Neutral Citation Number: [2021] EWHC 1675 (Admin)

Case No: CO/3765/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2021

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE JOHNSON

- -

Between :

GOVERNMENT OF TURKEY	**Appellant**
- and –	
OZGUR TANIS	**Respondent**

- -
- -

Nicholas Hearn and Hannah Burton (instructed by CPS) for the Appellant
Joel Bennathan QC and Claire Stevenson (instructed by Morgan Has Solicitors) for the Respondent

Hearing date: 10 June 2021

- -

Approved Judgment

Mr Justice Johnson:

1. The appellant seeks the extradition of the respondent to face trial on an allegation of attempting "to separate a part of the territory of the State under the sovereignty of the State from the Administration of the State". On 5 October 2020 DJ Zani refused the extradition request and ordered that the respondent be discharged, on the grounds that:

   (1) The appellant might be prejudiced at his trial by reason of his apparent links to and/or espoused support for the Kurdistan Workers' Party ("the PKK"), such that extradition was barred by section 81(b) Extradition Act 2003;

   (2) Extradition would not be compatible with the prohibition of inhuman or degrading treatment or punishment under Article 3 of the European Convention on Human Rights ("ECHR"), having regard to the risk of (a) long term solitary confinement, and (b) a whole life sentence without a right of review;

   (3) Extradition would not be compatible with the right to a fair trial under Article 6 ECHR.

2. DJ Zani dismissed other challenges to extradition, including the respondent's contention that extradition would be unjust or oppressive by reason of the passage of time since he is alleged to have committed the extradition offence.

3. The appellant appeals against DJ Zani's order discharging the respondent. The respondent seeks to cross-appeal on the ground that the District Judge should have found that extradition was barred by reason of the passage of time.

The extradition request and further information

4. On 28 May 2019, the appellant requested the extradition of the respondent for the offence identified in paragraph 1 above. The offence was said to have comprised two separate incidents:

   (1) On 10 October 1997, the respondent blocked a highway by cutting down trees, stopping traffic at gun point, forcing victims to get out of their cars, "controlled their identity cards and… made propaganda about the illegal terrorist organization [and] grabbed the money, identity cards, driving licences and other documents of the victims", and

   (2) On 3 April 1999, the respondent participated in the strangulation of two people with a rope, thereby killing them.

5. The evidence against the respondent is said to derive from 4 members of the PKK. The request states that the sentence prescribed for the offence is "aggravated life imprisonment."

6. The respondent served expert evidence which suggested that, amongst other matters, the respondent would not receive a fair trial in Turkey, that he would be at risk of a sentence of "aggravated life imprisonment" and that this would potentially result in him spending many years in solitary confinement. In January 2020 the appellant was asked for further information, including as to whether an assurance would be given about prison conditions, what "aggravated life imprisonment… means in practical terms

[including whether the respondent would be] subjected to solitary confinement as a matter of course", whether there is any data to show the acquittal rates for persons alleged to be members of the PKK, and what response the appellant wished to make to the expert evidence that had been served by the respondent.

7. The appellant provided further information in response to this request. It was denied that the respondent would be exposed to ill-treatment in Turkey. It was said that none of the accused persons that had been tried for similar offences had sought legal remedies for ill-treatment. It was denied that the respondent would "be exposed to unjust trial and abuse due to his Kurdish ethnicity" and it was said that because every terrorist organisation might have members from different ethnic origins, the suggestion "is clearly unacceptable." A copy of Article 25 of The Law on Execution of Penalties and Security Measures no 5275 was provided. It came into force on 1 June 2005. It states:

> "**Execution of aggravated life imprisonment**
>
> (1) The main principles of the regime for the execution of aggravated life imprisonment are set out below: a) The convict shall be accommodated in a single room. b) He shall have the right to walk and do exercises in the open air for one hour a day. c) Depending on risk and security considerations and on his effort and good behaviour in rehabilitation and treatment activities, the time for which he goes out and does physical exercises in the open air may be extended and he may be allowed, to a limited extent, to have contacts with convicts who stay in the same unit with him. d) He may carry out an artistic or occupational activity which is possible where he lives and which is considered appropriate by the administrative committee. e) In circumstances where it is considered appropriate by the administrative committee of the institution and once every fifteen days, he may make a telephone call to the persons specified in (t) below for up to ten minutes. t) He may be visited by his spouse, descendants and ascendants, siblings and guardian for up to one hour a day and with intervals of fifteen days, on the days, at the times and under the conditions specified. g) He may in no case be employed outside the penal execution institution or granted a leave. h) He may not participate in any sport and rehabilitation activity other than those specified in the internal regulations of the institution. i) The execution of his sentence may not be suspended in any manner. All health measures to be implemented for the convict shall be implemented in the penal execution institution except for medical tests and requirements or, if this is not possible, in the single-person and high-security convict room of a fully-equipped State or university hospital."

8. An assurance was provided that the respondent would, if extradited, be kept in a newly established prison, "Yalvaç T Type Closed Prison", and details were provided as to the facilities in the prison and the cell space that would be available. The assurance was in terms that have previously been accepted by the courts – see *Osbek v Turkey* [2019] EWHC 3670 (Admin) at [37].

9. The appellant did not directly answer the questions about aggravated life imprisonment and solitary confinement, beyond providing a copy of Article 25. Nor did the appellant answer the question about acquittal rates for members of the PKK.

The evidence before District Judge Zani

10. The extradition hearing was due to be heard in April 2020 but was adjourned because of the covid-19 pandemic. The hearing took place in September 2020.

11. The District Judge heard evidence from the respondent, and three expert witnesses called on behalf of the respondent: Professor Bowring and Mr Park (in relation to human rights in Turkey), and Professor Morgan (in relation to prison conditions in Turkey). The District Judge also received supporting evidence from members of the respondent's family, and from his solicitor. The respondent additionally relied on extensive documentary evidence (which was drawn on by the expert witnesses), including reports from the Council of Europe's Committee for the Prevention of Torture ("CPT") and the US State Department.

