IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
[2019] EWHC 3335 (Admin)

No. CO/4220/2018

Royal Courts of Justice

Tuesday, 8 October 2019

Before:

LORD JUSTICE SINGH
MR JUSTICE SWEENEY

B E T W E E N :

TINCU — Applicant

- and -

PUBLIC PROSECUTOR OF LIEGE (BELGIUM) — Respondent

MR P CARTER QC and MS M WESTCOTT (instructed by Dalton Holmes Gray Solicitors) appeared on behalf of the Applicant.

MS H HINTON (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

(Transcript prepared without access to the documents)

LORD JUSTICE SINGH:

Introduction

1 This is an application for permission to appeal against the judgment of District Judge Coleman, dated 19 October 2018, ordering the applicant's extradition pursuant to a European arrest warrant ("EAW") issued by the Public Prosecutor's Office of Liège, Belgium. The case has been listed before this court for a "rolled-up" hearing to address both permission to appeal and, if permission is granted, the substantive appeal. Applications have also been made by both the applicant and the respondent to adduce additional evidence which was not before the district judge.

2 The applicant relies on two grounds of appeal: first, he contends that the district judge erred in finding that there was no real risk to his Article 3 ECHR rights being breached; secondly, he contends that the EAW is not valid as it was not issued by a "judicial authority" within the meaning of section 2(2) of the Extradition Act 2003 ("the 2003 Act") conforming with the meaning of Article 6 of the European Union Framework Decision 2002/584.

Factual and procedural background

3 The extradition of the applicant is sought by the Deputy Public Prosecutor of the Public Prosecutor's Office of Liège, Belgium. The warrant was issued on 13 August 2018 and was certified by the National Crime Agency on 22 August 2018. The EAW in this case is a conviction warrant. The applicant is sought by the Belgian authorities to serve a sentence imposed for two offences of theft of electric cabling from a train track on 28 December 2015. He admitted the facts and was convicted in his absence to a term of imprisonment of two years.

4 The applicant was arrested at his home address in the United Kingdom on 6 September 2018. The extradition hearing was opened on 6 September, and on 19 October District Judge Coleman ordered his extradition pursuant to section 21(3) of the 2003 Act.

5 At that time, he advanced only one ground before the district judge, which was that his extradition would be incompatible with Article 3 ECHR owing to the condition of Belgian prisons. The district judge rejected that challenge, finding no bars to extradition and no human rights issues.

6 On 24 October 2018, the applicant applied for permission to appeal to this court, leading to the order of Sir Wyn Williams of 11 January 2019 which joined this matter with two other applications raising similar issues concerning Belgian prison conditions. Those two cases were subsequently withdrawn by consent. They had all been listed for a rolled-up hearing. The court directed a case management hearing, which subsequently took place on 3 April 2019 before William Davis J.

7 Following that case management hearing, the applicant filed fresh evidence on 17 April 2019 in the form of a report by Mr Christophe Marchand on the latest state of Belgian prisons, including recent developments on the prevention of strikes by prison staff, dated 15 April 2019. William Davis J directed the respondent to indicate its response to that submission, which the respondent provided on 28 April. The respondent is neutral as to the introduction of the report, but notes (amongst other points) that it has lost the opportunity to cross-examine Mr Marchand and asks that the court take consideration of this when

attaching weight to the report. Further, the respondent does not accept that Mr Marchand is to be treated as an expert witness, and argues that his opinion evidence is inadmissible for that reason.

8 On 14 May 2019, the applicant provided further evidence in the form of press articles. The respondent does not oppose the admission of these, although it does doubt their evidential value. On 30 May 2019, the respondent filed a response to the additional evidence adduced by the applicant. This evidence takes the form of an assurance provided by the Justice Department of the Federal Public Service of Belgium. It outlines the proposed detention plans for the applicant if he is returned to Belgium.

