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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**Between:**

**IRENA ROZAITIENE**

**Appellant;**

**-and-**

**THE REPUBLIC OF LITHUANIA**

**Respondent.**

**AND IN THE MATTER OF THE EXTRADITION ACT 2003**

**BEFORE A DIVISIONAL COURT**

**HIGGINS, GIRVAN AND COGHLIN LJs**

**HIGGINS LJ**

[1] This is an appeal under section 26(1) of the Extradition Act 2003 against a decision of the Recorder of Belfast, His Honour Judge Burgess, whereby he ordered that the appellant be extradited to the Republic of Lithuania. A Warrant was issued on 9 November 2004 by the Republic of Lithuania (the requesting state/respondent) in respect of Mrs Irene Rozaitiene (the appellant) seeking her arrest in relation to alleged misappropriation of money. The appellant was arrested on foot of this Warrant on 27 September 2007 in Northern Ireland. She appeared before the Recorder on the same date and was remanded in custody.

[2] By Order made by the Secretary of State under Section 1 of the Extradition Act 2003 (the Act) Lithuania is a designated territory for the purposes of Part I of the Act. The National Criminal Intelligence Service, the authority designated by the Secretary of State, has certified under Section 2(7) of the Act that the authority which issued the warrant has the function of

issuing warrants in Lithuania. A Part 1 Arrest Warrant is known and referred to as a European Arrest Warrant (the warrant). Section 3 of the Act provides for the arrest of the person named in the warrant. Section 4(2) provides that the arrested person must be brought before the appropriate judge as soon as practicable. In Northern Ireland the appropriate judge is such county court judge as is designated for the purposes of Part 1 of the Act – see section 67(1)(c). At the extradition hearing the Judge must decide whether the offence specified in the warrant is an extradition offence. If it is not the person must be discharged. If it is an extradition offence the Judge must proceed under Section 11 and decide whether extradition of the arrested person is barred by reason of any of the grounds set out in that section. Under Section 11(3) if the Judge decides that the extradition is barred for one of the specified reasons he must order the person's discharge. Under Section 11(5) if the Judge decides there are no grounds on which the extradition is barred (and the person has not been convicted of the offence) he must proceed under section 21 and decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human rights Act 1998. Under Section 9(4) the Judge may adjourn the hearing and remand the person in custody or on bail. Under Section 9(3) the Judge has the same powers as a magistrates' court would have if the proceedings were the hearing and determination of a complaint against the arrested person.

[3] At the hearing on 27 September 2007 the Appellant declined to return voluntarily and the proceedings were adjourned. A number of further hearings took place before the Recorder at which the Appellant's legal advisers sought time in which to obtain information and collate evidence to be presented on her behalf. The substantive application for extradition came on for hearing before the Recorder on 10 March 2008.

[4] The Appellant is 56 years of age and is a Lithuanian national. On 12 September 2003 the District Court of Jonava Region in Lithuania issued an arrest warrant in respect of the Appellant in relation to the alleged misappropriation of approximately 161,903 LTL (circa £30,000) in money belonging Rukla Secondary School, where the Appellant was employed as a Chief Accountant. The European Arrest Warrant is based on this earlier arrest warrant issued by the Ruklova District Court. Misappropriation of a substantial sum of money is an offence in Lithuania punishable by a maximum penalty of ten years imprisonment. The European Arrest Warrant alleged that the Appellant had gone into hiding from and during the pre-trial investigation of the alleged offence. On 24 April 2003 it was made public that she was sought in connection with this allegation. The Appellant contends she left Lithuania on 5 July 2002 in order to travel to the Republic of Ireland. On arrival there she travelled across the border to Northern Ireland where it is said two family members were already living. Her husband was left behind in Lithuania. He has since died. The appellant entered the Republic of Ireland on a visitor's visa with the declared intention of visiting her relatives in the

Republic of Ireland. However it now appears that her true motive, as she admitted in evidence before the Recorder, was to find employment in Northern Ireland, which she did. She was later joined by several of her children. The family now live at several addresses in Northern Ireland and the Republic of Ireland and the children work in Dundalk. The appellant claimed that she was unaware of the existence of the investigation into the misappropriation of money from the School and the District Court warrant, until her arrest in September 2007. This is not accepted by the respondent.

[5] The Extradition Act 2003 makes provision for extradition to different categories of foreign territories and has its origins in a meeting of the European Council at Tampere in Finland in October 1999. For some time concerns had been expressed about the existing extradition procedures which were regarded as too technical and gave rise to inordinate and unnecessary delay. The legal basis for the Council's concerns is to be found in Articles 31 and 34 of the Treaty on European Union which, inter alia, propose framework decisions to harmonise the criminal law of member states, as well as espousing judicial co-operation in criminal proceedings and the facilitation of extradition between the jurisdictions of member states. At the meeting in Finland a decision was taken to abolish the existing extradition procedures, initially in relation to those fleeing a jurisdiction after final sentence had been passed. Subsequently a proposal was put forward to introduce a European Arrest Warrant in respect of those suspected of criminal offences. The substance of the proposal was the simplification of the procedure whereby a person in respect of whom a warrant was issued in one Member State, might be extradited to another Member State. Discussions and consultation took place which ultimately led to a decision to implement the proposal, which decision is contained in the Council Framework Decision of 13 June 2002. Central to the Framework Decision was the introduction of the European Arrest Warrant which would lead to surrender of the arrested person between judicial authorities within the European Union.

[6] The European Arrest Warrant is defined in Article 1 of the Framework Decision and Article 2 provides for its execution.

> "1. The European arrest warrant is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.
>
> "2. Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."

It is noteworthy that Article 2 provides that execution of the warrant is on the basis of the principle of mutual recognition. The purpose of the Decision is set out in recitals (5), (6), (10) and (11) of the Preamble which provide –

> "(5) The objective set for the union to become an area of freedom, security and justice leads to abolishing extradition between member states and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between member states should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.
>
> (6) The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial co-operation …
>
> (10) The mechanism of the European arrest warrant is based on a high level of confidence between member states. Its implementation may be suspended only in the event of a serious and persistent breach by one of the member states of the principles set out in article 6(1) of the Treaty on European Union, determined by the Council pursuant to article 7(1) of the said Treaty with the consequences set out in article 7(2) thereof.
>
> (11) In relations between member states, the European arrest warrant should replace all the previous instruments concerning extradition, including the provisions of Title III of the Convention implementing the Schengen Agreement which concern extradition."

Recital (5) envisages the replacement of simple judicial co-operation with free movement of judicial decisions in criminal matters and the introduction of a simple system of surrender of sentenced and suspected persons. Recital (10) acknowledges that member states have a high level of confidence in each other (and inferentially in their judicial and justice systems) and the European Arrest Warrant is based on that confidence. It is evident that the procedure is founded, as Lord Bingham observed in Office of the King's Prosecutor, Brussels v Cando Armas and Another [2005] UKHL 67, [2006] 2 AC 1, at paragraph 2 "in the integrity of each other's legal and judicial systems". In the same case Lord Hope at paragraph 22 described the new procedure as simply a system of backing of warrants, a procedure well known to the two jurisdictions on the island of Ireland. Significantly he went on to say that the European Arrest Warrant –

> "is designed to enable the persons against whom they are directed to be handed over in the shortest possible time to the requesting authorities. The grounds on which a member state decline to give effect to the European Arrest Warrant are, as my noble and learned friend, Lord Scott of Foscote, points out, very limited."
>
> "**23** But a system of mutual recognition of this kind, such as that which in their relations with each other the three jurisdictions within the United Kingdom have long been used to, is ultimately built upon trust. Trust in its turn is built upon confidence. As recital (10) of the preamble puts it, the mechanism of the European arrest warrant is based on a high level of confidence between member states. The reason why discussions about the introduction of the European arrest warrant generated so much heat in the United Kingdom was a lack of confidence in the ability of the criminal justice arrangements of other member states to measure up to the standards of our own, and a corresponding lack of trust in the ability of the new system to protect those against whom it might be used. Now that the argument is over and the new system is in force it has to earn that trust by the way it is put into practice. The system has, of course, been designed to protect rights. Trust in its ability to provide that protection will be earned by a careful observance of the procedures that have been laid down."

