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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: MOR10430

Delivered: 13/10/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

JOHN JOSEPH O'CONNOR

Appellant;

-v-

GREECE

Respondent.

(Substantive Appeal)

Before: Morgan LCJ and Burgess J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal by an Irish citizen against an extradition order made by His Honour Judge Devlin on 11 December 2015. His extradition was sought on foot of a European Arrest Warrant issued on 11 March 2013 by a court in Athens and certified by the National Crime Agency on 16 October 2013. It alleged that he had made available a refrigerated truck to transport over 200 KG of raw hemp (cannabis) from Greece to Northern Ireland. It is proposed that he should be returned to Korydallas Men's Prison. The appellant appeals on the basis that the prison conditions to which he would be exposed in Greece would give rise to a real risk of inhuman and degrading treatment contrary to Article 3 ECHR. Mr Mulholland QC and Mr O'Keefe appeared for the appellant and Mr McGleenan QC and Ms McDermott for the respondent. We are grateful to all counsel for their helpful submissions.

[2] The appellant relied at first instance on the evidence of Professor Rod Morgan who is a professor emeritus of criminal justice in the Department of Law at Bristol University and a former chief inspector of probation. He has wide experience in the assessment of prison conditions. He requested access to Korydallas Men's Prison in the period leading up to the hearing of the case at first instance in order to make an assessment of the conditions but that was refused by the Greek authorities on the basis that permission was contrary to domestic legislation.

[3] He noted that there had been approximately 150 cases where the European Court of Human Rights had found custodial conditions in Greece to contravene Article 3 of the Convention but most of these had related to police detention. There were five cases where custodial conditions in Korydallas Prison had been found to breach Article 3 of the Convention.

[4] Professor Morgan noted that Korydallas Prison had been inspected on seven occasions by the CPT between 1993 and 2013. The inspections had consistently found the conditions to be unhygienic, overcrowded and with very low staff levels in place. In its 2009 report the CPT reported that overcrowding was not the only problem affecting the Greek prison system and that it was deeply concerned by the unsuitable material conditions and the poor provision of healthcare. A further visit in 2011 suggested that if anything matters were getting worse. As a result in 2011 the CPT issued a Public Statement expressing its serious concern regarding the lack of effective action to tackle the systemic deficiencies identified.

[5] In April 2013 a further visit indicated that nothing had changed and that in particular the level of overcrowding, the lack of custodial and health staff, the impoverished regime and the poor material conditions generally all remained the same. It was noted at paragraph [98] of the 2013 report that inter-prisoner violence and intimidation was a serious problem. That was linked to staff shortages and at Korydallas Men's Prison there were usually only one or two custodial officers in charge of a wing containing as many as 400 prisoners. The official capacity of the prison was 840 but at the time of the visit it was accommodating 2,300 prisoners. The four general practitioner posts identified in 2011 had been abolished and replaced by a rotation system involving local doctors making periodic visits and amounting to a total of what was described as a mere 15 hours per week. That was considered completely inadequate. Professor Morgan indicated that overcrowding alone was not the only source of the problems which arose as a result of a combination of factors of which overcrowding, unhygienic conditions, lack of staff and lack of adequate medical facilities were the main issues.

[6] In light of these complaints the Greek authorities provided the following written assurances:

“[a] A written communication dated 23rd September 2014 from the Directorate of Adults’ Correctional Treatment, Greek Ministry of Justice,

Transparency and Human Rights [‘the Ministry’]. In this communication, the number of detainees housed at Korydallos as at 16th September 2014 was given as 1920. The remainder of the communication dealt primarily with health care provision for detainees within the Greek prison system. It stated, inter alia, as follows:

‘The administration guarantees to the detainees medical and pharmaceutical care of a level equivalent with that of the remaining population.

Each inmate is examined by the establishment’s physician upon his admission and henceforth every six months, and can at any time demand an examination from the establishment’s physician or from the physician of his choice. In the event of chronic diseases he is entitled to solicit medical treatment from his own private physician, in the presence also of the establishment’s.....

