement that there had been consensual sex was because of a lack of interpreter and that his English was not perfect, and he was often misunderstood. He said that he informed Professor Katona of this.
21. In his first witness statement made on 19<sup>th</sup> May 2016, taken by his solicitors without an interpreter, in connection with his asylum claim, IZ said that he would hide who he was (this was taken by both parties and by us to mean his sexuality) when in prison. In his later witness statements and in oral evidence he said that he would disclose "who he was" because he took the view that if he were later "discovered" then he would be more humiliated than if he were open about his sexuality to begin with. He said in oral evidence that if he were not in prison in Lithuania he would hide "who he was". There were no other alterations to the evidence relied upon in that witness statement.
22. In his 2016 witness statement IZ said that that he had always lived a discreet life because of fear of being identified as gay and the consequences but that after the conviction and the publicity, people now knew he was gay and "the situation had become untenable for [him] with this crime". He resigned his employment in Lithuania on 25<sup>th</sup> May 2011 because "it became impossible for [him] to remain there as people at work were pointing fingers at [him] all the time". He confirms he has had long term relationships but with married men and that there was no long-term future in such relationships.
23. In his 2016 witness statement he refers to having mental health problems, which he disclosed to the respondent during his asylum interviews, which were

undertaken with an interpreter provided by the respondent in July and November 2015.

*Medical evidence*

24. IZ's GP records have not been produced. There is a record in the bundle of a "Patient Summary: Home Visit (problem based)" which refers to him declining voice mail messages on 18<sup>th</sup> August 2014, to him being newly registered "here" on 5<sup>th</sup> November 2015. The record produced states there is no information recorded of active problems or patient plan. From the disclosed record it states "Last 5 clinically relevant consultations" which record the appellant as having previously tried Setraline which was stopped because of adverse reaction and being prescribed Mirtazapine on 21<sup>st</sup> December 2015. There is reference to him having made plans as to how he would harm himself (21<sup>st</sup> December 2015) and on 22<sup>nd</sup> February 2016 to feeling more positive and that his solicitor has told him he is positive about a good outcome to the extradition hearing. There is a record on 31<sup>st</sup> October 2016 "Due to see Prof Katona privately (Expert in Mind...)-unsure whether this is a psychiatrist. They have requested a letter from patient's GP". There are no other GP records produced.
25. There is no record in the GP notes disclosed that the appellant informed the GP of a previous suicide attempt in 2002/3 whilst in Lithuania. A copy of any letter sent by the GP to Professor Katona is not in the bundle. The GP records of the appellant's first visit to them and of any medical notes made, other than as recorded above, have not been produced.

*Professor Katona's written and oral evidence*

26. Professor Katona produced written reports in respect of the Appellant dated 12<sup>th</sup> November 2016 following an examination on 7<sup>th</sup> (or possibly 11<sup>th</sup>) November 2016; 18<sup>th</sup> May 2017 commenting upon the First-tier Tribunal decision; 1<sup>st</sup> February 2018 following an examination on 30<sup>th</sup> January 2018; 4<sup>th</sup> July 2018 following the examination on 30<sup>th</sup> January 2018 and a letter dated 4<sup>th</sup> March 2019 responding to questions put to him by the respondent on an unknown date. Although Professor Katona spoke with IZ in a conference room at the Tribunal on 5<sup>th</sup> March 2019 in the presence of Ms Asanovic, we have placed no weight upon Professor Katona's evidence arising from that consultation, if that is what it was, given the inappropriate environment and conditions in which it took place.
27. All consultations between the appellant and Professor Katona took place in English and without an interpreter present. Professor Katona states in his first report that the appellant's English was heavily accented, but he was able "to use his clinical skills to elicit a clear account from [the appellant] of his past experiences, current circumstances and mental symptoms". In his oral evidence, Professor Katona said that he would not say that the consultations were not difficult but that he, Professor Katona, had the skill to enable the consultations to proceed. When asked why the appellant was prepared to come and see him but would not, as described in his various reports, seek therapeutic treatment elsewhere, Professor Katona said that the appellant was not seeking therapeutic assistance from him and that the appellant had no therapeutic

expectation from the consultation; it was to prepare a report for use by the solicitors and barrister.

28. In the November 2016 report, Professor Katona sets out the appellant's background as described to him by the appellant. He refers to the appellant's account that he had taken a large number of his mother's tablets in about 2002/2003 after the breakdown of the first relationship he had which he felt able to describe as love. The appellant, according to what he told Professor Katona, then vomited the tablets up and did not seek hospital treatment. He told Professor Katona that he had not "made any subsequent suicide attempts" and had not had any further relationships (other than casual) because he had hoped to resume the loving relationship. Professor Katona records the appellant saying that if returned to Lithuania, he would kill himself by taking tablets with alcohol. In this report Professor Katona concludes on the basis of his clinical observation of the appellant's speech, demeanour, appearance and symptoms, that the appellant

"7.2. ... currently fulfils the criteria of the Diagnostic and Statistical Manual of Mental Disorders ... for Major Depressive Episode ... In particular

7.2.1 He is low in mood most of the time

7.2.2 He has lost the capacity to enjoy

7.2.3 he feels tired and without energy most of the time

7.2.4 His sleep is disturbed – though less so since he has been taking antidepressants

7.2.5 he has thoughts of suicide and a specific plan

7.3. ... also has many features (see below) suggestive of post-traumatic stress disorder (PTSD) although he currently falls just short of fulfilling DSM 5 criteria for Post-Traumatic Stress Disorder (...)

7.3.1 He has experienced relevant *stressors* (two episodes of homophobic violence and the threat of imprisonment in Lithuania where he is convinced he would be subjected to severe homophobic ill-treatment).

7.3.2 He has *intrusions phenomena* (intrusive thoughts)

7.3.3 He has *avoidance-related behaviour* in the form of avoiding situations in which his tag (and his associated difficulties) are revealed.

