Neutral Citation Number: [2020] EWHC 1797 (Admin)

Case No: CO/3053/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2020

Before:

LORD JUSTICE HOLROYDE

MR JUSTICE WILLIAM DAVIS

- -

Between:

GOVERNMENT OF ECUADOR	**Appellant**
- and -	
WAGNER ONA LARCO	**Respondent**

- -

Richard Evans (instructed by **Crown Prosecution Service, Extradition Unit**) for the **Appellant**
Ben Brandon (instructed by **Corker Binning Solicitors**) for the **Respondent**

Hearing dates: 29 April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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LORD JUSTICE HOLROYDE

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10am 10/07/2020. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the administrativecourtoffice.listoffice@hmcts.x.gsi.gov.uk;

Lord Justice Holroyde:

1. The respondent Wagner Ona Larco, a national of Ecuador, is accused in that country of the rape of a young woman to whom I shall refer as CP. The appellant, the Government of Ecuador, requested his extradition from the United Kingdom to stand trial on that charge. On 23 July 2019 the Senior District Judge ("the Judge") discharged the respondent. The appellant now appeals against her decision. The respondent cross-appeals.

The facts:

2. On 11 June 2016, shortly before his 18th birthday, the respondent was one of a group of young persons socialising at the home of a friend in Quito, Ecuador. CP was also in that group. She drank some vodka. The respondent invited her to accompany him to the kitchen to get a drink of water. She did so, but alleges that she then felt a prick in her arm, and found that she could not stand and had to sit on the floor. She began to slip in and out of consciousness. It is alleged that whilst unconscious, she was raped by the respondent. She was menstruating at the time. When her friend found her, CP's condition was such that she had to be carried out of the house to a car, in order to be taken home.

3. CP was taken by her mother to hospital, where she was seen by Dr Hilda Condo at 0410 on 12 June 2016. She had bruises and there was a recent laceration in her anal region due to penetration. There was a puncture mark on her left arm. She gave an account to Dr Condo of feeling a poke or prick in her left arm, loss of consciousness, and waking up to find that she was no longer wearing her trousers and underwear, that the respondent was inserting a tampon into her vagina and that she was bleeding. A swab taken from CP's vagina yielded a DNA profile which matched the DNA of the respondent. A urine sample was also taken: a subsequent toxicology report showed no trace of any psychoactive drug but did show the presence of alcohol at a level well above the United Kingdom limit for drivers.

4. Statements were taken from persons who had been present at the party.

5. CP was interviewed on 29 June 2016 by Dr Jacome, who is referred to by the appellant as "a psychologist of the investigator's office" and "an official of the State General Prosecutor's office". The form of the interview was a "Gessell Chamber" procedure, similar in some respects to the video-recorded "Achieving Best Evidence" procedure used in this country when the police interview a person who alleges a sexual offence. CP's lawyer, the respondent's lawyer and the prosecutor all observed the interview from another room, and the interview was audio-visually recorded. CP repeated her allegation that the respondent had drugged and raped her. The respondent contends that his lawyer was not permitted to ask any questions of CP.

6. On 27 July 2016 a psychologist Dr Poveda examined CP. CP again repeated her allegation against the respondent.

7. The first procedural hearing took place in Ecuador on 7 September 2016. On 23 September 2016 the respondent entered the UK on a student visa, having been granted permission to take up a university course.

8. On 2 December 2016 the appellant issued a warrant for the arrest of the respondent. That was followed on 5 June 2017 by a request for his extradition from the United Kingdom. The request was certified by the Secretary of State, pursuant to section 70 of the 2003 Act, on 14 June 2017.

9. The respondent was arrested on 10 May 2017, and made his first appearance before the magistrates' court on the following day. He has been on conditional bail throughout the proceedings.

The proceedings in the magistrates' court:

10. There were numerous procedural hearings before the Judge. Six requests for further information were made to the appellant. The substantive extradition hearing began on 8 April 2019.

11. At that hearing, the respondent argued first, that no prima facie case had been shown, in particular because the accounts given by CP to Dr Jacome and Dr Condo were inadmissible and there was therefore no admissible evidence that CP had not consented to sexual intercourse; secondly, that in contravention of the respondent's rights under article 6 he would not receive a fair trial in Ecuador, in particular because his lawyer had not been permitted to question CP during the Gessell Chamber procedure and there would be no opportunity to cross-examine her at trial; thirdly, that the prison conditions in which the respondent would be held in Ecuador would breach his article 3 rights; and fourthly, that his prosecution was an abuse of the process. The judge found in the respondent's favour only in respect of the third issue. The appellant appeals against her decision on that issue. The respondent cross-appeals against her decisions on the first and second issues.

