Neutral Citation Number: [2019] EWHC 1939 (Admin)

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

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2019

Before :

LORD JUSTICE BEAN
And
SIR DUNCAN OUSELEY

- -

Between :

VELI YILMAZ and ERKAN YILMAZ	**Appellants**
- and -	
GOVERNMENT OF TURKEY	**Respondent**
(No. 2)	

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- -

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

Hearing date: 11 July 2019

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Approved Judgment

Lord Justice Bean :

1. This is the second judgment of the court given in this case and follows an adjourned hearing on 11 July 2019 of the Appellants' appeal against extradition to Turkey. We gave our first judgment ([2019] EWHC 272 (Admin)) on 14 February 2019 following a hearing on 30 January 2019. At that hearing the issue was whether extradition would expose the Appellants to a real risk of being treated in a manner which breached their rights under Article 3 of the ECHR by reason of prison conditions in Turkey. We adjourned the appeal and asked the Respondent authorities to provide answers to the following questions in relation to each Appellant:-

> (1) In which institutions will the Appellant be detained if he is returned to Turkey, both before trial and, if convicted, after conviction?
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> (2) Will the Appellant always be accommodated in a cell which provides him with at least 3 square metres of personal space (excluding any in-cell sanitary facilities)?
>
> (3) What will the other detention conditions and detention regime be for the Appellant throughout his detention, including sanitary facilities, air, light and time out of his cell?
>
> (4) Is the Requesting Judicial Authority prepared to give assurances in relation to any of the above?

2. The Turkish authorities responded in two letters (one in each Appellant's case) of 26 March 2019, served on 31 March 2019, from Judge Yilmaz Ciftci, Deputy General Director in The Turkish Ministry of Justice's General Directorate of Prisons and Detention Homes. These letters identified Yalvac as the prison to which the Appellants would be sent and gave details of the areas of the cells at that prison. (Yalvac is over 300km from Bursa, the location of the court where the Appellants' trial is expected to be held.) The letters continued:

> "In Yalvaç T Type Closed Prison,
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> In 24 multi-person unity where it is foreseen to accommodate 10 to 14 convicts/detainees, common area for 25 m², dorm for 35 m², 2 WC, 1 bathroom, hand washing basins, 1 urinal are available and each unity has a ventilation area for 30 m² which is open from 8am till the sun set.
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> In 6 multi-person unity where it is foreseen to accommodate 6 to 8 convicts/detainees, common area for 20 m², dorm for 30 m², 1 WC, 1 bathroom, hand washing basins are available and each unity has a ventilation area for 25 m² which is open from 8am till the sun set. Moreover, the prison has 12 single rooms.
>
> The minimum standards of penal institutions in the Recommendations of European Council Committee of Ministers on Criminal Enforcement are taken into consideration, when our Penal Institutions are planned and constructed and also when the convicts and detainees are accommodated. Moreover, according to the standards determined by

> the European Committee for the Prevention of Torture, minimum living space for a room for one person must be 6 m², while a good level of living space must be 9 m². For multi-person rooms, the standard living space was determined to be 4 m².
>
> In this scope, in the penal institutions in Turkey, currently, a room for one person was design to be minimum 11m² and maximum 16 m². For multi-person rooms, due consideration is given for them to be minimum 4 m².”

3. In response the Appellants obtained a further report from Professor Morgan dated 19 April 2019. Professor Morgan had first become aware of the prison at Yalvac in January 2019 at a hearing at Westminster Magistrates' Court in another extradition case. The prison was entirely new and in January 2019 was still being filled gradually with inmates. Professor Morgan wrote:-

