Neutral Citation Number: [2020] EWHC 1966 (Admin)

Case No: CO/2016/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2020

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE JAY

- -

Between:

BILAL HUSSAIN CHOUDHARY **Appellant**

- and –

PROSECUTOR AT THE CRETEIL TGI, FRANCE **Respondent**

- -
- -

Ben Cooper QC and Malcolm Hawkes (instructed by **West Midlands Solicitors**) for the **Appellant**
Helen Malcolm QC and Alex Tinsley (instructed by **the CPS**) for the **Respondent**

Hearing date: 9th July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 22nd July 2020 at 10am.

Lord Justice Popplewell giving the judgment of the Court:

Overview

1. This is an appeal under section 26 of the Extradition Act 2003 ("the EA 2003") brought with the leave of Mr Justice Martin Spencer against the decision of District Judge Zani given on 17th May 2019 ordering the extradition of Bilal Hussain Choudhary to France. Bilal Hussain Choudhary will be referred to as "the Appellant" only when his identity is not in issue.

2. Bilal Hussain Choudhary is the subject of a conviction European Arrest Warrant ("EAW") issued by the French Judicial Authority on 28th February 2018. On 9th February 2017 Bilal Hussain Choudhary was convicted in his absence of three offences of fraud, money laundering and tax evasion committed between September 2011 and June 2013. The EAW sets out that he committed the offences in the Paris region through two limited companies incorporated in France and of which he was the manager.

3. The Appellant's primary contention is that he is not the man the subject of the EAW and that this is a case of mistaken or stolen identity. His secondary argument is that his extradition to France would infringe his rights under Article 3 of the ECHR because conditions in Fresnes prison do not meet basic humanitarian standards.

4. There are five grounds of appeal. Grounds 1-4 capture the Appellant's principal contention. Ground 5, which engages section 21 of the EA 2003 and Article 3 of the ECHR, alleges that the prison conditions in which the Appellant would be held in Fresnes are so overcrowded and materially poor that his extradition to France would violate his Article 3 rights.

5. We had prepared a draft judgment dismissing the appeal on Grounds 1-4. However, in the light of further information from the French prosecutor which was made available to us on 14th July 2020, we have decided to adjourn final consideration of these grounds until further inquiries have been completed. At this stage, therefore, we will address only Ground 5.

Ground 5

6. On the Article 3 issue, District Judge Zani applied the two decisions of this Court in *Shumba and others v France* [2018] EWHC 762 (Admin) (*"Shumba 1"*) and [2018] EWHC 3130 (Admin) (*"Shumba 2"*) and concluded that the threshold for breach had not been met.

7. Mr Cooper submitted that District Judge Zani did not grapple with the issue of prison conditions, in particular in Fresnes, in the light of all the available evidence, and did not (perforce) deal with the important decision of the European Court of Human Rights ("ECtHR") in *JMB and others v France* (App. No. 9671/15 and 31 others) which was handed down on 31st January 2020 after his judgment.

8. Given the obvious saliency of the *JMB* decision, it is clear that District Judge Zani's ruling has been superseded by events.

9. In *Mursic v Croatia* (App. No. 7334/13), the Grand Chamber held:

> "126. It follows that, when it has been conclusively established that a detainee disposed of less than 3 sq. m of floor surface in multi-occupancy accommodation, the starting point for the Court's assessment is a strong presumption of a violation of Article 3. It then remains for the respondent Government to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space. The cumulative effect of those conditions should inform the Court's decision whether, in the circumstances, the presumption of a violation is rebutted or not.
>
> …
>
> 138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:
>
> (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor (see paragraph 130 above):
>
> (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see paragraph 133 above);
>
> (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above).
>
> 139. In cases where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see paragraph 106 above)."

These minimum dimensions exclude those of the toilet which are usually taken to be in the region of $1m^2$.

10. In February 2018 the French prisons inspector, the CGLPL, reported on conditions in Fresnes prison following a visit in October 2016. Her report contains four different statements on the issue of cell sizes:

> "1. From one division to another, the cells are identical to a few details: 3.94m deep by 2.46m wide and 2.99m high, i.e. an area of 9.69m² and a volume of 28.93m²"
>
> "2 – the current situation, with three persons in a cell of 9.8 m², constitutes an assault on the dignity and is not acceptable"
>
> "3 – The cells are in principle individual, approximately 10 m². In these cells, once the size of the beds (three bunk beds), toilets and table has been deducted, three people must then live in a space of barely 6 m²"
>
> "4. These cells are only 10 m², once you deduct the bed space, the toilets and the table…."