12. The respondent is now an adult, but at the time of the alleged offence he was aged only 17. An important feature of the criminal justice system in Ecuador is that, by reason of his age at the time of the alleged offence, the respondent if extradited will be tried in the juvenile court. Both before trial and, if convicted, when serving any custodial sentence, he will be held in the juvenile custodial estate, not the adult estate. It follows that this judgment is not concerned with conditions of detention in Ecuador's adult prisons.

13. The evidence before the Judge was that the respondent, if extradited, would be detained at the Virgilio Guerrero Juvenile Detention Centre ("the Centre"). Evidence about the Centre, which is managed by Capuchin priests, was contained in a number of letters provided by the appellant in response to requests for further information.

14. The first, dated 16 August 2017, was from Father Beltran, then the Director of the Centre. He said that the Centre covers 8,000m², and provides comfortable living space. It held at that time 116 adolescents with 45 professionals, 12 policemen and 4 religious prison guards. Five meals a day were provided. The inmates were provided with vocational and technical training, and had psychological care throughout their rehabilitative process.

15. The second letter, dated 18 August 2017, was from the President of the National Court of Justice. He confirmed that the respondent would be held at the Centre. He stated that Article 66 of the Constitution of Ecuador guarantees the right to freedom

from cruel, inhuman or degrading treatment or punishment. For adolescents convicted of sexual offences, sexual education programmes are provided. There were various custodial regimes: closed, semi-open and open. The Centre is not a jail: there are no cells and no bars. Technical classes are provided. There is a medical and dentistry centre, an auditorium, audiovisual equipment, a play centre, a library and sports pitches. It should be noted that parts of this letter seem clearly to have been copied and pasted (without attribution) from Father Beltran's letter.

16. A series of documents referred to complaints about Father Beltran and about the Centre which had been made in mid-2017 to the office of the Ombudsman. An official sent to investigate was initially refused admission to the Centre by Father Beltran, but a visit was subsequently made. In November 2017 six lawyers of the Public Defence System made a formal complaint about Father Beltran. They referred to a number of human rights abuses, in particular relating to the discretionary nature of punishments, and to violations of the principle of acting in the best interests of a child. They did not speak of overcrowding. They wished the good work which the Centre had done for decades to continue, but urged an immediate change of Director. Father Beltran was subsequently moved to another position.

17. In a letter dated 21 March 2018 Father Guerrero (the new Director of the Centre) referred to a problem arising from the number of detainees. He referred to the quota of 95 detainees and said:

> "at the moment we are attending 128 adolescents (closed and semi open measures) and the maximum capacity of the Centre is 95 adolescents as there is not enough room to have more beds, some adolescents do sleep on mattresses which are placed on the floor for them to rest during the night, <u>So it is recommended by the Authorities of the Ministry of Justice, Judges and District Attorneys not to send more adolescents knowingly that the Centre is overcrowded</u>". [emphasis in the original]"

18. A further letter by Father Guerrero, dated 16 October 2018, addressed the complaints raised by the defence lawyers about conditions at the Centre. Father Guerrero said that he had reversed the matters complained of, but did not say exactly what he had done.

19. The respondent did not give evidence. The case put forward on his behalf was that CP consented to sexual intercourse, or that he believed her to be consenting. The evidence on which he relied in relation to article 3 included expert evidence from an Ecuadorean lawyer Dr Albán, who had provided reports dated 28 February 2018, 12 March 2019 and 26 April 2019 and gave oral evidence by video link.

20. Dr Albán explained that in a case of this nature there is a policy of non re-victimisation of the complainant. The complainant gives evidence in advance of the trial by way of the Gessell Chamber procedure, and (save exceptionally) is not thereafter called to give evidence at trial. There would therefore be no scope for the trial process to rectify unfairness caused by a failure to ask relevant questions of the complainant at the Gessell Chamber stage. His opinion was that the respondent's lawyer had not been permitted to question CP during the Gessell Chamber procedure.

