

THE HIGH COURT

[2018 No. 247 EXT]

BETWEEN

THE MINISTER FOR JUSTICE

APPLICANT

AND

ARMANDAS KACEVICIUS

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 31st day of October, 2019

1. This is the second judgment in these proceedings, the first having been delivered on 24th May, 2019 (the "first judgment") and both judgments should be read together. Having considered the various objections to his surrender made on behalf of the respondent at the hearing of this application, I formed the view that the respondent should be surrendered to Lithuania for the purpose of serving the prison sentence imposed upon him (see para. 62 of the first judgment) provided that the Lithuanian authorities could address to my satisfaction the concerns raised by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the "CPT") as regards the conditions in and management of two specific prisons in Lithuania namely, Alytus and Marijampolė, or alternatively provide assurances that the respondent would not be required to serve his sentence in either of those prisons. I adjourned the matter to allow the applicant to liaise with the Lithuanian authorities in this regard.
2. Following upon that adjournment, the applicant wrote to the issuing judicial authority i.e. Kaunas Regional Court by letter dated 6th June, 2019. The Ministry of Justice of the Republic of Lithuania responded by letter dated 7th July, 2019. The matter then came back before the Court on 16th October, 2019. It is apparent from the response of the Ministry of Justice that it has taken the former of the two options referred to above i.e. they have attempted to address the concerns raised by the CPT rather than to provide an assurance that the respondent will not be required to serve his sentence in either of Alytus or Marijampolė prisons.
3. Matters of concern as identified by the CPT in relation to those prisons were, inter alia, inter-prisoner violence, excessive use of force by prison staff, overcrowding and poor living conditions. These had all been described in a report of the CPT in 2014 (relating to inspections carried out in 2012), and in a report dated 1st February, 2018 (relating to inspections carried out in September 2016), in the latter of which the CPT observed that the extent of inter-prisoner violence at Alytus and Marijampolė prisons had become even worse as compared with previous visits to those establishments.
4. The respondent swore an affidavit in opposition to this application in which he described how he had been attacked by other prisoners on three separate occasions while previously detained in a prison in Kaunas. In the first judgment, apart from affording the issuing judicial authority the opportunity to provide further information and/or assurances, I also afforded the respondent the opportunity to provide further information in relation to those previous assaults. The respondent took the opportunity to file a

further affidavit dated 6th June, 2019. While he does not identify those who assaulted him, he says that the three attacks upon him were carried out by members of a particular gang known as the "Azuolai", which he says has a significant presence across Lithuania. He avers that to his knowledge, members or affiliates of this gang are likely to be found in any prison in Lithuania. He avers that he was targeted by members of the Azuolai because at the time, he had been associated with a rival gang, of which he says he is no longer a member. Nonetheless he believes that he still remains a target because of his past association and, moreover, it is not possible to protect him by placing him in any particular prison in Lithuania, because the Azuolai gang are not concentrated in any one prison. He also avers that the prison protection regime in Lithuania would not be adequate and that he would still come into frequent contact with the general prison population, even if placed within the prison protection regime.

Letter of Ministry of Justice of 7TH July, 2019

5. In this letter, the Ministry of Justice states that since the 2016 CPT visit the total number of inmates in Lithuanian prisons has been decreased by 14 percent, and that none of the Lithuanian prisons are overcrowded. Furthermore, in Marijampolė prison, a new block has been constructed providing 87 cell-type living facilities, and in 2017, construction of a new block at Alytus prison started, and will provide 199 cell-type living facilities when complete.
6. The letter states that all inmates are provided with single bed and other supplementary furniture and minimum living space (excluding parts of the premises shared such as kitchens and restrooms) is close to or exceeds 4m².
7. The letter describes how prisoners are provided with adequate food, medical and dental care and are allowed to walk in fresh air anything from two to four hours per day, as well as to participate in other outdoor and recreational activities. The letter further states that prison staff do not tolerate any forms of violence or inappropriate treatment amongst inmates.
8. Aside from all of the above information, at the reconvened hearing the Court was provided with a further CPT report dated 25th June, 2019, following upon inspections of various prisons in Lithuania, including Alytus and Marijampolė prisons, between 20th and 27th April, 2018, as well as the response of the Lithuanian Government to that report which is undated but which is entitled: Response of the Government of the Republic of Lithuania on measures already adopted or envisaged in order to implement the recommendations of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment set out in the report on the visit to Lithuania carried out from 20th to 27th April, 2018.
9. The report of the CPT noted that the overall prison population had reduced by 5 percent since its 2016 visit. Marijampolė prison, which has a capacity of 950, was accommodating 931 adult sentenced prisoners at the time of the visit, and Alytus prison, with a capacity of 1,200, was accommodating 973 male sentenced prisoners. In spite of that however, the CPT found that the official norms of living space per prisoner were 3.1m² for

dormitory type accommodation and 3.6m² for multi-occupancy cells. Accordingly, it again called upon the Lithuanian authorities to raise the official minimum standard of living space per prisoner to at least 4m² in multi-occupancy cells and 6m² in single occupancy cells.