9 The case was listed for hearing before the Divisional Court comprising Nicola Davies LJ and Simler J in June 2019. However, at that point the applicant proposed an additional ground of appeal based on section 2(2) of the 2003 Act, leading the court to re-list the case for today's date. Permission to amend the grounds of appeal to include that additional argument was granted, but the issue of permission itself was deferred to this rolled-up hearing.

10 On 26 September 2019, the respondent filed an application to adduce further evidence, namely additional material received from the Belgian Justice Federal Service and a CPS prosecutor, Mr Max Madurai. The applicant is neutral as to that application. In addition, I should mention that, in the last few days, the court has had further material placed before it, again without objection subject to the views of the court.

Decision of the district judge

11 The applicant seeks to appeal against the judgment of District Judge Coleman ordering his extradition to Belgium. In the court below, the applicant challenged his extradition only on the ground that there was a risk of breach of Article 3 ECHR. In her judgment of 19 October 2018, District Judge Coleman noted that the burden of displacing the presumption of compliance with the ECHR in the context of a fellow Member State rests upon the requested person. In deciding the matter, the court considered the Council of Europe's Committee for the Prevention of Torture ("CPT") reports, and also news articles which had been submitted by the applicant. She attached little weight to those news articles.

12 The court distinguished the current case from *Purcell v Belgium* [2017] 1328 (Admin) ("*Purcell (No 1)*") on the basis that the strikes of the summer of 2018 which had been mentioned by the applicant were much briefer than those complained of in *Purcell (No 1)*, which had run for some weeks. The court noted that there were currently no strikes taking place in Belgium, and commented on recent improvements in the prison system. The district judge considered that any fear about strikes in the future was "speculative".

13 The court found that the applicant had failed to provide sufficient evidence to displace the presumption that Belgium would comply with its international obligations and so demonstrate that there was a real risk that his Article 3 rights would be breached upon return. No evidence of international consensus to that effect was found to exist by her.

14 The district judge noted that there was no information before her about which prison the applicant would go to if surrendered to Belgium. Similarly, no information concerning personal characteristics which would render the applicant more vulnerable than any other person was provided. As a result, the court was not persuaded that the first stage of the *Aranyosi* [2016] QB 921 procedure was triggered.

15 Since the decision of the district judge, further information has been provided by the respondent setting out where the applicant would be detained if returned to Belgium to serve his sentence. I will return to this later.

16 The court therefore rejected the applicant's Article 3 challenge.

Material legislation

17 For present purposes, it is necessary only to refer briefly to some provisions of the 2003 Act.

18 Section 21 provides that a judge must decide whether a person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998: see subsection (1). The section goes on to provide that, if the judge decides the question in the negative, he must order the person's discharge: see subsection (2). If the judge decides that question in the affirmative, he must order the person to be extradited to a category 1 territory in which the warrant was issued: see subsection (3).

19 Article 3 of the ECHR, which is one of the Convention rights set out in schedule 1 to the Human Rights Act, is well known and does not need to be set out here. For material purposes, it prohibits inhuman or degrading treatment.

20 Section 2 of the 2003 Act, which applies if the designated authority receives a Part 1 warrant in respect of a person, provides in subsection (2) that a Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains the relevant statements and information which are referred to in that subsection. It will be apparent from the present case that there is an issue which arises as to the meaning of "a judicial authority".

21 I should also mention section 27 of the 2003 Act, which relates to the reception of fresh evidence, but it is not necessary to set out its terms in detail here for reasons that will become apparent.

22 Finally, I should mention the Framework Decision, in particular Article 1, which refers to a "judicial decision" when issuing an extradition warrant. I should also refer to Article 6, which refers to the issuing authority having to be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that state. Paragraph 2 provides that the executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that state. In the present context, that would be the UK. Importantly, paragraph 3 provides that each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.