If in one particular establishment there is no permanent medical staff, the needs are covered on a 24 hour basis by the visits of outside physicians and nurses, which are summoned by the director of the establishment and are compensated for each visit by him.’

The remainder of this communication dealt with the admission of detainees suffering from sickness during their detention to either the establishment’s recovery room for treatment, or to a special therapeutic establishment, or where appropriate, to a public hospital or psychiatric hospital. The communication stated that in the case of the Korydallos facility, the closest Public Hospital could be reached in thirty minutes’ time, and further stated ‘that cases concerning the detainees’ health are dealt with by the medical and nursing staff of the Greek Public Hospitals with an absolute priority’.

[b] A written communication from the Ministry, dated 12th February 2015 and signed by the Minister; this is a generalised form of communication in which the Requested Person is not specifically identified or referred to. It however states inter alia:

‘In any case the Greek State shall ensure the protection of all persons under detention in Greek prisons, in conformity with the International, European and national rules of law. The Ministry of Justice, Transparency and Human Rights through its competent agencies is consistently ensuring the adequate hygiene standards within the Detention Establishments and shall continuously provide the detainees with the necessary health and medical care, on a level equivalent to that enjoyed by the general population of the country’.

[c] An email dated 3rd September 2015 from the Head of the General Directorate of Anti Crime and Correctional Policy within the Ministry, which refers specifically to the Requested Person, and to the earlier communications, but also goes on to further state as follows:

‘Furthermore, please take into consideration that, as a result of recent legislation [Law 4322/2015] the general population in Greek Correctional Facilities was significantly reduced. More specifically, in the Detention Facility of Korydallos, approximately 1270 detainees are currently held. There, the requirement for personal space of at least 3 m² can be fulfilled in any case.’

[d] A further written communication dated 18 September 2015 from the General Secretary of the General Directorate of Anti Crime and Correctional Policy within the Ministry. This communication seeks to describe the earlier communication described at [b] above as being a document which it is stated should ‘refer to all detainees in Greek Detention

Establishments' This communication makes, however, specific reference to the Requested Person Mr O'Connor, to the email dated 3rd September 2015, outlined at [c] above, and adds the following:

'Furthermore, with our e-mail dated 3/9/2015, updated information on the number of prisoners in the Detention Establishment of Korydallos were provided, and we assured the requirement for minimum space of 3m² per prisoner can be met. Regarding your more specific query on this requirement, we note that it is possible for a detainee to be held in a cell with only one more inmate, on his request, or alone.'

[7] The learned trial judge concluded that the combination of circumstances described in the CPT reports and the evidence of Professor Morgan could have given rise to substantial grounds for a belief that there might be a real risk that the requested person upon his extradition to Greece would be subjected to inhuman or degrading treatment in contravention of his Article 3 rights. He then turned to the question of the assurances and concluded that unless there was some concrete or cogent evidence such as to undermine the mutual trust upon which the system of European Arrest Warrants was based the court had to accept that assurances such as those which had been given in the present case would be regarded by Greece as being binding upon it and moreover would be implemented as stated. He noted that the assurances dated 3 September 2015 and 18 September 2015 were specific in relation to the appellant. He concluded that in light of the assurances and in the absence of clear and cogent evidence to the contrary the court had little alternative but to accept the assurances given as having been given in good faith and capable of being relied upon in terms of their ultimate implementation. On that basis he ordered the appellant's extradition.

