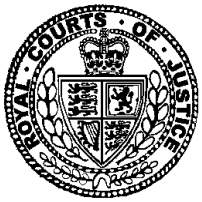

Neutral Citation Number: [2021] EWHC 149 (Admin)

Case No: CO/4736/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

29th January 2021

**Before**:
MR JUSTICE FORDHAM

- - - - - - - - - - - - - - - - - - - - -

**Between :**

ALIUS SPERAUSKAS

**Appellant**

**- and -**

PUBLIC PROSECUTORS OFFICE OF LITHUANIA

**Respondent**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

MARTIN HENLEY (instructed by Lloyds PR Solicitors) for the Appellant
RICHARD EVANS (instructed by Crown Prosecution Service) for the Respondent

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# JUDGMENT ON APPLICATION FOR CERTIFICATION

## MR JUSTICE FORDHAM :

Application arising out of [2020] EWHC 3543 (Admin)

1. On 9 December 2020 I gave my judgment [2020] EWHC 3543 (Admin) dismissing the Appellant's appeal. I explained (at paragraph 29 of the judgment) that it was possible that there may need to be a short addendum judgment explaining what the outcome was of the mechanism I there described. What happened next was this. On 10 December 2020, I made an Interim Order as follows, that: *"(1) There shall be no substantive Order on this appeal until the parties have by their representatives addressed the issues identified in the judgment regarding documents to accompany the Appellant on extradition. (2) The parties hereby have liberty to apply by email to Fordham J's clerk, on notice, for the Court to make a substantive Order, on appropriate terms, dismissing the appeal. (3) No order as to costs."* On 14 December 2020 I made a further Order, in terms whose substance had been agreed by the parties, as follows:

> ***UPON having given a judgment on 9.12.20 and having made an Interim Order on 10.12.20***
>
> ***AND UPON the following (referred to in this Order as "Findings")***
>
> ***a. The Court having found that the Appellant is at high risk of developing severe complications if he were to catch Covid-19.***
>
> ***b. The Court having found that the Appellant has complex medical needs, is highly vulnerable, requiring the provision of particular medication and specific occupational health requirements; the Respondent having assured the Court that the Appellant will receive the required medication and will be assessed as to his specific occupational health requirements.***
>
> ***c. The Court having recorded that it heard evidence that the Appellant has memory difficulties and severe communication problems.***
>
> ***IT IS ORDERED that:***
>
> ***1. The appeal is dismissed.***
>
> ***2. The parties shall agree a bundle of documents ("the Bundle"), which shall contain such documents as are necessary to inform both the authorities in the UK responsible for the transit and surrender of the Appellant and the authorities in Lithuania responsible for the transit and detention of the Appellant of the Court's Findings at a, b, and c above so that those Findings can be taken into account by those authorities, identified in paragraph 5 below, in the transit, surrender and detention of the Appellant.***
>
> ***3. The Appellant's solicitor, by 4:30 pm 8 January 2021, shall file with the court and serve on the Respondent and the NCA, a copy of the Bundle both in English and Lithuanian.***
>
> ***4. It is hereby directed and declared that the cost of the translation to Lithuanian of the Bundle is a necessary and proportionate disbursement on the representation order of the Appellant, and that the representation order be extended as necessary.***
>
> ***5. The CPS and the NCA, by 15 January 2021, shall ensure that the Bundle is distributed to the Respondent, the Bedfordshire Police, and the Central Authority for Lithuania.***
>
> ***6. The Appellant's extradition shall not take place until 7 days after the CPS informs the Administrative Court Office and the Appellant in writing that paragraph 5 has been complied with, including in that document a list of the authorities who have been so served.***

> ***7. As per section 36 (3) (b) of the Extradition Act 2003, the required period for extradition shall commence on 22 January 2021.***
>
> ***8. In the event that any party considers there has been non-compliance with this Order the parties are at liberty to apply to the Court for further directions or to vary the directions set out above, such an application being reserved to Fordham J (if possible), which will be dealt with on the papers unless the Court directs otherwise.***
>
> ***9. No order as to costs save for the detailed assessment of the Appellant's publicly funded costs.***

2. On 24 December 2020 Mr Henley submitted an application for (i) certification that "there is a point of law of general public importance involved in the decision" (section 32(4)(a) of the Extradition Act 2003) and (ii) permission to appeal on the basis that "the point is one which ought to be considered by the Supreme Court" (section 32(4)(b)). Mr Evans (now instructed for the Respondent) responded on 9 January 2021. This is my judgment dealing with the application, which I am satisfied (as is common ground) was made in time. As I explained in Makowska [2020] EWHC 3144 (Admin) at paragraph 6 (by reference to authority), the Court can and should properly decline to certify a point, inter alia (i) if, albeit properly to be characterised as a point of law, the answer to the line of analysis which the party wishes to advance in the Supreme Court is clear; and (ii) if the impugned analysis is a fact-specific decision relating to the circumstances of the present case.

The Question as Framed

3. The point of law of general public importance which the Court is invited to certify is formulated by Mr Henley as follows:

> ***Where the presumption, that a requesting judicial authority will protect an Appellant's rights under the ECHR in proceedings under the 2003 Act, has been rebutted by clear and cogent evidence: Should the UK court assess compatibility with the European Convention on Human Rights by reference only to UK law and practice?***

Later in the application, having made his submissions in support of the application, Mr Henley invites the Court to *"recast the question if it sees fit"*.

Analysis

4. In my judgment, there is no proper basis for certification of the question identified by Mr Henley, or any *"recast"* question based on his submissions in support of the certification application. I have reached that conclusion for the following reasons.