Grounds of appeal

23 The first ground of appeal advanced on behalf of the applicant relates to Article 3 ECHR. The applicant initially applied for permission to appeal on the sole basis that the district judge erred in finding that there was no real risk to his Article 3 ECHR rights. The applicant submits that the continued serious overcrowding of prisons in Belgium, combined with the unresolved dispute currently leading to prison officer strikes, means that, without more information, the applicant must be considered to be at risk of experiencing inhuman or degrading conditions if returned to Belgium.

24 The second ground of appeal was added pursuant to an application dated 4 June 2019 to

amend the grounds of appeal. It is submitted that the district judge was wrong to find that the EAW was valid, as it was not issued by a judicial authority within the meaning of the relevant legislation as construed in conformity with Article 6 of the Framework Decision.

Submissions for the applicant

25 On behalf of the applicant, Mr Peter Carter QC, appearing with Ms Mary Westcott, invites the court to consider whether the district judge ought to have decided the specified issue differently and therefore ordered the applicant's discharge under section 27(3). He also invites the court to consider whether a new issue or fresh evidence would have led the district judge to order discharge: see section 27(4).

26 The applicant relies in particular on section 27(4)(a), which provides for the possibility of fresh evidence on an appeal in order to support an appeal: see the decision of this court in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin).

27 Turning to each of the two grounds of appeal, in summary on the first ground the applicant contends that (i) the district judge was wrong on the Article 3 issue, as she should have found that there were substantial grounds to rebut the presumption of compliance in this case; (ii) the applicant's fresh evidence is admissible and material as it demonstrates that the district judge would have decided the key issue differently; (iii) the respondent's assurances are insufficient to dispel the risk of breach; (iv) the first stage of the *Aranyosi* procedure is triggered, and so the court should seek specific further information from the Belgian authorities; and (v) the respondent should only be provided with a reasonable time to provide that additional information.

28 Turning to the second ground of appeal, the applicant argues that the test for a competent "judicial authority" in section 2(2) of the 2003 Act has changed since the district judge considered this case. In particular, reliance is placed on the judgment of the Grand Chamber of the Court of Justice of the European Union in joined cases C-508/18 (*OG*) and C-82/19 PPU (*PI*). Reliance is also placed on the judgment of the same date in case C-509/18 (*PF*). These, it is said, clarify whether a public prosecutor's office may be regarded as a judicial authority within the meaning of Article 6(1) of the Framework Decision.

29 In *OG* and *PI*, the German public prosecutor was considered. The court held that it was not a judicial authority because of a direct or indirect risk of exposure to influence by the executive. In *PF*, the Lithuanian Prosecutor General who had issued the EAW might be considered to be judicial with sufficient guarantees of independence from the executive in connection with issuing an EAW. Nevertheless, the Court of Justice required further information about whether a decision to issue an EAW may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection, which it is for the referring court to determine.

Submissions for the respondent

30 We have been assisted by extensive written submissions filed by Ms Hannah Hinton on behalf of the respondent. For reasons that will become apparent, we did not need to call on her at the hearing.

31 In relation to the first ground of appeal concerning Article 3, in her written submissions Ms Hinton argues that Belgium is a respected extradition partner of the UK. The Framework Decision is based on principles of mutual recognition and mutual confidence which require the executing judicial authorities to consider that in implementing the EAW the issuing judicial authorities will ensure respect for the fundamental rights of the surrendered person.

32 She reminds this court that strike action per se does not automatically lead to violations of Article 3; rather, it is the impact on the individual requested person which may give rise to an issue under Article 3: see *Purcell (No 2)* at [38] (Hamblen LJ). Further, whilst strike action has been a concern, the promulgation of legislation concerning the organisation of penitentiary services and the status of penitentiary staff enacted on 23 March 2019 and published on 11 April 2019, she submits, means that prisoners' minimum rights are now protected by law, even if a strike does take place. Ms Hinton submits that the applicant is not exposed to a real risk of treatment contrary to Article 3. She observes that even Mr Marchand does not support the contention that there is a real risk: he describes the risk as a possibility which cannot be anticipated "with any degree of certainty".