11. According to the CGLPL's report, only 13% of the prison population benefited from an individual cell; 31% had to share a cell with one other remand prisoner; 56% with two others. All the above dimensions, which vary slightly in the report although its author also states that the cells are "à peu près identiques", take account of the toilet facilities. As for the cell furniture, the CGLPL report supported the opinion of the European Committee for the Prevention of Torture that the floor space it covered should be deducted.

12. The CGLPL's report was considered by this Court in *Shumba 1*: see paras 56-63 of its judgment. It was only one piece of the evidential jigsaw. Given the uncertainty surrounding the floor dimensions, this Court decided to ask a number of questions of the relevant French authorities. In *Shumba 2*, the responses of the French Ministry of Justice were closely analysed. The position in relation to Fresnes prison was as follows:

> "… smaller single cells (8 to 9m²) (excluding sanitary facilities) have space for one or two detainees, leaving a minimum of 4m² per person. As of 23 July 2018, the 386 larger single cells (10m²) accommodated three detainees, i.e. 3m² per person (excluding sanitary facilities)."

As for other "non-spatial" factors:

> "In Fresnes permanent eradication of bed bugs is a priority action, with regular 'disinsectisation' operations two or three times a week and whenever a specific report is made …"

13. At paras 13-22 of its judgment in *Shumba 2*, this Court concluded that a violation of Article 3 had not been demonstrated. It was said that the further, up-to-date information from the MoJ showed that each Appellant would have at least 3m² of floorspace.

14. The further information before District Judge Zani from the French Judicial Authority given in November 2018 was that "the cells measure 9 to 10m², including sanitary facility".

15. In *JMB and others v France*, the ECtHR was considering evidence in relation to a number of French prisons up to 1st January 2019. The present focus is on Fresnes prison where the overcrowding rate was 214% as at 18th April 2017 and 195.6% as at 1st January 2019. The applicants R.M. and A.T. each claimed to be sharing, or to have shared, a cell of 9m² including furniture and toilet with two other detainees. The ECtHR concluded that each had in fact been detained with two others in cells of 9.5m² before deduction of the sanitary facility, resulting in less than 3m² per detainee. In relation to applicant A.B.A., the ECtHR found that he had been detained in the same cell size as the others with one other detainee, and therefore had a personal space of 4m².

16. The ECtHR was clearly hampered by the French government's failure to produce documentary evidence confirming amongst other things the precise area of the cells. It accepted that the applicants' account was credible and reasonably detailed, and that the burden of proof was therefore transferred to the government. The ECtHR concluded as follows:

> "259. In the cases examined, the Court noted that the Government had produced information on the end of the applicants' detention or on the date of their end of sentence. On the other hand, it notes that the accuracy of the information communicated by the Government on the applicants' personal space is limited. These are sometimes non-existent, as is the case for detainees from Faa'a-Nuutania, Baie-Mahault and Nice. For others, they are incomplete because they do not always specify the area of the cells and do not indicate whether the sanitary annexes are included in these areas. Finally, the information is not always supported by a written document such as a co-ownership history. The Court noted these evidentiary shortcomings in the applications concerning the prisons of Ducos and Fresnes.
>
> In addition, the Court was unable to know precisely the area of the sanitary part of the cells, with the exception of those of the MA of Nîmes, which made it difficult to calculate the applicants' personal space when it had information on the total area of the cell. It then assumed that such a space was between 1 and 2m².
>
> …
>
> 260. In these circumstances, and while admitting the overcrowding situation in all the prisons concerned, the Court considers that the Government have not convincingly refuted the allegations made by the applicants of the CP of Ducos, Faa'a-Nuutania, Baie-Malhaut, Nice and Fresnes (as regards RM and AT for this last establishment) according to which they would have had less than 3 m² of personal space during their entire detention (paragraphs 29, 49, 59, 92 and 113 above). These allegations are further corroborated by relevant

information from national authorities such as the CGLPL or from international bodies such as the CPT.

…

299. Having regard to what it said in paragraph 260 above, and as regards the detention of RM and AT, the Court concludes that there is a strong presumption of violation of Article 3 of the Convention. This presumption cannot be called into question in the absence, in this case, of the first of the three cumulative factors challenging this rebuttal, namely periods of "short, occasional and minor" reduction in the applicants' personal space compared to at the minimum required. It follows that there is no need to examine the other factors (mutatis mutandis, Nikitin and others, cited above, § 184).