12. The respondent's account is that he was born in South East Turkey in 1976. He is of Kurdish ethnicity and an Alevi Muslim. The family moved to Istanbul when the respondent was still young. His parents and sister still live in Turkey. His brother has been recognised as a political refugee in Germany, and is now a German national. When the respondent was at school, he came into contact with PKK supporters. He became involved in Kurdish left wing politics, and this got him into trouble with the authorities. In July 1998 he was detained by anti-terrorist police for two days and was accused of undertaking "separatist activities" in Istanbul. The police, he says, tortured him and threatened to kill him if he continued with his activities. He left Turkey for Germany in November 1998. He applied for asylum, but this was refused. He came to the UK in December 1998. He was subsequently naturalised as a British citizen on 16 August 2010. Whilst in the UK he has studied, married and had a family, and he now works in the catering industry. He has not committed any offences in the UK. The respondent says that his name has been "falsely implicated" in the alleged offences, and that he had sought asylum in the UK at the time of the alleged offences.

13. Professor Bowring is a professor of law and a barrister. He has given expert evidence in relation to human rights in Turkey on many occasions. His evidence is that the respondent's sympathy with the Kurdish population generally, and the PKK, means that the prospects of him being able to have a fair trial in Turkey are very remote indeed, and that he will be at increased likelihood of ill-treatment (or even threat to life) in custody. He says that since 15 July 2016 over 4,000 judges and prosecutors have been dismissed or moved, and over 1,300 lawyers have been placed under criminal prosecution. He considers that this amounts to an "assault on the ability of advocates to represent their clients, and on the independence of the judiciary" such that "there is no longer the rule of law in Turkey." Further, the evidence (including from bodies such as the US State Department) of persecution of Turkey's Kurds is such that there is "a considerable risk that [the respondent] will not be able to receive a fair trial in Turkey."

14. Professor Morgan said:

> "Ozgur Tanis must by any standard be said to be at the greatest risk of custodial treatment and conditions breaching Article 3 in

> Turkey. He is of Kurdish ethnicity and it is claimed that he was in 1997-9 an active member of a proscribed, separatist, terrorist organization, the PKK, with which the Turkish state is effectively at war. Furthermore, in that capacity Ozgur Tanis allegedly engaged in acts of terrorism including kidnapping and murder. As the extradition warrant makes clear, if convicted of these offences he faces a sentence of 'aggravated life imprisonment', the most severe sentence to which any Turkish citizen is liable. 'Aggravated life imprisonment' means, according to Article 47 of the Turkish Penal Code, whole life imprisonment during which the prisoner is ordinarily held in a cell by himself, with very limited opportunity to associate with other prisoners and with visits from immediate family only. The CPT (following the 2015 ECtHR judgement in Vinter & Others v United Kingdom) condemns such provisions, arguing that the conditions within which life sentence prisoners are held should be based on the discretionary decisions of the prison authorities based on periodic risk assessments of the prisoner's behaviour".

15. Professor Morgan considered that the respondent might well find himself being subject to solitary confinement for many years. Professor Morgan was not cross-examined.

16. Mr Park is a Senior Lecturer in the Defence Studies Department at King's College London. His evidence was that a number of defence lawyers representing alleged terrorists had themselves been charged with abetting terrorism, and that the body empowered to appoint judges was controlled by the government and was staffed by government appointed lawyers who were often insufficiently qualified. He considered that there is a real risk that the respondent will not be able to receive a fair trial, and that he will face breaches of Article 3 ECHR in the prison estate.

17. The CPT visited three prisons in December 2005, six months after Article 25 (see paragraph 7 above) had come into force. Prisoners who were serving aggravated life imprisonment were held in single cells. Their only out of cell activity (aside from a visit every 15 days, and a fortnightly telephone call) was outdoor exercise of 1 hour per day which was taken alone. The CPT said in their subsequent report:

> "The application of an isolation-type regime is a step that can have very harmful consequences for the person concerned and can, in certain circumstances, lead to inhuman and degrading treatment. The CPT is of the firm view that the imposition of such a regime should be based on an individual risk assessment, not the automatic result of the type of sentence imposed…
> …
> 51. Possibilities for a more developed regime for prisoners sentenced to aggravated life imprisonment are foreseen in Article 25.1 c) and d) 6; **the CPT recommends that the Regulation on the application of the LESSM exploit these possibilities to the full.**
>
> **However, beyond this, the CPT considers that the very philosophy underlying Article 25 of the LESSM should be**

> **rethought. The decision whether or not to impose an isolation-type regime should lie with the prison authorities and always be based on an individual risk assessment of the prisoner concerned; further, the regime should be applied for as short a time as possible, which implies that the decision imposing it should be reviewed at regular intervals.**"
> [Emphasis in original]

18. In a report in 2016 the CPT was again critical of the restrictive nature of the prison regime for those sentenced to aggravated life imprisonment. It described this as "fundamentally flawed" and reiterated its recommendation for "a complete overhaul of the detention regime of prisoners sentenced to aggravated life imprisonment" and an amendment to "the relevant legislation".

19. In a report in 2017 the CPT made the same point, saying "the CPT must stress once again that the underlying concept of the detention regime of persons sentenced to aggravated life imprisonment, as defined in Section 25 of the LESSM, is fundamentally flawed… the imposition of such a regime should lie with the prison authorities and always be based on an individual risk assessment, and not be the automatic result of the type of sentence imposed." It again called for "a complete overhaul" and for legislative amendment.

20. By the time of a visit in May 2019 "the situation had not improved at all." The CPT indicated "it is a matter of serious concern" that prisoners were still not allowed to associate during outdoor exercise, notwithstanding the CPT's specific recommendation, that this was "not acceptable", and that there was "no legitimate security [justification]" for the restrictions. The CPT again called on the Turkish authorities to carry out a complete overhaul of the detention regime for those sentenced to aggravated life imprisonment, to amend the relevant legislation.