Lord Scott of Foscote, in the same case, made some significant statements about the principles underlying the new procedure and the approach to be adopted to it, by domestic courts.

> "**52** The principle underlying these changes is that each member state is expected to accord due respect and recognition to the judicial decisions of other member states. Any inquiry by a member state into the merits of a proposed prosecution in another member state or into the soundness of a conviction in another member state becomes, therefore, inappropriate and unwarranted. It would be inconsistent with the principle of mutual respect for and recognition of the judicial decisions in that member state.
>
> **53** Accordingly, the grounds on which a member state can decline to execute a European arrest warrant issued by another member state are very limited. Article 3 sets out grounds on which execution must be refused. Article 4 sets out grounds on which execution may be refused. None of these grounds enable the merits of the proposed prosecution or the soundness of the conviction or the effect of the sentence to be challenged. There is one qualification that should, perhaps, be mentioned. The execution of an arrest warrant can be refused if, broadly speaking, there is reason to believe that its execution could lead to breaches of the human rights of the person whose extradition is sought: see recitals (12) and (13)."

[7] The Extradition Act 2003 marks the United Kingdom's compliance with the Framework Decision. Consistent with the Framework Decision the Act contains safeguards for those arrested on foot of a European Arrest Warrant. In Part I they are described as bars to extradition and are set out in Section 11. (The Act has been amended by the Police and Justice Act 2006 which amendments took effect from 15 January 2007; I refer to the Act in its amended form.)

Section 11 provides -

> "1.1 Bars to extradition
>
> (1) If the judge is required to proceed under this section he must decide whether the person's

extradition to the category 1 territory is barred by reason of-

(a) the rule against double jeopardy;
(b) extraneous considerations;
(c) the passage of time;
(d) the person's age;
(e) hostage-taking considerations;
(f) speciality;
(g) the person's earlier extradition to the United Kingdom from another category 1 territory;
(h) the person's earlier extradition to the United Kingdom from a non-category 1 territory;
(i) the person's earlier transfer to the United Kingdom by the International Criminal Court;
(j) forum.

(2) Sections 12 to 19B apply for the interpretation of subsection (1).

(3) If the judge decides any of the questions in subsection (1) in the affirmative he must order the person's discharge.

(4) If the judge decides those questions in the negative and the person is alleged to be unlawfully at large after conviction of the extradition offence, the judge must proceed under section 20.

(5) If the judge decides those questions in the negative and the person is accused of the commission of the extradition offence but is not alleged to be unlawfully at large after conviction of it, the judge must proceed under section 21."

[8] Sections 12 to 19B make provision for each of the restrictions on extradition contained in Section 11(1) (a) to (j). The Appellant relied on Section 14 which stipulates the circumstances in which a person's extradition would be barred for passage of time. Section 14 (as amended) is in similar terms to earlier United Kingdom extradition legislation and provides –

"14. Passage of time

A person's extradition to a category 1 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 committed the extradition offence or 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)."

[9] The appellant also relied on Section 21 of the Act. This provides that before a judge makes an order that a person be extradited to a Category I territory he must decide whether the extradition would be compatible with the person's Convention rights under the Human Rights Act 1998. Section 21, as amended, is in these terms –

"21. Human Rights

(1) If the judge is required to proceed under this section (by virtue of section 11 or 20) 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 order the person to be extradited to the category 1 territory in which the warrant was issued.

(4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.

(5) If the person is remanded in custody, the appropriate judge may later grant bail."

[10] Following the execution of a European Arrest Warrant the extradition procedure involves a series of steps commencing with the initial hearing in accordance with Section 7 of the Act. If the judge decides that the person

brought before him is the person in respect of whom the warrant was issued, then he must proceed under Section 8. In proceeding under Section 8 the judge must fix a date for the extradition hearing not later that 21 days from the date of the arrest – see Section 8(4). Section 8(5) permits a later date to be fixed if the judge believes it to be in the interests of justice to do so and to do so more than once. Where an order for extradition is made the requested person may appeal to the High Court against that order – see Section 26. Section 31 provides that rules of Court must prescribe the period (the relevant period) within which the High Court must begin to hear the appeal, which period must be calculated from the date of arrest under the European Arrest Warrant – see Section 31 (2). Order 61A Rule 4 provides that the High Court must commence to hear the appeal within 40 days of the execution of the arrest warrant unless the Court under Section 31(4) and Order 61A Rule 4(2) extends the time if it believes it to be in the interests of justice to do so. These times limits reflect the tenor of the Framework Decision confirmed by Lord Hope, that a requested person should be handed over in the shortest possible time to the requesting authorities. Of course this aspiration for a timely handover to the other member jurisdiction is subject to the safeguards contained in the Act and the European Convention.

[11] At the extradition hearing in March 2008 the appellant gave evidence about her personal circumstances and also her knowledge of the Lithuanian police and prison system. The appellant was employed by the Lithuanian police as an accountant and an interpreter before she took up employment at the school. The Recorder regarded her as an intelligent woman who schemed to leave Lithuania and enter the United Kingdom via the Republic of Ireland. He did not accept that she was unaware of the police investigation into the alleged misappropriation of money from the school or that she was unaware that she was being sought by the Lithuanian authorities. In addition the Recorder heard evidence from Dr B Blitz, a Reader in Political Geography at Oxford Brooks University in England, who compiled a report on the Lithuanian criminal justice system and prisons and exhibited a number of reports from different international organisations about conditions in prisons in Lithuania and the treatment of persons detained there. Having considered this evidence and the written material the Recorder found that no bar to extradition had been established under Section 14 and that the extradition of the appellant would be compatible with the appellant's Convention rights within the meaning of the Human Rights Act 1998 and accordingly ordered that the appellant be extradited to Lithuania.

[12] The appellant appeals against that decision on two grounds –

i. Having regard to section 206 of the Extradition Act 2003, in arriving at his decision, the learned Recorder erred in law in his application of the burden and standard of proof to the determination of the application by the Respondent for the extradition of the Appellant.

ii. The learned Recorder erred in that he failed to attach appropriate weight to the evidence of the applicant.

[13] The appeal was listed in June 2008 but adjourned at the request of the appellant. An extension of time within which the appeal would be heard was later granted. The appellant had engaged new legal advisers. The first ground of appeal was dealt with as a preliminary point and in the meantime the parties assembled the voluminous material which had been placed before the Recorder, as well as the transcripts of the evidence of the appellant and Dr Blitz. The Court ruled against the appellant on the first point and then went on to consider the evidence relating to Ground ii.

[14] In a detailed judgment to which we pay tribute, the Recorder set out the facts and the relevant statutory provisions. He ruled correctly that the onus lay on the respondent (the applicant below) to establish beyond reasonable doubt all the formal matters required for extradition under Part I of the Act. He went on to state that once the formal matters have been proved the Court is then obliged to extradite the Requested Person, unless any of the provisions contained in sections 11 to 19 or 21 apply. In regard to those sections he considered there was an evidential burden on the appellant to demonstrate grounds on which the Court should not extradite her to Lithuania. He stated -

> "In my opinion the Act gives rise to an evidential burden [on the appellant] to show that there are grounds upon which this court should not return her to Lithuania. Her obligation is to do no more than to raise a reasonable doubt that any of the causes of concern referred to in the various Bars and other protections exist on the balance of probabilities."