> “6.1 It appears that since mid-January 2019 the Turkish authorities have repeatedly been giving assurances, often at the 11th hour, that defendants, no matter what their circumstances (untried, tried, irrespective of their community roots and court proceedings) will, if extradited, be held at Yalvaç Prison. This represents a clear change of policy. In the many Turkish extradition cases with which I have dealt in the last four years the Turkish authorities have generally refused to identify the prison in which the defendant would be held if extradited. This has made matters difficult for the court dealing with the extradition request with regard to Article 3 issues because prison conditions in Turkey vary greatly. Some prisons are grotesquely overcrowded, and others under-occupied, some institutions are modern and others are exceedingly run down. However, the refusal to identify and guarantee which prison would be used has made sense from the standpoint of the Turkish authorities: it has given them operational flexibility given the overcrowding the Turkish prison system is facing generally.
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> 6.2 The questions arises, however, as to why Yalvaç Prison is being stipulated in this and other cases currently. I suggest that the reasons certainly include the facts that:
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> - Yalvaç Prison, being new, could honestly be said, at least initially, not to be crowded;
> - Yalvaç Prison, because newly built, is completely unknown to persons and agencies outside Turkey;
> - Yalvaç Prison is the subject of no independent inspection reports by either the international human rights agencies (the CPT, the UN etc) or, to the extent

> that they function at all since the July 2016 failed coup, Turkey's domestic prison monitoring bodies.
>
> 6.3 I was asked in the case of *Turkey v Enders Ozbek* whether I was accusing the Turkish authorities of bad faith. At that point I declined to answer in the affirmative. However, in the present case, because Yalvaç Prison is manifestly an unsuitable prison for remand prisoners whose case is scheduled to be dealt with in Bursa, I can come to no other conclusion other than strong suspicion that this assurance is a ruse to circumvent arguments based on empirical evidence which would be available to the defence were it said that the defendants would be held in either Bursa Prison or another establishment geographically convenient to Bursa.
>
> 6.4 Because Yalvaç Prison is now full or even overcrowded, and because it is my hypothesis that even if initially at Yalvaç it is almost certain that the defendants will be transferred to another prison in or close to Bursa, I conclude that there remains a considerable risk that Veli and Erkan Yilmaz will be subject to conditions in breach of Article 3, inhuman and degrading if extradited to Turkey.
>
> 6.5 Finally, it would be very easy for the Turkish authorities to dispel the concerns stated above. They could explain why they have nominated Yalvaç Prison and they could provide the court with such information in a timely fashion. They could explain how the custody of the defendants is to be managed when they are brought to trial in Bursa. They could publish three CPT general prison inspection reports on visits undertaken by the CPT in September 2016, May 2017 and April 2018 so that we have a clearer up-to-date picture of the custodial situation in Turkey since the failed coup of July 2016. And finally, they could respond positively to requests that persons be enabled to make independent inspections of particular prisons in connection with extradition proceedings."

4. On 31 May 2019 (following an extension of time granted by the court) the Requesting State responded in considerable detail to the questions put to them in our previous judgment. The response is in the form of a 38-page letter of 29 May 2019 from Judge Altintas, the Turkish judicial authorities' liaison judge to the UK. At the conclusion of the letter, Judge Altintas wrote:-

> "… we give our unequivocal assurances that the requested persons (the RPs) Mr Erkan Yilmaz and Mr Veli Yilmaz, if extradited to the Turkish jurisdiction,
>
> - They would be brought before the 3rd High Criminal Court of Bursa (the Court) to be heard within 1 or 2 days depending on arrival hours of their flight from London to Istanbul and from Istanbul to Bursa at the

very most in accordance with the constitutional principles (Articles 19 and 141/4 of the Turkish constitution) and criminal procedural rules and practice in the Turkish criminal system.

- After being heard before the Court in the case numbered 2010/289, it will be at the discretion of the Court to finish the case by a conviction or an acquittal on the same day or to adjourn the trial; if an adjournment would be the case in the case concerned, it will be again at the discretion of the Court to keep the defendants in custody or remand them on bail.

- As previously promised, should the Court order that the defendants be remanded in the custody, in that case they will be kept in Yalvaç Prison; likewise, if convicted and sentenced to imprisonment they would be serving their time in Yalvaç Prison too.

- If applicable whilst serving their times, the defendants could have a chance to be serving their remaining times in a British prison, of course, if the British authorities give their consent to that sort of international repatriation under the terms of the Council of Europe Convention on Transfer of Sentenced Persons (ETS No.112) and the Additional Protocol thereto (ETS No.167).

- Due to Article 196(4) of the TPPL as mentioned earlier in this paper, the defendants would never be subject to a trip from Bursa to Yalvaç/Isparta to Bursa with a view to attending the trial sessions, indeed, they would be able to be present at the next trial sessions via video-link, of course, if applicable and should the court adjourn the trial.

