Neutral Citation Number: [2022] EWHC 3095 (Admin)

Case No: CO/2799/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

ANTHONY RAE	**Appellant**
- and -	
UNITED STATES OF AMERICA	**Respondent**

- -
- -

Rebecca Hill (instructed by **Paytons Solicitors**) for the **Appellant**
David Perry KC and Richard Evans (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 21 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 The appellant, Anthony Rae, is sought by the USA pursuant to a request dated 14 May 2020 and certified on 17 June 2020. He is wanted for trial on two indictments dating from 2003, each containing three counts alleging sexual abuse of a child and on two further indictments dating from 2019, each containing two counts of failing to surrender in relation to the sexual assault charges. The indictments were preferred by grand juries in Grayson County, Texas. The request is for Anthony Stevens, by which name the appellant used to be known.

2 On 21 June 2021, after a hearing at Westminster Magistrates Court, District Judge Tempia ("the judge") decided to send the appellant's case to the Secretary of State. On 6 August 2021, the Secretary of State ordered the appellant's extradition.

3 Permission to appeal was refused on the papers by Jay J on 2 March 2022. After a hearing on 4 May 2022, however, I granted the appellant permission to appeal against the judge's decision. The sole ground of appeal is that the judge was wrong to conclude that extradition would be compatible with the appellant's rights under Article 3 of the European Convention on Human Rights ("ECHR"), given the prison conditions he may face if convicted in Texas.

Adjournment of the appeal hearing

4 This appeal was originally listed for hearing on 10 November 2022. In accordance with the usual practice where an appellant wishes to attend his hearing, HMP Wandsworth had been notified in advance that the appellant was to be produced in the video suite in time for the hearing to begin at 10.30am, so he could observe and listen to the proceedings remotely. A further reminder was sent on the morning of the hearing. No indication was given that there would be any difficulty until the hearing started, at 10.30am, and the appellant had not been produced. The court was informed that it would not be possible to produce him until 2pm because there were no free video suites. Since half a day was not sufficient for argument, it was necessary to adjourn the hearing. HMP Wandsworth's failures (i) to ensure that the appellant was produced on time and (ii) to make any attempt to inform the court that it would not possible to produce him meant that a day of court time (which could have been used to hear another case) was wasted and substantial additional costs were incurred by the parties.

Fresh evidence

5 Since permission to appeal was granted, the respondent has produced a letter dated 24 May 2022 from Jason Clark, Chief of Staff of the Texas Department of Criminal Justice ("TDCJ"), providing what is variously described as an "assurance" or "information". There is a further email dated 17 October 2022 providing further information. The respondent invites me to admit this fresh evidence under my inherent jurisdiction. The appellant does not object and indeed relies on the further information. I am satisfied that it is in the interests of justice to consider it, even though it was not before the judge. I therefore grant the application to adduce the letter and email.

The evidence before the judge

Ms Deitch's report

6 The appellant's main evidence on prison conditions in Texas took the form of an expert report from Michele Deitch, a Distinguished Senior Lecturer at the University of Texas in Austin and also an attorney. Ms Deitch had been a federal court-appointed monitor of prisons from 1984-1990 and continues to go into prisons every year. She served as the original reporter (draftsperson) for the American Bar Association's *Standards for the Treament of Prisoners* (2010), a set of "aspirational" standards intended to guide courts, policy makers and correctional leaders.

7 Ms Deitch submitted two reports, the second a revised version of the first. The contents were based on her own personal knowledge of the Texas prison system, gained through first hand observation of prison conditions, her research team's analysis of relevant data, her own research into correctional oversight, her continuous review of extensive media coverage, her reading of relevant court opinions, testimony at legislative hearings and letters and information received from incarcerated people and their families and from prison staff.

8 Ms Deitch noted that in Texas there is a distinction between "jails" and "prisons". Remand prisoners and those sentenced to terms of less than a year for misdemeanour offences were typically held in county jails. Mr Rae would be held in the Grayson County Jail if remanded in custody. His stay there would likely be relatively short as most trials take place within a year. If convicted, he would be turned over to the Texas Department of Criminal Justice ("TDCJ"), which runs the prison system, which houses those convicted of felony offences. There are about 100 of these prisons, ranging in capacity from 1,000 to 3,000. They are generally in rural areas. A convicted person could be housed in any of these.

9 Assuming that he is convicted of the aggravated sexual assault of a child (a first degree felony in Texas), he could face a sentence of up to 99 years' or life imprisonment. He would be required to serve a minimum of half his sentence before becoming eligible for parole, which Texas authorities are notoriously unwilling to grant to those convicted of serious sexual offences.

10 Ms Deitch's report deals with many aspects of the treatment of prisoners in the Texas prison system. These include the lack of independent external oversight mechanisms, COVID risks and the lack of effective precautions against those risks, poor quality food, extreme heat, physical conditions, safety issues, the use of solitary confinement, work requirements and lack of pay and visitation and family contact. She also addressed risks particular to the appellant, given his health issues and age.

11 Given the way the case was presented before the judge and before me, it is not necessary to set out the parts of her report dealing with issues other than extreme heat and personal space.

12 As to extreme heat, Ms Deitch said this:

> "57. Most Texas prisons are not air conditioned in the housing areas and in most areas where incarcerated people spend their time. According to an investigative news article, 4 out of 5 incarcerated people in Texas do not have access to air conditioning in their prison cells. In the hot summer months, outdoor temperatures in some parts of Texas can soar to 110 degrees F or more (43 degrees C), and can stay that high for weeks on end. Indoor temperatures are even higher. These extreme temperatures make the conditions inside the living areas unbearable, and for some incarcerated people, the heat is not just uncomfortable but deadly. There have been at least 20 deaths in Texas prisons attributed to heat stroke since 1998, and in 2019, there were 56 heat-related illness for incarcerated people and staff, according to TDCJ. Incarcerated people who are taking psychotropic medications and medications for high blood pressure, as well as those who are geriatric, are particularly vulnerable to heat stroke and death.
>
> 58. A five-year lawsuit challenging the lack of air conditioning in one prison facility, a geriatric unit, resulted in a federal court ruling in 2017 that the conditions amounted to cruel and unusual punishment. After vigorously fighting the court order, TDCJ ultimately agreed in 2018 to settle the lawsuit by air conditioning this particular facility. Nevertheless, the prison agency's efforts to comply with the agreement were so inadequate that the judge threatened to hold the agency officials in contempt in 2019. The judge called conditions in the facility 'grotesque' and said he wished he had the authority to order the entire prison system to be air conditioned, but that he lacked the power to do so.
>
> 59. Efforts by advocates to persuade the Texas Legislature to provide funding to air condition the housing areas in Texas prisons have been unsuccessful to date. Given the extraordinary budget shortfalls the state is facing at the current time due to the COVID crisis, it seems extremely unlikely that this funding situation will change in the current legislative session. Even if funding were to become available, the political dynamics in Texas mean that many lawmakers would not support any efforts to improve the living conditions of people in custody."

13 As to physical conditions, Ms Deitch said this:

> "60. With approximately 100 facilities in the Texas prison system, conditions will vary to some degree among the different prisons (also called "units"). But there are commonalities among most of the facilities, and the newer facilities (those built since Texas vastly expanded its prison system in 1993) all follow certain prototypes.

61. A Texas general population prison cell can be as small as 40 square feet (8' x 5') in the older prison facilities. The newer prisons have cells that are supposed to measure 80 square feet. The vast majority of cells hold two people, so the individual square footage per person in a cell is between 20 and 40 square feet (1.86 to 3.7 square meters) of encumbered space. As much as half the space in the cell is encumbered and not usable. The cells contain a metal bunkbed and a stainless steel open toilet attached to a washbasin. Drinking water comes from the washbasin. There is no privacy partition of any kind. With very few exceptions, there are no televisions in the cells. There are no windows in the cells of the older prison units (though there are windows in the hallways), and only the most minimal natural lighting in the newer cellblocks. Older cellblocks have bars (sometimes with metal mesh coverings over the bars), while newer cellblocks have solid metal doors. The cells are spartan and cramped, regardless of whether the facility is older or newer.