33 Ms Hinton submits that the applicant has not adduced, as is required in cases of this kind, clear, cogent and compelling evidence of something approaching an international consensus to lead to a finding that there are substantial grounds to believe that a real risk exists. Ms Hinton places particular reliance on assurances which have now been provided to this court. She submits that it is clear what the conditions are which this applicant himself would face if returned to Belgium. She submits that the assurances amount to a solemn undertaking from the Belgian authorities that the applicant will be held in conditions which comply with Article 3. These assurances, she submits, should allow the court to discount the existence of any risk, even if there otherwise were thought to be a risk of breach of Article 3.

34 Turning to the second ground of appeal, Ms Hinton submits that Belgium, pursuant to Article 6 paragraph 3 of the Framework Decision, has designated the competent issuing judicial authorities in the following way. First, in the case of an EAW for the purposes of prosecution, it is the examining magistrate. Secondly, in the case of an arrest warrant for the purposes of executing a sentence, it is the public prosecutor. Further, she submits, the public prosecutor has no discretion in deciding whether to issue an EAW; the prosecutor simply facilitates the enforcement of a sentence which is at least four months long where an offender is found to be outside Belgium. Ms Hinton submits therefore that a Belgian public prosecutor has the required institutional status to comply with the independence required of a judicial authority within the meaning of Article 6 of the Framework Decision, and accordingly complies with section 2(2) of the 2003 Act.

The applications to adduce fresh evidence

35 Like the parties, I do not need to dwell on this separately or in detail. Both parties have placed material before the court which is closely tied up with the substantive arguments for each side. It is also common ground that the court should decide a case such as this on the basis of the most up-to-date evidence which is available, not least because otherwise there might be a risk of breach of Article 3 of the ECHR which would then go unchecked by this court. To the extent the evidence is helpful in determining the issues, therefore, I intend to refer to it.

36 Like Mr Carter in his oral submissions, I will address ground 2 first, since logically it arises before the Article 3 issue in ground 1.

Ground 2: section 2(2) of the Extradition Act 2003

37 In *Assange v The Swedish Prosecution Authority* (Nos 1 and 2) [2012] 2 AC, it was held by the Supreme Court that a public prosecutor was a judicial authority for the purposes of issuing an EAW. However, the applicant places reliance on more recent decisions of the Court of Justice, in particular *OG*. It is submitted that this requires sufficient guarantees of independence of a public prosecutor from the executive in connection with issuing an EAW.

38 It is not suggested on the facts that the Public Prosecutor's Office of Liège was influenced by anything done by the executive; it is the institutional arrangements about which complaint is made. However, the real focus of Mr Carter's submissions, as became apparent at the oral hearing before us, in fact relates to a different point: he submits that the public prosecutor in Belgium in a conviction case does not exercise any discretion in deciding whether to issue an EAW. He submits that that is required by EU law.

39 In addressing those arguments, it is necessary first to refer to the relevant law in Belgium and then to refer to the salient facts which arise from recent correspondence between the parties.

40 In Belgium there is legislation to implement the European arrest warrant scheme dating from 19 December 2003 which was published on 22 December 2003. Article 2 paragraph 1 provides that:

> "The arrest and surrender of persons wanted for the exercise of criminal prosecution or for the execution of a sentence or a detention order between Belgium and the other Member States of the European Union are governed by this law."

41 Paragraph 3 provides that the European arrest warrant is:

> "... a judicial decision issued by a competent judicial authority of a Member State of the European Union, referred to as the issuing judicial authority, for the arrest and surrender by the competent judicial authority of another Member State, called the executing authority, of a person wanted for the exercise of criminal prosecution or for the execution of a sentence or a detention order."

42 Article 32 of the 2003 law provides in paragraph 1:

> "When there is reason to believe that a person wanted for criminal prosecution is found in the territory of another Member State of the European Union, the investigating judge issues a European arrest warrant in keeping with the formalities and under the conditions stipulated under Articles 2 and 3..."