10. Living conditions in prisons were noted to be generally good in already refurbished or reconstructed units, although it was noted that overcrowding in large capacity dormitories represented one of the factors contributing to inter-prisoner violence. The CPT noted that many inmates in prisons complained that they were only allowed to take a shower once a week and recommended that the frequency of showers be increased to at least twice a week, and more, if necessary. It had recommended this previously. There were also complaints about food at two prisons, one of which was Marijampolė, and the CPT repeated a previous recommendation that steps be taken to review the quality and quantity of food for prisoners.
11. The CPT also made recommendations in relation to the provision of organised activities, including at Alytus and Marijampolė prisons and recommendations regarding the review and improvement of prison healthcare facilities. The CPT repeatedly uses the word “reiterates” in relation to many of its recommendations in the report, obviously indicating that many of the recommendations have been made previously.
12. By far the most critical part of the CPT report is that relating to inter-prisoner violence. To get a full appreciation of the extent of the problem as identified in the report, it is necessary to quote from certain paragraphs extensively. In para. 17 of the report it is stated: -

“By contrast, a number of credible allegations of physical ill-treatment, many of them corroborated by medical evidence were heard at Alytus, Marijampolė and Pravieniskes prisons; the ill-treatment alleged consisted essentially of use of excessive force (punches, kicks and truncheon blows) in the context of staff interventions to stop inter-prisoner violence.”

13. At paras. 22-23: -

“22 As had been the case during previous visits to Lithuania, the delegation observed – especially in the three penitentiary establishments with predominately dormitory-type accommodation i.e. Alytus, Marijampolė and Pravieniskes prisons – truly extraordinary levels of inter-prisoner violence, intimidation and exploitation.

The delegation was again inundated with allegations of prisoners having been subjected to violence (including violence of a sexual character and forcing prisoners to perform slave labour) from members of informal prisoner hierarchies, whose power was reportedly linked with the omnipresence of illicit drugs and alcohol (as well as mobile telephones and dangerous objects including bladed weapons) and facilitated by a very low prison staff presence (as well as, at least to a certain degree, staff collusion and corruption).

It should be added that the examination of relevant medical registers, prisoners' medical files and other documentation in the three prisons (Alytus, Marijampolė and Pravieniskes) revealed – despite the generally poor and even worsening quality of medical records – the presence of numerous injuries, sustained by prisoners inside the accommodation and work/activity areas, the character of which clearly suggests their violent origin.

23. The numerous allegations of inter-prisoner violence heard from inmates in the three establishments visited, referring to a phenomenon acknowledged to a large degree by the prison Directors and many of the staff members with whom the delegation spoke (as well as other delegations' interlocutors, including senior officials and NPM staff), gave the delegation a strong impression that the main detention areas in the three prisons were unsafe for inmates, and that the only parts of the establishments under the full control of the administration were the punishment blocks (KTP) which were almost invariably frequently used and constantly filled to capacity.

As a result, inmates seeking protection from fellow prisoners had to spend months (usually 6 months) if not years in small and often dilapidated cells, being subjected to an extremely impoverished regime (no activities, no association, no long term visits), *de facto* amounting to solitary confinement for those prisoners who are accommodated alone... one may thus sum up their situation in the following way: prisoners asking for protection received instead isolation and punishment.

Despite such poor conditions, some inmates were – according to their own words – so desperate to be taken away from the main accommodation that they were prepared to kill a fellow inmate, only to be able to obtain the much sought after disciplinary segregation measure and thus feel safer than in their ordinary unit.

To make the dismal picture complete, many prisoners told the delegation that they had sought placement in KTP because of the perceived threat of being forced to become drug addicts and out of fear of contracting HIV and hepatitis C. This situation is clearly totally unacceptable.”