62. Approximately 30 to 40 percent of cells in Texas prison facilities appear to not meet international human rights standards, which have been interpreted by the European Court of Human Rights as requiring a minimum of 3 square meters per person of floor space. Moreover, the vast majority of cells in Texas prisons do not meet the requirement that each person must have an individual cell (see Mandela Rule 12). Each cellblock has a dayroom, which consists of several stainless steel tables and chairs bolted to the ground, and some benches facing a mounted television. People are generally provided the opportunity to move between their cells and the dayroom once per hour. Conditions in the dayroom can get very crowded and noisy. The dayrooms are also used as staging areas for people to wait before being taken to the 'chow hall,' to their work assignments, to medical appointments, to showers, or to programs.

64. To take showers, people are usually taken to a central area in the prison, where they wait in long lines in the hallway. The shower area itself consists of rows of showerheads, with no privacy partitions between showers. Hundreds of people may be forced to shower at the same time, in very crowded and dirty conditions. There is a place in each shower area for people to exchange their dirty clothes for clean ones. No one has individually designated clothing items; even underwear is communal.

65. Many of the prison facilities also have dormitory-style housing areas that can each house up to 100 or more individuals. These dormitory areas consist of rows of cubicles with short walls, each containing a single bed and a small desk. There is a row of open toilets and sinks in each dormitory, and many dormitories do not have their own showers. Also, there is a small

> open dayroom area in each dormitory, consisting of a few benches or tables and a television."

14 The evidence for the respondent included comprehensive information about Grayson County Jail, where the appellant would be held if remanded in custody. It is not necessary to summarise that information, because the appellant's contention that there is a real risk of a violation of Article 3 ECHR is based on conditions in the prisons under the responsibility of the TDCJ, in which he would serve any sentence imposed. As to those conditions, the respondent relied on a series of letters from Mr Clark on behalf of the TDCJ.

15 Again, given the focus of the appellant's arguments before me and below, I concentrate here on the passages relevant to extreme heat and personal space. On extreme heat, Mr Clark said this in his letter of 14 December 2020:

> "The TDCJ has robust precautions in place during extreme temperatures. The well-being of staff and inmates is a top priority for the agency and we remain committed to making sure that both are safe during the extreme temperatures. The agency takes precautions to help reduce heat related illnesses such as providing water and ice to staff and inmates in work and housing areas, restricting inmate activity during the hottest part of the day, and training staff to identify those with heat related illnesses and refer them to medical staff for treatment.
>
> Some correctional units, to include all medical and psychiatric facilities, are air conditioned (AC). However, on those units not having AC to mitigate the impact of excessive heat, the agency employs a number of protocols to ensure that the most heat sensitive inmates are identified, monitored and provided appropriate housing. Additional measures are taken to protect all inmates regardless of their heat sensitivity. Certainly, extra attention is paid to inmates with medical conditions, such as COVID-19.
>
> In closing, the TDCJ meets or exceeds American Correctional Association standards and is fully compliant with federal PREA mandates. Should Anthony Rae be convicted and sentence to a term of imprisonment, he would be incarcerated in a facility that complies with both US and Texas law."

16 Information about the sizes of cells was provided by Mr Clark in a letter of 19 January 2021:

> "The agency is accredited through American Correctional Association (ACA), which has specific standards for spacing. Those standards are listed below.
>
> 5-ACI-2C-01: Cell/rooms used for housing inmates shall provide at a minimum, 25 square feet [2.32 sq. m.] of unencumbered space per occupant. Unencumbered space is

> usable space that is not encumbered by furnishing or fixtures. At least one dimension of the unencumbered space is no less than seven feet. In determining unencumbered space in the cell or room, the total square footage is obtained, and the square footage of fixtures and equipment is subtracted. All fixtures and equipment must be in an operational position.
>
> 5-ACI-4B-06: All cells/rooms in Restrictive Housing provide a minimum of 80 square feet and shall provide 35 square feet of unencumbered space for the first occupant [3.25 sq. m.] and 25 square feet [2.32 sq. m.] of unencumbered space for each additional occupant.
>
> It is also worth noting that the agency's population is at 120,000. Our population has not been this low since 1995. At the beginning of January, the inmate population was approximately 140,000. This has allowed us to close facilities and have additional spacing during the pandemic."

17 Mr Clark provided further information in a letter of 17 February 2021, noting that the UK defines "unencumbered space" differently from the US and that the TDCJ has a mixture of dormitory and cellblock housing. He continued:

> "For housing areas allowing two individuals within the same shared space, approximately 87% of the inmate housing areas within the TDCJ have a minimum of three metres of unencumbered space utilising the UK definition. should there be a single inmate housed in the space, 100% of beds meet the requirement. Regardless of the inmates housing assignment, every inmate has an assigned bunk and an individual sleeping space. An inmate may move freely around his assigned bunk and sleeping space.
>
> In 2020, the TDCJ has closed three correctional facilities and idled four others. This is a result of declining inmate populations. Since 2011, a total of 15 facilities have been closed or idled. As of February 8, 2021, there were 118,861 inmates in the custody of the agency at secure correctional facilities. The agency's bed capacity is 138,861 and our operational capacity (96%) is 133,307. For context, the prison population in 2011 was 156,522. Predictions by the Legislative Budget Board in Texas do not show a return to pre-pandemic levels in the next three years."

The judgment below

18 At [137] *et seq.*, the judge set out Article 3 ECHR and the key cases interpreting it. At [142], she described the approach of the Grand Chamber of the Strasbourg Court in *Muršić v Croatia* (2017) 65 EHRR 1. The Court confirmed that in multi-occupancy cells, 3 sq. m. was the minimum floor space per detainee. Where it fell below that, there was a strong presumption of a violation of Article 3, which was normally capable of being rebutted only where (1) the reductions in the required minimum personal space are short,

occasional and minor, (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities and (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility and there are no other aggravating aspects of the conditions of his or her detention.

19 The judge noted that the appellant accepted that the required personal space would be provided on remand, so the focus was on the facilities that would be provided by the TDCJ if he should be convicted. The judge undertook a careful, analysis of the written and oral evidence of Ms Deitch. At [148], she considered the issue of personal space. At [149], she noted:

> "Although Ms Deitch continues to go into prisons, she has not been a monitor since 1990 and I found her evidence lacking specificity. She could not tell me exactly how many cells house two-people and the specific dimensions of the cells. She was not confident that the prison occupancy related to particular prisons but the whole prison estate which would impact on the number of prisoners in cells but could not be more specific than that".

20 By contrast the judge considered that the evidence adduced by the respondent, in the form of the letters from Mr. Clark, was more specific. The judge noted Mr Clark's evidence that there was currently under-occupancy of the prisoner estate.

21 At [150]-[151], the judge noted that Mr Clark had set out the specific standards for spacing in cells as required by the ACA, through which the TDCJ was accredited. The judge found it clear that Mr Clark was referring to the whole prison estate, and not merely to some specific prisons. On this basis, she held that the appellant had not provided clear and cogent evidence of a real risk of a breach of the appellant's Article 3 rights in respect of personal space if extradited.

22 At [152], the judge considered the question of extreme heat. She drew attention to Ms Deitch's evidence on this topic. However, at [153], she found that these concerns had been "comprehensively addressed" by Mr Clark in his letter dated 14 December 2020. Therefore, there was no clear and cogent evidence of a real risk of an Article 3 violation on account of extreme heat or temperature.