The judgment of District Judge Zani

21. On 5 October 2020 District Judge Zani gave judgment. He accepted that the respondent's evidence was truthful (including his evidence that he had been ill-treated and tortured by the police in Turkey). He found Professor Bowring's evidence to be "persuasive and helpful to this court and untainted by any bias" and that Professor Morgan and Mr Park were both compelling witnesses. He did not accept evidence that Professor Bowring had initially given (but which he had subsequently clarified) that nobody in Turkey could have a fair trial. He did, however, accept Professor Bowring's evidence that, in this particular case, the prospects of a fair trial "are very remote" because of a combination of the respondent's ethnicity, his support for the Kurdish cause, and the fact that he faced prosecution for terror-related crimes.

22. District Judge Zani found that extradition was barred by section 81(b) of the 2003 Act:

> "147. I bear in mind throughout that Turkey is a member of the Council of Europe and is a signatory to the European Court of Human Rights.
>
> 148. I have given very careful consideration to the substantial body of expert evidence received, particularly from Prof.

> Bowring, Mr Park and - to a lesser extent - Prof. Morgan, as well as the various International Reports to which my attention has been drawn.
>
> 149. Noting the scathing evidence provided by the above experts and International reports, I feel driven to conclude that, in the event that he were to be returned, there is a serious possibility for believing that, if extradited, OT will suffer s.81 (b) prejudice by reason of his apparent links to / espoused support for the PKK.
>
> 150. Accordingly extradition must be refused on this ground."

23. He further found that extradition would be incompatible with Article 3 ECHR for two separate reasons. First, the respondent faced the prospect of a 36 year sentence and it was a "reasonable inference" that "there is no prospect of any reduction", contrary to the principles identified in *Vinter and others v United Kingdom* (2016) 63 EHRR 1, *Murray v Netherlands* (2017) 64 EHRR 3 and *Attorney General's Reference (No 69 of 2013); R v Newell and R v McLaughlin* [2014] EWCA Crim 188 [2014] 1 WLR 3964. Second, there was a real risk that the respondent would be subject to "a regime of virtual solitary confinement potentially for many years."

24. DJ Zani also found that extradition would be incompatible with the right to a fair trial under Article 6 ECHR – he considered that in the light of the evidence of Professor Bowring and Mr Park there was a very real risk that the respondent may well not receive a fair trial.

25. DJ Zani rejected the respondent's additional challenges to extradition on the ground that extradition would be incompatible with his right to respect for private and family life under Article 8 ECHR, or that it was barred by the passage of time under section 82 of the 2003 Act. In respect of the passage of time, the District Judge took account of the fact that the allegations went back up to 23 years, but he was not satisfied that this period of time had given rise to any injustice: the respondent's alibi witnesses (including members of his family who could testify to him being in the UK at the time of the alleged offence) were still available. Nor did the District Judge consider that it would be oppressive to extradite the appellant in the light of the time that had passed.

Statutory framework

Grounds for resisting extradition

26. The grounds for resisting extradition that are raised by the respondent are those prescribed by sections 81 ("extraneous considerations"), 82 ("passage of time") and 87 ("human rights") of the 2003 Act.

27. Section 81 states:

> "**81 Extraneous considerations**

> A person's extradition to a category 2 territory is barred by reason of extraneous considerations if (and only if) it appears that—
>
> (a)the request for his extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or
>
> (b)if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions."

28. Section 82 states:

> "**82 Passage of time**
>
> A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have—
>
> (a)committed the extradition offence (where he is accused of its commission), or
>
> (b)become unlawfully at large (where he is alleged to have been convicted of it)."

29. The District Judge was required to proceed under section 87 by virtue of section 84(7). Section 87 states:

> "**87 Human rights**
>
> (1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited."

30. It is common ground that extradition is incompatible with the Convention rights provided by Article 3 and Article 6 ECHR respectively if:

(1) There are substantial grounds for believing that there is a real risk of the requested person being subjected to torture, or inhuman or degrading treatment or punishment contrary to Article 3 ECHR – see *Soering v United Kingdom* (1989) 11 EHRR 439 at [91].

(2) There is a risk of a flagrant denial of the right to a fair trial under Article 6 ECHR – see *Soering v United Kingdom* (1989) 11 EHRR 439 at [113].

Right of appeal

31. Section 103 of the 2003 Act provides a right of appeal against an order to send a case to the Secretary of State under Part 2 of the Act for her decision as to whether a person is to be extradited. Section 108 provides a right of appeal against a decision of the Secretary of State to make an extradition order.

32. Here, the District Judge ordered that the respondent be discharged. The appellant's right to appeal against the order of DJ Zani arises from section 105:

> "**105 Appeal against discharge at extradition hearing**
>
> (1) If at the extradition hearing the judge orders a person's discharge, an appeal to the High Court may be brought on behalf of the category 2 territory against the relevant decision.
>
> …
>
> (3) The relevant decision is the decision which resulted in the order for the person's discharge.
>
> (4) An appeal under this section—
>
> (a) may be brought on a question of law or fact, but
>
> (b) lies only with the leave of the High Court.
>
> (5) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 14 days starting with the day on which the order for the person's discharge is made."

33. The Court's powers on an appeal are prescribed by section 106:

> "**106 Court's powers on appeal under section 105**
>
> (1) On an appeal under section 105 the High Court may—
>
> (a) allow the appeal;
>
> (b) direct the judge to decide the relevant question again;

(c) dismiss the appeal.

(2) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge.

(3) The court may allow the appeal only if the conditions in subsection (4) or the conditions in subsection (5) are satisfied.

(4) The conditions are that—

(a) the judge ought to have decided the relevant question differently;

(b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.

(5) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the judge deciding the relevant question differently;

(c) if he had decided the question in that way, he would not have been required to order the person's discharge.