[15] It had been submitted by counsel then appearing on behalf of the appellant that, once a requested person raised an issue under sections 11 to 19 and 21, then the onus transferred to the requesting state (the applicant) to disprove the issue raised and to do so beyond reasonable doubt. In support of that submission counsel relied on section 206 of the Act which provides that where a question as to the burden or standard of proof arises it shall be decided by applying any enactment or rule of law which would apply if the extradition proceedings were proceedings for an offence.

[16] The Recorder rejected the proposition that the onus lay on the requesting state to disprove the issues raised by the requested person beyond a reasonable doubt. After considering several cases he went on to say -

> "I require to decide whether on the balance of probabilities [the appellant] has persuaded me either that it would be unjust or oppressive by reason of passage to time to order her extradition to the applicant state or that by doing so there would be a breach of her human rights under section 21 of the Act."

[17] In that sentence the Recorder clearly ruled that the onus was on the appellant on the balance of probabilities in relation both to an issue under section 14 (passage of time) and under section 21 (human rights). Earlier he had referred to the obligation on the appellant to raise a reasonable doubt that any of the causes of concern existed on the balance of probabilities. It is not clear precisely what the Recorder meant by this. To suggest that the onus lay on a requested person to raise a reasonable doubt about an issue implies that the onus on the other party is to prove that issue beyond a reasonable doubt. That would be inconsistent with an onus to prove an issue on the balance of probabilities. Raising a reasonable doubt requires no more than showing a real possibility that what is alleged by the opposing part is not so.

[18] Mr Hunter QC who, with Mr McCreanor, appeared on behalf of the appellant (but not in the Court below) renewed the submissions that were made before the Recorder in relation to the onus of proof. It was argued that the terms of Section 206 were clear. If any question arises in extradition proceedings as to the burden or standard of proof then the same burden and standard applicable in proceedings for an offence applies to the extradition proceedings. By virtue of Section 206(3) the extradition proceedings are treated as if the requested person is accused of an offence and the requesting state is the prosecutor of that offence. In this jurisdiction the burden in proving an offence lies on the prosecution and the standard applicable is proof beyond reasonable doubt. Thus it was submitted that if a person arrested on foot of an extradition warrant raises, through evidence, an issue relating to any of the bars to extradition referred to in section 11 or a human rights issue in section 21, the respondent or requesting authority must disprove that issue beyond a reasonable doubt. The appellant relied on section 206 and a passage in Saadi v Italy (Application No 37201/06), a decision of the Grand Chamber of the European Court of Justice.

[19] Mr Maguire QC who, with Mr McAlister, appeared on behalf of the respondent submitted that the onus was on the arrested person to prove an issue on which he relies on the balance of probabilities. This was the intention behind section 206 and consistent with the practice in earlier extradition cases. In any event it would be a difficult logistical exercise for a foreign state to seek to disprove, in another jurisdiction, such issues beyond a reasonable doubt. Section 206 provides in effect that an extradition hearing is analogous to the hearing of a complaint before a Magistrate's Court. Section 124 of the

Magistrates Courts (Northern Ireland) Order 1981 provides that if a defendant seeks to rely on, inter alia, any exception, exemption or excuse, the burden of proving such rests on him. Traditionally the burden on the defence is on the balance of probabilities. He referred to a number of cases both before and after the 2003 Act in which it was held or accepted that the onus of proving a particular issue was on the arrested person, on the balance of probabilities.

[20] Section 206 of the Act provides -

> 206. Burden and standard of proof
>
> (1) This section applies if, in proceedings under this Act, a question arises as to burden or standard of proof.
>
> (2) The question must be decided by applying any enactment or rule of law that would apply if the proceedings were proceedings for an offence.
>
> (3) Any enactment or rule of law applied under subsection (2) to proceedings under this Act must be applied as if--
>
> (a) the person whose extradition is sought (or who has been extradited) were accused of an offence;
>
> (b) the category 1 or category 2 territory concerned were the prosecution.
>
> (4) Subsections (2) and (3) are subject to any express provision of this Act.
>
> (5) In this section "enactment" includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament."

[21] Section 206 only applies if a question arises in the extradition proceedings as to the burden or standard of proof. If the question arises it must be decided by applying any enactment or rule of law which would apply in proceedings as if the arrested person were accused of an offence. Thus the ordinary rules relating to criminal prosecutions apply. The onus is on the requesting state in relation to the matters to be proved in support of the extradition request and the standard is proof beyond reasonable doubt. Section 206 is subject to any express provision of the Act – see section 206(4). In relation to a Part 1 arrest section 7(3) provides that the question whether

the person brought before the Judge is the person in respect of whom the warrant was issued, must be decided by the Judge on the balance of probabilities. Where the requested person seeks to prove a fact or relies on section 14 (or the other bars mentioned in section 11) then the onus is on the requested person to prove that fact on the balance of probabilities.

[22] Mr Hunter relied on two matters as a bar to extradition – the passage of time (section 14) and the appellant's Convention rights ( section 21). The passage of time relates to the date of the alleged offence and the date of the execution of the European Arrest Warrant. Those are formal matters to be proved by the requesting state, in this case the Respondent. The passage of time will be evident from those dates. It will then be for the requested person to assert why it would be unjust or oppressive for him to be returned to the requesting state. Only the requested person would be privy to the reasons why extradition after the passage of time would be unjust or oppressive. One reason associated with the passage of time might be that events happened so long ago that relevant witnesses are no longer available or cannot be traced and a fair trial of the charge is no longer possible. It will be for the requested person to establish some facts or inferences upon which it might be said that extradition in those circumstances would be unjust or oppressive. The Court then has to ask whether "it appears" that it would be unjust or oppressive to extradite the requested person by reason of the passage of time. It does not seem that the answer to that question gives rise to an onus or standard of proof in the conventional sense. It will be for the requested person to raise the issue and establish facts or circumstances on which he relies and for the court to rule whether, in those circumstances, it would be unjust or oppressive to extradite the arrested person. The requesting state may argue to the contrary. There is no onus on the requesting state to establish beyond a reasonable doubt that it would not be unjust or oppressive.

[23] The Recorder referred to the judgment of Jack J in Kociukow v District Court of Bialystok III Penal Division [2006] 2 All ER 451, also an extradition case. In that case an analogy was drawn with an application to stay proceedings on the ground of abuse of process. At paragraph 9 Jack J stated:

> "9. Section 206 of the 2003 Act is titled 'Burden and standard of proof'. It provides that any question as to burden or standard of proof must be decided as if the proceedings were proceedings for an offence with the person sought to be extradited being the person accused, and the extraditing territory being the prosecution. That means that the court must proceed as if the accused were being prosecuted before an English court with the extraditing state as the prosecutor. It is not obvious how that should be applied to issues arising under sections

> 11(1)(c) and 14. In my view there is an analogy with an application to stay proceedings on the ground of abuse of process arising from the passage of time. There the burden is on the accused and the standard of proof is the balance of probabilities. That was the position under the previous law relating to extradition and the passage of time. I refer to *Union of India v Narang* [1978] AC 247 at 293 per Lord Keith. So, in my judgment, that is the basis on which the appellant's case is to be decided."

[24] It seems that in referring to this case the Recorder was adopting the approach of Jack J and was holding, in the passage of his judgment quoted above, that the onus is on the requested person to prove what he alleges and the standard of proof is the balance of probabilities. This approach is consistent with a number of authorities. In Piotrowski v District Court of Slupsk Poland 2007 EWHC 1982(Admin) the appellant sought to argue that it would be unjust or oppressive (under section 14 of the Act) to extradite him to Poland. It was held at paragraph 11 that the onus was on the appellant to demonstrate that it would be unjust or oppressive to return him. In that case the requested person relied on the passage of time from the date of the alleged offence and it was held that his conduct in fleeing the jurisdiction should be regarded as a relevant factor. In Harvey v Portugal 2007 EWHC 3282(Admin) it was common ground between the parties that the onus rested on the requested person to establish, under Section 14 of the Act, a serious risk of injustice (or oppression) on the balance of probabilities - see paragraph 24. In Guven v Governor of HM Prison Brixton 2005 EWHC 1391(Admins) a similar approach was adopted. In none of the many extradition cases that have been heard since the introduction of the 2003 Act has it been held that the onus is not on the requested person to prove what he alleges under section 14. Nor has it been suggested that where the requested person raises an issue, that section 206 places an onus on the requesting state to disprove that issue beyond a reasonable doubt.