21. In relation to conditions of detention, Dr Albán expressed the view that conditions at the Centre were better than in adult prisons, but not ideal. His only personal experience of representing a client who was detained at the Centre was in 2011. He referred to a 2014 Ombudsman's report which described conditions at the Centre as "good", and to reports in 2015 and 2016 which were critical of the treatment of adolescents there. In August 2018 the President had announced austerity measures in response to a budgetary crisis, and the situation in the prison system had thereafter deteriorated. He referred to press reports indicating that further detainees had been sent to the Centre despite Father Guerrero's letter of 21 March 2018.

22. At the conclusion of the hearing, the Judge required further information from the appellant in relation to the article 6 issue, but not in relation to the article 3 issue. Further written submissions were thereafter made. The judgment was given on 23 July 2019.

The Judge's decision:

23. The Judge noted that this was the first extradition request received from Ecuador. Many of the documents provided had been poorly translated, and some had not been translated at all.

24. The Judge reviewed the evidence in detail. On the first issue, she held that Dr Jacome was charged with the duty of investigating the offence through the Gessell Chamber procedure and that the transcript of that interview was "admissible as hearsay" pursuant to section 84(2) of the 2003 Act. She listed features of the evidence capable of supporting CP's account, including the fact that CP was lapsing into and out of unconsciousness when the respondent had sexual intercourse with her, and she noted that the respondent did not deny having had sexual intercourse with CP, his case being that it was consensual. She rejected submissions by the respondent to the effect that the transcript was inaccurate and unreliable, and that its admission in evidence would result in unfairness. She was satisfied that there was a case for the respondent to answer, and therefore rejected the respondent's first challenge to extradition.

25. As to the second issue, the Judge did not accept that CP was not questioned by the respondent's lawyer. A judge was present during the Gessell Chamber procedure, and the rules of that procedure make clear that there should be defence questioning, the questions being fed into the interview by the judge through the interviewer. The defence case of consent could have been put very shortly. Dr Albán's evidence on this issue was speculation. No evidence had been called from the lawyer who was said to have been denied permission to ask questions. She found that it was more likely than not that the respondent's lawyer asked brief questions of CP via the judge and Dr Jacome. The second ground of challenge therefore failed.

26. In relation to the article 3 issue, the Judge found that very little reliance could be placed on Father Beltran's evidence. At [193] she commented that Mr Brandon had not made overcrowding "the central plank" of his submissions, but she found that the Centre is overcrowded. She did so on the basis of information contained in Father Guerrero's letter of 21 March 2018: the capacity of the Centre was 95 inmates, but in March 2018 it held 128 (35% overcrowding), and in August 2017 it held 116 (23% overcrowding). The recommendation that no further adolescents should be sent to the Centre had been underlined, but there had been no update since that time and there

was nothing to indicate that there had been any subsequent easing of the problem. Dr Albán said he had evidence that adolescents were still being sent to the Centre. The Judge observed that the appellant had repeatedly been asked about the conditions in which the respondent would be held, but had not responded with the detail the court would expect. She continued:

> "It is not clear whether he will be held in the closed section of the prison and for how long. It is unclear as to how many prisoners of a similar age will be held with him in a particular pavilion. It is customary in extradition cases that countries provide the square metreage they guarantee for the extraditee."

27. The Judge at [196] said that other concerns about the prison conditions "are less significant", though Father Guerrero should have been asked to explain the changes he had made. She continued:

> "The evidence is that Virgilio Guerrero is overcrowded and that the Director did not want any more prisoners sent there yet that is the prison suggested for the RP. The authorities have been coy about the reasons for the departure of Father Baltran. It could have been coincidental but he left at a time when there had been a number of complaints about inhumane and degrading practices at the centre. It is possible that Dr Guerrero has reversed some of the practices complained about there but there is no detailed evidence to that effect."

28. The Judge indicated at [197] that she based her conclusions on the evidence of the number of prisoners held in the Centre in 2018 and 2017 compared to the official capacity of 95, combined with the lack of information from the appellant as to the type of cell or room in which the respondent would be held or the amount of space he would be allowed. She referred to the evidence of a recent reduction in the Centre's budget "at a time when the number of prisoners is growing", as a result of which the resources of the Centre "are increasingly under strain". She put into the balance the many positive things she had read about the Centre, including that it had been well-regarded in the past and provided good pastoral care.