(6) If the court allows the appeal it must—

(a) quash the order discharging the person;

(b) remit the case to the judge;

(c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

…"

34. Section 116 makes general provision in respect of appeals under Part 2 of the 2003 Act:

"**116 Appeals: general**

(1) A decision under this Part of the judge or the Secretary of State may be questioned in legal proceedings only by means of an appeal under this Part.

…"

35. Section 210 of the 2003 Act provides that rules of court may make provision as to the practice and procedure to be followed in connection with proceedings under the 2003 Act. Rules made under section 210 are contained in Part 50 of the Criminal Procedure Rules ("the Rules"). Section 3 of Part 50 of the Rules makes provision in respect of appeals to the High Court.

Ground 1: s81(b) – prejudiced at trial

Submissions

36. Mr Hearn, on behalf of the appellant, points out that the District Judge rejected the respondent's contention, by reference to section 81(a), that he was being targeted for his political beliefs. Having reached that finding, he argues that it was incumbent on the District Judge precisely to identify the prejudice at trial that the respondent might suffer by reason of his political beliefs so as to justify discharge under section 81(b) – see *Slepcik v Governor of HMP Brixton* [2004] EWHC 1244 (Admin) *per* Maurice Kay LJ at [23]. The District Judge failed to do that – he did not explain how he feared that prejudice at trial might manifest itself.

37. Further, Turkey is a signatory to the ECHR. There is a presumption that it is to be trusted to comply with the requirements of the Convention. An assurance had been granted that the respondent will receive a fair trial. There is no specific evidence that the respondent's trial, in particular, would be unfair. Moreover, the respondent is protected by the fact that he is a British citizen with a right to consular access and by the sovereign assurances that have been given to the UK about the way in which he will be treated.

38. The respondent stresses the narrow test for allowing an appeal against an extradition decision – see *Love v United States* [2018] EWHC 172 (Admin) [2018] 1 WLR 2889 *per* Lord Burnett CJ at [25]. Here, he says, the District Judge had been presented with an overwhelming body of evidence from respected international bodies and expert witnesses that show that someone with the respondent's profile will not receive a fair trial. The District Judge had been entitled to accept that evidence.

Discussion

39. The reasoning at [147]-[150] of the District Judge's judgment is (read in isolation) sparse. It does, however, show that the District Judge started with the presumption that Turkey is a signatory to the ECHR but that, in the light of the expert evidence and the international reports, there is a serious possibility the respondent will suffer prejudice at trial because of "his apparent links to / espoused support for the PKK." It is therefore clear that the District Judge reached his finding because of the expert evidence and the international reports. It is therefore necessary to read his ultimate findings in respect of section 81(b) in the light of his analysis of that underlying evidence. The District Judge's detailed analysis of that underlying evidence is set out in his judgment at [52] - [103].

40. The District Judge did not uncritically accept the expert evidence. He rejected Professor Bowring's suggestion that nobody in Turkey could receive a fair trial. He did, however,

accept Professor Bowring's evidence that the respondent's prospects of a fair trial are "very remote" because of his ethnicity, his support for the Kurdish cause, and the fact that he faces terror-related crimes.

41. Mr Hearn came close to suggesting that the District Judge was not entitled to make this finding (and so, what was initially presented as a reasons challenge morphed into something closer to a perversity challenge). However, the District Judge's finding emerges directly from Professor Bowring's evidence which was corroborated by the evidence of Mr Park (and to a lesser extent Professor Morgan), and by the reports of other bodies, including the US State Department. Professor Bowing had referred to evidence showing that large numbers of judges and lawyers in Turkey had been arrested or dismissed, and that judges were subject to influence from the government. Moreover, the respondent's evidence, which was accepted by the District Judge, was that he had himself been arrested and tortured in Turkey because of his Kurdish ethnicity and his support for the PKK.

42. The effect of the expert evidence was that the respondent, as an ethnic Kurd and a man who was perceived to support the PKK, would not receive a fair trial because of his ethnicity, the nature of the offence with which he was charged, the lack of independence of the judiciary and the inability of lawyers freely and fearlessly to act for their clients.

43. The District Judge was entitled to accept this evidence. It was internally consistent and mutually corroborated. The further information provided by the appellant amounts to a bare denial of the allegations made by the expert witnesses, without descending into any detail. The appellant had the opportunity to call expert evidence in response, but chose not to do so. It had the opportunity to cross-examine the expert witnesses. Professor Morgan was not challenged at all. Professor Bowring was cross-examined, but the factual detail of his evidence (eg as to the dismissal of judges) does not appear to have been challenged.

44. The District Judge took account of the fact that Turkey is a signatory to the ECHR, that assurances have been provided, and that the respondent is a British citizen. However, having accepted the evidence that was put before him his finding that there was a risk of prejudice to the respondent at trial was all but inevitable.

45. The appellant is right that the District Judge did not particularise precisely how any prejudice would arise or become manifest at trial. However, that is not required by s81(b) and the appellant's approach sets an unrealistic standard. It was sufficient for the District Judge to find that the judiciary were not independent, that the rule of law was not operating, and that the respondent would, in the light of his particular profile, suffer prejudice at his trial. That establishes the test under s81(b).

46. The decision in *Slepcik*, relied on by the appellant, does not establish that it is necessary to identify precisely how prejudice will manifest itself. At [22]-[23] Maurice Kay LJ said:

> "22. It is common ground that in order to succeed under this heading, the applicant must establish "a reasonable chance", or "substantial grounds for thinking", or "a serious possibility" that he might if returned suffer in the way foreseen by [the statutory

> provision]: see *Fernandez v Government of Singapore* (1971) 1 WLR 987, 994, per Lord Diplock.
>
> 23. It is also important to emphasise that [the statutory provision] requires us to assess the state of mind of the Czech authorities at the time of making the extradition request, so as to establish whether or not its purpose was to punish for discriminatory reasons. Moreover, [the statutory provision] requires us to predict prejudice which the applicant might suffer as a result of punishment, detention or restriction for discriminatory reasons if returned."