14. As a result of these findings, the CPT requested the Lithuanian authorities to provide a detailed action plan addressing these matters, within three months. The action plan was provided by letter of 26th September, 2018, and addressed the various headings of action suggested by the CPT, including certain legislative changes, increased security in prisons, providing prison staff with Tasers and telescopic truncheons and training in the use of this equipment (including when it is appropriate to use the same), the provision of body cameras for every prison officer responsible for supervision, and other measures. The CPT welcomed the response of the Lithuanian authorities which it felt would, if properly and energetically implemented, contribute to the reduction of the extent of inter-prisoner violence. The CPT then made a series of further recommendations. These included increasing the number of prison staff (and increasing staff salaries to make it easier to recruit suitable personnel), training to develop staff professionalism with high priority

being given to de-escalation skills and the use of control and restraint measures. The Lithuanian Government, in its response, noted that a number of these recommendations were already adopted and in the course of being implemented, while others would be implemented soon. Salaries had already been increased and would be further increased in 2019 and 2020. This had already had a positive effect with a gradual increase in personnel noted in 2017 and 2018, contrasted with 2016 which saw a drop off in personnel employed.

15. At the end of this year, 2019, a project is to be launched in conjunction with the University College of Norwegian Correctional Service, focusing on the formation of a positive attitude towards inmates, the development of communication skills and the resocialisation of inmates.
16. The response of the authorities also states that a model of dynamic security has been introduced at all penitentiary establishments and the number of officers working directly with inmates and specially trained in applying the principles of dynamic security is being increased. Furthermore the number of staff working in a management capacity has been reduced, making it possible to increase the number of employees working directly with inmates.
17. The CPT expressed particular concern about the availability of drugs in Lithuanian prisons and the link between the availability of drugs and inter-prisoner violence. On the positive side, it noted that in Marijampolė and Pravienskės prisoners there were newly opened “residential rehabilitation centres” and therapeutic programs were offered to prisoners who were drug users. The CPT recommended the authorities to implement fully a long-standing recommendation to develop a comprehensive strategy for the provision of assistance to prisoners with drug-related problems. In its response, the Lithuanian government stated that substitution therapy for prisoners as well as drug rehabilitation programmes are included in the inter-institutional action plan for the prevention of drugs, and inmates who are identified as being involved in drug distribution are isolated from the remaining prison population. Furthermore, the authorities claim that the dynamic model of inmate care enables a larger number of officers to be present constantly (during the day) in the inmates living areas, preventing distribution of drugs.
18. The response of the Lithuanian government also states that: -

“In order to eliminate any threats to persons being held in correctional establishments, the problem is solved by organisational means – first and foremost by moving the inmates who have a negative impact on other inmates (informal prison leaders and their assistants) from one correctional establishment to another, or by isolating them in vacant cell-type rooms in the same correctional establishment. In addition, all places of detention became multifunctional as of 1st September, 2018 i.e. they can all be used to hold both remand prisoners and all categories of inmates.”

The response goes on to say that if there is concrete data demonstrating that an inmate has a negative impact of other inmates, such a person is immediately isolated so that he or she cannot have contact with the inmates being effected by that negative impact.

19. The response also addressed the concerns raised by the CPT as regards living conditions in prisons.

Conclusion

20. Firstly, I think it is clear from the report of the CPT of 25th of June, 2019 that, leaving aside the issue of inter-prisoner violence, the conditions in and management of prisons in Lithuania are not such as to give rise to a violation of rights guaranteed under Article 3 of the European Convention on Human Rights or Article 4 of the European Charter. New facilities have been constructed, more staff have been employed and a reduction in the prison population has been achieved, so that issues that were previously of concern are no longer of concern, or at least not to the extent that they might give rise to a violation of the respondent's rights.
21. However, inter-prisoner violence remains a very significant concern and it is the respondent's case that, if surrendered, he would be subjected to violent assaults by other prisoners. It is very clear from the extracts of the CPT report above that, at the time of the inspections in April 2018, the CPT found an alarming abundance of evidence of inter-prisoner violence in prisons in Lithuania, and in particular at Alytus, Marijampolė and Pravieniskes prisons such that the main detention areas of those institutions were "unsafe for inmates". Moreover, for this and other reasons quoted above, the CPT concluded that the "situation" [in these prisons] "is clearly unacceptable". This begs the question as to whether the "situation" in these prisons is such as to amount to a violation of Article 3 of the Convention and/or Article 4 of the Charter, as contended by the respondent.
22. Before addressing the likely risk posed to the respondent by reason of inter-prisoner violence in prison institutions in Lithuania, it is desirable that I should in the first instance consider whether or not this, in and of itself, could ever be a reason for finding that detention in any particular prison is contrary to Article 3 of the Convention/Article 4 of the Charter. Unfortunately, this very fundamental question was not argued and the application seems to have proceeded on the assumption that this is at least a possibility. However, this is far from clear. Inter-prisoner violence is just what it says, violence between prisoners, and is not, by definition, an activity of the State. It may well of course be argued that a particular State, in some circumstances, facilitates such activity by, for example, failing to manage its prisons appropriately and/or to provide adequate resources for such management, and that in such circumstances that State bears a significant proportion of the responsibility for the violence. If a court were to so find, then it is not difficult to see how, in the context of proceedings such as these, a court might further conclude that the inaction or negligence of the State concerned has given rise to a risk of inhuman or degrading treatment in the form of inter-prisoner violence, contrary to Article 3 of the Convention and/or Article 4 of the Charter. This point was not however argued, and nor was any authority opened to me to support the argument that in any given