[25] Mr Hunter QC submitted that no distinction should be drawn between a bar to extradition under section 14 or an issue raised under section 21 and that section 206 applied to both. Section 21 prevents extradition in breach of a requested person's rights under the European Convention on Human Rights. It was alleged on behalf of the appellant that if she was extradited to Lithuania she would not receive a trial within a reasonable period of time, that she would be held in detention in circumstances that were inhuman or degrading, that there was a real risk that she might be physically or mentally ill-treated by state authorities or that she might harm herself and that she would not receive a fair trial as the judiciary in that country were neither

impartial nor independent. Thus she raised issues under Articles 3 and 6 of the Convention.

[26] Article 3 provides -

> "3. No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The relevant part of Article 6 provides –

> "6. 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[27] The appellant alleges that if she is extradited to Lithuania her rights under Article 3 and 6 may be breached. The allegations relate to how she may be treated and to the conduct of any trial, if she is returned to Lithuania. It follows that these allegations are about events that may occur some time in the future. They engage the question whether there is a risk that extradition might lead to a breach of the requested persons' Convention rights. Questions involving a risk at some future date are not susceptible of the usual approach to the burden and standard of proof. In this regard extradition cases are analogous to immigration cases, in which it is alleged that the removal of a person to another country would lead to treatment in the receiving state which would be in breach of his Convention rights.

[28] In R (Ullah) v Special Adjudicator 2004 2 AC 323, an immigration and asylum case, Lord Bingham stated at paragraph 24:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than art 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In

relation to art 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: see Soering v UK (1989) 11 EHRR 439 at 468–469 (para 91), Cruz Varas v Sweden (1992) 14 EHRR 1 at 33–34 (para 69), Vilvarajah v UK (1992) 14 EHRR 248 at 286–287 (para 103). In Dehwari v Netherlands (2001) 29 EHRR CD 74 at 75 (para 61) (see [13], above) the Commission doubted whether a real risk was enough to resist removal under art 2, suggesting that the loss of life must be shown to be a 'near-certainty'. Where reliance is placed on art 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: see Soering v UK (1989) 11 EHRR 439 at 479 (para 113) (see [10], above), Drozd v France (1992) 14 EHRR 745 at 793 (para 110), Einhorn v France App No 71555/01 (16 October 2001, unreported) (para 32), Razaghi v Sweden App No 64599/01 (11 March 2003, unreported), Tomic v UK App No 17837/03 (14 October 2003, unreported). Successful reliance on art 5 would have to meet no less exacting a test. The lack of success of applicants relying on arts 2, 5 and 6 before the ECtHR highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as arts 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the ECtHR ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under arts 8 and 9 is

> in my opinion that indicated by the Immigration Appeal Tribunal (Mr CMG Ockelton, deputy president, Mr Allen and Mr Moulden) in Devaseelan v Secretary of State for the Home Dept [2002] UKIAT 702, [2003] Imm AR 1 at [111]:
>
> > 'The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state'."

[29] This approach was confirmed in the recent case of Saadi v Italy in which the applicant contested his expulsion from Italy to Tunisia, following his conviction of terrorist related offences, on the grounds that he would be subject to torture, inhuman or degrading treatment, contrary to Article 3 of the European Convention on Human Rights. The United Kingdom Government intervened, arguing that the onus was on the applicant to show on the balance of probabilities, that he would be subjected to such treatment. In rejecting that submission the Grand Chamber reaffirmed its opinion, based on earlier authorities, that the onus lay on the applicant to show substantial grounds for believing that he faces a real risk of being subjected to such treatment, if deported to that country. The position is no different where an applicant alleges a breach of Article 6 of the Convention (the right to a fair trial). In those circumstances he must show substantial grounds for believing that a flagrant denial of a fair trial would occur. The test, which the Court said applied in extradition and as well as expulsion cases relating to Article 3, was set out at paragraphs 128 to 134 which state –

> "128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with art 3, the court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu (see HLR v France [1997] ECHR 24573/94 at para 37, and Hilal v UK (2001) 11 BHRC 354 at para 60). In cases such as the present the court's examination of the existence of a real risk must necessarily be a rigorous one (see Chahal v UK (1996) 1 BHRC 405 at para 96).

129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to art 3 (see N v Finland [2005] ECHR 38885/02 at para 167).
(2008) 24 BHRC 123 at 150

Where such evidence is adduced, it is for the government to dispel any doubts about it.

130. In order to determine whether there is a risk of ill-treatment, the court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances (see Vilvarajah v UK [1991] ECHR 13163/87 at para 108 in fine).

131. To that end, as regards the general situation in a particular country, the court has often attached importance to the information contained in recent reports from independent international human rights protection associations such as Amnesty International, or governmental sources, including the US State Department (see, for example, Chahal v UK (1996) 1 BHRC 405 at paras 99–100; Muslim v Turkey (App no 53566/99) (judgment, 26 April 2005) at para 67; Said v Netherlands [2005] ECHR 2345/02 at para 54; and Al-Moayad v Germany (App no 35865/03) (admissibility decision, 20 February 2007) at paras 65–66). At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of art 3 (see Vilvarajah v UK [1991] ECHR 13163/87 at para 111, and Fatgan Katani v Germany (App no 67679/01) (admissibility decision, 31 May 2001)) and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence (see Mamatkulov v Turkey (2005) 18 BHRC 203 at para 73, and Muslim v Turkey (App no 53566/99) (judgment, 26 April 2005) at para 68).

132. In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the court considers that the protection of art 3 of the convention enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous paragraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see, mutatis mutandis, Salah Sheekh v Netherlands [2007] ECHR 1948/04 at paras 138–149).

133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the contracting state at the time of expulsion. However, if the applicant has not yet been extradited or deported when the court examines the case, the relevant time will be that of the proceedings before the court (see Chahal v UK (1996) 1 BHRC 405 at paras 85–86, and Venkadajalasarma v Netherlands [2004] ECHR 58510/00 at para 63). This situation typically arises when, as in the present case, deportation or extradition is delayed as a result of an indication by the court of an interim measure under r 39 of the Rules of Court (see Mamatkulov v Turkey (2005) 18 BHRC 203 at para 69). Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive.

iii. The concepts of 'torture' and 'inhuman or degrading treatment'

134. According to the court's settled case law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of art 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, Price v UK (2001) 11 BHRC 401 at para 24; Mouisel v France [2002].”

[30] Mr Hunter QC relied on paragraph 129 and in particular on the last sentence in which the Court stated that it was for the Government to dispel any doubts raised by the evidence adduced. The paragraph must be read as a whole. The Court stated that the onus was on the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of was implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 (my emphasis). Where the applicant does produce evidence which is capable of proving the substantial grounds then the Government must dispel any doubts about them.