43 Paragraph 2 provides:

> "When there is reason to believe that a person wanted for the purpose of serving a sentence or a detention measure is found in the territory of another Member State of the European Union, the King's Prosecutor issues a European arrest warrant in keeping with the formalities and under the conditions stipulated under Articles 2 and 3."

44 Paragraph 2 goes on to provide that:

> "If, in this case, the sentence or detention measure was pronounced in a decision taken by default, and if the wanted person had not been personally summoned nor otherwise informed of the date and place of the hearing that resulted in the decision made by default, the European arrest warrant indicates that the wanted person will have the possibility of filing opposition in Belgium and being judged in his presence."

45 I turn next to the material part of the Belgian constitution. Chapter 6 governs the judicial power of the state. In that chapter, it is relevant to refer to Article 151, which, so far as material, provides in paragraph 1 that:

> "Judges are independent in the exercise of their jurisdictional competences. The public prosecutor is independent in conducting individual investigations and prosecutions, without prejudice to the right of the competent minister to order prosecutions and to prescribe binding directives on criminal policy, including policy on investigations and prosecutions..."

46 The scheme has been described in a little more detail by the Belgian authorities in a letter dated 11 June 2019. In that letter it is stated that a prosecutor is the competent authority for issuing an EAW for the purpose of the execution of sentences. Under the heading "Guarantees for independence", the letter states that the Belgian constitution guarantees the independence of the Public Prosecution Office within the framework of individual investigations and prosecutions, referring to the provision in the constitution which I have already cited. The letter continues to state that this independence is not affected by the possibility of the Minister of Justice to order the launch of a prosecution before the Belgian courts. The competence of the Minister of Justice does not entail the possibility to give specific instructions on how the investigation should be conducted, nor any powers related to investigative measures, including the issuing of a European arrest warrant. This competency is moreover merely related to the facts and can never be directed against a specific person. Finally, the letter states the Minister of Justice may also issue binding guidelines on general criminal policy, including those related to investigation and prosecution policy. These guidelines are not directives or instructions in individual cases. Furthermore, the independence of the prosecutor guarantees that he/she is always entitled to divert from these guidelines based on the concrete elements of the case. In that context, reference is again made to Article 151, paragraph 1 of the constitution.

47 Further information on this subject was provided in a letter dated 25 July 2019. I will set out the material passages. First, it was said that in this case a conviction in absentia was pronounced, against which no opposition was lodged by the applicant within the normal period. Since no opposition was lodged, the public prosecution must execute the conviction pronounced. Since the applicant could not be found in Belgium, an EAW was issued as the conviction concerns a sentence of more than four months: see Article 3 and Article 32, paragraph 2 of the law of 19 December 2003 to which I have referred.

48 The letter went on to state that in the framework of an EAW in execution of a conviction pronounced, the Minister of Justice cannot give instructions to issue an EAW in accordance with Article 151 of the Belgian constitution. It was said that the public prosecution act on the basis of a conviction pronounced by an independent judge, against which an opposition or appeal may be lodged. In this way, the convicted person is given the opportunity to explain his defence.

49 The letter went on to state that in the present case the prosecutor acted in accordance with Article 3 and Article 32(2) of the law of 2003. It was further stated that when the prosecutor issues an EAW regarding the execution of a conviction pronounced by an independent judge, he has no considerations regarding the substance of the case. In accordance with Article 3 of the 2003 law, the conviction pronounced at least four months' effective imprisonment and that sufficed to trigger the provision.

50 Finally in this context, I should make reference to a recent email dated 20 September 2019 which was sent as between the parties. In that email, the respondent authorities confirmed

that they have no discretion in this matter.

51 I will turn next to material passages in the judgment of the Court of Justice in *OG*. In that case there were proceedings in Ireland concerning the execution of two EAWs issued by the Office of the Public Prosecutor at the Regional Court of Lübeck, Germany in one case, and the office in Zwickau in the other case. There was a request for a preliminary ruling from the Court of Justice concerning the interpretation of Article 6 of the Framework Decision.