7.3.4 He has *negative alterations in cognitions and mood* in the form of emotional numbness, anhedonia and social withdrawal

7.3.5 He has *alterations in arousal and reactivity* in the form of disturbed sleep but does not have any other symptoms in this category. This may reflect the tranquillizing/sedating effect of the anti-depressant treatment he is currently taking

7.3.6 His symptoms have lasted for more than a month, have functional significance to the extent of substantially impeding his day-to-day activity and cannot in my clinical opinion be explained in terms of medication, illicit drugs or of other health problems.

7.4. ... in my opinion he should be regarded as having PTSD as well as major depression despite not quite fulfilling the relevant diagnostic criteria (probably because of the beneficial effects of antidepressant treatment, being in a safe place and having the structure and distraction provided by his two jobs) at the time I assessed him.

7.5. In my clinical opinion [the appellant's] depression has been caused by multiple factors. These include his separation from his immediate family, his years of being unable to express his sexuality freely, and the current threat of extradition to what he is certain will be a terrible fate. His PTSD is in my view caused by more specific factors – his past experiences of homophobic assault and the threat hanging over him of extradition to what he is certain will be a terrible fate.

...

8.3. I am aware that [the appellant] did not receive treatment for his mental symptoms until quite recently. In my opinion this is largely a reflection of his sense of relative safety in the UK till he lost his appeal against extradition and then had his asylum claim refused. People with PTSD .... are also often reluctant to seek help because doing so would mean that they were obliged to describe their traumatic experiences and thereby suffer the distress associated with such re-experiencing. Avoidance of such re-experiencing is a hallmark of PTSD.

9.1. ... NICE emphasises that psychological treatments should be regarded as 'first-line' treatment and medication as second-line treatment.

9.2. [The appellant] has so far made only a limited response to antidepressants and would in my view benefit from psychological intervention. Unfortunately, [people like [the appellant]] who have suffered 'interpersonal' trauma (ie following the deliberate cruelty of others) often do not respond well to brief trauma-focussed CBT and need much longer and more individually tailored psychotherapy which may also need to be more prolonged.

9.3. A sense of safety is a crucial requirement for effective treatment of PTSD.

...

10.1. [The appellant] made clear to me that he was convinced that, both because of the generally poor prison conditions in Lithuania and (more crucially) because of the high risk he perceives of being subjected to homophobic discrimination and attack, he would rather die than serve his sentence in a Lithuanian prison. He views prison in Lithuania as an environment in which he would be in extreme danger.

10.2. ... His already high suicide risk would also increase.

...

11.2. If he were forced to serve his sentence in Lithuania, his risk of suicide would increase further. This would be the case in the UK once he had lost all hope of being allowed to remain. It would also remain very high during the removal process and once he was back in Lithuania. There



would be a further increase in risk once he was incarcerated in Lithuania (particularly if he experienced any further homophobic attacks).

...

12.1. There is evidence that perceived discrimination worsens psychological distress, and that the effect is particularly marked where the perceived discrimination is related to sexual orientation...

12.2. In my clinical opinion, [the appellant's] attempts to hide his sexuality during his adolescent and adult years in Lithuania has contributed significantly to his PTSD and major depression symptoms."

- 29.** The reports dated 1<sup>st</sup> February 2018 and 4<sup>th</sup> July 2018 appear to be virtually identical save that the later report includes extracts from what Professor Katona describes as "recent GP notes relevant to his mental health." Those notes themselves have not been produced. The extracts describe a switch in medication and then a return to Mirtapazine. Professor Katona reiterates in these reports that the appellant would, in his view, benefit from psychological intervention but that a "sense of safety is a crucial requirement for effective psychological treatment...". He confirms that his conclusions on the impact of incarceration in Lithuania have not changed since the 2016 report but that in his view the risk of suicide if the appellant were forced to serve his sentence in Lithuania has increased because the appellant has spoken of hoarding tablets with a view to an overdose.
- 30.** Paragraph 3.5 of Professor Katona's report says
- "On 5<sup>th</sup> January 2018 Dr Anderson noted that [the appellant] 'says feels gen(erally) better on Mirtapazine' but that he was 'tearful when relating the circumstances and stresses he has gone through'. He 'had been suicidal/not afraid to die' but 'the recent judge pronouncement has given him more hope'. Dr Anderson nonetheless explained to [the appellant] that '28 tabs of mirtazapine [were] more appropriate than the requested 56'. This indicates Dr Anderson's concern about [the appellant's] risk of taking an overdose."
- 31.** In response to written questions and in his oral evidence, Professor Katona drew attention to the appellant's stated intention that he would not seek psychological help, that he had formed a suicide plan if forced to return to Lithuania and that although
- "... reasonable precautions such as removal of means, hospitalization and close or constant observation would reduce the risk to some extent but would not eliminate it. Such measures do not address the underlying cause of his suicidality (his subjective belief of the fate in store for him) and would also be likely to increase his distress."
- 32.** Professor Katona said
- "... one of the things that research evidence shows is that multiplicity of trauma makes the likelihood of trauma more likely. In the appellant's case it is not just two discreet episodes of trauma but also the chronic

discrimination for years and the fears he has of homophobic assault/rape in prison. It is the combination of what might happen in the future”.

33. When asked about the appellant’s coping strategies both now and in the future, Professor Katona referred to the appellant keeping himself busy, the decision to be open about his sexuality is a coping strategy but that it would depend on the circumstances he might find himself in.
34. Professor Katona referred to the appellant feeling that he would be safe serving his sentence in the UK. He makes reference to the appellant, on going into custody in the UK, identifying himself as gay and being placed in a separate section in the prison.
35. In answer to a question from us, Professor Katona said that the appellant has not engaged with psychological treatment; although he has engaged with the GP to the extent of being prescribed medication that is a much lower level of engagement than is required to engage with therapy. Nor, he said, was telling him (Professor Katona) to be equated with a therapeutic relationship.
36. Professor Katona drew on his extensive clinical experience that it was not uncommon for individuals who have been traumatised to be resistant to treatment; that the appellant doesn’t want to talk because it brings reminders of “bad things” that have happened and “bad things” that will happen. Professor Katona confirmed the appellant had not described any particular specific instances of discrimination but that his understanding was that  

“... a lot of people who are gay and live in societies in which being gay is not tolerated feel criticised/observed all the time not necessarily because of what is actually happening but because of what they perceive....”