[31] That the onus rests on the requested person to show substantial grounds for believing a breach of his Convention rights might occur, was the approach adopted in Miklis v Deputy Prosecutor General of Lithuania 2006 EWHC 1032 (Admin) a case not dissimilar to the present appeal, in which Dr Blitz was called in support of the appellant's case that he would subjected to treatment contrary to Article 3, should be extradited to Lithuania. Dr Blitz produced reports similar to the reports exhibited in this appeal. It was held that the evidence adduced came nowhere near establishing substantial grounds for believing that the appellant in that case would be subject to treatment contrary to Article 3. It is worth noting the remarks of Latham LJ in relation to such reports and the use that can be made of them, in the context of an extradition hearing. At paragraph 11 he stated –

> "11. The final point made in relation to the district judge's decision in this respect is that he was unduly dismissive of those reports. There is no doubt that he approached them with a degree of scepticism. That is not surprising bearing in mind the very general nature of the allegations that were made. That is not intended to belittle the reports. It is, however, important that reports which identify breaches of human rights, or other reprehensible activities on the part of governments or public authorities are kept in context. The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse. In relation to the risk of ill-treatment from other prisoners, the district judge was right to conclude

> that the reports before him gave no sufficient support to the contention that the appellant would not be given protection by the prison authorities. He himself made no complaints about ill-treatment whilst he had been in prison before. And he gave no details of those from whom he considered himself to be at risk so as to enable any judgment to be made as to the chances of their still being in prison, and being in a position, if they so wished, to harm him. The material could go no further than raising a speculative, as opposed to a real risk of his being harmed in prison. And that goes nowhere near establishing substantial grounds for believing that there would be a real risk of art 3 ill-treatment in the sense that the authorities themselves would either be responsible for it, or be unable or unwilling to provide him protection from it."

[32] In an extradition hearing in which the requested person alleges, under section 14 of the Act, that it would be unjust or oppressive to extradite him, the onus is on the requested person to show on a balance of probabilities why it would be unjust or oppressive so to do. Where he alleges under section 21 that his extradition would not be compatible with his Convention rights within the meaning of the Human Rights Act 1998, the onus is on him to show substantial grounds for believing that his rights under Article 3 or 6 would be violated. Should he establish evidence capable of proving that there are substantial grounds for believing there is a real risk that his Convention rights would violated, then the requesting state must dispel any doubts arising from that evidence.

[33] The principal reason why it was argued that it would be unjust and oppressive to return the appellant to Lithuania was that she was now settled in Northern Ireland. The Recorder was not satisfied that the appellant was unaware of the investigation into the missing funds or the events as they developed in Lithuania relating to them. The appellant alleged she had returned to Lithuania during this period. No argument was put forward that the passage of time alone, would prevent the appellant obtaining a fair trial. The onus was on the appellant to show why it would be unjust or oppressive to return her to Lithuania. The Recorder was satisfied that she had failed to do so. We have considered carefully the evidence and are satisfied that the Recorder applied the appropriate test and came to the correct conclusion, that the passage of time provided no bar to the appellant's extradition.

[34] Having been so satisfied the Recorder then had to consider, under section 21, whether the extradition of the appellant would be compatible with

the appellant's Convention rights. The evidence on these issues was provided primarily by Dr B Blitz, a Reader in Political Geography at Oxford Brooks University, though the appellant gave some evidence on this issue based on her previous employment. Dr Blitz produced a Report on the appellant and several Appendices. In his judgment the Recorder dealt with this issue at paras 43-56 of his judgment. He did not find the appellant's evidence of assistance as it was relevant to conditions as they existed some 12-18 years ago. For that reason the Recorder found that he could not depend on the evidence of the appellant in relation to pre-trial prison conditions or the independence of the judiciary – see paragraph 50 of his judgment. There is no reason to doubt the correctness of that decision. The Recorder then went on to consider the evidence of Dr Blitz "for the purposes of seeing if she is (sic) discharged the onus and proof to the standard required." The Recorder was provided with a number of exhibits in the form of lengthy reports. Dr Blitz referred to passages in the reports which supported his conclusions. The Recorder on reading the Reports found other passages which referred to contrary views or improving conditions. At para 57 the Recorder concluded that these gaps in Dr Blitz's report (and evidence) undermined to a significant extent the weight that could be attached to his evidence. In light of this it was submitted, correctly, that the Recorder did not find Dr Blitz an impressive witness. The Recorder quoted the passage from the judgment of Latham LJ in Milkis, referred to above. He then went on to consider each of the issues on which reliance had been placed. I shall refer to each of them individually, adopting the abbreviation used in the skeleton arguments on behalf of the respondent.

[35]

(a) Delay in legal proceedings

The Recorder concluded that he did not find it proved on the balance of probabilities that the appellant would not receive a trial within a reasonable period of time. He noted that the charge against the appellant has already been the subject of investigation and that if extradited any pre-trial investigation would be short. The cases relied on by Dr Blitz were in the period 1995-2000 and were mainly civil. The Freedom House Report of 2005 noted the improvements brought about by the new Penal Procedure 2003 with which assessment Dr Blitz agreed.

(b) Lack of independence in the Lithuanian courts in guaranteeing human rights

The Recorder concluded that the evidence did not establish the allegations that were made. Lithuania acceded to the European Union in May 2004. The Freedom House report stated that this marked a "major turning point for the Lithuanian legal system and judiciary". The Constitution of Lithuania provides protection for fundamental political, civil and human

rights. The Freedom House report noted that the right to a fair trial was well established in Lithuanian law and in Lithuanian international obligations. An opinion poll in December 2004 demonstrated that Lithuanians considered the "human rights situation to have improved over the last three years." Judges are regarded as fair and impartial and the Constitutional Court serves as a guarantor of human rights. Dr Blitz reported that the Lithuanian judiciary was generally regarded as applying standards comparable to the Judiciaries of other member states of the European Union. A US State Department Report 2006 supported these findings. It was submitted by the respondent that neither the oral evidence of Dr Blitz nor the written material relied on supported the contention that the Lithuanian Courts did not guarantee fundamental human rights. While Dr Blitz referred to continuing irregularities, he accepted that the judiciary in Lithuania is well placed to guarantee human rights. The evidence adduced does not establish that the appellant's Convention rights would not be protected by the Lithuanian Courts.

(c) The backlog of cases and evidence of delay

The Recorder concluded –

> "We are dealing with the criminal law and I am satisfied from everything I have read, including the references which I have already set out as to the engagement by the judiciary in tackling delay, including at pre-trial stage, that no evidence has been produced which would allow the court to consider that this conclusion or representation is proved"

The Recorder could only find one passage in Dr Blitz's report relating to this complaint. This stated simply that "judicial delays take place especially with regard to property restitution decisions." The Recorder reached the only conclusion possible in relation to this.

(d) Human rights abuses and police brutality

The Recorder was satisfied that there was evidence of concern about conditions and treatment in police detention centres in the past. However he found no evidence of such in recent times. The US Department of State Report of March 2006 noted that instances of physical mistreatment of detainees continues to decline and that the Lithuanian Ombudsman's office received isolated complaints of force being used to obtain evidence in pre-trial investigations. The Recorder noted the steps taken to investigate complaints and to provide medical examinations of those in detention. The Recorder also referred to the requirement of warrants for arrest and that suspects detained

on foot of such a warrant could be held for up to only 48 hours and were, in most instances, provided with legal assistance. If charged a suspect has the right to apply for bail. Dr Blitz agreed that if the appellant was extradited to Lithuania she would be brought before a court within 48 hours of her return and if not bailed would be held in pre-trial detention. There was considerable debate as to where she would be held in pre-trial detention, whether in a prison for women or elsewhere. Dr Blitz accepted this was a matter of speculation. The Recorder concluded that the evidence did not satisfy him that there was any real risk of her suffering ill-treatment.

(e) Poor or life threatening conditions in Prisons.