52 The court considered the questions referred to it, in particular from [42] of its judgment. Ultimately, the way in which the court answered the questions was as follows. The concept of an issuing judicial authority within the meaning of Article 6(1) of the Framework Decision must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject directly or indirectly to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant.

53 In my view, it is important to emphasise the last part of that answer which focuses upon the decision to issue a European arrest warrant. In the circumstances of the cases before it, the court considered that there was a possibility pursuant to the institutional arrangements in those cases that the possibility of political involvement in such a decision could not be ruled out. It did not matter that there were safeguards in place and that the exercise of the government's power might be exercised only in extremely rare cases; it was the possibility under those institutional arrangements that the executive did have power to issue instructions in an individual case which led to the difficulty in law: see in particular the reasoning of the Court of Justice at [74] to [90].

54 It is clear from the judgment that the concept of a judicial authority is an autonomous one in EU law. It does not depend on how an office or body is characterised by the national law of a Member State. It is also clear that it is not confined to judges or courts; it can include others who participate in the criminal justice process, such as prosecutors. The critical question, as the judgment makes clear, in particular at [74] to [80], is whether a prosecutor is sufficiently independent of the executive.

55 The focus of Mr Carter's submissions before this court, at least at the oral hearing, has been on a different point. He relies in particular on [67] to [72] of the judgment. In that passage, the court stated that the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level at which a national decision such as a national arrest warrant is adopted, there is the protection that must be afforded at the second level at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.

56 As regards a measure such as the issuing of a European arrest warrant which is capable of impinging on the right to liberty of the person concerned, that protection means that a decision meeting the requirements inherent in effective judicial protection "should be adopted at least at one of the two levels of that protection". The court continued that it follows that where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which is not a judge or a court, the national judicial decision on which the EAW is based must itself meet those requirements. In this context, I would interpose: that, of course, would be the decision of the court of law at which the applicant was convicted and sentenced. The court continued:

> "Where those requirements are met, the executing judicial authority may

> therefore be satisfied that the decision to issue a European arrest warrant for the purpose of criminal prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision..."

57 The court continued that the second level of protection of the rights of the person concerned means that the judicial authority competent to issue a European arrest warrant must review in particular observance of the conditions necessary for the issuing of the European arrest warrant and examine whether in the light of the particular circumstances of each case it is proportionate to issue that warrant. Finally in this context, the court stated that it is for the issuing judicial authority to ensure that second level of protection, even where the European arrest warrant is based on a national decision delivered by a judge or a court.

58 In my view, there are certain fundamental difficulties for the submissions made on behalf of the applicant. First, there can be no question on the material before this court that there is any real possibility of the interference by the executive, for example the Minister of Justice, with a decision by a public prosecutor to issue an EAW, at least in a conviction case such as the present. Secondly, the judgment in *OG* does not hold what Mr Carter submits it does, that there has to be a judicial decision at each of the two stages; it says only that there must be a judicial decision at least at one of those stages. In any event, in the circumstances of a conviction warrant, there is a decision by a judicial authority within the meaning of EU law, namely the public prosecutor, at the second stage. That authority decides whether the criteria in the Belgian legislation of 2003 are met. Those criteria include not only the fact that there has been a conviction and sentence imposed by a court of law, they also include the fact that the requested person is not in Belgium and that there has been no objection to the issuing of the warrant. The issuing of the warrant is not automatic since the criteria set out in the legislation must be satisfied.

59 Insofar as there is a need for proportionality for issuing an EAW, that is a decision which has already been made by the Belgian legislation. The law itself imposes the minimum condition that the sentence to be served must be at least four months long. In my view, there is no requirement in EU law that there must be a discretion vested in the public prosecutor to be exercised in every case on an individual basis. We were shown no authority to that effect. The judgment in *OG* does not provide authority for that proposition. The issue in that case, as I have indicated, concerned a different point of law, namely whether the public prosecutor's office in that case was sufficiently independent of the executive for relevant purposes.

