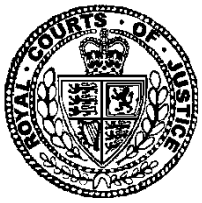

Neutral Citation Number: [2020] EWHC 1338 (Admin)

Case No: CO/4464/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2020

Before :

MR JUSTICE FORDHAM

- -

Between :

PHILIP MURPHY — **Appellant**

-and-

HIGH COURT REPUBLIC OF IRELAND — **Respondent**

- -
- -

CATHERINE BROWN instructed by McMillan Williams Solicitors Ltd for the **appellant**
STUART ALLEN instructed by the CPS for the **respondent**

Hearing date: 14 May 2020
Judgment as delivered in open court at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM :

1. This hearing proceeded by telephone conference, with the agreement of the parties. It and its timing had been listed in the cause list with contact details for anyone wanting to ask for permission to observe. Counsel addressed me in exactly the way as if we were in the court room. I am quite satisfied: that this constituted a hearing in open court, that the open justice principle has been secured, that no party has been prejudiced, and that in so far as there has been any restriction on a right or interest it is justified as necessary and proportionate.

2. This is a renewed application for permission to appeal in an extradition case. It is a case of a European Arrest Warrant dated February 2019 which is an accusation warrant. It relates to 6 alleged offences are said to have taken place in February 2016: allegations of false imprisonment threats to kill and sexual assault in the case of two lone women. Extradition was ordered by the district judge after a hearing on 10 October 2019 in a ruling given on 11 October 2019. In his judgment he addressed the article 3 point which is the issue raised in the case, and the issue raised before me. He held that he was satisfied that there was no evidence of a real risk of inhuman and degrading treatment in this case, by reference either to overcrowding and prison conditions; nor by reference to enter prisoner violence and protective arrangements. Mrs Justice Eady refused permission to appeal on 11 March 2020, giving very full reasons. It is tempting simply to read them out because I wholeheartedly agree with what she said but I am going to give my reasons in my own way in this ex tempore ruling.

3. The central point in the case, as Miss Brown for the appellant acknowledges, is what she has called an 'overarching' or 'main' submission relating to overcrowding. This is a point which she honed in on in her perfected grounds of appeal and helpfully re-emphasised in an email to the court prior to this hearing. The 'overarching submission' is this. There have been occasions at Midlands and Cloverhill prisons – those are two of the three places which have been identified on the evidence as the likely destinations of the appellant: Cloverhill on remand and Midlands together with Arbor Hill were he to be convicted. The submission is that there have been occasions at Midlands and Cloverhill where issues such as overcrowding have arisen that give rise to an arguable breach of article 3. On that premise, continues the submission, what was required in this case was an enquiry of the Irish authorities to answer the points. Miss Brown has helpfully emphasised in her oral submissions that the particular point, giving rise on those occasions to overcrowding crossing the article 3 threshold, relates to the use of mattresses on the floor with the consequence of additional individuals occupying cell spaces.

4. There is no dispute as to the relevant law. The principles applicable so far as floorspace are concerned are well known and articulated at paragraphs 136 to 141 of Mursic v Croatia a decision of the Strasbourg Grand Chamber on 20 October 2016. That explains the rebuttable presumption of violation if floorspace is below 3m² per detainee, and the rebuttable presumption of compliance if the floorspace is in the range between 3 to 4m², identifying the way in which the court would approach either of those scenarios and the other factors that would be relevant in the article 3 evaluation.

5. So far as enquiry is concerned that there is a well-established three-step process in these cases which can be found in the case of Aranyosi a decision of the Luxembourg Grand Chamber on 5 April 2016 at paragraphs 88 to 95. The same 3 steps can be seen applied by the Divisional Court in the context of Bulgaria in the case of Kirchanov [2017] EWHC 827 (Admin) at paragraphs 42 to 44. It comes to this. The court will be looking to see, at step (i), whether there is a body of information which is objective, reliable, specific and properly updated, so far as the conditions of detention in the requesting state is concerned, in order to answer the question of real risk of inhuman or degrading treatment. If at step (i) there is that body of evidence that has that potential consequence then step (ii) is that the court must always proceed to make an individualised assessment as to whether there is a real risk of the relevant harm on substantial grounds relating to the individual. The third step, step (iii), is that the court must not condemn the requesting state on article 3 grounds without first giving it the opportunity specifically to respond by way of supplementary information.

6. The central submission in this case is that it is properly arguable that the district judge went wrong in failing to recognise that there was a need for that step (iii), a targeted enquiry. In my judgment that is not a reasonably arguable ground of appeal, and there is no realistic prospect of this court on a substantive appeal upholding that argument.

7. It is quite clear that the judge did not accept the premise that there was the appropriate body of evidence to give rise to the article 3 threshold concern, in relation to conditions in the various prisons and remand facilities in the Republic of Ireland.