- If extradited and kept in the prison, the defendants' relatives and lawyers in the UK or in our jurisdiction or the British Counsellors pay them a visit in the Turkish prison whenever they want.

- The RPs shall be receiving a fair trial in compliance with the ECHR standards and that the appropriate Turkish authorities will provide all necessary measures given the specificities of the requested persons' health conditions if applicable.

- The RPs shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to their surrender other than that for which they were extradited,

nor shall they be for any other reason restricted in their personal freedom, except in the cases listed in Article 14 of the Convention (Rule of speciality).

- If convicted and not satisfied with the final judgement delivered by the appropriate Turkish judicial authorities, again if not satisfied with the prison conditions whilst being kept and serving their time in the prison of Yalvaç, of course if applicable and convicted and it would be the case in the case concerned, the RPs will be able to bring their cases/claims/human rights violations before the ECHR by an individual application pursuant to the provisions laid down in ECHR.

5. A further letter dated 31 May 2019 was submitted from Judge Saban Yilmaz, Director General in the Turkish Ministry of Justice's Directorate General for Prisons and Detention Houses. This protested against Professor Morgan's use of the word "ruse" to describe the policy of giving assurances in extradition cases that the requested persons would be held both on remand and in the event of conviction at Yalvac. On the material before us, including the detailed assurances we have just quoted, we consider the use of the term "ruse" unjustified. It is an entirely sensible policy for a Requesting State to house its extradited prisoners in particular institutions where care is taken to comply with the requirements of ECHR case law, as Judge Saban Yilmaz explained in the further information of 31 May 2019.

The living space issue

6. Judge Saban Yilmaz wrote that the current maximum capacity of Yalvaç T-Type Closed Penitentiary Institution was 400 and that 388 inmates were accommodated there as of 27 May 2019. He repeated the figures given in Judge Ciftci's letters of 31 March 2019 for the areas of the large and small multi-person units and the single rooms at the prison. (The smaller units and single rooms give each inmate more living space than the large multi-person units but, since there is no guarantee as to which type of unit will accommodate the Appellants, the argument before us focussed on the large multi-person units.) Judge Saban Yilmaz' calculation is that in the large multi-person units there is a minimum of 4.2m² (25+35=60/14) per inmate including sanitary facilities plus a further 2.14m² per inmate if one includes the ventilation area open during the day. He states that inmates have access to the common areas and the bedrooms/dormitories at all times of the day.

7. Objection was initially taken to Judge Altintas' letter of 29 May 2019 being admitted in evidence but we indicated that we were minded to deal with the appeals on the whole of the material placed before us by each side, and Mr Josse did not press the objection. Indeed, as will be seen below, the Appellants sought to rely on the letter in an application to open up a new area of challenge.

8. On the living space issue, it was submitted in writing on behalf of the Appellants that Judge Altintas did not engage with Professor Morgan's argument that the ongoing rise in the number of inmates at Yalvaç will inevitably lead to that prison becoming overcrowded. We do not accept that the Requesting State's evidence is deficient in that respect. The information given is that by the end of May 2019 the number of

inmates (388) was just short of the prison's maximum capacity of 400, and the figures given in Judge Saban Yilmaz' letter are based on the prison being at or near maximum capacity. It was also originally suggested that the common area was not available to inmates overnight but that was based on a misunderstanding, as Professor Morgan apparently conceded when giving evidence at Westminster Magistrates' Court in *Turkey v Molla* (see paragraph 50 of the judgment of District Judge Zani, 14 May 2019). It is the ventilation area which is only available between 8am and sunset.

9. Mr Josse's final attack on the Respondent's calculation on personal space is that amount of space taken up by sanitary facilities is not separately calculated. That is correct and it would be helpful in future cases if the Requesting State's authorities could give that figure. But it seems extremely improbable that it would amount to so great a proportion of the total of 60m² available to 14 inmates as to reduce the available space below the minimum of 3m² required by the case law.