47. *Slepcik* was a case where the appellant had been convicted, so the potential for prejudice "at trial" did not arise (that is why those words are absent from the last sentence of [23]). The Court was concerned with the alternative possibility of the appellant being "punished, detained or restricted" for a discriminatory reason. The requirement to "predict prejudice" is a reference to the need to identify a risk of such treatment being accorded by reason of race, religion, nationality or political opinion. Maurice Kay LJ did not suggest that it was necessary to identify the precise mechanism by which this might occur. It was sufficient that the appellant might suffer one of the specified consequences as a result of discrimination. In this context, it is sufficient that the respondent might suffer prejudice at trial.

48. The District Judge rejected the respondent's contention, by reference to section 81(a), that the extradition request was made for a discriminatory reason. He did so because he was satisfied that there was evidence that the respondent had committed the alleged offences and that evidence (rather than discrimination) explains the extradition request. It does not, however, follow that the District Judge was bound to conclude that there was no possibility of the respondent suffering prejudice at trial within the meaning of section 81(b). Section 81(a) and section 81(b) address two different stages of the process. The fact that extradition is not barred under section 81(a) does not mean that it cannot be barred under section 81(b). Put another way, the District Judge's finding that extradition is barred by section 81(b) is not inconsistent with his rejection of the respondent's case under section 81(a).

49. It is important to stress the limited ambit of the District Judge's decision. He explicitly rejected the suggestion that nobody in Turkey could receive a fair trial. His conclusion that the respondent might be prejudiced at his trial was tied to the particular features of this individual case. They include that the respondent is of Kurdish ethnicity, that he is perceived to be a supporter of the PKK, that he faces prosecution for a terrorist related offence, that there was a considerable body of expert evidence, supported by an underlying body of material evidence suggesting he would face prejudice at trial, and the lack of response by the Turkish authorities to requests for information which were relevant to the section 81(b) assessment.

50. Accordingly, it has not been shown that the District Judge was wrong to conclude that, if extradited, the respondent might be prejudiced at his trial. It follows that I would dismiss this ground of appeal. Moreover, given that the District Judge's finding on section 81(b) is sufficient to result in the respondent's discharge, the rejection of this ground of appeal is sufficient, in itself, to dismiss the appeal.

Ground 3: Article 6 – right to a fair trial

51. The District Judge did not make reference to the correct legal test for determining whether extradition is incompatible with Article 6 ECHR (see paragraph 30(2) above). He did set out the correct legal tests for each of the other challenges to extradition. There is a gap of a few lines in the judgment at the point at which the test for determining whether extradition is compatible with Article 6 would otherwise have appeared. The respondent contends that this is likely simply to have been an error in the way in which the judgment was typed or produced, and it does not reflect any underlying error in the District Judge's reasoning. Moreover, the correct legal test had been identified by the parties in their respective arguments and there is nothing in the judgment to suggest that this was not accepted by the experienced District Judge as being the correct test.

52. Mr Hearn realistically and helpfully accepted that the appeal on this ground stands or falls with the appeal under section 81(b). As explained at paragraphs 39 - 50 above, the District Judge was entitled to accept the expert evidence that the respondent might be prejudiced at his trial. The underlying reasoning is such that it is inevitable that he would have concluded that there was a real risk of a flagrant breach of the right to a fair trial under Article 6 ECHR. It follows that it has not been shown that the District Judge was wrong to conclude that extradition would be incompatible with Article 6 ECHR.

Ground 2A: Article 3 – solitary confinement

Submissions

53. The appellant contends that the District Judge was wrong to conclude that the respondent would be at risk of Article 3 breaches in respect of the prison conditions he faces in Turkey. It relies on the assurances that have been provided which have previously been accepted by the courts (see paragraph 8 above). The appellant says that the District Judge has not provided a reasoned decision as to why he concluded that there is a real risk of a breach of Article 3 as a result of solitary confinement. Article 25 (see paragraph 7 above) shows that the appellant will be entitled to exercise of 1 hour a day, as well as visits and contact with relatives, and the possibility of employment and artistic or occupational activities, if deemed appropriate. In any event, the fact that a person would be subject to inhuman and degrading treatment in the requesting country does not mean that extradition is incompatible with Article 3. Further, the appellant says that it should have been given the opportunity to provide a specific assurance to address any residual concern about solitary confinement.

54. The respondent argues that the District Judge was right to conclude that there are substantial grounds for believing that there is a real risk of the respondent being subject to long term solitary confinement, that this would amount to inhuman or degrading treatment, and that the District Judge was not, in the context of this case, required to give the appellant an opportunity to address the matter by way of a further assurance.

Discussion

55. There was clear evidence before the District Judge that the respondent might be subject to long term solitary confinement. In particular, the evidence of Professor Morgan is that the respondent would be held in a cell by himself with very limited opportunity to

associate with other prisoners, and with visits from immediate family only. His evidence was not challenged. It is corroborated by findings of the CPT (see paragraphs 17 - 20 above). There is no evidence that Turkey has undertaken the complete overhaul of the regime for those serving aggravated life sentences that has consistently been recommended by the CPT over many years. Nor has Article 25 been amended, again as consistently recommended by the CPT.

56. The appellant's assurance as to conditions of incarceration have previously (and recently) been accepted by the domestic courts. However, the focus in previous cases has been on over-crowding and cell-space, rather than solitary confinement. In respect of solitary confinement, the assurance says:

> "The execution of the penalty of a convict who cannot continue his life in solitary in prison conditions due to a severe illness or disability or who are evaluated to constitute no severe or substantial danger in terms of social security may be deferred until his/her recovery…"

57. This does not come close to addressing the concerns that have been expressed by the CPT, or by Professor Morgan.

58. The appellant's reliance on article 25 must be seen in the light of the CPT's concerns as to how that provision operates in practice. Moreover, the right to exercise prescribed by article 25 is not said to be a right to communal (as opposed to solitary) exercise. In the light of the wording of article 25(d) (and the content of the CPT reports) the District Judge was entitled to conclude that the possibilities of artistic or occupational activities were within the discretion of the prison authorities rather than a presumptive right. There is the possibility of visits, but these are of relatively short (1 hour) duration at infrequent (every 15 days) intervals.