*Written and oral evidence of Professor Morgan*

37. Professor Morgan first wrote a report in connection with Prison Conditions and the appellant in 2014. That report was considered by the High Court – see below. On 11<sup>th</sup> August 2016, Professor Morgan emailed the appellant’s solicitor and said that he had no basis before him to alter his views as expressed in that report. He brought to the attention of the solicitors that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) was due to visit Lithuania again during 2016. The CPT was set up under the Council of Europe and the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1989. It is a non-judicial preventative mechanism to prevent those deprived of their liberty from being exposed to torture and other ill-treatment. To achieve this aim, the CPT carry out periodic inspections every four years with additional ad hoc inspections where necessary. CPT delegates have unlimited access to places of detention and the right to move inside such places without restrictions; they interview those deprived of their liberty in private and communicate freely with anyone who can provide information. Cooperation with national authorities is at the heart of the CPT’s work since the aim is to protect those deprived of their liberty rather than to condemn states for abuses.

38. Professor Morgan produced a further report, to be read alongside his 2014 report, dated 2<sup>nd</sup> March 2019 and gave oral evidence. Professor Morgan's evidence was impartial, clear, coherent and plainly based upon his expert knowledge of custodial conditions in Lithuania through his inspection work together with his broader experience of custodial conditions and the standards promulgated by key international human rights bodies. He stressed that the reports prepared by the CPT were thorough and based on detailed examination, random interviews and independent analysis.
39. Professor Morgan was asked to prepare a report on the basis that the appellant was a gay man who had been convicted in 2012 for a sexual offence against a man and had been sentenced to 12 months' imprisonment. Professor Morgan had not, it seems, been provided with all the documents in the case by the appellant's solicitors but understood that the appellant suffered from PTSD and would be at high risk of suicide if returned to Lithuania and prison; Professor Morgan read the appellant's witness statement. We have not been provided with a copy of the letter of instructions but from Professor Morgan's summary it seems that it was suggested that the appellant's "homosexuality will make him vulnerable to harm from fellow prisoners should he be extradited to serve" his sentence.
40. Professor Morgan provided a very helpful summary of the methodology employed by the CPT: The CPT undertake periodic visits and if they encounter areas/issues of concern they will identify them and say that improvements should be considered. They tend to return to the location that caused them concern to see whether things have improved. If they have not improved they may use Article 8(5) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which is an immediate observation requiring quick response, because of the concerns identified; a time schedule may be imposed. It is a ratcheting up of pressure on the basis of the evidence they have. The next step is high level talks. There is not usually an inspection but, over 1-2 days, there are "serious meetings" with the responsible members during which the CPT will set out their concerns and explain why those matters need to be addressed and solutions found. Those discussions are not generally published. Some countries publish the initial report as soon as it is received; some countries publish the report and their response to that report at the same time – as does Lithuania. The high-level talks are the last step before the CPT utilise their last 'weapon' which is a public declaration. There have only been 6-8 in the history of the CPT where there is extensive maltreatment. The timescale for a public declaration can vary enormously; for Turkey and Greece the public declarations were within a short time of the warning – the high-level talks or an extreme report.
41. In the case of Lithuania, the CPT first carried out a visit of inspection to Lithuania in 2000 and has since carried out a further seven visits. The CPT visited Lithuania between 5<sup>th</sup> and 15<sup>th</sup> September 2016. The Lithuanian Government's response to that report together with the report itself was published on 1<sup>st</sup> February 2018. Professor Morgan had been a member of earlier inspection visits by the CPT but not that one. The CPT also visited

Lithuania to hold “High Level Talks” with Lithuanian Ministers and senior officials in April 2017. Professor Morgan states

“4.4 ... The agenda for that meeting has not been divulged but we can reasonably infer from previous CPT reports on Lithuania what the CPT wished to discuss as matters of pressing concern repeatedly raised in inspection visit reports. Those matters were extensively covered in my report of 29 December 2014 but can be confirmed by reference to the CPT report arising out of the Committees visit in September 2016 and since published.

4.5 The CPT’s concerns include: at the principal prisons for sentenced prisoners:

- o generally poor living conditions for prisoners in large dormitories not meeting the CPT or ECtHR minimum space standards;
- o inadequate provision of food;
- o insufficient employment or other positive regime activities for prisoners meaning that a high proportion are idle for much of the time;
- o too few staff for adequate prisoner supervision
- o dangerously high levels of inter-prisoner exploitation and violence including sexual exploitation;
- o excessive use of force on prisoners by prison guards;
- o inadequate medical services, in particular the absence of psychiatric support.”

42. The CPT visited Lithuania again in 2018 and went to the principal prisons for convicted prisoners. Professor Morgan did not know how that related to the high-level talks that were held in April 2017; the 2018 report has not yet been published. Professor Morgan addressed the Lithuanian Government’s response to the 2016 CPT report, stating *inter alia*

“4.7 The Lithuanian authorities have repeatedly asserted in their published responses to CPT reports that they will shortly address the deficiencies identified by the CPT ...

4.8 The pleas from the Lithuanian authorities in their responses to CPT reports that plans are in hand to remedy shortcomings has been a continuing and disappointing refrain. For example, when the CPT first visited Lithuania in 2000, the Government responded to the assessment of Lukiskes Prison, Vilnius, the country’s largest and principal remand prison (but which also houses lifers and some other sentenced prisoners) in which in 2008 the CPT found some conditions to be ‘outrageous’ and which could be said to amount to inhuman or degrading treatment

...