Despite the assertion of the Lithuanian matters in the further correspondence referred to below (in paragraph [36]), it cannot be ruled out that the appellant if extradited, might be remanded to prison pre-trial. Thus the court has to consider detention in prison pre-trial as well , should she be convicted of an offence and sentenced to imprisonment, where and in what conditions she would serve that sentence. The Recorder noted that considerable improvement has been made in "prison" conditions since 1992. Overcrowding was a matter of concern but a recent reduction in the prison population and an increase in prison capacity were confirmed by a report from the International Centre for Prisons Study 2005. The Recorder was satisfied that the Lithuanian government was responding to concerns expressed about prison conditions. Dr Blitz referred to "incidents of violence in female prisoners which <u>may</u> violate the defendant's Article 3 rights under the ECHR." The Recorder considered that those incidents could not be regarded as systemic or to such a frequency and extent as could be categorised as exposing [the appellant] to human rights abuse." He was satisfied that the reports provided insufficient support for the contention that the appellant would not be protected by the Lithuanian authorities and could find nothing in her personal situation which suggested she might be exposed to any particular risk. He regarded the contention put forward on her behalf as speculative rather than raising any real risk that he appellant would be harmed in prison.

(f) Prison overcrowding and self-harming

The Recorder found that this contention was not supported by the evidence produced by Dr Blitz. No account was taken of the changes that have been made in prison accommodation and numbers. Whilst there were concerns about suicide rates the Recorder found nothing in the evidence to suggest that the appellant would be exposed to self-harm or driven to such harm.

[36] The transcript of the evidence of the appellant and Dr Blitz, together with the reports and other written materials, were placed before this court.

The Recorder approached the human rights issues on the basis that the onus lay on the appellant to prove what she was alleging on the balance of probabilities. The correct test is that referred to earlier namely, whether the evidence relied on and viewed as a whole, shows substantial grounds for believing that if the appellant was extradited to Lithuania, there was a real risk she would be exposed to treatment contrary to Article 3 or denied a fair trial contrary to Article 6 of ECHR, in the six areas identified. If it was capable of so proving then the Lithuanian authorities would have to dispel any doubts relating to them. It should be remembered that it is the exposure of the particular individual to risk with which the court is concerned. As Latham LJ observed in Miklis, evidence of, or reports about, past breaches of human rights, whilst a matter of concern, is not in itself evidence that the appellant will be subjected to violations of her human rights. There is, as the Recorder observed, no evidence that the appellant herself would be at any specific risk, though she may well feel differently about that. No evidence has been adduced relating to the alleged offence or concerning her personal circumstances which suggests otherwise. Further details were sought in relation to a number of matters, as well as information about another case in which extradition had been ordered to Lithuania. This related principally to where the appellant would be held if in custody prior to trial and whether, if convicted, time spent in custody in this jurisdiction would count towards any sentence imposed in Lithuania. Initially an unsatisfactory response was forthcoming. However further correspondence with the Lithuanian authorities disclosed that if extradited and refused bail, it was likely that the appellant would be detained in Jonava Region Police Commissariat (police custody) and that time spent in custody in Northern Ireland would count towards any sentence imposed in Lithuania. The further correspondence from the Lithuanian authorities and the assertion that the appellant would be at lesser risk in a women's prison than in police custody, required this court to look closely at the evidence relating to this issue. Having reviewed the material adduced on all the issues raised under section 21` and the evidence given before the Recorder as well as the submissions of counsel on behalf of the respondent, no grounds have been shown for believing that there is a real risk that this appellant, if returned to Lithuania, would be exposed to any treatment contrary to Article 3 of the Convention or that she would be denied a fair trial in contravention of Article 6 of the Convention. The evidence adduced fell well short of establishing the risks contended for.

[37] An appeal may be brought on a question of law or fact – see section 26(3) of the Act. Section 27 makes provision for the powers of the court on appeal. Section 27(1) provides that the High Court may either allow or dismiss the appeal. However the court may allow the appeal only if the conditions set out in section 27(3) or (4) are satisfied. They provide –

> "(3) The conditions are that-

(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) 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 appropriate judge deciding a question before him at the extradition hearing differently;
(c) if he had decided the question in that way, he would have been required to order the person's discharge."

[38] The Recorder ought to have decided the question relating to the onus of proof applicable to section 21 differently, but if he had done so, he would not have been required to order the discharge of the appellant. Thus the conditions set out in section 27(3) are not met. Some evidence was available to this court that was not available to the Recorder, but that evidence would not have resulted in him deciding any question differently. Accordingly the appeal against the decision of the Recorder is dismissed.

**Neutral Citation No.: [2009] NIQB 3**

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| *Delivered:* | **12/01/09** |

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

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**BETWEEN:**

**IRENA ROZAITIENE**

**Appellant;**

**-and-**

**REPUBLIC OF LITHUANIA**

**Respondent.**

**GIRVAN LJ**

[1] Higgins LJ in his judgment has set out the factual and evidential background to the appeal. I agree with the conclusion that the appeal should be dismissed. In view of the arguments addressed to the court on the points of law raised in the appeal I add a few observations of my own on the applicable legal principles in the context of the factual evidence.

**The Grounds of Appeal**

[2] Mr Hunter QC on behalf of the appellant argued that the judge wrongly directed himself on the onus of proof in his approach to the decision whether extradition should be ordered. In paragraph 36 of his judgment the Recorder said:

> "36. Therefore having decided that I am satisfied that all necessary matters have been proved by the applicant beyond reasonable doubt, I require to decide whether on the balance of probabilities Mrs Rozaitiene has persuaded me either that it would be

> unjust or oppressive by reason of the passage of time to order her extradition to the applicant state, or that by doing so there would be a breach of her human rights under section 21 of the Act."

Counsel argued that any burden placed upon the appellant should be no more than an evidential burden and provided sufficient evidence was adduced to raise an issue it was for the Lithuanian authorities to show beyond reasonable doubt that sections 11 and 21 of the Extradition Act 2003 should be answered in the negative. Counsel contended that section 206 of the Extradition Act 2003 showed that issues of burden and standards of proof are to be dealt with as if the proceedings were proceedings for an offence. He contended that the Lithuanian authorities had not made out a case beyond reasonable doubt.

**The Relevant Statutory Conditions**

[3] Section 11(1) of the Extradition Act provides:

> "(1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of –
>
> …
>
> (c) the passage of time."

Section 14 states:

> "A person's extradition to a category 1 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 committed the extradition offence or since he is alleged to have become unlawfully at large (as the case may be)."

[4] Section 21 provides:

> "(1) If the judge is required to proceed under this section (by virtue of Section 11 or 20) he must decide whether the person's extradition will be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

> (2) If the judge decides the question in sub-section (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.
>
> (4) If the judge makes an order under sub-section (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.
>
> (5) If the judge remands a person in custody he may later grant bail."

[5] Section 206 (which deals with burden of standard of proof) provides:

> "(1) This section applies if, in proceedings under this Act, a question arises as to burden or standard of proof.
>
> (2) The question must be decided by applying any enactment or rule of law that would apply if the proceedings were proceedings for an offence.
>
> (3) Any enactment or rule of law applied under sub-section (2) proceedings under this Act must be applied as if-
>
> (a) The person whose extradition is sought (or who has been extradited) where accused of an offence;
>
> (b) the category 1 or category 2 territory concerned were the prosecution."
>
> (4) Sub-section (2) and (3) are subject to an express provision of this Act."

[6] Before turning to the question raised by the appellant it is necessary to put the provisions of the Extradition Act in their proper context. The Council Framework Decision ("the Framework Decision") on an European Arrest Warrant was duly adopted on 13 June 2002 and purports to set out the mechanisms for the European Arrest Warrant. As emerges from recitals

5,6,7,10 and 11 the Framework Decision is based on a high level of confidence between Member States and points to the intention of creating a system of free movement of judicial decisions in criminal matters covering both pre-sentence and final decisions within an area of freedom, security and justice. The recitals refer to the principle of mutual recognition as the "cornerstone" of judicial recognition. In the case of Ignacio Goioechec (12 August 2008) the European Court of Justice pointed out at paragraph 51 of its judgment:

> "It is apparent from recitals 5, 7 and 11 in the pre-amble to the Framework Decision that in order to eliminate the complexity and potential for delay inherent in the extradition procedures then applicable it aims to replace the system of multi-lateral extradition between Member States based on the European Convention on Extradition of 13 December 1957 by a simpler system of surrender between judicial authorities."