59. The District Judge was therefore entitled to conclude that there is a real risk that the respondent will be subject to long term solitary confinement.

60. A minimum threshold must be met before prison conditions amount to inhuman or degrading treatment or punishment within the meaning of Article 3 ECHR. Whether that threshold is met is highly fact sensitive. It is, however, clear that long term solitary confinement without adequate justification can, in principle, amount to inhuman and degrading treatment or punishment contrary to Article 3 ECHR – see the Grand Chamber decision in *Sanchez v France* (2007) 45 EHRR 49 at [120] - [124].

61. The respondent relied on *Provenzo v Italy* (2019) 69 EHRR 17. In that case, the applicant was subject to a prison regime that only allowed one visit a month from a family member, with no other visits, no right to use the telephone, no right to engage in "handicrafts" and no more than 2 hours' outdoor exercise each day in groups of no more than 4 persons (see at [57]). The Court closely considered whether those restrictions could be justified by reference to the particular facts of the applicant's case, which included that the applicant was "an extremely dangerous individual and a prominent leader of one of the largest existing criminal organisations… [who posed a] great danger… to society." The Court was not satisfied that there was sufficient justification for the measures in the particular circumstances of the case, and it found a breach of

Article 3 (see at [147]-[158]). Here, the potential for solitary confinement exists over a period of many years, even if there is no conceivable security justification.

62. The appellant's submission that this does not necessarily mean that extradition would be incompatible with Article 3 was based on the decision of the House of Lords in *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72 [2009] 1 AC 335. In that case it was held that extradition to the United States to face a potential life sentence with only limited eligibility for seeking early release was compatible with Article 3. Lord Carswell, at [56], observed that "Obviously one cannot approach the issue of extradition to a state which is not a party to the Convention as if its provisions applied there with full force." Lord Hoffmann, at [24], said "Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account." He considered (at [35]) that the sentence in that case would only contravene Article 3, in the context of extradition, if it were "clearly disproportionate".

63. The context of the present issue is very different from that in *Wellington*. Turkey is a party to the Convention so the case can be approached on the basis that its provisions apply there with full force. The issue here is not concerned with the question of whether a particular form of life sentence amounts to inhuman and degrading punishment, but rather whether the conditions in which the respondent will be incarcerated amount to inhuman or degrading treatment. The nature of the finding made by the District Judge, and the underlying analysis of the CPT, is that there is no individualised objective basis for the application of a regime that amounts to solitary confinement. The logical consequence of the District Judge's finding is that the imposition of solitary confinement is clearly disproportionate.

64. Accordingly, the decision in *Wellington* does not assist the appellant on the particular facts of the present case.

65. Mr Hearn suggested that the District Judge ought to have sought an assurance as to the application of Article 25 to the respondent's case, before concluding that extradition would be incompatible with Article 3. More ambitiously, Mr Hearn eloquently argued that we could now seek such an assurance.

66. In this respect, Mr Hearn relied on the decision of the Court of Justice of the European Union in *Aranyosi and Căldăraru* [2016] QB 921. That concerned the proper application of Council Framework Decision 2002/684/JHA to requests for extradition to an EU Member State where there is "objective, reliable, specific and properly updated evidence" which suggests a real risk of a breach of Article 3 ECHR because of the general detention conditions in the requesting state. The Court held (at [94] – [95]) that the effect of articles 1(3), 5, 6(1) and 15 of the Framework Decision is that in such a case the executing judicial authority:

> "is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing member state, he will run a real risk of being subject in that member state to inhuman or degrading treatment, within the meaning of article 4.

> To that end, that authority must, pursuant to article 15(2) of the Framework Decision, request of the judicial authority of the issuing member state that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that member state."

67. Turkey is not a EU Member State, and the respondent is not sought pursuant to a European Arrest Warrant governed by the Framework Decision. It is, nevertheless, open to a non-EU state to offer an assurance as to the manner in which a requested person will be treated, and it was open to the District Judge to seek such an assurance. Any such assurance would then be assessed in accordance with the principles set out in *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1 (at [187] – [189]). The courts, in appropriate cases, routinely seek such assurances. Where an assurance is given, but some point of clarification is required, it is not unusual to seek a further, more detailed assurance. Whether, however, such an assurance should be sought is a fact sensitive exercise of judicial discretion in the particular circumstances of any individual case.

68. In the present case, an assurance as to prison conditions had been provided (albeit it did not provide a great deal of detail about the application of Article 25). The appellant had been specifically requested to provide further information about the question of solitary confinement, and it did not respond to that aspect of the request. The District Judge had available to him a considerable body of evidence, particularly from the CPT, as to the application of Article 25. The extradition request related to an offence that had allegedly taken place more than 20 years ago. There had been considerable delay in the extradition proceedings (the hearing had been listed to be heard in April 2020 but was then adjourned as a result of the covid-19 pandemic). The respondent had been remanded in custody throughout. The special objective in extradition proceedings requires the court to have regard to the importance of dealing swiftly with extradition requests (Criminal Procedure Rules Practice Direction 50 paragraph 2(b)). In all the circumstances, the District Judge was justified in proceeding without seeking a further, specific, assurance from the appellant.