The fresh evidence

23 The material part of Mr Clark's letter of 24 May 2022 is as follows:

> "Should [the appellant] be convicted and sentenced to a term of imprisonment in the TDCJ on the pending charges before the Court, the TDCJ assures it will make a good faith effort to place [the appellant] in a conforming housing area (at least three square meters of personal space) during the term of his incarceration. However, the TDCJ cannot guarantee he will never be placed in a nonconforming housing area over the term of his incarceration due to operation or inmate needs.
>
> The TDCJ continues to see decreased inmate populations. As of May 12, 2022, there were 118,422 inmates in the custody of the

> agency at secure correctional facilities. The agency's bed capacity is 133,612 and our operational capacity (96%) is 128,268."

24 The email of 17 October 2022 shows that the US authorities were asked to provide "information identifying whether there was a less than 5% prospect of the appellant being detained in nonconforming housing taking into account based on: how many inmates are currently housed in cells where they receive less than 3 sq. m. of personal space; the current TCDJ prison population; the percentage of inmates in dormitory in cell block housing; the percentage of cell block housing designed for housing two inmates; and at present the percentage of housing areas allowing two individuals which are occupied by two inmates". The email continues:

> "The TDJ have indicated that the information <u>does not</u> demonstrate that there is a less than 5% chance of being detained in a cell with less than 3m2 of personal space." (Emphasis added.)

Submissions for the appellant

25 Ms Rebecca Hill for the appellant submitted that, on the respondent's own evidence, the appellant faced a real risk of Article 3 ill-treatment. She focussed on two aspects: personal space and extreme heat.

26 Mr Clark's letter of 17 February 2021 showed that 13% of cell accommodation did not meet the *Muršić* standard if there were two prisoners in a cell. Ms Deitch's evidence was that cells designed for two people were used to house two people. Taken together with the email of 17 October 2022, the respondent's own evidence showed that the proportion of prisoners in accommodation with less than 3 sq. m. of unencumbered space was somewhere between 5% and 13%. The Texas authorities were conspicuously silent about how many cells were occupied by only one person.

27 The judge had placed considerable emphasis on the occupancy figures, but there was no proper basis for deriving any comfort from that, because overall occupancy rates for the prison estate tell one nothing about occupancy rates in particular institutions. Mr Clark's evidence suggests that the authorities respond to under-occupancy by closing or mothballing institutions or wings, rather than by accommodating prisoners more generously in the institutions or wings that remain open.

28 Ms Hill relied on the recent judgments of the Divisional Court (Jay J and Stuart-Smith LJ) in *A v France*, in which that Court formulated a detailed request for information from the French authorities about personal space and other conditions in relation to particular prisons ([2021] EWHC 2543 (Admin)) and decided, after consideration of the response, that there was no real risk of a breach of Article 3 ([2022] EWHC 841 (Admin)). She pointed out that the latter conclusion was reached on the basis that the proportion of cells with less than 3 sq. m. of space was less than 5% (see at [11]) and of these almost all had 2.96 sq. m. of personal space (see at [67]). This was far removed from the present case, where the statistical risk was higher, possibly much higher, and the non-confirming cells in many cases had considerably less than 3 sq. m. of personal space and in some cases as little as 1.86 sq. m.

29 As to the letter of 24 May 2022, Ms Hill submitted that it would have been easy for the Texas authorities to give an assurance that the appellant would be housed in a "conforming" cell. But the letter gives no such assurance, just an assurance that "a good faith effort" would be made to achieve that outcome. As the letter candidly made clear, this meant that there was no guarantee that he would not be placed in such a cell "due to operation or inmate needs". This alone meant that there was a real risk of treatment contrary to Article 3.

30 The position was even clearer when the effect of extreme heat was taken into account. As to that, she referred to the decisions of the Strasbourg Court in *Muršić v Croatia* (2017) 65 EHRR 1, [139], *Štrukelj v Slovenia* (App. No. 6011/10), Judgment 24 February 2014, [10], *Mathew v Netherlands* (2006) 43 EHRR 23, [211], [214] and [217] and *Peers v Greece* (App. No. 28524/95, Judgment 19 April 2001), [64], [70], [72] and [75]. The temperatures found to give rise to a breach of Article 3 in some of those cases were well below those evidenced in this case. The evidence of Ms Deitch, taken with the conclusions of the US federal judge to which she referred, were such that it was not open to the judge to conclude that the measures relied upon by the Texas authorities adequately addressed the effects of extreme heat.

Submissions for the respondent

31 For the respondent, David Perry KC made six general submissions as to the proper approach to Article 3 ECHR.

32 First, ill-treatment must reach a certain level of severity in order to fall within the scope of Article 3 ECHR: *Ireland v UK* (1980) 2 EHRR 25, [162]. The level is relative and depends on all the circumstances of the case, including the age and characteristics of the prisoner: see *Dougoz v Greece* (2002) 23 EHRR 1480, at [44].

33 Second, the test to be applied when considering a violation of Article 3 in foreign cases is a high one: *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [24] ("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").

34 Third, while the prohibition on Article 3 ill-treatment remains absolute, the extradition context is important. In *Sanchez-Sanchez v United Kingdom* (Application No. 22854/20, Judgment 3 November 2022), the Grand Chamber of the Strasbourg Court had found that a prospect of treatment which would breach Article 3 in a contracting state would not necessarily prevent extradition to a state like the USA.

35 Fourth, it is not sufficient to demonstrate that Article 3 is generally violated in a requesting state; it is necessary to establish that the requested person will in particular be subject to such treatment: *Miklis v Lithuania* [2006] EWHC 1032 (Admin).

36 Fifth, lack of personal space does not necessarily amount to a violation of Article 3, even where there is less than 3 sq. m.: *Muršić*, [138].

37 Sixth, in Case C-404/15 PPU *Aranyosi* EU:C:2016:198 [2016] QB 921, it was established by the Court of Justice of the European Union that in European arrest warrant cases, where a prospective finding of violation of Article 3 is likely, there is an obligation on

the court to request further information rather than to discharge the accused: [91] and [95]. In *Larco v Ecuador* [2020] EWHC 1797 (Admin), the Divisional Court accepted at [43]-[44] that a similar approach applies in relation to a Part 2 case: see, e.g., *Dzgoev v Russia* [2017] EWHC 735 (Admin), and *Yilmaz and Yilmaz v Turkey* [2019] EWHC 272 (Admin). (I adopted the same approach in *Kaderli v Turkey* [2021] EWHC 1096 (Admin), [76].)

38 Mr Perry emphasised that assurances were to be presumed to be given in good faith. He relied on the Divisional Court's decision in *Snowden v Ghana* [2018] EWHC 198 (Admin), [24]-[25]. In that case, extradition was ordered even though the Ghanaian authorities could not promise that the requested person would be kept in a particular prison in all circumstances. The presumption of good faith was particularly strong in the case of assurances given by a state with a long-standing history of respect for democracy, human rights and the rule of law. More generally, Mr Perry submitted that the approach of the Divisional Court in *A v France* should not be followed. In that case, the very detailed list of questions which the court had formulated for the French authorities amounted to an inappropriate attempt to micromanage the conditions of detention.

39 As to personal space, Mr Perry submitted that the ACA standards comply with the requirement for a minimum of 3 sq. m. personal space, because the former do not include space occupied by furniture, whereas the latter does. The information as to the proportion of cells where the space falls below 3 sq. m. does not establish a 13% real risk that the appellant would be provided with inadequate personal space, given that the appellant might be housed in dormitory accommodation (where 3 sq. m. is provided), there is low prison occupancy and there is no basis for concluding that two inmates are being detained in cells where 3 sq. m. is not provided. Even if there were a 13% chance of being detained in a cell with less than 3 sq. m. of personal space, this would not establish a "real risk".

40 The email of 17 October 2022 does not affect the analysis. It was understandable that the TDCJ declined to commit themselves to the assessment that the risk of the appellant being housed in non-conforming accommodation was lower than 5%. This reflects the caution which in *Sanchez-Sanchez* was recognised as an inherent part of the predictive exercise. The assurance that the TDCJ would make a good faith effort to place the appellant in a conforming cell was given in good faith; its cautious terms reinforce that.