29. The Judge said it was "a finely balanced decision", but concluded at [199] that the appellant had failed to provide the sort of detailed evidence which the court requires when considering prison conditions and overcrowding. She continued:

> "In the circumstances that Mr Ona Larco, if returned and convicted, will be spending a minimum of four years in this centre, the court needs an assurance as to the personal space he will be afforded. In the circumstances, I find substantial grounds to believe that RP if extradited would face a real risk of being subjected to in inhuman and degrading treatment due to overcrowded conditions contrary to article 3."

30. Finally, the judge rejected the fourth ground of challenge, based on abuse of process. It is unnecessary to say more about it.

31. In the light of her decision on the article 3 issue, the judge decided that the extradition of the respondent was not compatible with his Convention rights, and accordingly discharged him under section 87(2) of the 2003 Act.

32. Before considering the grounds on which each party challenges the Judge's decisions, it is convenient to summarise the relevant legal framework.

The legal framework:

33. Ecuador is a Category 2 territory to which Part 2 of the Extradition Act 2003 applies.

34. Section 84 of the 2003 Act, so far as material for present purposes, provides:

> "**84 Case where person has not been convicted**
>
> (1) If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were the summary trial of an information against him.
>
> (2) In deciding the question in subsection (1) the judge may treat a statement made by a person in a document as admissible evidence of a fact if—
>
> (a) the statement is made by the person to a police officer or another person charged with the duty of investigating offences or charging offenders, and
>
> (b) direct oral evidence by the person of the fact would be admissible.
>
> (3) In deciding whether to treat a statement made by a person in a document as admissible evidence of a fact, the judge must in particular have regard—
>
> (a) to the nature and source of the document;
>
> (b) to whether or not, having regard to the nature and source of the document and to any other circumstances that appear to the judge to be relevant, it is likely that the document is authentic;
>
> (c) to the extent to which the statement appears to supply evidence which would not be readily available if the statement were not treated as being admissible evidence of the fact;
>
> (d) to the relevance of the evidence that the statement appears to supply to any issue likely to have to be determined by the judge in deciding the question in subsection (1);
>
> (e) to any risk that the admission or exclusion of the statement will result in unfairness to the person whose extradition is

sought, having regard in particular to whether it is likely to be possible to controvert the statement if the person making it does not attend to give oral evidence in the proceedings.

(4) A summary in a document of a statement made by a person must be treated as a statement made by the person in the document for the purposes of subsection (2).

(5) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(6) If the judge decides that question in the affirmative he must proceed under section 87.

(7) If the judge is required to proceed under this section and the category 2 territory to which extradition is requested is designated for the purposes of this section by order made by the Secretary of State—

(a) the judge must not decide under subsection (1), and

(b) he must proceed under section 87. …"

35. Ecuador has not been designated by the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 for the purposes of section 84(7) of the 2003 Act. Subsection (7) therefore does not apply to this case, and it was necessary for the appellant to demonstrate a prima facie case.

36. Section 87 of the 2003 Act provides:

"87 **Human rights**

(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c.42).

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited"

37. Article 3 of the European Convention on Human Rights ("article 3") provides:

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

38. In *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at]24] Lord Bingham stated that when a requested person resists extradition on article 3 grounds -

> "… 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."

39. European and domestic case law has established that when prison overcrowding is relied on as a basis for asserting such a risk, a minimum provision of 3m² of floor surface per prisoner in a cell is usually required. In *Ananyev v. Russia* (Applications Nos 42525/07 & 60800/08) the European Court of Human Rights held at [145] that 4m² of floor surface per prisoner is the 'desirable standard' for multiple occupancy prison accommodation, and that if less than 3m² per prisoner is available, there is overcrowding which

> "must be considered to be so severe as to justify of itself a finding of a violation of Article 3".

40. The Court went on to state that three elements must be considered in relation to issues of overcrowding in a multiple occupancy cell: the need for each prisoner to have an individual sleeping space; the need for at least 3m² of floor space; and the need for the overall surface of the cell to be sufficient to enable prisoners to move freely between the items of furniture.

41. In *Mursic v Croatia* (2016) App 7334/13 the Grand Chamber said at [137]:

> "When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space.
>
> 138 The strong presumption of a violation of art.3 will normally be capable of being rebutted only if the following factors are cumulatively met:
>
> (1) the reductions in the required minimum personal space of 3m² 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."