8. As it seemed to me from reading the papers, the high watermark of Miss Brown's case could be illustrated by reference to two specific submissions that she made in her Perfected Grounds of Appeal. One of the advantages not only of suggested pre-reading, is targeted to particular passages in bundles, but also of the oral hearing in the interchange that takes place through the medium of the oral hearing, is that I have been able to consider with Miss Brown's assistance to submissions that she made and they evidential basis that she says exists for them.

9. The first specific submission related to the remand facility Cloverhill. Miss Brown's submission about overcrowding and Cloverhill, so far as its high watermark that is concerned, was in her Perfected Grounds of Appeal where she submitted as follows: "detainees in some prisons e.g. Cloverhill in particular do not have at least 3m² of floor space and prisoners who are accommodated in cells where there are matches on the floor will not be able to move freely within the cell". I was able to ask her what the evidential basis was for that submission. She took me to passages in the report of her expert who gave written and oral evidence before the district judge and which evidence was considered by the district judge. He is Professor Ian O'Donnell and he wrote a 33 page report for the court in September 2019. I particularly wanted assistance because I, for my part, had been unable to find anywhere in his written report a passage which supported the contention being made. He discusses the picture and the circumstances at the various institutions. He discussed the parameters that had been identified after 2010 so far as cell space was concerned and referred to 6m² for a single occupancy cell, 9m² for a double, and 12m² for triple occupancy. He set out in detail, and by reference to those capacity thresholds, a table to show the practical operation of the various prisons. That table showed Cloverhill in August 2019 as operating it at "86%". He also made reference to Cloverhill as being a place where "some men are held in cells with two or more other prisoners", which at Cloverhill is

"cramped", referring to "12m²". Nothing that I have been shown in his written report evidences the submission that was made, including by reference to fluctuations and occasions and mattresses on the floor.

10. Miss Brown submitted that there was more to it than that because he had given oral evidence. She submitted that his oral evidence supported another contention in her Perfected Grounds of Appeal. It read as follows: "Most detainees at Cloverhill are in triple cells. The smallest cells in Cloverhill are 9.36m² and the largest or 11 to 12m². The cell measurements do not exclude the sanitary facilities. There is no information as to the size of the sanitary facilities." She also made reference to "the use of mattresses on the floor" which "limits how freely detainees can move around the cells". Even on the basis that that submission was supported by the oral evidence of the Professor before the judge, I cannot see, even arguably, how that evidence supports the submission that "detainees [at] Cloverhill … do not have at least 3m² of floor space". I asked Miss Brown whether she put to her expert whether it was right that detainees in some prisons do not have at least 3 m² of floor space. She submits that she did and that the expert at answered in a way that identified that as being a risk.

11. I find it impossible to see a reasonably arguable basis on which this contention can be advanced, with a realistic prospect of success, of establishing the step (i) body of evidence required in the three-step process. The district judge had the expert evidence, including the oral evidence, and evaluated it and concluded that there was not a real risk on this or any other basis. Nothing that I have been shown begins, in my judgment, to undermine that finding.

12. The other contention that seemed to me to illustrate the high watermark of this overarching submission was made later in the Perfected Grounds of Appeal. There, Miss Brown submitted as follows: "At Midlands Prison … the cell size (designed to accommodate two prisoners) of the larger cells is 8m² … This means that, with an extra prisoner, and excluding 1m² for sanitary facilities, prisoners are permitted 2.4 m² of personal space".

13. I asked the same series of questions in relation to that. Miss Brown's answer was that she had no support for this submission from the evidence of the expert. She candidly drew to my attention in a footnote in her Perfected Grounds, which she rightly and properly drew to my attention in her oral submissions, that she accepts "that Professor O'Donnell did not raise concerns as to overcrowding at Midlands Prison in his report". She also told me that she did not put this to him in his oral evidence. That might be thought, of itself, to be fatal: that the expert report does not support it, and that it was not put to the expert, remembering that I am considering an appeal from the district judge. On the other hand, this is a fundamental human rights point and a very anxious one, if it is properly supported by other evidence. I have therefore considered, with Miss Brown's assistance, whether it is.

14. I am quite satisfied that there is not, even arguably, a proper body of evidence to support the submission that is made. In the first place, it involves identifying what is said to be a discrepancy in the assessment of the appellant's own expert. The argument involves taking a report from 2015 which describe "approximately 8m²" for dual occupancy at Midlands Prison, and then preferring that to the very specific evidence of Professor O'Donnell. He identifies the "smallest" cell size at Midlands

Prison as "9.12m²". He even specifically addresses the "approximately 8m²" from the 2015 CPT report and reiterates that "in fact" the minimum size is 9.12m². That is a very specific figure and it is contained in the expert report that was being put forward and relied on by the appellant. There are other problems, in my judgment, with the submission. In the end it involves – again as she candidly told me – Miss Brown having conducted her own calculation, starting with 8m² and then positing not double occupancy but triple occupancy, including a mattress on the floor, and then an adjustment relating to the sanitary facilities within the cell. That is a picture which is painted, in my judgment, without any proper evidential support.