41 Generally, the judge was entitled to conclude that other material conditions, including extreme heat, did not create a real risk of a violation of Article 3 ECHR.

Discussion

<u>The proper approach to Article 3 in extradition cases: general</u>

42 In *Elashmawy*, at [49], Aikens LJ summarised in a set of propositions the correct approach in extradition cases where it is alleged that prison conditions in the requesting state give rise to a real risk of treatment that would breach Article 3 ECHR:

> "(1) The extradition of a requested person from a Contracting state to another state (whether or not a Contracting state) where that person will be held in detention (either awaiting trial or sentence or in order to serve a sentence lawfully imposed) can

> give rise to an Article 3 issue, which will engage the responsibility of the Contracting state from which the extradition of the requested person is sought. (2) If it is shown that there are substantial grounds for believing that the requested person would face a "real risk" of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country then Article 3 implies an obligation on the Contracting state not to extradite the requested person. (3) Article 3 imposes "absolute" rights, but in order to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. In general, a very strong case is required to make good a violation of Article 3. The test is a stringent one and it is not easy to satisfy. (4) Whether the minimum level is attained in a particular case depends on all the circumstances, such as the nature of the treatment, its duration, its physical and mental effects and, possibly, the age, sex and health of the person concerned. In that sense, the test of whether there has been a breach of Article 3 in a particular case is "relative". (5) The detention of a person in a prison as a punishment lawfully imposed inevitably involves a deprivation of liberty and brings with it certain disadvantages and a level of suffering that is unavoidable because that is inherent in detention. But lawful detention does not deprive a person of his Article 3 rights. Indeed, Article 3 imposes on the relevant authorities a positive obligation to ensure that all prisoners are held under conditions compatible with respect for human dignity, that they are not subjected to distress or testing of an intensity that exceeds the level of unavoidable suffering concomitant to detention. The health and welfare of prisoners must be adequately assured. (6) If it is alleged that the conditions of detention infringe Article 3, it is necessary to make findings about the actual conditions suffered and their cumulative effect during the relevant time and on the specific claims of the complainant. (7) Where prison overcrowding reaches a certain level, lack of space in a prison may constitute the central element to be taken into account when assessing the conformity of a given situation within Article 3. As a general rule, if the area for personal space is less than 3 metres^2, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3: (see the ECtHR judgment of *Ananyev v Russia* (Applications Nos 425/07 and 60800/080910) of January 2012, referred to at [9] of *Florea v Romania* [2014] EWHC 3538 (Admin) ("Florea"). (8) However, if overcrowding itself is not sufficient to engage Article 3, other aspects of the conditions of detention will be taken into account to see if there has been a breach. Factors may include: the availability for use of private lavatories, available ventilation, natural light and air, heating, and other basic health requirements."

43 At [50], Aikens LJ set out another set of principles derived from *Krolik v Poland* [2012] EWHC 2357 (Admin), [2013] 1 WLR 490, which on their face apply when considering

extradition to ECHR contracting states and EU Member States, but which Mr Perry submitted were also of relevance when considering extradition to other states with long-established traditions of democracy and adherence to the rule of law, such as the USA:

> "(1) Member states of the Council of Europe are presumed to be able and willing to fulfil their obligations under the ECHR, in the absence of clear, cogent and compelling evidence to the contrary. (2) That evidence would have to show that there was a real risk of the requested person being subjected to torture or inhuman or degrading treatment or punishment. (3) This presumption is of even greater importance in the case of member states of the European Union. In such cases there is a strong, albeit rebuttable, presumption that EU member states will abide by their Convention obligations. Each member state is entitled to have confidence that all other EU states will abide by their Convention obligations. (4) The evidence needed to rebut the presumption and to establish a breach of Article 3 by the EU member state (our emphasis) will have to be powerful."

44 Neither party takes issue with [49] of *Elashmawy* as a summary of the law applicable at the time of the judgment, though it predated *Muršić*. The applicability of [50] of *Elashmawy* to a request for extradition to a non-ECHR state was not, however, common ground. In my judgment, the presumption described there does not apply to such requests.

45 The reason why ECHR states are presumed, absent cogent evidence to the contrary, to comply with ECHR standards is because they have assumed the obligation in international law to do so and taken steps to implement that obligation in their domestic law – and their good faith in that regard is to be presumed. There are other liberal democratic states with at least as firm a commitment to the rule of law, which are neither contracting parties to the ECHR nor members of the EU, but which have their own binding constitutional or human rights standards. These standards may be higher or lower in particular respects than those of the ECHR. In their case, good faith supplies no reason for them to conform to the standards set by the ECHR, to which they have never committed themselves.

46 To take an obvious example, the Eighth Amendment to the US Constitution contains a prohibition against "cruel and unusual punishment". Many punishments which would contravene ECHR standards if carried out in a contracting state would also contravene the Eighth Amendment, but not all. The death penalty contravenes the minimum standards as elaborated in the case law of the Strasbourg Court and now codified in the 13th Protocol to the ECHR, but has generally been held by the US Supreme Court to be consistent with the Eighth Amendment (save during a short period in the 1970s). This is a reflection of the fact that, even among mature democratic polities committed to the rule of law, there are differences of view about what substantive standards should be imposed.

47 Minimum standards of the kind found in the case law of the Strasbourg Court on personal space are even less likely to attract universal agreement. The selection of 3 sq. m. as the presumptive minimum draws a bright line which is helpful in achieving consistency among contracting states. But there is no *a priori* reason to expect or presume that a state which has not committed itself to comply with the ECHR should or will meet the 3 sq.

m. standard. That raises the question whether it is appropriate to require non-contracting states to adhere to such a standard as a precondition for extradition.

Does the standard set by Article 3 differ between the domestic and extradition contexts?

48 In *Wellington v USA* [2008] UKHL 72, [2009] 1 AC 335, the House of Lords considered whether extradition to the USA was compatible with Article 3 ECHR where there was a real prospect of the imposition of a sentence of life imprisonment without parole. The leading opinion was given by Lord Hoffmann. Having analysed the Strasbourg jurisprudence, he held that the imposition by a contracting state of a whole life term did not *ipso facto* infringe Article 3 ECHR, provided that the sentence was "*de jure and de facto* reducible", and that in deciding that question, it was relevant whether there was a system providing for consideration of the possibility of release: see at [9]-[10], citing *Kafkaris v Cyrpus* (2009) 49 EHRR 35, at [98]-[99].

49 Lord Hoffmann then considered how this applied in the extradition context. He drew a distinction between torture and other forms of inhuman and degrading treatment. So far as the latter was concerned, he noted that at [89] of the Strasbourg Court's judgment in *Soering v United Kingdom* (1989) 1 EHRR 439, it had recognised the importance of extradition arrangements and of avoiding safe havens. This, he said at [24], meant that:

> "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."

This was what Lord Hoffmann called a "relativist approach", under which Article 3 was "applicable only in an attenuated form if the question arises in the context of extradition or other forms of removal to a foreign state": see at [27]-[28]. This, Lord Hoffmann thought, was consistent with the line of cases holding that a real risk of a breach of Article 6 ECHR would not be enough to stop extradition or removal to a foreign state; something more – a real risk of a "flagrant denial of justice" – was required, because "the Convention does not require the contracting parties to impose its standards on third states or territories": [29].

50 Lord Carswell and Lady Hale agreed with Lord Hoffmann on this point. Lord Brown and Lord Scott did not. At [86], Lord Brown said that there was:

> "no room in the Strasbourg jurisprudence for a concept such as the risk of a flagrant violation of article 3's absolute prohibition against inhuman or degrading treatment or punishment (akin to that of the risk of a 'flagrant denial of justice'). By the same token that no one can be expelled if he would then face the risk of torture, so too no one can be expelled if he would then face the risk of treatment or punishment which is properly to be characterised as inhuman or degrading."