[8] The CPT conducted a further visit to Greece between 14 and 23 April 2015. Their report was published on 1 March 2016 after the date of delivery of the learned trial judge's judgment. The Greek government published its response on the same date. The latest CPT report indicated its concern that the Greek prison system was reaching breaking point and that despite the numerous warnings the authorities had not taken up the fundamental structural issues raised in the previous reports with the necessary urgency. At the time of the inspection it was noted that Korydallas Men's Prison was functioning at 200% or more of its official capacity. Paragraph [63] of the report indicated that the CPT's Public Statement of March 2011 was an alarm call for the Greek authorities to act to put in place a prison system that can provide safe and secure custody for inmates. Regrettably the situation has further deteriorated to the point where lives are being lost. Many prisons in Greece were

merely acting as warehouses in which to hold people until they were eligible to be released back into the community.

[9] At paragraph [67] of the report the CPT commented that in Korydallas Men's Prison there were wings of some 350 to 400 prisoners who were staffed by only one or at best two custodial officers. They stated that they had no idea what was going on in the wings and that they could not intervene when there was an incident or a fight. The two officers were responsible for transferring the 350 or more inmates from the yard into some 120 cells. The explosive situation within the wings burst out in an open battle on 3 May 2015 when groups of Albanian and Pakistani inmates reportedly fought each other in one wing. It ended with two prisoners being killed and 21 requiring hospitalisation. That was not the first serious incident to occur. On 29 December 2014 five prisoners required medical treatment following a fight and on 15 September 2013 a large-scale fight resulted in 21 inmates requiring treatment in the prison hospital and another 10 being transferred to external hospitals with severe, even life-threatening injuries. Korydallas Men's Prison was described as an extreme example.

[10] The response by the Greek authorities recognised that the serious problem of prison overcrowding required long-term solutions. Serious efforts were being made for the wider use of electronic monitoring as an alternative to custody. A proposal was in place for the emergency recruitment of a minimum number of prison staff. Staff shortages were acknowledged as retirements were not replenished with equal recruitments given the fiscal challenges facing the country. Disciplinary proceedings were taken against those who perpetrated violence on others.

[11] By letter of 4 November 2016 the Greek authorities provided further information in relation to the situation at Korydallas Men's Prison. There had been progress in relation to overcrowding. On 1 January 2015 1913 persons were detained. That had fallen to 1596 persons by 1 November 2016. That is, of course, higher than the number of prisoners in September 2015. The decongestion of prisons was combined with initiatives for improving living conditions through refurbishment of existing establishments, restriction of health care in prisons as well as developing educational, training, athletic and cultural activities for inmates.

[12] In respect of staffing levels the Ministry of Justice was taking all necessary steps to achieve a better management of correctional staff and recruitment of the necessary manpower based on existing budgetary capabilities. Former municipal police had been transferred into the fields of prison security. A decision had been made to hire 633 employees for the prison establishments within the year 2018. Violence, abuse and victimisation among prisoners were not tolerated and penal legislation had become stricter.

The law

[13] Section 27(4) of the Extradition Act 2003 makes provision for the introduction of fresh evidence on appeal that was not available at the extradition hearing. The appeal can only be allowed if the evidence would have resulted in the appropriate judge deciding a question before that the extradition hearing differently and if he had decided the question in that way he would have been required to allow the person's discharge. The material contained in the CPT report dated 1 March 2006 is updated information in relation to prison conditions in Greece. That material is relevant to the question of whether the return of the appellant to Greece would breach his Article 3 rights. Any breach of Article 3 would, of course, occur at the point of extradition and it is not unusual, therefore, to find on appeal that fresh information in relation to prison conditions may become available which the court is in any event required to take into account in order to discharge its obligation under Article 3 of the Convention. The approach to be taken to the introduction of fresh evidence by an appellate court was considered in *RT v Poland* [2017] 1978 EWHC (Admin). For the reasons given in that decision we agree that in a fresh evidence case the court hearing an extradition appeal must make its own determination on the relevant questions on the basis of all the material then available.