42. In *Shumba v France* [2018] EWHC 1762 (Admin) at [33] the High Court summarised the relevant case law in this way:

> "In the context of prison overcrowding, there will be a strong presumption of a breach of Article 3 if any of the following criteria are absent:
>
> (1) a private sleeping place within a prison cell;
>
> (2) at least 3m2 of floorspace per prisoner; and
>
> (3) an overall surface area of the cell which is such as to allow the detainees to move freely between the furniture items.
>
> Where a detainee is allocated between 3 and 4m² of personal space, a violation of Article 3 will be found if there are other aspects of inappropriate physical conditions: in particular, regard will be had to access to outdoor exercise; natural light or air; availability of ventilation; adequacy of room temperature; access to private toilet facilities; and compliance with basic sanitary and hygiene requirements."

43. In *Criminal Proceedings Aranyosi and Caldarau* [2016] Q.B. 921 the Court of Justice of the European Union held, at [89 and 91], that a finding of a real risk of a breach of article 3 arising out of the general conditions of detention in a requesting state must be based on information that is objective, reliable, specific and properly updated, and cannot of itself lead to a refusal to execute a European arrest warrant. An urgent request must be made for further information from the requesting state, to be provided within a fixed time limit, as to the conditions in which the requested person would be held if extradited. When such a request has been made, the Court held at [104] that –

> "the executing judicial authority 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. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end."

44. Although that decision related to extradition to Part 1 territories, I accept Mr Evans' submission a similar approach has been adopted in proceedings to which Part 2 of the 2003 Act applies.

The grounds of the appeal and the cross-appeal:

45. The sole ground of the appeal is that the judge ought to have decided differently the question of whether the respondent's extradition would amount to a real risk of a violation of his rights under article 3. It is submitted that the evidence before the Judge did not provide substantial grounds for believing that there was a real risk of such a violation: in particular, the respondent had not demonstrated that he would not receive at least 3m² of personal space, that being the criterion established by the decisions in *Ananyev v. Russia* and *Mursic v Croatia*. In the alternative, it is submitted that the judge, rather than discharging the respondent, should have requested further information or an assurance as to the amount of personal space

which would be provided in accordance with the principles established in *Aranyosi and Caldarau*.

46. The grounds of the cross-appeal are that the judge ought to have decided two questions differently: whether the appellant had established a prima facie case pursuant to section 84 of the 2003 Act, in particular in relation to CP's lack of consent; and whether the respondent's extradition would result in a flagrant denial of justice contrary to article 6.

The submissions on the appeal:

47. For the appellant, Mr Evans submits that the Judge fell into error in her approach to the article 3 issue. The burden was on the respondent to show substantial grounds for believing that there is a real risk that his article 3 rights will be violated by the conditions in which he will be held upon his return: see *Elashmawy v Italy* [2015] EWHC 28 (Admin) at [49]. The judge based this part of her decision on overcrowding, not on any other aspect of the conditions at the Centre. Although the Judge was correct to say that in extradition cases the requesting state often does provide "the square metreage they guarantee", she was in error in overlooking the burden on a requested person to show a real risk of violation of article 3: it is only when that has been shown that the requesting state is required to give assurances as to the personal space which will in fact be provided. Here, the respondent's written submissions had not raised any issue of overcrowding, and the evidence before the Judge did not provide any substantial grounds for believing that there was a real risk of violation of the respondent's article 3 rights. Although there was some evidence of overcrowding, there was no evidence from Dr Albán or any other witness that the respondent would not receive at least $3m^2$ of personal floor space. The information contained in Father Beltran's letter was that those detained at the Centre were afforded comfortable living space. The Judge herself did not make any finding that the respondent would receive less than $3m^2$ of floor space if detained at the Centre. She focused on the fact that the number of detainees at the Centre exceeded the official capacity, but overcrowding in that sense is not in itself decisive of the issue of whether a detainee will have sufficient personal space: in this regard, Mr Evans points to *Shumba v France (no 2)* [2018] EWHC 3130 (Admin) and *Grant v France* [2018] EWHC 1630 (Admin) as examples of cases in which a requested person failed to show any real risk of a breach of his article 3 rights even though there was evidence that the population of the relevant prison was over capacity.

48. In the alternative, Mr Evans submits that once the Judge had found there to be a real risk of a violation of article 3, she should have requested further information and/or an assurance, in accordance with the approach established by *Aranyosi and Caldarau*. No such request was made, even though the Judge did request further information relating to the article 6 issue.