This, however, was not to say that, just because a practice like "slopping out" was degrading in Scotland, it must also be so regarded in all countries (since the motivation for any particular treatment, and in particular whether it was intended to humiliate or debase, was important).

51 In *Ahmad v United Kingdom* (2013) 56 EHRR 1, the Strasbourg Court had to consider the proper approach to Article 3 in extradition cases in the context of a request by the USA for extradition of individuals to face charges for terrorism offences. One of the complaints was that conditions of detention at a particular prison – ADX Florence – fell below Article 3 minimum standards. A key issue was whether Article 3 was "relativist" in the sense used by Lord Hoffmann in *Wellington*. As to that, the Court held at [171] that no distinction could be drawn between torture and other forms of inhuman and degrading treatment. At [172]-[175], it held that the question whether the treatment reached the minimum level of severity needed for an Article 3 violation could only be assessed independently of the reasons for removal or extradition. The Court then said this:

> "177. However, in reaching this conclusion, the Court would underline that it agrees with Lord Brown's observation in *Wellington* that the absolute nature of art.3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State. As Lord Brown observed, this Court has repeatedly stated that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other states. This being so, treatment which might violate art.3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of art.3 in an expulsion or extradition case. For example, a Contracting State's negligence in providing appropriate medical care within its jurisdiction has, on occasion, led the Court to find a violation of art.3 but such violations have not been so readily established in the extra-territorial context.
>
> 178. Equally, in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of art.3:
>
> • the presence of premeditation;
>
> • that the measure may have been calculated to break the applicant's resistance or will;
>
> • an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority;
>
> • the absence of any specific justification for the measure imposed;
>
> • the arbitrary punitive nature of the measure;
>
> • the length of time for which the measure was imposed; and

> • the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.
>
> The Court would observe that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context.
>
> 179. Finally, the Court reiterates that, as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to art.3 of the Convention. It has only rarely reached such a conclusion since adopting the *Chahal* judgment. The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of art.3 if an applicant were to be removed to a state which had a long history of respect of democracy, human rights and the rule of law."

52 Language almost identical to this can also be found in the Strasbourg Court's judgment in *Harkins & Edwards v United Kingdom* (2012) 55 EHRR 19, [124]-[131]. The catalogue of case-specific factors set out by the Strasbourg Court in *Ahmad* at [178] was cited with approval by the Supreme Court in *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 487, [42].

53 *Ahmad* and *Harkins & Edwards* distinguish between two forms of "relativism" in the context of Article 3 ECHR. They disapprove the kind espoused by Lord Hoffmann, according to which the question whether treatment in another state is inhuman or degrading depends on the reasons for removal to that state. Such reasons might include case-specific ones (such as the seriousness of the offence and, thus, the weight to be given to the public interest in ensuring that the requested person is tried for it) or more general ones (such as the weight to be given to honouring extradition treaties and avoiding safe havens). The effect of *Ahmad* and *Harkins & Edwards* is that none of these can be relevant to the question whether extradition is compatible with Article 3 ECHR.

54 By contrast, *Ahmad* and *Harkins & Edwards* appear to endorse the different form of relativism referred to by Lord Brown (which might be better termed "contextualism") in which the question whether treatment reaches the minimum level of severity could be sensitive to context, including the conditions in the country concerned. Thus, a practice like "slopping out" might be considered debasing or humiliating in a country like Scotland, but not so in a poorer country, for example if such a practice were common outside the prison context. A failure to provide particular forms of medical treatment might also reach the minimum level of severity in a contracting state but not in a country where such treatment was not generally available.

55 The passage at the end of [178] of *Ahmad* also has some significance here. It emphasises that assessing whether treatment contravenes Article 3 is an intensely fact-sensitive exercise and, for that reason, underlines the difficulty of establishing a breach prospectively in an extradition or expulsion context.

56 The significance of [179] is that, while not suggesting that states with a long history of respect of democracy, human rights and the rule of law should be presumed to comply

with ECHR standards (as ECHR contracting states are), the Strasbourg Court has laid down a marker that it will be very rare to find a real risk of a treatment which would breach Article 3 ECHR in such states.

57 Are the minimum space requirements in *Muršić*, which apply in a domestic case, also applicable in the context of extradition to a non-ECHR state? In *Serra v Paraguay* [2017] EWHC 2300 (Admin), the Divisional Court (Burnett LJ and Sir Wyn Williams) described *Muršić* as "the latest incremental step" in driving up minimum standards in prison conditions in ECHR states: see at [13]. The Court then said this:

> "16. The argument before us proceeded on the basis that there was no difference of approach for the purposes of article 3 between prison condition cases of the sort considered by the Strasbourg Court in which serving prisoners have complained of the conditions in which they are being detained in an ECHR state, and extradition cases. In short, that if a requested person could establish that there were substantial grounds for believing that there was a real risk that he would be detained in a multi-occupancy cell with less than three square metres of personal space, as defined in *Muršić*, his extradition would be prohibited unless the narrow circumstances identified in paragraph 138 (quoted above) were in play. We were content to approach the case of that basis because this aspect of the appeal turns on the assurances given by the Paraguayan authorities. Nonetheless, we would not wish to be taken as having decided that the approach is necessarily the correct one.
>
> 17. We have observed that it is the reality that the courts of the many countries whose prison conditions have been the subject of pilot judgments in the Strasbourg Court have been able, whilst they seek to improve conditions and reduce prison populations, to detain prisoners on remand and sentence those convicted to imprisonment even though that entails a real risk, even likelihood, of being detained in non-compliant accommodation. We have not seen any decision of the Strasbourg Court (or the Luxembourg Court) dealing with the question of space in the context of extradition. It might be thought anomalous, to say the least, that a fugitive from justice in an ECHR state apprehended in his own country would be returned to prison (with his remedy for sub-standard accommodation being a complaint in the courts and then Strasbourg) but the same person who manages to cross the border into another ECHR state would be immune from return, absent assurances. The same anomaly would be apparent were the countries concerned both in the European Union and subject to the European Arrest Warrant procedure. Similarly, in connection with extradition of a person from an ECHR state to a non-ECHR country, it might be thought anomalous were extradition to be impossible in circumstances where the conditions of detention would satisfy, for example, the ICRC suggested standards but not match the high standards applicable

> to ECHR states set by the Strasbourg Court in *Muršić*. No doubt, the Strasbourg Court itself will in time have an opportunity to consider an application which raises these issues.
>
> 18. In the meantime, they may arise in another case in the domestic context."

58 The question identified in *Serra* does not appear to have been answered, though the Divisional Court has on several occasions assumed that the Strasbourg Court's minimum space requirements do apply without modification in the context of extradition to a non-ECHR state: see *Cato v Peru* [2016] EWHC 914 (Admin), [23(ii)] (Laws LJ and Nicol J); *Chawla v India* [2018] EWHC 1050 (Admin), [27] (Leggatt LJ and Dingemans J); *Pimenta v Brazil* [2017] EWHC 2588 (Admin), [21(7)] (Hamblen LJ and Dingemans J); *Larco v Ecuador*, [41] and [60] (Holroyde LJ and William Davis J); *Sanchez v USA* [2020] EWHC 508 (Admin), [10(vi)] and [50] (Fulford LJ and Elisabeth Laing J). The first two of these authorities applied the case law before *Muršić*, which also attached significance to the 3 sq. m. minimum standard, through a slightly weaker presumption.