4.9 In the Lithuanian Government’s response to the CPT’s 2016 report it is stated that the problems of staff maltreatment of prisoners and the prevalence of inter-prisoner violence were being addressed through

enhanced prison officer training and the introduction of 'dynamic security' methods. It is vital to understand what this might mean. The term dynamic security is in a prison context used to refer to control and surveillance reliant on a continuous and pervasive staff presence of contact with prisoners – that is, Control through interaction. It follows that real dynamic security can only be secured by both the training *and* greatly increased staff numbers. Nowhere in the Government response to the CPT, however, are there hard data promising a commitment to greatly increased staff numbers and consequently incurring the substantially increased costs involved. For that reason, on the basis of past experience, it is reasonable to be sceptical that fundamental change will be achieved, not least because the problem (inadequate staff numbers) and the outcome (high levels of inter-prisoner exploitation and violence) have been identified by the CPT for 20 years now.”

**43.** Professor Morgan concludes in his report:

“5.2 No great confidence can be placed in the reformist Lithuanian Government responses to successive CPT reports, including those stated in 2016 with regard to staff training and the use of 'dynamic security'. Provision of enhanced dynamic security would require a very substantial increase in staff, which would be costly. It is precisely on budgetary grounds that the Lithuanian prison authorities have failed to deliver the reforms promised and planned in the past.”

**44.** Professor Morgan elaborated on the meaning of dynamic security, which as a term of art requires significant personnel input to detained prisoners. The Lithuanian government is working with the Norwegian government on that model. Professor Morgan acknowledged the Lithuanian authorities were willing but the difficulty, in his view, was a lack of funding; although they had reduced substantially the number of detained convicted prisoners and thus there had been an improvement in the ratio of officers to prisoners, there remained a significant shortfall in his view such that the criteria of dynamic security as utilised by the Norwegian authorities could not be met. He confirmed that the focus of the CPT had become that of violence rather than overcrowding.

**45.** He provided the example of past CPT reports which had concentrated on remand prison conditions and prisoners which had led to assurances being sought in extradition proceedings for extradited non-convicted prisoners to be held in particular remand centres. Such assurances were no longer sought. Professor Morgan referred to a report he contributed to which confirmed that conditions in which remand prisoners were held were no longer of such concern. In remand prisons, detainees were allocated a cell and there were very tightly controlled regulations as to what categories of alleged criminal could be placed together.

**46.** In so far as conditions for convicted prisons were concerned, he said that there wasn't the hard evidence to support the view that the Lithuanian authorities had done what they said they would do in their response to the 2016 report on convicted prisoners.

47. Professor Morgan confirmed that the CPT had not identified any particular issues arising out of sexual offence convictions or LGBT prisoners. He said the reports had referred to sexual exploitation although he commented that homophobia was a problem in most jurisdictions. He also commented that it was not possible to identify how frequent any such attacks were, but that inter-prisoner violence was acknowledged to be a serious problem. Prisoners could be put in segregated units for punishment, for identifying threats or fear of violence and there was some evidence that prisoners self-harmed to be put into segregation units where conditions would be similar to those for remand prisoners.
48. The CPT has expressed serious concerns at the lack of availability of psychiatric services, and that the physical conditions in Vilnius prison hospital were appalling. Professor Morgan pointed out that the Lithuanian authorities had said they were committed to closing the wing but that it had continued for years. He referred to the appointment of an ombudsman. He said the ombudsman did not seem "frightfully effective" but the post was there and was encouraged and has been quite active in the past. He said there was not a lot of evidence to consider with regard to the ombudsman, particularly in translation, in connection with the hospital establishments but there had been some damages awards made.
49. Professor Morgan did not feel qualified to comment on the availability of the mental health services that the appellant might require – he had not seen the medical evidence the appellant relies upon. He confirmed the CPT had not identified LGBT prisoners as having any particular additional problems such as to be of concern to the CPT. He commented that homophobia was no less a problem in UK prisons.

**The relevant legal principles:**

50. Article 3 of the European Convention on Human Rights provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment".
51. The test for a breach of Article 3 ECHR on removal to an EU state, as explained by the Supreme Court in *R(EM) (Eritrea) v Home Secretary* [2014] UKSC 12, [2014] 2 All ER 192, [2014] 2 WLR 409 at 41 and 58, is not whether the violation of Article 3 rights is "systemic" or "systematic" in a country, but simply whether it is shown that there are substantial grounds for believing that there is a real risk that the person surrendered would suffer treatment contrary to Article 3, in the presence of a presumption of compliance with international standards on the part of the receiving state ( see also *Tarakhel v Switzerland* [2014] ECHR 1185.)
52. As set out in the decision of the Grand Chamber in *Mursic v Croatia* (7334/13) judgment 20<sup>th</sup> October 2016), torture, inhuman or degrading treatment or punishment is prohibited irrespective of the circumstances and the victim's behaviour. Ill treatment must attain a minimum level of severity to fall within the scope of Article 3. To conclude that there has been a breach of Article 3 there

must be an assessment which takes into account all the circumstances of the case which include the duration of the treatment, its physical and meant effects and in some cases the age, sex and health of the victim. It usually includes bodily injury or intense physical or mental suffering, but even if these are absent a violation can be found where there is a diminishing of human dignity so as to raise fear and anguish capable of breaking an individual's moral and physical resistance. An absence of an intention to humiliate a detainee by placing him in poor conditions does not conclusively rule out a finding of a violation of Article 3. It is incumbent on a government to organise its penitentiary system in such a way as to ensure respect for the dignity of detainees regardless of financial and logistical difficulties.

53. A summary of the general propositions, addressed by both parties and taken into account by us in the context of extradition cases is set out in *Elashmawy v Court of Brescia* [2015] EWHC 28.
54. We also take into account that prison conditions are unlikely to be static and to make a conclusion about the real risk test the Court has to examine the present and prospective position as best as it can on the materials available, (see *Elashmawy v Italy* at paragraph 90) and that the view of any Court, including the ECtHR on prison conditions in a country can only be definitive at the time that the view is expressed.