300. As regards A.B.A., the Court held that he had a personal space of approximately 4 m² (see paragraph 113 above). In their observations, the Government indicate that the personal space of A.B.A. is not less than 3 m² (see paragraph 250 above). In these circumstances, the Court considers that it must be held that the applicant had personal space of between 3 and 4 m² throughout his detention.

The Government also indicate that the recreation and the possibility of playing sports are sufficient to consider that the threshold of gravity required by Article 3 of the Convention has not been reached. In view of the findings of the judge hearing the application for interim measures, the CGLPL and the CPT, which observe and describe the very degraded conditions of detention within the MA of Fresnes (see paragraphs 06, 108, 151 and 152 above), the Court does not share this point of view. It notes that it appears from their decisions and reports that the MA of Fresnes, obsolete because of its age and lack of renovation, is repeatedly confronted with the presence of pests, and in particular bedbugs in the beds of detainees, and that the latter suffer from the lack of light and humidity in the cells (idem). It also notes that if the length of the exercise walks in the prison courtyards is not disputed by the applicants, it is the condition of these places which is in question: in its emergency recommendations published in December 2016, the CGLPL indicated that the areas were cramped (twenty-five people in 45 m²) and lacked shelters and toilets and that the rats were moving around there en masse (see paragraph 106 above). The Court does have no information on the current state of these facilities but the description made by the applicants detained in Fresnes at the time of the introduction of their request in 2017 corresponds to that which was made by the CGLPL in 2016 (paragraph 106 above) and the finding of the domestic judge in 2018 who considered that the conditions under which the

> exercise walks take place are detrimental to the dignity of detained persons (see paragraph 109 above).
>
> In view of the above, the Court considers that the conditions of detention of A.B.A. amounted to degrading treatment within the meaning of Article 3 of the Convention."

17. Mr Cooper relied on these robust conclusions and submitted that the Court should rule that the Article 3 threshold of inhuman and degrading treatment has been surpassed in relation to Fresnes prison. Ms Malcolm submitted that District Judge Zani's conclusions are supportable. In our view, the right answer lies somewhere between the parties' submissions to us. Plainly, the issue cannot fairly be determined solely on the basis of the evidence that was available below, which will entail ignoring *JMB and others*. Conversely, the evidential picture remains unclear in relation to cell sizes and in other respects matters may have moved on. Given that it is unclear what steps, if any, the French authorities have taken to address the shortcomings identified by the ECtHR, the correct approach is to make a request of the French authorities setting out the matters on which this Court needs specific information before the extradition of the Appellant to France might be countenanced. Those requests are set out in the Annex to this judgment. The Court invites a substantive response by Monday 7th September 2020.

ANNEX

1. Please confirm that, if extradited to France, Bilal Hussain Choudhary ("the Appellant") will be held in Fresnes prison.

2. If not, please specify where the Appellant be held.

3. In relation to Fresnes prison:

   (1) How many cells are there in all?

   (2) Do the dimensions of the cells vary at all?

   (3) Please provide full details of (a) the exact dimensions of the floor space of the cells in each category (assuming that there is individual variation between cell sizes) and (b) the number of cells in each category. For the avoidance of doubt, by "floor space" is meant the total surface area of each cell including sanitary/toilet facilities.

   (4) Please provide the same details of the exact dimensions of (a) the sanitary/toilet facilities, and (b) the cell furniture, specifying what that furniture is.

   (5) What is the current occupancy or overcrowding rate of Fresnes prison?

   (6) In relation to each category of cell (assuming that there is individual variation between cell sizes), what percentage is currently occupied by (a) one prisoner, (b) two prisoners, and (c) three prisoners?

   (7) Is it possible to say at this stage (a) what category of cell the Appellant would be occupying (assuming that there is individual variation between cell sizes), and (b) whether he would be sharing a cell with one or more prisoners, if so how many?

4. Please provide as much information as possible as to the steps the French authorities have taken to address the adverse findings made by the European Court of Human Rights in *JMB and others*: including (a) lack of partitioning of the toilets, (b) bed bugs, (c) lack of light and ventilation, (d) vermin and other pests, and (e) the other matters referred to at paras 106, 108, 151, 152 and 300 of its judgment.

5. Do you have any other comment on the adverse findings of the ECtHR in *JMB and others*, in particular as to the dimensions of the cells (see the CGLPL report and the ECtHR's own findings) and the other conditions the subject of criticism?