59 But none of these authorities squarely addressed the question raised in *Serra*. Mr Perry invites me to grasp the nettle and hold that a real risk of being held in a cell with less than 3 sq. m. of personal space should not, in and of itself, be a bar to extradition, even if the state concerned is unable to satisfy the cumulative requirements in *Muršić* at [138]. The principal foundations for that submission are the very recent judgments of the Strasbourg Court in *Sanchez-Sanchez* and *McCallum v Italy* (App. No. 20863/21), both given by the same constitution of the Grand Chamber on 3 November 2022 and both concerning the compatibility of extradition to the USA with Article 3 in the context of the possible imposition of a whole life term of imprisonment.

60 In order to understand what the Grand Chamber decided in those cases, it is necessary to explain the background. In *Vinter v UK* (2016) 63 EHRR 1, the Grand Chamber held that Article 3 ECHR requires whole life sentences to be "reducible" by way of a review which allows the domestic authorities to consider whether any changes in the prisoner or progress towards rehabilitation are such that continued detention was no longer justified: [119]. What was required in the domestic context was "a dedicated mechanism guaranteeing a review no later than 25 years after the imposition of a life sentence, with further periodic reviews thereafter": [120]. In *Trabelsi v Belgium* (2015) 60 EHRR 21, the Strasbourg Court applied these criteria in a case about extradition to the US, holding that the US mechanisms of review relevant to that case did not satisfy them: [137].

61 In *Sanchez-Sanchez*, the Grand Chamber of the Strasbourg Court accepted the UK Government's invitation to depart from *Trabelsi*. It pointed out at [91] that *Vinter* was not an extradition case. At [92], it noted that, in the domestic context, the applicant will have been convicted and sentenced, so his position will be known. In the extradition context, by contrast, a complex risk assessment is called for and this justified caution in applying the *Vinter* principles. At [93], it distinguished between the "substantive" obligation to ensure that a life sentence does not over time become a penalty incompatible with Article 3 and "related procedural safeguards", which were not ends in themselves, but served to avoid a breach of the substantive obligation by contracting states. To apply the procedural safeguards in the extradition context would amount to "an over-extensive interpretation of the responsibility of a Contracting State" and would be unduly difficult

for domestic authorities deciding on extradition requests. At [94], the Court then gave this additional reason:

> "Moreover, the Court points out that in the domestic context, in the event of a finding of a violation of Article 3 of the Convention, the applicant would remain in detention pending the application or introduction of a Convention-compliant review mechanism which could – but would not necessarily – lead to his release earlier than initially intended. Thus, the legitimate penological purposes of incarceration would not be undermined. In contrast, in the extradition context the effect of finding a violation of Article 3 would be that a person against whom serious charges have been brought would never stand trial, unless he or she could be prosecuted in the requested State, or the requesting State could provide the assurances necessary to facilitate extradition. Allowing such a person to escape with impunity is an outcome which would be difficult to reconcile with society's general interest in ensuring that justice is done in criminal cases (see López Elorza, cited above, § 111). It would also be difficult to reconcile with the interest of Contracting States in complying with their international treaty obligations (see *Khasanov* and *Rakhmanov*, cited above, § 94), which aim to prevent the creation of safe havens for those charged with the most serious criminal offences."

62 Thus, the procedural safeguards set out in *Vinter* were not a prerequisite for compliance by the sending Contracting State with Article 3 ECHR: [96]. However, at [99], the Court said this:

> "The Court would emphasise that the prohibition of Article 3 ill-treatment remains absolute. In this regard, it does not consider that any distinction can be drawn between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extra-territorial context (compare *Harkins and Edwards*, cited above, §§ 124-131). Furthermore, nothing in the preceding paragraphs undermines the now well-established position that the extradition of a person by a Contracting State will raise problems under Article 3 of the Convention where there are serious grounds to believe that he would run a real risk of being subjected to treatment contrary to Article 3 in the requesting State (see *Soering*, cited above, § 88; see also *López Elorza*, cited above, § 102)."

63 In *McCallum*, the Grand Chamber of the Strasbourg Court dismissed as manifestly inadmissible a complaint brought by a woman sought by the US for trial in Michigan. The applicant had argued that, even for second-degree murder, there was a real risk of a sentence that was irreducible in the *Vinter* sense, because of the role of the Governor of Michigan (a politician) in the decision whether to grant parole. At [53], the Court rejected that argument because it "relates to a matter that cannot be regarded as pertaining to the *Vinter* safeguard… but rather is more in the nature of a procedural guarantee". The court

"refers to the distinction between a substantive obligation and the related procedural safeguards that derive from Article 3 when it comes to the issue of life sentences in the extradition context". The availability of procedural safeguards in the requesting state was not a prerequisite for compliance by the requested contracting state.

64 Thus, the position can be summarised as follows:

(a) The prohibition of Article 3 ill-treatment is absolute. There is no distinction to be drawn between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extra-territorial context. The extradition of a person by a contracting state will raise problems under Article 3 where there are serious grounds to believe that he would run a real risk of being subject to treatment contrary to Article 3 in the requesting state: see, most recently, *Sanchez-Sanchez*, at [99]. "Serious grounds" in this context means "strong grounds": *Ullah*, [24].

(b) Article 3 is not "relativist" in the sense suggested by Lord Hoffmann in *Wellington*. In an individual case, the question whether treatment in the requesting state will reach the Article 3 level of severity does not admit of a balancing exercise between the treatment on the one hand and the seriousness of the offence for which extradition is sought or the importance of the public interests in favour of extradition: *Harkins & Edwards*, [124]-[128]; *Ahmad*, [172]-[175]; *Sanchez-Sanchez*, [99].

(c) However, the question whether treatment reaches the minimum level of severity required to engage Article 3 is intensely fact-sensitive and contextual. In a domestic case, the court is looking backwards at a concrete factual situation. In an extra-territorial case, the court is looking forward and attempting to gauge whether there is a real risk of Article 3 ill-treatment. Given the highly contextual nature of the assessment required, this may make it more difficult to establish a real risk of a breach: *Harkins & Edwards*, [130]; *Ahmad*, [178].

(d) This is particularly so where the requesting state is one with a long history of respect of democracy, human rights and the rule of law, such as the USA: *Harkins & Edwards*, [131]; *Ahmad*, [179].

(e) The fact-sensitive nature of the Article 3 assessment has another corollary. It is possible to conceive of forms of treatment which would reach the minimum level of severity in a contracting state, but would not do so in a requesting state. This is consistent with (a) and (b) above because of the relevance of motivation in the contextual assessment required under Article 3. Lord Brown's example was "slopping out": this may be regarded as humiliating and debasing in a contracting state but a perfectly normal practice in some countries. The Strasbourg Court's example was the denial of particular kinds of medical treatment: this may reach the minimum level of severity in a contracting state, but not in other countries, where such treatment is generally unavailable: *Wellington*, [86] (Lord Brown); *Harkins & Edwards*, [129]; *Ahmad*, [177].

(f) A refinement of the approach to Article 3 is required in cases where the treatment alleged to breach that provision is the imposition of a whole life prison sentence.

In the domestic context, the Strasbourg Court's case law imposes substantive requirements (broadly, that the sentence must not be irreducible *de jure* or *de facto*) and procedural safeguards (requiring a review mechanism of a particular type). In the extradition context, the substantive requirements apply, but the procedural safeguards do not: *Sanchez-Sanchez,* [94]-[96]; *McCallum,* [53]. The Strasbourg Court arrived at this conclusion in part by reference to policy considerations including the need to avoid allowing persons sought for very serious offences to escape with impunity.

The application of these principles to the present case

65 Other than *Serra*, where the point was not decided and the Divisional Court expressly indicated that it might in due course have to be, there is no authority directly addressing the applicability of the *Muršić* minimum space requirements to extra-territorial cases. I therefore consider the issue from first principles.