5. First, the answer to the question *as framed* is clear. In assessing compatibility with the European Convention on Human Rights the relevant "UK law" – and therefore any relevant "practice" – means the Court is addressing compatibility "with the Convention rights within the meaning of the Human Rights Act 1998": see section 21A(1)(a) of the 2003 Act. The applicable law will be that which has authoritatively articulated by reference to the "Convention rights", having had appropriate regard to the Strasbourg jurisprudence: see section 2(1) of the Human Rights Act 1998. That is what the Supreme Court did in the immigration case of AM (Zimbabwe), which I discussed in the judgment on the present case (paragraphs 6-7): Lord Wilson's analysis was based on what had been said by the Strasbourg Grand Chamber.

6. Secondly, the answer to the *underlying point* made by Mr Henley about assessing compatibility "by reference only to UK law and practice" is also clear. What Mr Henley says, in the application for certification, about an assessment being "undertaken in accordance with UK law and practice" relates to the part of my judgment in this case concerning 'mental impairment' and whether the Appellant is "fit to stand trial": see the judgment on this appeal at paragraphs 23-25, in particular the second point made at paragraph 25. Mr Henley's thesis is this. He says the UK Court must undertake an exercise in "determining whether the Appellant's mental incapacity is sufficient to render him as unfit to stand trial … under the law of the UK". He says that is something which 'stage two' "implies" ('stage two' is the stage which I discussed at paragraph 7 of the judgment, by reference to Magiera at paragraph 32 and AM (Zimbabwe) at paragraph 23). He says failing to determine whether the requested person would be fit to stand trial under the law of the UK "would be to abrogate the duty of this court". He says that the approach in Hewitt (see the judgment in this case at paragraph 25) has been "overtaken" by the Strasbourg jurisprudence and in particular by AM (Zimbabwe), and that it is "incompatible with the process" set out in that case.

7. I should first make these points. (1) Mr Henley did not advance this thesis at the hearing before me. I would have dealt with it if he had. It is, to say the least, unattractive to launch an application for certification of a point "involved in the decision" (section 32(4)(a)), where "the decision" is "a decision of the High Court on an appeal" (section 32(1)), and where the point was not advanced before the Court and is not addressed in the judgment. (2) If it were right that the approach in Hewitt has been "overtaken" by the Strasbourg jurisprudence and in particular AM (Zimbabwe), then that was undoubtedly a point to be taken before this Court. Mr Henley cited Magiera and AM (Zimbabwe). Mr Payter cited Hewitt. I would not be bound by an earlier decision of a Divisional Court (Hewitt) if demonstrably overtaken by later Strasbourg jurisprudence reflected in domestic Supreme Court authority (AM (Zimbabwe)). (3) The premise in the question *as framed* is not engaged by the Court's "decision" on this aspect of the case. The first point I made in paragraph 25 of the judgment on the appeal in this case was the point that, on this aspect of the case, the presumption ('that the requesting authority will protect the Appellant's rights under the ECHR') was in place and not rebutted (still less 'by clear and cogent evidence'). I referred to the presumption of compliance and said there was "absolutely no basis to think" that the Lithuanian authorities would not deal with any (existing or future) deterioration as to mental impairment. This point means that the question *as framed*, when read with what Mr Henley submits about fitness to stand trial, cannot properly be said to be a point "involved in the decision". The premise to the question identified is absent.

8. In my judgment, the answer to Mr Henley's underlying thesis is clear. The key points are these. (1) The bar to extradition on the basis of physical or mental condition has not been framed by Parliament as being whether it appears to the judge that the physical or mental condition of the person in respect of whom the warrant is issued is such that he would not be fit to stand trial in the United Kingdom. That would be a very easy and obvious test to formulate in an accusation warrant case, if it were the relevant question to be determined. (2) Mr Henley has pointed to no authority – domestic or in Strasbourg – which says, or even suggests, that a determination whether the individual would be fit to stand trial in the United Kingdom is a question requiring to be answered by the Court when addressing (a) the section 25 test (the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him) or (b) the section 21A(1)(a)

test (extradition would be compatible with Convention rights). (3) So far as concerns fitness to stand trial, the observations in Hewitt at paragraphs 28 and 37 concerning the section 25 test – what it is and what it is not, and as to the evidential position, inevitability and doubt – are plainly sound. They were based on previous Divisional Court authority (a judgment of the then Lady Justice Hale): see paragraph 28. They are not brought into any doubt by any authority or passage in any authority to which Mr Henley has pointed. (4) So far as concerns medical condition and Convention rights, the analysis (as to Article 8 and section 25) of Julian Knowles J in Magiera and (as to the Article 3) of the Supreme Court in AM (Zimbabwe) identify questions to be asked and the analytical steps to be undertaken. Extradition of a requested person which is compatible with the Convention rights in accordance with those authorities does not become incompatible with those rights on the basis that the Court has not determined whether the requested person would be fit to stand trial in the United Kingdom.

9. Finally, Mr Henley's submissions in support of the application for certification make the point that ensuring that the relevant materials are made available to the authorities involved in extradition represented a failure to ensure that all outstanding issues had been resolved before surrender. The answer to that point is also, in my judgment, clear and is as follows. (1) The relevant issues for resolution were addressed in the judgment on the appeal, as a fact specific decision relating to the circumstances of the present case. (2) The 'added assurance' which guarantees communication of the relevant materials is the same as it was in Magiera at paragraph 36 in the context of medical records. It ensures that the relevant authorities involved in the surrender and in dealing with the requested person post-surrender do not lose sight of the relevant information in discharging their duties, as explained in the judgment on this appeal at paragraph 29.

10. In my judgment, the answers to Mr Henley's submissions are clear to the point that his question as framed – or any reframed question based on his submissions in support – engage no point of law of general public importance. I therefore decline certification. The application for permission to appeal falls away and I refuse it.