49. For the respondent, Mr Brandon submits that overcrowding was raised as an issue and was referred to in the respondent's closing submissions, albeit that it was not a central part of his case. He submits that the appellant had not been able to challenge Dr Albán's evidence about conditions and overcrowding at the Centre, because the appellant either had no evidence on the relevant points or had put forward obviously unreliable evidence. The respondent had faced substantial difficulties in trying to ascertain conditions at the Centre: in particular, a request for an expert instructed on

behalf of the respondent to inspect the Centre was not granted. Despite those difficulties, it had been shown that conditions there were very poor and were getting worse because of austerity and because of an increase in the number of juvenile detainees. The respondent had adduced evidence not only of overcrowding, with insufficient bed space and mattresses placed on the floor, but also of arbitrary detention in solitary confinement for prolonged periods; the arbitrary use of other punishments; compulsory haircuts; religious manipulation; cold water baths; interprisoner violence; prohibition on visits; and discrimination against black and indigenous inmates. The appellant, despite repeated opportunities, had not adequately dealt with requests for further information about conditions and overcrowding at the Centre, and, as the Judge found. had been "coy" about the reasons for the departure of Father Beltran, who had been criticised for abuse and mistreatment of detainees. The Judge correctly applied the test stated in *Shumba v France* and was entitled to reach the conclusion she did. The decision she had to make was a multifactorial one, not merely a question of personal floor space, and whilst overcrowding was the decisive issue for the Judge, her decision should be viewed in the context of all the other factors identified in her judgment that plainly had a bearing upon the issue.

50. Mr Brandon further submits that the Judge adopted a correct approach to further information and/or undertakings. He accepts that in a number of Part 2 cases the court has in fact sought an assurance rather than discharging the requested person, but submits that it does not follow that the Judge was wrong to discharge this respondent. She noted at [194] of her judgment that the appellant had repeatedly been asked about the conditions in which the respondent would be held and had not responded with the detail the court would expect. She was entitled to find that such information and assurances as had been provided over a period of about 2 years were inadequate and that the situation was unlikely to improve. The letter of 18 August 2017 appeared to have been written in ignorance of the fact that Father Beltran had been moved away from the Centre. The Judge was therefore entitled to conclude that no purpose would be served by a further adjournment of the hearing to allow yet further information to be requested. Mr Brandon relies on the fact that after the Judge's decision a yet further request was made for further information, but even now no clear and straightforward undertaking has been offered as to the provision of a minimum standard of personal space.

The submissions on the cross-appeal:

51. The respondent submits that the only evidence that CP had not consented to sexual activity was contained in the account she gave to the psychologist Dr Jacome during the Gessell Chamber procedure. Dr Jacome had not been shown to be "charged with the duty of investigating offences", and by virtue of section 84(2) of the 2003 Act the hearsay evidence of what CP said in the Gessell Chamber procedure was inadmissible, with the consequence that the respondent should have been discharged on the ground that no prima facie case had been shown. The judge was wrong to accept evidence that Dr Jacome was an official of the prosecutor's office as evidence that she had been charged with the duty of investigating offences. Mr Brandon relies in support of this submission on the evidence of Dr Albán that local law requires a formal resolution on the court file that the public prosecutor has appointed a psychologist to examine the alleged victim of a crime, and that no such resolution had been produced in this case. He submits that the burden was on the appellant to prove

to the criminal standard that Dr Jacome was a person charged with the duty of investigating offences, not merely a person employed by or attached to the prosecutor's office, and the appellant had been unable to do so. The Judge failed to address in her judgment the evidence of Dr Albán on this issue, and her ruling was consequently wrong. For similar reasons, the account given by CP to Dr Condo was also inadmissible.

52. In relation to the article 6 issue, Mr Brandon accepts that the burden was on the respondent to establish that there was a real risk that he would suffer a flagrant denial of justice at his trial, but argues that he had raised an objection of substance, and it was therefore for the appellant to counter the objection: see G*overnment of Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin). It was common ground before the Judge that the respondent would not be permitted to examine CP at his trial or on appeal. It follows that, if the respondent's lawyer had never had any opportunity to question CP, the respondent would be denied a fair trial. The judge found however that the respondent's lawyer had not only been permitted to ask questions of the CP on the occasion of the Gessell Chamber procedure, but had actually done so. It is submitted that that finding was contrary to the evidence and was wrong. The transcript of the interview of CP – which Mr Brandon acknowledges was incomplete, even though the appellant had specifically been asked to provide a full copy – does not include any record of any question being asked by the respondent's lawyer. This is in contrast to the transcripts of the interviews of two other witnesses, which do include questions asked by the respondent's lawyer. Dr Albán's evidence was that the lawyer either did not ask any questions, or, more probably, was not permitted to do so. It is submitted that, in the absence of a full transcript, the Judge should have accepted the evidence of Dr Albán on this point: although not present at the interview, his expert evidence contained a reasoned explanation of his opinion, and the Judge was wrong to have found that he was merely speculating about this matter.