66 *Sanchez-Sanchez* represents a genuine development in the Strasbourg Court's case law, but the development is not as fundamental as Mr Perry suggests. The judgment represents a reversal of one branch of the Article 3 case law concerning extra-territorial cases where there is a real prospect of a whole life prison sentence in the requesting state. Even in that narrow field, the Strasbourg Court took pains to distinguish between substantive requirements (which were applicable even in extra-territorial cases) and procedural requirements (which were not). This is consistent with the well-established line of authority on the application of the procedural guarantees of Articles 5 and 6 to extra-territorial cases. In that context, it is not enough to show a real risk that ECHR procedural standards will not be honoured; it is necessary to show a real risk of a "flagrant denial of justice": see e.g. *Othman v United Kingdom* (2012) 55 EHRR 1, [259]; *Elashmawy,* [38].

67 It is easy to see why it would cause real difficulties if ECHR contracting states were required to insist, as a precondition for extradition to a non-ECHR state, on the same procedural safeguards as contracting states are required by Articles 3, 5 or 6 to confer on those within their own jurisdictions. The procedural safeguards offered by a non-ECHR state are likely to depend on the constitutional and legal traditions of that state or (in a federal state) of its component parts. For example, the constitution may reserve certain tasks to a member of the executive, or the law may prescribe a particular procedure for applications for parole or clemency. It may well be constitutionally, legally or politically impossible for a non-ECHR state to comply with ECHR procedural safeguards either generally or, following a request for an assurance, in particular cases. The practical consequence of imposing such standards as a precondition for extradition would be to turn the *espace juridique* of the ECHR into a safe haven for fugitives from the justice system of such states.

68 The same point seems to have underlain Lord Brown's caution, endorsed in *Harkins & Edwards* and *Ahmad*, about assuming that treatment which would reach the Article 3 minimum level in a contracting state must necessarily do so in a non-ECHR state. The effect of transposing a substantive requirement for flushing toilets or particular types of medical intervention to the extra-territorial context might be to prevent extradition to states where such facilities or interventions were not available.

69 But it is important not to allow this point to be stretched further than justified by the policy concerns which animated it. Suppose, for example, that a state where flushing toilets are universally used by the general population decides for policy reasons to deny its prisoners access to them in circumstances which would give rise to a breach of Article 3 in a contracting state. In that case, it would be very difficult to say, when considering extradition to that state, that there was no real risk of a breach of Article 3 without infringing the principle in para. 64(a) above. This would be so whether the lack of flushing toilets was designed to be part of the punishment or merely reflected a desire not to spend public money on prisoners. Such a state might choose to provide the facilities required to avoid a breach of Article 3 minimum standards for prisoners it is seeking to extradite from ECHR contracting state, but not for others. If it decided not to do that, Article 3 would preclude extradition. If this made the *espace juridique* of the ECHR a safe haven for those sought by its justice system, that would be the result of its own policy choice.

70 In my judgment, the same approach applies to the two aspects of prison conditions relied upon by the appellant in this case: personal space and extreme temperature. In the case of personal space, *Muršić* creates a strong presumption that Article 3 will be breached in multi-occupancy accommodation if less than 3 sq. m. per prisoner is provided, unless the requirements in [138] of that decision are cumulatively met. There is no reason why it would be inappropriate to apply the same rule in a case concerning extradition to the US. No-one has suggested that the US in general, or Texas in particular, lacks the resources to provide accommodation meeting the *Muršić* minimum requirements: indeed, the evidence suggests that Texas does provide conforming accommodation for 87% of those housed in two-person cells. Even applying a contextual approach to the question whether treatment reaches the minimum level of severity necessary to engage Article 3, there is no convincing reason of principle why accommodation that falls below Article 3 standards because of inadequate personal space in a contracting state should be held not to breach such standards in a case concerning extradition to the US.

71 It may be objected that this approach involves refusing extradition to a non-ECHR state because of a real risk of treatment to which many prisoners are in fact subject in contracting states. In my judgment, this objection is not convincing. No doubt conditions which breach Article 3 standards have at times persisted, and may still do so, in some contracting states. If so, those states are required by Article 13 to provide domestic legal remedies to address them. If those remedies are not effective, complaint can be made to the Strasbourg Court, the implementation of whose judgments is, in turn, subject to supervision by the Council of Ministers. Cases where Article 3 is relied upon extra-territorially are different because the act of extradition, deportation or removal puts the individual beyond the protection of ECHR system. If the constitution or law of the requesting state imposes standards that are, in certain respects, lower than the minima insisted upon by Article 3, there will be nothing that can be done to enforce those minima. This is why, since *Soering*, the Strasbourg Court has held that a real risk of a breach of Article 3 by a non-ECHR state engages the responsibility of a contracting state considering whether to extradite or expel.

72 The question for the judge in this case, therefore, was whether there were serious grounds to believe that the appellant would run a real risk of being housed in accommodation with less than 3 sq. m. of personal space, other than in circumstances satisfying all three of the conditions in [138] of *Muršić*. In answering that question, the principles I have

summarised in para. 64(c) and (d) above applied. Given the contextual nature of the Article 3 assessment, it will be a rare case where the "real risk" test is met prospectively, but each case depends on its own facts.

73 As to the number of cells of particular dimensions, the judge preferred Mr Clark's evidence over Ms Deitch's. Having heard Ms Deitch cross-examined, she was entitled to do so. In relation to personal space, the "real risk" question therefore had to be answered on the basis of Mr Clark's evidence. At [149] of her judgment, she recorded his statement, in his letter of 17 February 2021, that 87% of the two person cells actually occupied by two persons and 100% of the two person cells occupied by one person conformed to the *Muršić* minimum space requirement. The judge then said this:

> "I take into account his evidence that currently there is underoccupancy of the prison estate which will affect the numbers of inmates in cells…"

She returned to the issue at [151], saying this:

> "Not only have I evidence from the Chief of Staff of the TDCJ about the amount of personal space but also that the occupancy of the prison estate is reduced which I consider significant, as submitted by Mr Evans, when looking at real risk…"

74 Thus, a key part of the judge's reasoning depended on an inference from the underoccupancy of the TDCJ system to the unlikelihood that the appellant would be placed in a non-conforming cell. This inference, however, was unsound. The significance of under-occupancy depends on the authorities' response to it. If the response is to close down, idle or mothball particular prisons, or parts of them, there would not necessarily be any impact on the likelihood of the appellant being placed in a non-conforming cell. In fact, there was specific evidence from Mr Clark that this was the TDCJ's response to under-occupancy. In his letter, he had said:

> "In 2020, the TDCJ has closed three correctional facilities and idled four others. This is a result of declining inmate populations. Since 2011, a total of 15 facilities have been closed or idled."

As Mr Perry conceded, it was unclear from the letter whether the total capacity figures set out included the closed/idled facilities or whether the closed/idled facilities were the older or newer ones. Moreover, Ms Deitch had given evidence that cells designed for two people were generally used to house two people. The judge did not reject this aspect of her evidence.

75 In my judgment, there was a material error in the judge's reasoning. On the evidence before her, she could not properly infer from the under-occupancy of the Texas prison system that there was no real risk of the appellant being placed in a non-conforming cell. On that evidence, the precise extent of the risk was unclear, but it might be as much as 13%.

76 At one point in the argument, Mr Perry submitted (in response to a hypothetical question from me) that, even if cells were allocated by drawing lots, a 13% risk of being placed in a non-conforming cell would not be a "real" risk. I have no hesitation in rejecting that

submission. Assessing whether the "real risk" test is met involves looking at both the risk of being subjected to the treatment and the extent to which the treatment would fall below the Article 3 minimum: see e.g. *A v France (No. 2),* where Divisional Court regarded as relevant both the low risk of the treatment eventuating (under 5% on an arithmetic basis) and the fact that if it did eventuate the breach of the *Muršić* minimum space requirement would be likely to be marginal. In this case, however, the non-conforming cells had substantially less space than the *Muršić* minimum. There was no evidence that they meet any other international standard, as the Divisional Court in *Serra* speculated might be the case in a non-ECHR country. Moreover, there was no information about the length of time for which a prisoner might be held in such a cell. In that context, a risk which may be as high as one in eight is, on any view, "real".