[14] The legal test for the court was helpfully set out at paragraph [5] of *Marku and Murphy v Greece* [2016] EWHC 1801 (Admin):

“If there are substantial grounds for believing that there is a real risk that if extradited a person will be subjected to torture, inhuman or degrading treatment in breach of Article 3 ECHR his extradition must be refused and an order made for his discharge under s21 Extradition Act 2003. In the case of a request by a judicial authority of a member state of the Council of Europe which is also a member state of the European Union, there is a strong, but rebuttable, presumption that it will comply with its obligations under Article 3 ECHR . If cogent evidence is adduced that there is a real risk that it will not, ordinarily in the context of something approaching an international consensus to that effect, extradition must be refused unless the requesting judicial authority can give, and if necessary secure from the relevant authority of its state, an assurance sufficient to dispel that real risk: see the summary of UK and Strasbourg cases in *Kroluk v Poland* [2012] EWHC 2357 (Admin) at paragraphs 4 – 7 and in *Elashmawy v Italy* [2015] EWHC 28 (Admin) at paragraph 50.”

[15] That was a case which also concerned the return of a prisoner to Korydallas Men's Prison. It involved consideration of the CPT report dated 1 March 2016. The court noted the continuing high rate of overcrowding at the prison but recognised that was not the only root problem. The CPT had expressly stated that the other was understaffing. The court continued at paragraph [16]:

“As the CPT expressly stated, the other one is understaffing. Until that is both addressed and surmounted, the ceding of control of the accommodation areas to groups of stronger prisoners and the risk that that poses to anyone not in that group cannot be overcome. It is the effective loss of control by the Greek prison authorities of the running of the prisons and management of the day to day lives of the prisoners which emerges as the most stark conclusion of the CPT 2015 report. Difficulties hinted at and expressed in relatively mute tones in the earlier report have come to the fore, and loudly so. We recognise that a number of the worst aspects of the immediate poor conditions in both establishments have received attention since the visit of the CPT and that the falling population in both will help. But we consider that to send individuals into a prison outside the effective control of the authorities which is run by prisoners and gangs in an atmosphere of violence, intimidation and constant threat exposes an individual to inhuman or degrading treatment. It is not a question simply of whether the person concerned will end up as a victim of violence but living in fear and under threat in a lawless prison that crosses the threshold.”

[16] In our view there is no material difference between the evidence adduced in that case in respect of Korydallas Men's Prison and that adduced in this case. Although there is a strong but rebuttable presumption that Greece will comply with its obligations under Article 3 ECHR, cogent evidence has been adduced indicating that there is a real risk that it will not. The central issue in this case, therefore, is whether the court has received sufficient assurance from Greece to dispel that real risk.

[17] The issue of assurances was addressed by the European Court of Human Rights in *Othman v United Kingdom* [2012] 55 EHRR 1. In the international context the Court at paragraph [189] stated that it would assess first the quality of assurances given and second whether in light of the receiving state's practices they can be relied upon. It then set out a range of factors that it would take into account. These factors have in general terms been adopted by the courts of the United Kingdom.

[18] It is unnecessary in this case to review the impact of each of the factors. The second factor mentioned by the court is whether the assurances are specific and in this context that relates to whether the assurances address the issue which gives rise to the real risk and give an assurance as to an outcome which removes that real risk. Like the court in *Marku* we do not doubt that the assurances which we have identified were given in good faith and are binding on the relevant Greek authorities. We consider that the assurance regarding personal space should be taken at face value but the real issue in this case concerns the problem associated with loss of control of the prison. That will require more trained staff to address the lawlessness and intimidation exercised by groups of prisoners ready to use violence when necessary. There is certainly evidence that the Greek state proposes to do something about staffing levels but an absence of specificity in relation to how that will affect the position at Korydallas and whether that will be sufficient to deal with the problem which gives rise to the real risk in that prison.

Conclusion

[19] In light of the new evidence we are satisfied that there are substantial grounds for believing that there is a real risk that if extradited the appellant would be subjected to inhuman or degrading treatment in breach of Article 3 of the Convention. We do not consider that the assurances are sufficiently specific to remove that real risk and accordingly we consider that the appropriate judge would have been required to order his discharge. The appeal is allowed.