*Domestic authorities and ECHR case law:*

55. We observe that there have been number of domestic and international cases that have considered prison conditions in Lithuania. We do not intend to carry out a full analysis of those authorities for the purposes of this decision, a significant number of which consider remand prisoners, with which we are not concerned here, or were decided in terms of conditions that existed several years ago. A summary is set out in the decision of Jane v Prosecutor General's Office [2018] EWHC 2691, which includes decisions pre and post 2015 (hereinafter referred to as "Jane"). Of the cases relied upon Ms Asanovic in her written submissions, these relate to remand prisoners or to detention in overcrowded conditions, that pre-date the most recent CPT report and response and the evidence of Professor Morgan. The detentions complained of are historic in nature. The evidence before us, as referred to below, does not support the contention that such conditions continue to exist.

**Discussion**

56. We have been greatly assisted by the skeletons both parties relied upon, together with the oral and written submissions. We have read these with care, and in the context of the evidence before us, in reaching our conclusions. We do not refer in our discussion to every point made but have taken them fully into account.
57. We note that Ms Asanovic states that she relies upon the Refugee Convention in her written closing submissions. We are surprised at this assertion given that the issues we are addressing are as set out in [2] above; this was agreed with the parties at the commencement of the hearing and so we proceed on the

basis that reference to the Refugee Convention is in error. Nor do we accept Ms Asanovic's assertion in her written submissions that stating that the appellant has been wearing a tag since his release from prison in the UK supports the appellant's submission that he has a real subjective fear of prison in Lithuania. We note that in the appellant's bundle, although not referred to by Ms Asanovic, there are a number of documents relating to homophobic attacks, inter-prisoner violence and violence meted out to sex offenders in UK prisons. We note the appellant was of the view that his experience of a UK prison regime was positive but take the view that his opinion of that is his subjective view which may or may not be supported by objective evidence – a matter upon which we make no findings and do not express an opinion other than to observe that the appellant himself has experienced no such difficulty.

58. In so far as the respondent sought to rely upon unreported decisions, magistrates' decisions and the extradition hearing, we note their content but place little weight upon them in reaching our decision. They do not address Article 3 issues in the context of the evidence that we have before us.
59. We also note that the case law relied upon by Ms Asanovic, although reported relatively recently, is of some vintage and does not refer to the most recent report of the CPT or the response by the Lithuanian Government. As emphasised by both parties, the decision before us is fact specific and we are not bound by decisions as to prison conditions in Lithuania where the factual matrix significantly pre-dates the evidence before us.
60. In general terms we accept the proposition that a response to a CPT report should not be taken "at face value". The response has to be considered in the context of the evidence as a whole. It must also be recalled that the CPT is the body charged with the identification of significant issues, making the recommendations and dealing with the issue of whether those recommendations have been carried out. The CPT reporting process is indicative of the extent of the concerns identified; there is no indication that there are significant concerns of an Article 3 breach that are not identified in the CPT reports. Although there were individual press reports and articles referred to by Ms Asanovic, these reports are subjective reports of individuals and in some cases relate to incidents that occurred some time ago. We have placed little weight upon them; the accounts they give are not reflected in the generality of the CPT reports but are reports of a very small number of individuals, particularly in the context of the number of prisoners in Lithuania, and their content is not reflected in the bulk of the evidence before us.
61. Reference is made by Ms Asanovic to the question of mutual trust and that there is an obligation on the judiciary to examine the 'plain meaning of the words of the assurance' and whether it addresses the identified risk. She accepts that the appellant will not be sent to a remand detention centre. We note that in the past, the assurances of the Lithuanian government with regard to individuals being extradited to Lithuania that they would only be sent to certain specified centres, were accepted (see *Jane*). We also note that, as referred to by Professor Morgan, conditions in the remand centres have now improved to the extent that assurances in connection with remand prisoners are no longer deemed necessary. We also note that individual assurances for



convicted prisoners are not considered, by the UK government, to be required from the Lithuanian government. In this circumstance we have taken Ms Asanovic's submission as made in her closing written submission to relate to the general assurances given in the response to the 2016 CPT report. We address this in reaching our conclusions and make our findings taking into account the specific factual matrix for this particular appellant in the context of the evidence before us. We do not accept 'at face value' the assurances given as being the defining and conclusive factor.

62. We accept, as does the respondent, that there is discrimination and homophobia in Lithuanian society. We do not accept, and it was not submitted to us, that the level of discrimination and homophobia rises to the level of persecution of gay men.

*Medical issues*

63. Professor Katona is clearly an experienced psychiatrist with considerable expertise both in the examination of individuals and in the writing of reports for the Upper Tribunal. We have not been provided with all the evidence that he was provided with, in particular he makes reference to GP records that were relevant to the appellant's mental health that have not been provided to us in the documentary evidence the appellant has chosen to submit. We do not know what consultations took place between the appellant and his GP, whether the GP discussed the possibility of CBT or other therapies or what information the appellant gave to the GP that resulted in him being prescribed medication. Professor Katona in his oral evidence said that even though the NICE recommendation is that there should be consideration of 'talking therapies' before medication, a GP's intervention would be at a much lower level than is required to engage with therapy. Whilst this may be correct as a general view, we have not seen the appellant's GP records and so do not know whether that was the case for him. Professor Katona did not say whether there was something more specific in the records which he had seen which supported his general view.
64. Professor Katona said that the appellant understood that the consultations he had were not for therapeutic purposes but for the purpose of writing a report for his court proceedings. We note that Professor Katona did not use an interpreter for his consultations, but his evidence was that because of his skills he was sure that he was able to obtain a clear account from the appellant. We have some concerns about this. Only 6 months earlier, the appellant had been interviewed by his skilled and experienced immigration and asylum legal advisors, without an interpreter, in connection with his asylum claim. It has not been suggested that his legal advisor lacked the necessary skills firstly, to be able to identify that the appellant was having difficulty expressing himself or secondly that he was unable to give a true and accurate account of his asylum claim and his response to the respondent's reasons for refusal letter. Yet in a handwritten statement/letter in February 2017 the appellant states that there had been difficulties in understanding in the preparation of that witness statement because there had been no interpreter, such that his account of consensual sex with the man in the railway sleeping compartment changed fundamentally to there being no more than flirtation which had then led to an

altercation which in turn had led to an assault and an unjustified allegation of sexual assault. If correct, this is a fundamental misunderstanding by the immigration legal advisor. Although the appellant's appeal in Lithuania was dismissed and his account of the incident on which he now appears to be relying was disbelieved, this reference to interpretation difficulties causes us concern in our assessment of the weight to be placed upon Professor Katona's assertion that his skills were sufficient to ensure that he obtained a clear and accurate picture of the appellant's account and so of his mental health.