77 The only remaining question is whether the fresh evidence is such as to reduce the risk below the requisite level. In my judgment it is not. The email of 17 October 2022 supports the conclusion that, leaving the "assurance" of 24 May 2022 aside, the statistical risk of the appellant being placed in a non-conforming cell is somewhere between 5% and 13%, i.e. a "real" one.

78 Whether the letter of 24 May 2022 gives an "assurance" or is better characterised as providing "further information" does not matter. Either way, it is far removed from the Ghanaian assurance accepted as sufficient in *Snowden*. In that case, the assurance said that the Ghana Prison Service was prepared to accommodate the requested person in a particular named establishment and gave details of the cell accommodation in which the requested person "will be detained": see at [14]-[15]. The limited caveat was that the Ghana Prison Service could "only guarantee its commitment to the extent allowable under its governing laws". Here, by contrast, there is no commitment about where the appellant will be held, just an undertaking that the TDCJ will make a "good faith effort" to place him in a conforming housing area. But, as the letter makes clear, this is not a guarantee; and the reasons why he might be placed in non-conforming accommodation go well beyond the *force majeure*-type circumstances envisaged in *Snowden* and include "operation or inmate needs".

79 I should emphasise that there can be no legitimate question about the *bona fides* of Mr Clark, or about the credit to be accorded as a matter of principle to any assurance from the US authorities: see, in this regard, *Ahmad v USA* [2006] EWHC 2927 (Admin), [2007] HRLR 8, [74]-[75] (Laws LJ). The question here is not whether the assurance will be honoured: one can properly assume that it will. The question is what will happen if it is. As to that, Mr Clark's letter is both careful and frank. Even taking into account the genuine undertaking to make a "good faith effort", a real risk remains that, for operational or inmate-related reasons, he will have to be placed in non-conforming accommodation in circumstances that would breach Article 3 standards.

80 I turn next to the question of extreme heat. As to this, the judge did not reject Ms Deitch's evidence that temperatures can reach 110F (43C). She recorded this evidence at [152] of her judgment. Ms Deitch had in fact been more specific. She had said that temperatures can stay that high for weeks on end during the summer months and that indoor temperatures were "even higher". This was not disputed. The sole basis for concluding that this state of affairs did not give rise to a real risk of treatment contrary to Article 3 was that these concerns had been "comprehensively addressed" by Mr Clark in this letter of 14 December 2020: [153].

81 The difficulty with this is that, aside from air conditioning (which Mr Clark said was limited to "some units" and Ms Deitch said only 1 in 5 prisoners had), the precautions listed were all said to be directed at reducing heat-related illnesses. But the case law of the Strasbourg Court suggests that the effects of extreme temperatures on prisoners confined in small, multi-occupancy cells (even ones that meet the *Muršić* minimum space requirements) may contribute to a finding of breach of Article 3 even if they do not result in heat-related illnesses.

82 In *Štrukelj*, average late afternoon indoor temperatures of 28C (exceeding 30C on seven days) during the second half of July and August contributed to a finding that Article 3 had been breached. Ms Deitch's evidence suggests that the outdoor temperatures can be very considerably higher than this for long periods in the summer and that indoor temperatures are higher still.

83 In *Mathew*, iced water was provided to detainees in a cell whose situation exposed it to the heat of the sun. Despite this, the Strasbourg Court found it "unacceptable that anyone should be detained in conditions involving a lack of protection against… extreme temperatures": [214]. This contributed to the finding that Article 3 had been breached: [217]. Here, the provision of water and ice is one of the measures said to have been introduced to reduce the number of heat-related illnesses. Ms Deitch's evidence, recorded by the judge at [152] of her judgment, was that prisoners use this water to wet the floor and then lie on it in an attempt to cool down.

84 The opinion of US District Judge Ellison in *Cole v Collier* is also of some significance. It provides a detailed and vivid account of the effects of extreme temperatures on the lives of the plaintiff prisoners and an explanation of the ineffectiveness of measures other than air conditioning in addressing these effects. The case related to one particular prison housing older prisoners, but its significance cannot be confined to that prison, even though the remedy the court was empowered to grant was so confined.

85 In my judgment, the judge erred in confining her inquiry to the adequacy of measures taken to address heat-related illnesses. Given Ms Deitch's apparently uncontroverted evidence as to the actual temperatures that could be endured, the evidence as to the effects of these temperatures in *Cole v Collier* and the significance attributed to much lower temperatures (without any suggestion of heat-related illness) in the Strasbourg authorities on Article 3, she was wrong to find that the concerns about extreme temperatures were "comprehensively addressed" by Mr Clark's evidence.

86 The question whether treatment reaches the high level of severity necessary to engage Article 3 depends on a holistic assessment of the conditions of detention. As to personal space, unusually, *Muršić* creates a bright line rule giving rise to a strong presumption of breach. As to other conditions of detention, it will be rare that one element taken on its own will be sufficient to trigger the application of Article 3 in the domestic context and, *a fortiori*, in an extradition case: see para. 64(c) and (d) above.

87 However, in this case, the evidence about extreme temperatures was not presented on its own and out of context. The context was that these temperatures would have to be endured by persons most likely sharing two person cells, which – even if they met the *Muršić* minimum space requirements – would still be very small. The cells include a

toilet with no privacy partition and, in older blocks, no window. Taken together, on the information presently before the court, the conditions described give rise to a real risk of treatment that would breach Article 3 standards applying the jurisprudence of the Strasbourg Court.

88 It may be that the US authorities are able to provide evidence which discounts this risk, for example by showing, contrary to Ms Deitch's evidence, that indoor temperatures do not reach unacceptable levels for substantial periods, and/or that – despite the lack of air conditioning in most cells – the measures employed to mitigate the effects of those temperatures are such as to avoid treatment contrary to Article 3, as well as to reduce the incidence of heat-related illnesses. But such evidence has not yet been provided.

Conclusion and further questions

89 For these reasons, I have concluded that the judge was wrong to decide that the appellant had failed to establish serious grounds for believing that he would be subject to a real risk of treatment contrary to Article 3 ECHR if convicted and imprisoned in Texas. The fresh evidence does not displace that conclusion.

90 In the light of the Divisional Court's decision in *Larco* (and the other case law cited at para. 37 above), it is common ground that I should follow the approach in cases to which Framework Decision 2002/584/JHA applies. This means that the court must "postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk": see *Aranyosi*, at [104]. I shall accordingly make no final order on the appeal at this stage.

91 The request for further information was the subject of agreement between the parties following the circulation of this judgment in draft. Subject to a minor modification from me, it appears in the Annex to this judgment.

ANNEX – REQUEST FOR SUPPLEMENTAL INFORMATION

1. In relation to personal space, please provide the following information:

    i. Details of the personal space with which Anthony Stevens (also known as "Anthony Rae") will be provided if detained in TDCJ facilities ("personal space" being floor space including space occupied by furniture but excluding any in-cell sanitary facilities).
    ii. In the letter from Jason Clark dated 24 May 2022, what is meant by "*operation or inmate need*" when reference is made to circumstances in which the Appellant may be placed in a non-conforming housing area?

2. In relation to extreme heat, please provide the following information:

    i. Is it correct that indoor temperatures can reach 110°F (43°C) for weeks during the summer months with indoor temperatures being even higher? If not, please provide further information as to the indoor temperatures in TDCJ facilities during the summer.
    ii. What measures are in place to mitigate the effects of these temperatures, not limited to measures designed to reduce the incidence of heat-related illnesses?
    iii. Are the measures employed to mitigate the effects of these temperatures effective in avoiding treatment which is inhuman or degrading?

3. Please provide any additional information that may be relevant to the treatment which Anthony Stevens (also known as "Anthony Rae") may receive in the event of his return to the United States and which may be of assistance to the High Court.