15. On that basis, on this aspect too, I see no reasonably arguable ground on which this court could be persuaded to conclude that the judge was wrong about the body of evidence and what it showed in relation to the article 3 threshold, such that he needed to take the step (iii) enquiry approach and require the Republic of Ireland authorities to answer these prison overcrowding concerns.

16. In my judgment it does not, even arguably, undermine the district judge's appraisal of the evidence that he didn't refer specifically to the use of mattresses. He was conducting an evaluation of the evidence, specifically and as a whole, by reference to the written and oral evidence of the expert.

17. A number of other points were raised in relation to this appeal and it is right for me to make clear that I have considered them. I will simply deal with the ones that in my judgment were the most prominent and call for some comment. But I make this general point. Having considered everything that has been said orally and set out in writing, I can see no reasonably arguable grounds arising out of any other points in this case.

18. First, I will mention the point that is made at about other places of detention. The judge focused on the three places of detention that had been identified by the evidence. There is authority to support, as a matter of principle, the court doing that. I mention, simply for reasons of fullness the case of Dorobantu the judgment of the Luxembourg Grand Chamber on 15 October 2019 at paragraphs 263 through to 268. I did not need to hear argument in relation to this point. It is in my judgment impossible to identify, in relation to any institution, based on the evidence that is being put forward in this case, an arguable article 3 grounds even leaving aside the question of focusing on particular institution. There has been every opportunity, before the district judge and before me, to identify what the particular concerns are that justifies what is said to be a real risk on substantial grounds of inhuman or degrading treatment.

19. Next, the point is made about the frequency or in frequency of inspections; the absence in the Republic of Ireland's ratification of the Optional Protocol to the Convention against Torture, and what is said to be the relative infrequency of the and scrutiny inspections by the Office of the Inspector of Prisons. There is nothing in my judgment that reasonably arguably supports an article 3 appeal on the basis of those points. They are points that will feature in the overall evaluation, as they have done in this case.

20. Next, the point was raised and maintained about inter-prisoner violence, as to both the general position and a criticism raised in relation to Cloverhill in particular. I has been accepted in this case in writing that the inter-prisoner violence point is one, in

particular, arising in the context of Cloverhill. It suffices to say that the evidence of Professor O'Donnell dealt with the arrangements at relevant detention facilities, and also at remand facilities. No specific passage in his report describing a particular regime has been identified which it is said that the district judge overlooked. I am quite satisfied that nothing was overlooked and in any event looking at the material myself and independently, I can see no reasonably arguable basis for an article 3 complaint referable to the arrangements that are in place to protect against inter-prisoner violence. So far as that point is concerned, Mr Allen for the respondent rightly reminded me that back in 2008 the Divisional Court in the case of McLean [2008] EWHC 547 (Admin), at paragraphs 29 to 30 in particular, held that the evidence "fell well short" of establishing that the arrangements for protecting in Irish prisons against inter-prisoner violence constituted a breach of article 2 or article 3. In my judgment, and beyond argument, the evidence which is before the court in this case equally falls well short of supporting a conclusion that there is a real risk, on substantial grounds, of treatment that would breach the article 3 human rights threshold so far as inter-prisoner violence is concerned.

21. When permission to appeal was renewed following the refusal on the papers, one of the points that was flagged up with the court was that the listing of the renewal hearing ought to be deferred to allow a period of time for experts evidence to be put forward in relation to the current Covid 19 pandemic and the implications so far as Irish prisons and remand facilities were concerned. Some material has been put before the court by way of fresh evidence. The time requested was allowed. Miss Brown, again candidly, informs the court that following informal approach to Professor O'Donnell he had confirmed that there had been "no particular problems caused and that the Irish prison service had put measures in place in order to combat any outbreak". The position before me is that there is no further evidence from Professor O'Donnell in relation to this point and no oral submissions have been advanced in relation to it. I simply say that I have seen nothing in the materials that would support the view that there is a reasonably arguable appeal in relation to that matter.

22. There were other points raised in the papers as well but, as I have said, I have dealt with the ones that appeared to me at to be the principal points calling for some observations in this ruling. For the reasons that I have given, the renewed application for permission to appeal is refused. I wholeheartedly agree with the detailed observations made by Mrs Justice Eady when she refused permission to appeal. They are very much in line with the observations and reasons that I have given for my refusal of permission, having looked at all the arguments and considered them a fresh to see whether, reasonably arguably, there is anything in this proposed article 3 appeal.