65. We raised with Professor Katona the question why a skilled psychiatrist would not be able to provide the relevant explanation to the appellant of the benefits of therapeutic treatment. Professor Katona explained the necessity of a person feeling safe in order to be able to obtain the benefit of such therapy and that the mental health problems the appellant was suffering from stretched back many years. We of course accept that many individuals may not seek treatment unless they feel safe and that this may well be the case generally, as evidenced by Professor Katona's extensive experience and expertise. But this appellant has not provided personal evidence why he has not sought such treatment. In this case:
- o The appellant self-referred himself to a GP and, through his solicitors, obtained a report from Professor Katona having disclosed mental health problems to the respondent's interviewing officer;
  - o The appellant has repeatedly said that he feels safe here in the UK;
  - o The appellant's GP record that has been disclosed says that the appellant was told by his solicitors that there was a likelihood of a positive outcome, yet despite that he did not seek the therapeutic treatment suggested by Professor Katona;
  - o The appellant did not seek treatment during the couple of years he was in the UK prior to his arrest at Gatwick airport despite saying he felt safe here;
  - o The appellant is reported by Professor Katona as suffering from chronic discrimination for years and having a fear of homophobic rape in prison, yet despite Professor Katona's report in 2016 and despite the appellant having been in the UK since January 2012 and despite his solicitors advising him, in late 2017/early 2018 that they were of the view that there would be a positive outcome to his appeal, he did not seek therapeutic treatment and there is no indication that his GP advised him to or referred him for such treatment and no indication in Professor Katona's report whether this was explored with him and what the outcome of those exploratory examinations were;
  - o The appellant has not identified to Professor Katona what discrimination he was subjected to other than a generalised perception of discrimination in Lithuania; there is no indication in Professor Katona's report that the appellant has, for the last 7 years felt discriminated against in the UK;
  - o The appellant has not identified to Professor Katona what impact the fear of extradition had upon him since his arrival in the UK and the knowledge that he had been sentenced to 1 year in prison, given that he said that his

arrest was not unexpected. There is no indication of the impact on his mental health or his behaviour during those couple of years prior to arrest when on his own evidence he felt his arrest was not unexpected, or why he did not seek assistance from GP services;

- o The appellant has provided no explanation why he felt able to disclose issues to Professor Katona, (although we accept that Professor Katona explained to the appellant the consultations were of non-therapeutic nature), who then recommended therapeutic treatment when he felt safe and yet he did not then seek such treatment.

We do not know whether the GP suggested treatment other than medication, if not why not, or if so what the appellant's response was. Professor Katona's report does not indicate that he explored the possibility of treatment with the appellant either in the UK or in Lithuania. We do not know from the appellant (or his solicitors) whether Professor Katona's first report in 2016 was sent to the GP and if not why not or if it was, whether the appellant had a consultation with the GP to discuss the possibility of therapeutic treatment. Professor Katona's report indicates long-standing mental health problems for which he did not seek help until after his arrest, but there is little to explain why, given the appellant felt safe in the UK, he had not sought treatment.

66. The appellant claims to have suffered discrimination and there is little reason to doubt that there is discrimination in Lithuania against gay men. The appellant did not describe a single incident of harassment or violence save for the incident in 1999 and that which led to his arrest. He came to the UK in 2007 - after Lithuania joined the EU - but returned to Lithuania after a short while. He did not seek to leave Lithuania again until after his arrest and conviction despite saying that he hated his life. He had been in the UK before and knew the relative freedom to express himself. Yet he waited until his arrest and conviction before coming back. Professor Katona does not record in the reports why the appellant should behave in such a way or how such mental health problems he has should manifest themselves in that way. The travel to the UK after arrest and conviction are not the actions of a man who fears for his life or feels himself to be at risk of being persecuted or a man who has serious mental health problems. They are the actions of a man fleeing imprisonment.
67. We recognise the appellant said to Professor Katona that his arrest was not unexpected; he however did not say that despite this he did not feel safe in the UK. Even though he knew he had been sentenced to a year in prison, he reiterated that he felt safe in the UK. The appellant remained in Lithuania for some 2 weeks after his arrest; he then returned to Lithuania for the trial. His evidence was that after the trial he was not strong enough to be able to handle the impact on his family and neighbours or the publicity which included newspaper reports and that was why he left Lithuania. He did not state that he had attempted suicide at that time and there is no indication in Professor Katona's report that this was something that the appellant had even considered at that time. Yet Professor Katona has concluded that the appellant is now at serious suicide risk because of a description of an attempt in 2002/3 following the break-up of a relationship together with a statement by the appellant of that intention now. Professor Katona does not, in his report, explore whether the

attempt in 2002/3 was because of the break-up of the relationship or because the appellant was gay or a combination of both. The appellant is recorded as saying that he felt that he needed a loving relationship which is what he had lost. Although the report refers to the appellant's fear of return to a Lithuanian prison and that the appellant has been stockpiling pills and indicated an intention to kill himself with pills and alcohol, the reports do not explore the impact of the homophobic abuse he says he sustained in 1999 in terms of possible suicide risk, or the impact of the assault if his current description of the offence is correct, or the impact of a claim that he has been wrongly convicted or the breakdown of his relationship in the UK. The reports make reference to these incidents but do not analyse the impact or effect of those save to support the contention that the appellant has suffered mental health difficulties for many years. There is no indication that the appellant had suicidal thoughts around those incidents. It is difficult to conclude that such mental health problems as he now claims to have are sufficient to require treatment given his lack of any documented attempt to obtain treatment or any documented evidence that he exhibited any adverse mental health problems prior to his arrest other than in 2002/3 following the breakdown of a relationship. It is difficult to conclude, and we do not do so given the paucity of evidence of mental health problems prior to his arrest at Gatwick, that his mental health problems now are a culmination of his previous history and are of such severity as to result in a serious suicide risk.