53. The appellant submits that the Judge was correct to conclude that the appellant had established a prima facie case and to find that the Gessell Chamber transcript was admissible. Dr Jacome was part of the prosecutor's office, was interviewing CP about her allegation, and was plainly a person charged with the duty of investigating offences. The transcript of that interview was in itself sufficient to establish a prima facie case; but there was also admissible evidence of the accounts given by CP to Dr Condo and Dr Poveda.

54. As to the article 6 issues, Mr Evans submits that the Judge was correct to conclude that extradition would not result in a real risk of a flagrant violation of article 6: the respondent did not demonstrate that on the balance of probabilities he was denied the right to examine CP during the Gessell Chamber procedure. The transcript was incomplete, but local law did not require it to be complete and the fact that it did not include any questions from CP's lawyer did not indicate that none were permitted. Dr Albán had initially speculated that the lawyer had not even been present; when that had been demonstrated to be incorrect, he then speculated that the lawyer had not been permitted to question CP.

55. I am grateful to both counsel for their submissions. I have considered all the many points made, though I do not find it necessary to mention all of them.

Discussion: the appeal:

56. The appellant brings this appeal pursuant to section 105 of the 2003 Act. The effect of section 106 is that this court can only allow the appeal if two conditions are satisfied: first, that the Judge ought to have answered differently the question whether there was a real risk of a violation of the respondent's article 3 rights if extradited; and secondly, that if she had decided that question in the way she ought to have done, she would not have been required to order the respondent's discharge.

57. The approach to be taken in considering whether those conditions are satisfied was considered by the High Court in *India v Chawla* [2018] EWHC 1050 (Admin). At [35] the court said:

> "It is established that when considering what approach to take to a challenge to a District Judge's findings about real risks of infringement of human rights the Court must have "a very high respect for the findings of fact", "we must also have respect for the DJ's evaluation of the expert evidence", and "the decision of the DJ can only be successfully challenged if it is demonstrated that it is 'wrong'", see *United States of America v Giese* at paragraph 15 and *Dzgoev v Russian Federation* [2017] EWHC 735 (Admin) at paragraphs 23 and 24."

58. The burden was on the respondent to show substantial grounds for believing that there was a real risk of a contravention of his article 3 rights if extradited. It is in my view clear, from the passages in the judgment to which I have referred at [27-29] above, that the basis on which the Judge found that he had done so was that there was overcrowding at the Centre where he would be held. Specifically, as she stated at [197], she based her conclusions on the evidence as to the number of detainees in 2018 and 2017, compared to the official capacity, combined with a lack of information from the appellant as to the type of cell or room in which the respondent would be held or the amount of space he would be allowed. She said at [195] that other concerns about the conditions at the Centre were less significant, and she did not specifically refer to any other aspect of the conditions of detention at the Centre when stating her conclusions on the article 3 issue at [197-199].

59. In my view, and with great respect to the Judge, she fell into error in the approach she took to this issue and reached conclusions which were not open to her on the evidence. The fact that the population of a custodial institution is over the official capacity is of course an important consideration, but it is not in itself sufficient to show that insufficient personal space is provided for an individual detainee and is not in itself determinative of the existence of a real risk that the detainee will be subjected to inhuman or degrading treatment. But, as is clear from the Judge's judgment, there was a marked absence of any evidence on which the respondent could rely beyond the population figures stated in Father Guerrero's letter.