10. Mr Josse maintained the general argument on behalf of the Appellants that assurances given by the Turkish authorities could not be relied on, emphasising that Professor Morgan has not had the opportunity of inspecting Yalvaç, and that the Requesting State has been very slow in publishing reports of the CPT (see our judgment of 14 February 2019, paragraphs 6 to 11)

11. We are not impressed with this argument. The Turkish authorities have indeed been regrettably slow to publish reports by the CPT, but in this case they have given very full answers to the questions we raised in our first judgment and have given detailed and categorical assurances in respect of the treatment of these Appellants if they are extradited. There is no pilot judgment of the ECHR at present in force shifting the burden onto the Requesting State. Turkey remains a member of the Council of Europe and is entitled to expect the court to start from the premise that its assurances will be honoured. The criteria set out in paragraph 189 of *Othman v United Kingdom* [2012] 55 EHRR have in our view been satisfied.

12. Accordingly we consider that the Requesting State's assurances on prison conditions, in particular on living space, should be accepted in this case, and the Article 3 appeals should be dismissed.

Article 6

13. The District Judge in the present case dismissed the Appellants' grounds of appeal under Article 6. When notice of appeal to this court was given, permission to appeal on Article 6 grounds was refused on papers by Elisabeth Laing J and at an oral renewal hearing by Garnham J. The hearing before us on 30 January was therefore concerned only with the Article 3 grounds on which permission had been given.

14. The Appellants, however, seek to rely on a new issue raised by the terms of Judge Saban Yilmaz' letter of 31 May 2019. This indicates that:-

> "With the order of the Court where the inmates/detainees are on trial, the inmates/detainees who are on trial and/or [wish] to be heard by the Court in a different province can be present/attend the trial by a screen of SEGBIS (Sound and Video Information Technology System) which is also presented with the

> institution (Yalvaç). In such cases should the relevant court order the detainee to be present before the court in person, then in accordance with the written instructions of our Directorate General, the detainees are transported to be present before the court; and after the trial they are taken right back to the institutes [where] they were being accommodated. Should the same one day trial session be prolonged it is possible for a short term stay to be arranged within the province where the trial is being held the detainee is being taken right back to the institute [where] they were being accommodated after the trial."

15. On receiving this (well after 31 May 2019, we were told) the Appellants' solicitors obtained a further report from Professor Bowring in which he states that the SEGBIS video link system has apparently been used over 244,000 times in Turkey in 2017. He writes about five high-profile cases in which the video link has failed, causing problems in the proceedings.

16. In reply, Judge Altintas, by letter of 5 July 2019, stated as follows:

> "The requested persons would be brought before the criminal court of Bursa very likely within 24 hours of their arrival from London via Istanbul to Bursa. The main trial session will be held on the day of their arrival in Bursa. Since all pieces of evidence in the case file will already have been made known to the requested persons' lawyers and since there will no cross-examination of the requested person the trial session is expected to take "just a couple of hours at most I suppose". If the Appellants were not released but remanded in custody or convicted and sentenced to imprisonment, they would be kept in Yalvaç prison. "

17. Mr Josse did not contend that we could immediately allow the appeal on Article 6 grounds. He submitted, however, that the material provided at a late stage by the Requesting State should lead us to permit amendment of the grounds of appeal to raise Article 6 again, and to adjourn the appeal once more to enable further evidence to be obtained on the issue, firstly on the issue of video link facilities and secondly, more generally, on the fairness of a trial procedure which appears to give so little opportunity for a defendant to have any or any substantial opportunity to instruct lawyers and to speak to them in confidence before the trial hearing.

18. We are not prepared to grant this application. As to the video link issue, we do not consider that it has been shown that there is a real risk of the Appellants being unable to appear in person at their trial in Bursa to give their evidence. Their appearance over the video link for other parts of the trial, if it continues to another day, would not breach Article 6. As to the wider issues concerning access to lawyers and the trial procedure generally, there is nothing in the trial procedure as described by Judge Altintas which strikes us as unexpected or abnormal in an inquisitorial system. But, be that as it may, if the Appellants wished to advance an Article 6 argument containing a broad based attack on the inquisitorial trial procedure in Turkish criminal courts, that should have been raised before the District Judge. The widespread use of SEGBIS by 2017 had not led to evidence of any interference with privileged communication

between accused and lawyers by the time of the extradition hearing, and there is still no real evidence of it.

19. For these reasons we refuse the applications to amend the grounds of appeal and to adjourn.

20. The Appellants' appeals are therefore dismissed.