68. Professor Katona records the appellant's extensive work commitments and what the appellant says about this; in particular that he doesn't want time to think. Yet the appellant also describes his social life and that he has had a boyfriend. It does not appear that there has been any exploration with the appellant of the possibility of treatment being available in Lithuania.
69. We reiterate that Professor Katona has extensive and expert experience and knowledge and he would in many cases be able to obtain sufficient information to be able to provide the kind of detailed diagnosis that he has done for this appellant. But we do have concerns that the lack of detailed exploration of the significant incidents in the appellant's life, the lack of exploration as to why the recommended therapeutic treatment has not been undertaken and the possibility of misunderstanding through the lack of an interpreter means that we are unable to place as much weight upon his report as the appellant requests.
70. We have no doubt that the appellant is suffering distress and anxiety at the possibility of return to a Lithuanian prison; quite possibly increased by his perception of what may happen to him there. We have no reason to doubt that he swallowed pills in 2002/3 in a suicide attempt, which he then vomited up. But we do not accept that he is a serious suicide risk if he is now extradited to Lithuania. The appellant's history does not, in our view, indicate an increased risk – the other traumatic events in his life have not resulted in suicide attempts. The pivotal incident appears to have been the extradition proceedings. We do not find that Professor Katona's report, for the reasons given above, provides sufficient basis upon which to find that the appellant is at risk of suicide either in the UK or during the removal process.

71. If we are wrong in this finding, we are nevertheless satisfied that the authorities in the UK will provide the adequate care that is required; they will notify the authorities in Lithuania, in any event, of the appellant's stated intentions and we are satisfied – see below – that there are adequate facilities to manage that stated intention.
72. In so far as the appellant's mental health generally is concerned, we are satisfied (see below) that there are adequate mental health facilities available to treat such mental health problems as he has, in the event that he does subsequently choose to seek it. We are satisfied that expert skilled psychiatrists in Lithuania will be able to elucidate as much, if not more, information for the appellant so as to enable a programme of treatment to be devised.
73. We do not accept that the appellant's risk of suicide in Lithuania is such as to amount to an Article 3 risk. We do not accept that there is a sustainable objective foundation to the appellant's subjective fear of Article 3 risk for mental health reasons

*Prison conditions in Lithuania*

74. Professor Morgan in his evidence was unaware of one of the detention centres referred to in the CPT report. We accept that this may be because of a slight difference in name and we do not find that his lack of knowledge of the prison by the exact name referred to in the CPT report in any way undermined his evidence. If anything, his ready acknowledgement that he was unaware of this reinforces the reliability of his views expressed upon asserted knowledge of relevant facts.
75. Professor Morgan's report and oral evidence confirmed that the situation had changed for remand prisoners. He made the point that there had been a number of promises made over the years in connection with remand prisons which had not been complied with by the time they said they would be. From this he also drew the comparison with the assurances given to the CPT in the responses to the 2012 and 2016 reports dealing with convicted prisoner conditions that various matters would be addressed. He acknowledged there was no bad faith involved but that there were significant funding issues which meant, when considered in the context of the historical approach by the Lithuanian authorities to remand centres, their current assurances could not be relied upon. He expressed little concern over the issue of overcrowding; little concern was expressed by the CPT of this issue in the latest report. His interpretation of the lack of any public follow up to the high-level talks as a helpful sign that the Lithuanian authorities are sufficiently willing to follow up what they have said they will do.
76. There has been no further announcement by the CPT since their high-level talks in 2017. There has been a further visit. If the concerns expressed by the CPT in their 2016 report and the response by the Lithuanian authorities which then led to the high-level talks had continued to raise significant concern to the extent that there was a real risk of Article 3 prohibited treatment, we are of the view that the CPT would have done more than arrange a further visit in 2018. Having visited again after those high-level talks, had there been continuing

cause for concern – as for example was the case mentioned by Professor Morgan in relation to Turkey and Greece – then it is reasonable, in our view, that a further announcement would have been made or further high-level talks arranged. That has not happened.

77. We acknowledge Professor Morgan's scepticism that the Lithuanian authorities either would be doing or would be able to do that which they say in their response. Nevertheless, we note that work they did around remand prisons was undertaken, that issues of overcrowding in convicted prisoner prisons no longer form a focus of the CPT report and that there has been continued work with the Norwegians. We also note that there has been a reduction in the overall number of prisoners and that there have been no further high-level talks arranged and no public announcement.
78. The 2016 report did not identify particular problems regarding prisoners convicted of sexual offences or LGBT prisoners. Whilst, as Professor Morgan says, that does not mean that there is no inter-prisoner violence, or homophobia or targeting of those convicted of sexual offences, such is a common occurrence in prisons around the world (with the notable exception of the Scandinavian countries according to Professor Morgan). It is not the fact that such violence exists generally that is of our concern in this case, but whether there are in place sufficient resources to enable sufficient protection to be provided for this appellant.
79. We have taken note of the evidence regarding segregation. We note that segregation can occur in a number of instances including self-referral as well as through punishment. Ms Asanovic did not in her closing submissions submit that segregation itself was inhuman and degrading rather the mechanism for getting into such units meant that prisoners had sometimes to resort to self-harm. We note that segregation is an occurrence in many instances for convicted sex offenders. We do not accept that segregation itself is inhuman and degrading.
80. Ms Asanovic submitted that without a proper system for the recording of injuries and incidents, effective control over inter-prisoner violence would not exist. She drew attention to there being a lack of commitment to enable reporting of allegations of ill-treatment. There was some reference in the CPT report to consistency between the allegations and the records; we note that there does not appear to be an independent system for dealing with allegations of prison guard violence. We do note Professor Morgan's reference to an ombudsman which he referred to in the context of questions about prison hospitals and that although not 'frightfully effective' there had been reports and it has been active in the past. It seems from this that there is record keeping of some adequacy.
81. The response to the CPT report refers to refurbishment of prisons, reduction in prisoners and increased education courses. Ms Asanovic submitted that pressure on accommodation would increase during any refurbishment and that the increase in education courses had to be seen in the context of reduction in prisoners. Whilst we accept that there will be pressure on accommodation and that the situation in the prisons is far from ideal, we cannot accept the submission that there is a real risk that detention in a Lithuanian prison for a