[7] In his speech in Office of the King's Prosecutor Brussels v Cando Amas [2006] 2 AC Lord Bingham at paragraphs [2] to [11] of his speech analysed the background to the introduction of the European Arrest Warrant pointing to the movement among the Member States of the EU in establishing a quicker and more effective procedure founded on Member States confidence in the integrity of each others legal and judicial systems. At paragraph 8 of his speech he said:

> "Part I of the 2003 Act did not effect a simple of straightforward transposition, and it did not on the whole use the language of the Framework Decision. But its interpretation must be approached on the twin assumptions that Parliament did not intend the provisions of Part I to be inconsistent with the Framework Decision and that, while Parliament might properly provide for a greater measure of co-operation by the United Kingdom than the decision required, it did not intend to provide for less."

[8] Article 4 of the Framework sets out the grounds for optional non-execution of the European Arrest Warrant. It provides that the executing judicial authority may refuse to execute a warrant (inter alia):

> "(4) where the criminal prosecution and punishment of the requested person is statute barred according to the law of the executing Member State

> and the acts fall within the jurisdiction of the Member State under its own criminal law."

Under our domestic criminal law prosecutions cannot become statute barred as such though the criminal courts do have a power to stay proceedings as an abuse of process in certain instances where delay in the prosecution works injustice. The relation between section 11(1)(c) and section 14 of the 2003 Act on the one hand and article 4(4) of the Framework Decision is not entirely an easy one. While article 4 deals with "optional" non-execution it is likely that it was intended to confer power on Member States to incorporate a domestic law provision to refuse extradition in time delayed cases. The 2003 Act seeks to deal with the issue by providing under domestic law that time delayed cases should not be the subject of extradition where it appears that it would be unjust or oppressive to extradite the person. The 2003 Act follows the wording of section 8(3) of the Fugitive Offenders Act 1967. While it could be argued that the 2003 Act confers a power to refuse an extradition on a much wider basis than that contemplated or permitted by the more limited circumstances set out in article 4.4 of the Framework Decision the respondent did not present any such argument and the case proceeded on the basis that section 11(1)(c) and section 14 contain a permissible statutory basis for refusing extradition where it would be unjust or oppressive to extradite the party by reason of the passage of time since he or she was alleged to have committed the offence.

[9] The Recorder in his decision referred to Kakis v Governor of Cyprus (1978) 1 WLR 779 and the decision of Sedley J in Re Arthur Ashley Riddell DC 22 November 1993. He concluded that it would be neither oppressive nor unjust to extradite the applicant. No argument had been raised that she could not obtain a fair trial by reason of the passage of time and no evidence was produced to allow it to come to that conclusion. Having regard to his findings relating to the circumstances in which she absented herself from Lithuania and came to the Republic of Ireland and thence to Northern Ireland and lived in this jurisdiction it could not be described as in any way oppressive to return her to Lithuania to meet the charge. By her own actions she had obstructed the prosecution and delayed the matter coming to a hearing.

[10] In the Union of India v Manohar Lal Narang [1977] 2 All ER 348 the House of Lords set out the proper approach by appellate courts reviewing to a lower court's conclusion whether it would be unjust or oppressive to extradite a person by reason of a passage of time. The test to be applied in reviewing the Divisional Courts decision was stated to be that applicable by an appellate court when reviewing a decision of fact by a judge at first instance. Where the credibility of witnesses was not in question the appellate court is at liberty to draw its own inference from the primary facts before the lower court whether it would be unjust or oppressive by reason of the

passage of time since the alleged commission of the offence to extradite the individual. Their Lordships in that case pointed to the need for the applicant to show material leading to the conclusion that as a result of the passage of time it would be impossible for the person to obtain justice. Lord Keith at 379J pointed out that it would always be material to take into account the reasons why the passage of time had come about, for example, that it was due to concealment on the part of the applicant or on the part of the authorities seeking her return. In an appropriate case the court could be influenced by the personal circumstances of the applicant for example that he had long been settled in this country and had led there a respectable life in a responsible position.

[11] While the question of onus of proof is not expressly dealt with by their Lordships other than Lord Keith, his analysis of the onus of proof appears to be clearly implied in the approach adopted by the rest of their Lordships. Lord Keith at 379A said:

> "I consider that while of course an applicant must make out his case under the sub-section, no more than the ordinary burden of proof rests on him. It must always be for the court to appraise the facts on which it thinks it right to proceed and form a conclusion on the matter of injustice and oppression without any presumption in either direction."

[12] The approach adopted by the Recorder and his analysis of the question of the onus of proof on this issue was thus correct. This court cannot conclude that he ought to have decided the question before him at the extradition hearing differently (in the words of section 26(3)(a)). Accordingly the appellant's argument on this issue must be rejected.

**The Human Rights Issue**

[13] In challenging the respondent's right to execute the arrest warrant the appellant contended that her return to Lithuania for trial in connection with the alleged charge would be incompatible with her Convention rights. She gave evidence herself in relation to her experience in relation to pre-trial detention centres and prisons arising from her work with the Lithuanian Police between 1990 and 1996 though the Recorder considered her evidence as relating to experience before the new constitutional status of Lithuania and its accession to the EU in May 2004. She also gave evidence of being involved as a member of a woman's organisation which in 2000 visited a pre-trial detention centre in Lukiskes. She referred to seeing individuals being kept isolated in police stations and referred to overcrowding in a further detention centre which was old and had poor sanitary conditions. She gave hearsay evidence about conditions in a federal prison at Panevezys some ten years

ago. The Recorder concluded that he could not depend to any extent on the appellant's evidence in relation to prison conditions, pre-trial conditions or the independence of the judiciary as it pertains today. He concluded that it was the evidence of Dr Blitz which had to be addressed in the context of the human rights challenge.

The court has had the benefit of the transcript of evidence of the appellant. In the light of that transcript the conclusion reached by the Recorder who had the benefit of seeing and hearing the appellant was entirely justified in relation to the status of her evidence.

[14] Dr Blitz called by the appellant as an expert as to relevant conditions prevailing in Lithuania provided extensive evidence to the court below both by way of written and oral evidence the written evidence was voluminous and included various written reports and documents from organisations familiar with the Lithuanian system. The Recorder in his careful judgment analysed the evidence and at paragraph [55] of his judgment ultimately concluded he was not satisfied on the balance of probabilities that any of our human rights would be breached by reason of a return to Lithuania.

[15] The appellant's human rights challenge focused on a number of areas. These comprise, firstly, a challenge in relation to her fair trial rights in Lithuania. That challenge focused on delays and the length of proceedings and the alleged lack of independence on the part of Lithuanian judges. Secondly a case was made out that there was considerable and reliable evidence of human rights abuses including police brutality. Thirdly, it was said that the prison conditions in Lithuania were poor and on occasion life threatening with evidence of increasing prison overcrowding.

[16] The Recorder noted the introduction of a new constitution in Lithuania in October 1992 which contained provisions, inter alia, relating to the judiciary and the penal system. He noted the introduction of an Ombudsman and complaints procedure covering the exercise of powers by relevant institutions. It was noted that Lithuania joined the EU in May 2004 and acceded to the requirements of the Framework Decision. The Recorder also noted that Lithuania had been the subject of reports by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment ("CPT"). The reports related to conditions in 2000 and 2004 and made a number of serious criticisms of the Lithuanian penal system though some improvements were noted between 2000 and 2004.