60. The evidence before the Judge showed that statutory provisions in Ecuador prohibit inhuman or degrading treatment of prisoners. It could certainly be said to show grounds for believing that there had been abusive treatment of some detainees at the Centre when Father Beltran was the Director; but he had been moved elsewhere by March 2018, and there was an absence of any evidence of similar failings during the period since Father Guerrero assumed the post of Director. There was no evidence at all that the personal space available to the respondent would be less than $3m^2$. Father

Guerrero's letter of 21 March 2018 provided evidence that some detainees slept on mattresses on the floor: that is obviously an unsatisfactory state of affairs (though a mattress may be an "individual sleeping space" as required by *Ananyev v. Russia*), but it cannot be equated with evidence of a lack of sufficient personal space. Dr Albán's evidence was of little or no assistance on this point, because he had no relevant or recent knowledge of the conditions at the Centre, and no witness was called who had such knowledge. In addition, it is important to remember that the Centre is not a prison, and (apart from a small number of cells sometimes used for solitary confinement) the detainees sleep in rooms, not cells. There is in my view a material difference, when considering questions of personal space, between the provision of space in a shared cell which an inmate cannot leave and the provision of space in a room which is not locked and which the inmate can leave.

61. I bear in mind of course the submissions that the respondent's legal representatives were not able to commission an expert report and that the appellant has consistently failed to provide any precise information about the personal space which would be available to the respondent. I have some sympathy with those submissions, but they do not assist the respondent to discharge the burden which initially was upon him. An obligation to provide sufficient information and/or assurances would arise if the respondent was able to show a real risk that he would be subjected to inhuman or degrading treatment because he would have insufficient personal space. But he was not able to do so (which is perhaps why lack of personal space was not a central part of his case), and the Judge in my view was not entitled to find such a risk on the basis of figures showing a population over capacity coupled with an absence of information about the type of room in which the respondent would likely be detained.

62. The Judge was therefore in error in approaching this issue on the basis that the appellant had failed to provide details of a kind commonly provided in extradition cases. The evidence was not sufficient to shift the burden on to the appellant to provide such details.

63. I would therefore quash the Judge's decision on the article 3 issue. It is accordingly unnecessary for me to decide the appellant's alternative submission. I say only that I see considerable force in the proposition that in a Part 2 case the court should take the same approach as in a Part 1 case, and should not discharge a requested person without first seeking a specific assurance.

Discussion: the cross-appeal:

64. I do not think that the account which CP gave to Dr Jacome fits comfortably within the category of "a statement made by a person in a document". However, it is unnecessary to debate that point: assuming, without deciding, that it was necessary for the appellant to satisfy the criteria in section 84(2), the judge was in my view correct to find that the appellant had done so. When CP was interviewed by Dr Jacome, she was being questioned about the alleged rape. It is entirely understandable that the procedure which was adopted involved the asking of questions by a psychologist rather than by a judge or lawyer. But Dr Jacome was not asking questions for the purpose of making a psychological evaluation or for a therapeutic purpose. It is clear, in my view, that the Judge was entitled to find that Dr Jacome had been charged with the duty of investigating the offence. Indeed, I find it hard to see what other conclusion the Judge could have reached: the purpose of the questions was to

investigate what happened; that was why the judge and legal representatives were observing from an adjoining room and why there was scope for questions mediated by the judge to be passed to Dr Jacome for her to ask. The argument based on a failure to comply with section 84 therefore cannot succeed.

65. I would add that in any event, as the Judge rightly found, there was other evidence – including from some of those present at the party – which was capable of establishing a prima facie case even without the account given by CP during the Gessell Chamber procedure. The respondent admitted sexual intercourse but asserted that it was consensual. However, the Judge rightly noted that witnesses who were present agreed that CP "was so drunk that she was in and out of consciousness within minutes of sexual relations having taken place". There was therefore, at the least, a case to answer on the basis that CP could be shown to have been incapable of consenting to sexual activity.

66. As to the article 6 issue, the Judge was plainly entitled to find that the respondent's lawyer was able to, and probably did, ask questions during the Gessell Chamber procedure. As she rightly found, the procedure enables the defence lawyer to ask questions, mediated by the judge, and no evidence was put forward to suggest any reason why the judge would not have permitted that to be done in this case. The lawyer concerned, who was the obvious witness to speak to any denial of permission, did not provide any evidence. Dr Albán had initially suggested that the lawyer was not even present, a suggestion which had to be abandoned when the evidence proved that he was present and had indeed signed the record of the procedure. The Judge was entitled to conclude that Dr Albán's later assertion that the lawyer was not permitted to ask questions was mere speculation. The argument based on a denial of a fair trial therefore cannot succeed.

Conclusion:

67. For those reasons, I would allow the appeal, quash the order discharging the representative and remit the case to the Judge with a direction that she proceed as she would have been required to do if she had decided the article 3 issue differently at the extradition hearing. I would dismiss the cross-appeal.

Mr Justice William Davis:

68. I agree.