69. So far as the appeal proceedings are concerned, the suggestion that the District Judge should have sought an assurance was not identified as a discrete ground of appeal. When seeking permission to appeal, the appellant did not invite the Court to seek an assurance. Nor was any separate application made for such a step at any stage during the proceedings. If we were now to adjourn the proceedings to seek such an assurance then that would inevitably cause significant further delay in a case which is already stale. It would, moreover, likely lead to significant further argument as to the reliance that could be placed on any such assurance. The respondent would be able to rely on the apparent failure of the appellant to respond to the recommendations made by the CPT over many years. Further, the refusal of this extradition request does not necessarily prevent the appellant from making a further request if it considers that the grounds on which extradition was refused can be addressed. Accordingly, I do not consider that this court should, effectively of its own motion, further delay the proceedings by seeking an additional assurance from the appellant as to the way in which Article 25 will be applied.

70. In all the circumstances, it has not been shown that the District Judge was wrong to conclude that there are substantial grounds for believing that there is a real risk that the respondent might be subjected to inhuman or degrading treatment or punishment, contrary to Article 3 ECHR.

Ground 2B: Article 3 – irreducible whole life term of imprisonment

Submissions

71. The appellant accepts, in principle, that an irreducible whole life term of imprisonment can amount to inhuman or degrading punishment contrary to Article 3 ECHR. He contends, however, that here the sentence is reducible, as shown by the decision in *Öcalan v Turkey* (no 2) (application 24069/03, judgment 18 March 2014) at [203] ("under Turkish law, in the event of the illness or old age of a life prisoner, the President of the Republic may order his immediate or deferred release.").

72. Further, the appellant points out that although the European Court of Human Rights in *Öcalan* found Turkey to be in breach of Article 3 ECHR in respect of the implementation of aggravated life sentences, it has not required the immediate release of any prisoners. Moreover, the fact that prison conditions in a contracting state might breach Article 3 ECHR does not mean that extradition to that state would itself amount to a breach of Article 3 ECHR (*Öcalan* does not suggest otherwise, and *Wellington* shows that the desirability of extradition must be weighed in the balance). In any event, if the respondent is extradited and if he then faces inhuman or degrading treatment or punishment, he would be entitled to a remedy from the European Court of Human Rights.

73. The respondent accepts that the District Judge erred in the approach to this issue. The District Judge said:

> "OT faces the possibility of a sentence of up to 36 years imprisonment and the reasonable inference is that, if such a sentence is imposed there is no prospect of any reduction, which appears to be contrary to the principles laid down in *Vinter*, *Murray* and *McLaughlin & Newell* above."

74. As the respondent correctly recognises, nothing in the authorities suggests that a determinate sentence (even one as long as 36 years) has to leave open the prospect of a review and possible early release in order to avoid being incompatible with Article 3 ECHR. The risk of an article 3 breach that is recognised in the authorities only arises in the case of a whole life term (or, conceivably, a determinate sentence that is so long that it inevitably amounts to a whole life term). Accordingly, insofar as the District Judge's conclusion depended on his finding that there was a risk of a sentence of 36 years imprisonment, the respondent accepts that it was flawed.

Discussion

75. The District Judge was wrong to suggest that the possibility of a 36-year determinate sentence amounted to a breach of Article 3 ECHR. There is nothing in the authorities, and no reason of principle, to support such a conclusion. In England and Wales, the murder of two or more persons results in a mandatory life sentence and the starting

point, in determining the minimum term, is 30 years (see Criminal Justice Act 2003, schedule 21, paragraph 5(1)(a) and 5(2)(f)). There is nothing in principle objectionable by reference to the ECHR about the imposition of a 36-year term.

76. Mr Bennathan QC was therefore right to make a concession. That concession is not, however, determinative of this ground of appeal. That is because although the District Judge found that there was a possibility of a 36-year determinate sentence, he also found that there was a possibility of an aggravated life sentence. That latter finding was clearly correct: it is supported by the extradition request itself (which states that an aggravated life sentence is available) and by Article 126 of the Turkish Penal Code, and by the further information provided by the appellant (which says that aggravated life sentences have been imposed for similar offences), and the expert evidence of Professor Bowring and Professor Morgan.

77. A whole life sentence with no possibility of early review and release on the grounds that continued imprisonment is no longer justified on "legitimate penological grounds" is contrary to Article 3 ECHR – see *Vinter and others v United Kingdom* (2016) 63 EHRR 1 at [119] and [129] (and [103]-[122]). Article 3 therefore requires that a whole life sentence must be subject to the possibility of a review, enabling an assessment of whether any changes since the imposition of the sentence are so significant as to mean that continued detention can no longer be justified – *Vinter* at [119].

78. In *Öcalan* the European Court found that an aggravated life term imposed for the same charge as that faced by the respondent was incompatible with Article 3 ECHR.

79. This conclusion applies to the present case. There is nothing to distinguish the aggravated life sentence passed in the present case with that passed in *Öcalan*. Nor is there anything to suggest that the appellant has adopted the legislative changes that the European Court of Human Rights contemplated (at [207]) as being necessary.

80. The possibility of a discretionary Presidential pardon that was intimated in *Öcalan* at [203] is not sufficient to render the sentence reducible (and hence compatible with Article 3) in the sense required by *Vinter*. As the Court explained in *Öcalan* (by reference to *Vinter* at [120]), what is required is a right to review on penological grounds after not more than 25 years.

81. The fact that the Court in *Öcalan* did not require the applicant's immediate release is not relevant. The important point is that it found that the aggravated life sentence regime is not compatible with Article 3, absent a *Vinter*-compliant review mechanism.

82. Nor is it relevant that the respondent would have a remedy by way of complaint to the European Court of Human Rights. The question that arises under section 87 is whether extradition is compatible with Convention rights, rather than whether there would be a remedy for any breach of Convention rights.

83. That then leaves the appellant's reliance on *Wellington*, and the need to weigh in the balance the desirability of extradition proceedings. The District Judge did not address this issue. His decision was in any event flawed, as the respondent accepts. It is not necessary, on this appeal, to resolve the question one way or the other, because the appeal falls to be dismissed on the basis of the District Judge's findings on section 81(b) and Article 6 ECHR (as well as solitary confinement/Article 3 EHCR). It is not

desirable to do so having regard to the potentially highly fact sensitive nature of the exercise of determining whether an aggravated life sentence would, in the particular circumstances of the case, be "clearly disproportionate."