convicted prisoner will be a breach of Article 3. The lack of follow up by the CPT to the very real problems they identified in the 2016 report which led to the high-level talks in 2017 was not and has not been further publicised despite the powers the CPT has and despite a further investigation in 2018. The CPT identified a lack of progress since the 2012 report despite assurances given by the Lithuanian Government then. The response to the 2016 report led to high level talks in 2017 by the CPT. It appears likely, to us, that the high-level talks ensued because of the history of non-compliance with earlier assurances given. The fact that no further public steps have been taken by the CPT since their follow-up visit in 2018 suggests to us that the assurances given by the Lithuanian authorities in the response to the 2016 report were acceptable and were being acted upon. If matters remained as serious as identified by the CPT we consider that further public announcements would have been made rather than enable an EU country to treat its convicted prisoners in a manner which breached Article 3. If that were not the case, we would expect at the very least an indication to have been made that specific assurances for individual prisoners should be obtained before extradition.

- 82.** That is not to say that we accept unconditionally the assurances given by the Lithuanian authorities. It is not for the CPT, the UK Government and the Lithuanian Government to determine whether there is a possibility of a breach of Article 3. The evidence before us, including the evidence from Professor Morgan, does not point to prison conditions generally being such as to render a convicted prisoner as being at risk of serious harm/persecution.
- 83.** There was a lack of evidence to support the contention that as an LGBT prisoner there was additional vulnerability. The CPT reports isolated incidents, so they were clearly aware that there might be a problem. But the evidence to support the submission that being gay was an identifiable aspect of vulnerability that would mean the person ran the risk of Article 3 persecution was absent.
- 84.** Professor Morgan had been told the appellant suffered from PTSD and was at high risk of suicide. For the reasons we have given above we do not accept the appellant is at high risk of suicide. But in any event, we take note of the fact that the CPT report records that the picture for medical treatment is mixed. Professor Morgan did not feel able to offer an expert opinion on the availability of medical treatment for mental health problems. We note that Ms Asanovic accepts that transfer of the prison hospital materialised in 2016 although it had been promised earlier. But the fact is that it has occurred. Again, the lack of any public reference by the CPT to lack of adequate treatment following the response to the 2016 report is an indication that the assurances given have been or are being complied with and there are adequate facilities for an individual with mental health problems, including someone at high suicide risk. We also note that there is no real evidence before us that there are significant difficulties or problems in the handling of mental health problems. We cannot conclude that there are problems in the absence of relevant evidence. That a significant problem in the past has now been resolved does not mean that it is possible to make a finding that the problems continue.
- 85.** We have carefully considered this appellant's personal characteristics in reaching our conclusions. We accept that he has mental health problems but

not to the extent set out in Professor Katona's report. We do not accept that he is a high suicide risk or that he would be on removal or whilst in prison. The evidence points to there being psychiatric treatment available and, if the appellant requires therapeutic treatment, we find that such treatment would be available to him. If he continues to choose not to undertake such treatment that is a matter for him.

86. The appellant has said, and we accept, that he would disclose his sexuality. We do not accept that being gay would in and of itself render the appellant more at risk of inter-prisoner violence. That is simply not established by the evidence before us.
87. As a convicted sex offender, we accept that he would be likely to be identified as such at some point and, in common with many prison regimes, may well be at higher risk of inter-prisoner violence than had that not been the case. But there are segregation units to which the appellant can be allocated. Such allocation would not result in an Article 3 breach.
88. We were not presented with significant evidence that as a gay convicted sex offender that personal factual matrix would result in him being perceived as more vulnerable, although we are prepared to accept that because of his mental health problems (even though they are not to the extent described by Professor Katona) he may be less able to cope with prison and thus present as vulnerable. However, we find that segregation is available from self-referral. We have taken account of the references to self-harm being used in order to obtain transfer to segregation but the evidence before us did not indicate what the basis for such desire to be transferred stemmed from or how long ago that was or the individual case studies. We have taken account of the reduction in overcrowding, the involvement of the Norwegians in the structuring of the prison system, the increase on staffing and education/activities, the developed and developing health care and the lack of further notifications from the CPT in reaching this conclusion.

## **Conclusions**

89. We are not satisfied that there is a real risk that detention of the appellant as a gay man in a Lithuanian prison for convicted prisoners will result in Article 3 prohibited treatment;
90. We are not satisfied that there is a real risk that detention of the appellant as a sex offender in a Lithuanian prison for convicted prisoners will result in Article 3 prohibited treatment;
91. We are not satisfied that there is a real risk that the detention of the appellant as a person with mental health problems in a Lithuanian prison for convicted prisoners will result in Article 3 prohibited treatment;
92. We are not satisfied that there is a real risk that the detention of the appellant with all three characteristics in a Lithuanian prison will result in Article 3 prohibited treatment;



93. We are not satisfied that there is a real risk that the detention of the appellant as a segregated prisoner in a Lithuanian prison for convicted prisoners will result in Article 3 prohibited treatment

**Decision:**

The decision of the First-tier Tribunal did involve the making of an error on a point of law and the decision is set aside. The appeal is re-made as follows: We substitute a fresh decision to dismiss the appeal.



Upper Tribunal Judge Coker; Upper Tribunal Judge Reeds

8<sup>th</sup> May 2019