circumstances the violent conduct of prisoners could amount to a violation of rights (by a State) guaranteed by those articles.

23. The issue was touched upon in the decision of Donnelly J. in the case of the *Minister for Justice and Equality v. M.V.* [2015] IEHC 524, where she said, at para.71: -

“I accept that for the purpose of the protection of rights a State may be under a duty to take positive steps to ensure that an individual is protected from inhuman and degrading treatment by non-state actors. That, of course, does not mean that a state must prevent all possible ill-treatment by those actors. Such a commitment is factually impossible and legally not required. Children and other vulnerable people in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity (see *A v United Kingdom* (1999) 27 E.H.R.R. 611). A vulnerable prisoner is entitled to such protection in the form of effective deterrence. It is a question of considering whether effective deterrence operates.”

24. In that case, Donnelly J. found the respondent to be a vulnerable prisoner and so it was not necessary for her to adjudicate upon the more general duty of the State in the context of prisoners not suffering from any special vulnerability. The furthest that she put the issue is as set out above i.e. the state *may* have a duty to take positive steps to protect individuals from the actions of others. So far as this Court is aware therefore, this remains an open question awaiting resolution in a suitable case.
25. It is not, however, necessary to arrive at any decision on the issue for the purposes of this application. If it was, I would have to ask counsel to address me specifically on the point, but I have come to the conclusion that it is unnecessary because, in my view, this Court can and should rely both upon the assurances received directly from the Ministry for justice of Lithuania and the action plan put forward by the government of Lithuania to the CPT in response to the latter’s report of 25th June this year. The CPT itself welcomed the action plan and acknowledged that the proposed measures could contribute to the reduction of the extent of inter-prisoner violence in Lithuania’s penitentiary establishments, if properly and energetically implemented.
26. It is clear from the report of the CPT of June 2019 that many of its recommendations were made previously. However, it is also clear that many of the recommendations of the CPT have by now either been implemented or are in the course of being implemented. It remains to be seen whether or not the Lithuanian government fully implements the action plan put forward to the CPT in September of last year, and, if it does so, what the impact of that will be. However, the Court is both obliged to have trust and confidence in the assurances and promises of the Government of Lithuania in these matters and is also obliged to be forward looking in its deliberations. Therefore, having regard to: -
- (i) the contents of the action plan,
 - (ii) the positive reaction of the CPT to the action plan,

- (iii) the fact that the Lithuanian government has already taken significant steps towards the implementation of the plan and
- (iv) the assurances given by the Ministry of Justice of Lithuania directly to this Court,

I consider that this ground of objection to the respondent's surrender should be rejected.

27. The respondent also put forward an argument that he is specifically at risk of assault if imprisoned in Lithuania by reason of prior membership of a gang which would expose him to violence from another gang (the "Azuolai") which he says is omnipresent in Lithuanian prisons. He blames this gang for assaulting him when he was previously detained in Lithuania and he believes it will not be possible to protect him by placing him in any particular prison, because of the presence of that gang in every prison in Lithuania. The difficulty with this argument is that, if it were accepted, it could be used by just about every person who might be liable to surrender to Lithuania. While there is a degree of specificity about it insofar as the respondent claims that he is particularly vulnerable because of prior membership of another gang, it is nonetheless an argument that could be advanced by just about anybody, by mere assertion, and the evidence put forward by the respondent i.e. his own affidavit, lacks the necessary cogency and specificity for this argument to have any prospect of success. If what the respondent says is correct, it is a matter to be taken up with the prison authorities after his surrender.