60 Accordingly, in my view, the applicant has not shown that ground 2 is arguable.

<u>The first ground of appeal: Article 3 ECHR</u>

61 The law concerning Article 3 ECHR is not in dispute between the parties. The relevant legal principles were summarised in *Purcell (No 2*) at [9] to [14] by reference to earlier and well-known authority. A large amount of evidence has been placed before the court, including reports of a CPT and two reports by Mr Marchand. However, in my view, that evidence is mostly of a generic nature and also largely about circumstances in the past, in particular in 2017. What is crucial, in my view, in the present case is the evidence which the court has about what will happen to this particular applicant if he is returned to serve his sentence in Belgium. For that purpose, it is necessary to refer to some of the correspondence between the parties.

62 First, there is a letter of 24 July 2019 from the Federal Public Service in Belgium. In that letter, it is stated that there is a guarantee that the applicant will be detained in the prison of Lantin, which is not merely theoretical but will be applied in practice. It was also said that the applicant will first be incarcerated at Saint-Gilles in Brussels before being transferred to the prison of Lantin. Importantly, the letter states:

> "All the safeguards that Belgium has undertaken to respect concerning the conditions of detention of [the applicant] in the prison of Lantin are not of a hypothetical nature but will be effectively implemented. This also includes that the surrendered person will be detained alone with sufficient individual cell space, a separated sanitary block and out-of-cell activities."

63 A reference was made to the capacity of the Lantin prison and the actual population in July 2019. It is right to observe that there was overcrowding by reference to the capacity of the prison. The letter also made reference to the law of 23 March 2019, to which I will refer later. Finally, the letter stated that there were no strikes ongoing in any Belgian prison at that time.

64 It is important to emphasise that the letter of 24 July 2019 provides an assurance to this court not only in relation to cell space and toilet facilities which this applicant will have at Lantin prison, but also in relation to out-of-cell activities. There is simply no evidential basis for this court to go behind those assurances. Similar assurances have been repeated in a very recent letter from the Belgian authorities dated 7 October 2019.

65 The other main point on which Mr Carter focuses is the risk of industrial action in Belgian prisons and the impact which that may have on the conditions in which prisoners are required to live. However, since the CPT reports in the present case, and since the decisions in *Purcell*, a very important development has taken place. This is the enactment of a law in Belgium to safeguard minimum rights of prisoners even at a time when industrial action is taking place. This was indeed one of the improvements for which the CPT has called in the past. For this purpose, it is necessary to refer to a letter from the Belgian authorities dated 23 September 2019. This refers to both the master plan which the Belgian Government has had in place since 2016 generally (for example, for the construction of new prisons and the extension of existing ones); it also refers to the new law of 23 March 2019 which was published in the Belgian Official Journal on 11 April 2019. The letter goes on to state that implementing arrangements for that law are still currently prepared in order to ensure the entire effectiveness of the rights applicable under the new law. It adds that the social consultation provided for by law as part of its implementation has started. Finally, it says that there were at that time no strikes ongoing in any Belgian prison. It is right to observe that more recent evidence has been placed before this court that there has recently been a strike.

66 The important point, however, in my view, is that the Belgian law which is in the process of being implemented now caters for the minimum safeguards which prisoners have a right to enjoy even in a situation where there is industrial action taking place in a prison.

67 In all those circumstances, I have reached the conclusion that the applicant has not displaced the presumption that Belgium will comply with its obligations in Article 3 ECHR. Accordingly, the case for the applicant on ground 1 also is not arguable.

Conclusion

68 For the reasons I have given, I would refuse this application for permission to appeal.

Although this is a permission decision, I would certify that it may be cited in future cases in view of the issues raised.

69 MR JUSTICE SWEENEY: I agree.

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CERTIFICATE

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