The cross-appeal

Submissions

84. The respondent contends that it would be unjust to extradite him to Turkey having regard to the passage of time since the alleged offence. Although family members could testify that he had been in the UK at the time of the offence, they would be too scared to return to Turkey to testify. Other evidence that would prove that he was in the UK is not likely to remain available now. Moreover, the appellant has engendered a false sense of security in the respondent given that he had visited the Turkish Consulate and no suggestion was made that he was under investigation in Turkey.

85. The appellant contends that there is no jurisdiction to entertain the cross-appeal and that, in any event, DJ Zani was right to reject the respondent's argument that extradition was barred by the passage of time.

Discussion

86. The jurisdictional issue that is raised by the appellant does not appear to have been considered in any authority or in the leading text-books. The courts have previously assumed that there is a right to bring a cross-appeal, but without explicitly addressing this issue.

87. By section 116(1), the decision of DJ Zani can be questioned only by way of an appeal under Part 2 of the 2003 Act.

88. If DJ Zani had ordered that the case be sent to the Secretary of State, then the respondent would have had a right to appeal against that decision pursuant to section 103. However, where, as here, a district judge orders that the requested person be discharged (on the basis of at least one, but not all of the grounds argued by the requested person), that person has no right of appeal under Part 2 of the 2003 Act against the rejection of his argument that discharge should have been ordered on a wider basis. The only right of appeal is that contained in section 105, which permits an appeal to be brought by the requesting state but not by the requested person.

89. Nothing within Part 2 of the 2003 Act, or the Criminal Procedural Rules, explicitly permits a person in the position of the respondent to bring a cross-appeal.

90. However, the appellant's appeal may only be allowed if the court is satisfied that the District Judge "would not have been required to order the person's discharge" (section 106(4)(b) and section 106(5)(c)). It is open to the respondent to argue that this condition is not satisfied because the District Judge would have been required to order the respondent's discharge by reference to the points that the respondent seeks to raise on the cross-appeal.

91. Further, section 106 provides that where the conditions in subsection 4 or subsection 5 are satisfied the Court "may" allow the appeal – see section 106(1) and (3). It is open

to the respondent to argue that this language permits the court to exercise a residual discretion not to allow an appeal if it can be shown that the District Judge would have been required to order the respondent's discharge on other grounds.

92. Accordingly, whilst there is nothing in the legislation that explicitly permits a cross-appeal, it may nevertheless be open to a respondent to argue that a district judge's decision should be upheld for reasons different from or additional to those given by the district judge.

93. It is not, in the circumstances of this case, necessary to reach a final conclusion on this issue if, as I have concluded, the appellant's appeal would otherwise fall to be dismissed. For the same reason, it is not necessary to address the merits of the proposed cross-appeal.

Conclusion

94. I would therefore dismiss the appeal.

Lord Justice Dingemans:

95. I agree that the appeal should be dismissed for the reasons given by Mr Justice Johnson. I also agree that it is not necessary to decide the interesting point about whether there is jurisdiction to hear a cross appeal, and would prefer to leave that to be decided in a case in which it needs to be resolved.

96. I would like to say something about the appellant's submissions that: first District Judge Zani should not have ordered the discharge of the respondent on the grounds relating to a real risk of impermissible treatment contrary to article 3 of the ECHR because of solitary confinement, but should have sought further assurances from the appellant relating to that issue; and secondly that this court should, if it considers there to be force in the solitary confinement issue, not dismiss the appeal on this point but adjourn the appeal to seek further assurances.

97. Assurances are an important part of the extradition process, see *Shankaran v India* [2014] EWHC 957 (Admin) at paragraph 59 and *Giese v USA (No.4)* [2018] EWHC 1480 (Admin); [2018] 4 WLR 103 at paragraphs 37 to 39. The Court may consider assurances at various stages of the proceedings, including on appeal, and the Court may consider a later assurance if an earlier assurance or undertaking has been found to be defective, see *Dzgoev v Russia* [2017] EWHC 735 at paragraphs 68 and 87 and *India v Dhir* [2020] EWHC 200 (Admin) at paragraph 36.

98. Such an approach is consistent with the further objective in extradition proceedings of having regard to the importance of "mutual confidence and recognition between judicial authorities" set out in the Criminal Procedure Rules at Rule 50.2(a). Courts must also have regard to the importance of dealing swiftly with extradition requests, see the Criminal Procedure Rules at Rule 50.2(b). In some cases it will not be possible to identify the way in which an assurance will need to be framed until contested evidence has been heard, but in other cases it might be possible to require any relevant assurance on a particular issue to be provided by a certain date before the extradition hearing, see *India v Dhir* at paragraph 42. In many, probably most cases, it will be possible to case manage the process of providing assurances so that proceedings are not delayed and all

parties fairly know what are the issues. Although a court may adjourn to obtain an assurance there is in my judgment no duty on the court, of its own motion, to adjourn proceedings to seek assurances in circumstances where the requesting state has been asked about a particular issue, and has not offered an assurance on the matter. Such an approach would frustrate attempts to deal with extradition cases swiftly.

99. Further it is not appropriate for this court to adjourn this appeal to seek an assurance about solitary confinement. This is because the appellant has not provided an assurance to this court, nor has the appellant said in terms that it is willing to provide an assurance on the solitary confinement issue. This is in circumstances where it was apparent to the appellant from the terms of District Judge Zani's judgment that the issue of solitary confinement was a concern of the court. As it is, for the reasons given by Mr Justice Johnson, the provision of such an assurance would not have led to the appeal being allowed in this case because of the conclusions on section 81(b) of the Extradition Act 2003 and article 6 of the ECHR.