[17] Having heard Dr Blitz and considered his reports and documents the Recorder concluded that the appellant had not shown on a balance of probabilities that she would not receive a fair trial within a reasonable time. No evidence was produced which would allow the court to conclude that the delay would present a problem. Freedom House Report of 2005 noted the

introduction of a new penal code in May 2003 and a new penal procedure code and penalty execution code. The penal procedure code was tailored to speed up law enforcement and the penalty execution code removed excessive restrictions on the rights and liberties on convicts and improved the mechanisms for filing and investigating their complaints. The Recorder did recognise that there were recognised flaws in the new codes but the evidence did not show that the applicant would not receive a trial within a reasonable time. On the question of judicial independence the Recorder rejected the proposition that a lack of judicial independence would prejudice her trial rights. The Freedom House Report of 2005 recognised a major turning point had occurred on Lithuania accession to the EU and it stated that equality before the law was generally respected. The Constitutional Court continues to serve as a powerful independent and reliable guardian of the countries basic law and the rights it guaranteed. A United States Department report of March 2003 recorded the presumption of innocence, the independence of the judiciary, the role of the Constitutional Court and the right of legal counsel protected by oversight by the Parliamentary Ombudsman.

[18] In relation to the issue of police brutality the Recorder was satisfied on the evidence adduced by Dr Blitz that there was evidence of concerns as to conditions and treatment in police detention centres in the past. The US Department of State report of 8 March 2006 noted that at times police beat or otherwise physically maltreated detainees but noted that such incidents continued to decline. It also noted that from January to June 2006 the Ombudsman's Office received isolated complaints that officials used force to obtain evidence and pre-trial investigations. The Recorder noted that the probability was that the appellant would be held in a pre-trial detention centre rather than by the police. Persons in pre-trial detention have a right to a prompt judicial determination of the legality of their detention and persons who had alleged ill-treatment are able to request forensic medical examination, review of the criminal investigation to safeguard against ill-treatment and the informing of prosecutors of possible cases of ill-treatment. The Recorder concluded that the appellant had not satisfied him on a balance of probabilities of any real risk of suffering ill-treatment.

[19] In relation to prison conditions the Recorder concluded that the evidence did not establish substantial grounds for believing that there would be a real risk of article 3 ill-treatment in the sense that the authorities would be either responsible for it or be able or willing to provide protection from it. The court noted the past serious concerns that prison facilities in Lithuania fell short of the standards found in other prisons in the EU but considerable strides had been made relating to prison conditions. Overcrowding which had been viewed as a considerable problem in 2004 by the CPT had led the Lithuanian authorities to provide a programme of building and carrying out improvements. The International Centre for Prison Studies in 2005 noted that there had been substantial reduction in the prison population over the years

and an increase in prison places. A number of legislative steps have also been taken not least a promulgation of a national programme for the protection and recognition of human rights. This arose out of a world conference in human rights. Dealing with the question of violence in the women's prison the Recorder concluded that there was insufficient evidence to support the appellant's contention that she would not receive protection from the prison authorities.

[20] The appellant's human rights challenge to extradition essentially is founded on the argument that her extradition would expose her to a breach of article 3 and article 6 of the Convention. In Soering v United Kingdom (1989) 11 EHRR 439 the applicant resisted extradition to the United States of America contending that trial there would infringe his article 6 rights and the detention on death row if he were convicted would infringe article 3 rights. In relation to the article 6 issue the Court stated:

> "The Court does not exclude that an issue might exceptionally be raised under article 6 by an extradition decision in circumstances where the fugitive has suffered or risked suffering a flagrant denial of a fair trial in the requesting country."

In relation to the article 3 issue of the court pointed out that the Convention cannot be interpreted as justifying a general principle to the effect that notwithstanding its extradition obligations a contracting state may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. The Court went on to state:

> "It would hardly be compatible with the underlying values of the Convention … were the contracting state knowingly to surrender a fugitive to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. The courts view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by article 3."

This approach was followed in Chahal v United Kingdom (1996) 1 BHRC 405 and a number of other decisions.

[21] In R (Ullah) v Special Adjudicator [2004] 3 All ER 805 Lord Bingham referring to the Strasbourg authorities stated:

> "In relation to article 3 it is necessary to show strong grounds for believing that the person if returned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment. … Where reliance is placed on article 6 it must be shown that a person has suffered or is suffering a flagrant denial of a fair trial in the receiving state. … The lack of success of applicants relying on Articles 2, 5 and 6 before the European Court of Human Rights highlights the difficulty of meeting the stringent test which the court imposes. The removing state will always have what will usually be strong grounds for justifying its own conduct; the great importance of operating firm and orderly immigration control in an expulsion case; the desirability of honouring extradition treaties made with other states."

[22] The Recorder posed the question whether the applicant had persuaded him on a balance of probabilities that her extradition to Lithuania would breach her human rights. In Miklis v Deputy Prosecutor General of Lithuania [2006] 4 All ER 808 the district judge in that case rejected a human rights challenge to extradition on the basis that the evidence given by the applicant was not up to the appropriate standard on the balance of probabilities that he would be in danger if returned or would be kept in inappropriate conditions. The Divisional Court held that in applying the balance of probabilities test he was clearly wrong. The appropriate test was whether there were substantial grounds for believing that there would be a real risk of the appellant suffering article 3 ill-treatment. The Recorder was, accordingly, in error in posing a test requiring the applicant to prove on a balance of probabilities that her Convention rights would be infringed if she was extradited to Lithuania. It is, therefore, necessary for this court to consider whether on the evidence, applying the proper test as formulated by the European Court of Human Rights Lord Bingham in Ullah and the Divisional Court in Miklis the applicant faces a real risk of being subjected to inhuman or degrading treatment or punishment if returned to Lithuania or whether it had been shown that the applicant risked suffering a flagrant denial of a fair trial in Lithuania.

[23] In approaching this question the court must bear in mind that Lithuania is now a full member of the EU, is a country in whose justice system the United Kingdom poses a high level of confidence under the Framework; and is a signatory of the European Convention of Human Rights.

[24] In Miklis Latham LJ stated:

> "It is important that reports which identify breaches of human rights and other reprehensible activities on the part of governments or public authorities are kept in context. The fact the human rights violations take place is not of itself evidence that a particular individual would be at risk of being subject to those human rights violations in the country concerned. That depends on the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of the characteristic which would have exposed him to human rights abuse."

In that case the court concluded that the material adduced by Dr Blitz could go no further than raising speculation as opposed to a real risk of his being harmed in prison and it went nowhere near establishing a substantial ground for believing that there would be a real risk of article 3 ill-treatment in the sense that the authorities themselves would either be responsible for it or be unable or unwilling to provide proper protection from it.

[25] In relation to the threatened breach of the appellant's article 6 rights having reviewed the evidence in the light of the need to apply the proper test, it does not provide justification for the conclusion that the appellant risks suffering a flagrant denial of a fair trial.

[26] In relation to the question of potential abuses during pre-trial detention, in the course of the hearing before the Recorder there was a question whether the appellant would be detained in a women's prison or in police detention. If the former, Dr Blitz accepted that the appellant would face a much lower risk of ill-treatment than if she was sent to a police detention centre. Dr Blitz considered that if she was in police detention the risk of ill-treatment would be considerably greater. However, if as appears likely in view of the answers provided by the Lithuanian authorities she will be detained in police custody for some or all of the pre-trial period the evidence falls short of showing a real risk of article 3 ill-treatment. In relation to the question of the prison conditions likewise the evidence falls short of establishing a real risk of article 3 mistreatment as a consequence of the prison conditions. There is no evidence to suggest that she would be a specific target for violence in prison. In R(Bagdanavicius) v Home Secretary [2005] 4 All ER 263 the House of Lords held that in an asylum case where a claimant claims that he would be subjected to ill-treatment contrary to article 3 if returned (in that case to Lithuania) he had to establish that he would be at a real risk of suffering serious harm and also that the receiving country did not provide for those within its territory a reasonable level of protection against such harm if the harm was brought about by the actions of non-state

agencies. The evidence does not give substantial grounds for believing that if returned to Lithuania on foot of an extradition order the appellant would be at a real risk of being subjected to article 3 ill-treatment.