Neutral Citation Number: [2017] EWHC 2588 (Admin)

Case No: CO/5592/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/10/2017

Before :

LORD JUSTICE HAMBLEN
MR JUSTICE DINGEMANS

- -

Between :

Alisson Soares Pimenta	**Appellant**
- and -	
Government Of The Republic Of Brazil	**Respondent**

- -
- -

Malcolm Hawkes (instructed by **Lansbury Worthington**) for the **Appellant**
Daniel Sternberg (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 10 October 2017

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. This is the judgment of the court.

2. The Appellant (Mr Pimenta) appeals against the decision of Deputy Senior District Judge Emma Arbuthnot (now the Senior District Judge) to send his case to the Secretary of State to consider his extradition for the reasons set out in her judgment dated 5 September 2016. On 20 October 2016 the Secretary of State ordered Mr Pimenta's extradition to Brazil.

3. Mr Pimenta challenges the judge's decision on the basis that, contrary to her findings, extradition is incompatible with his rights under Article 3 and/or Article 6 of the European Convention on Human Rights ("ECHR").

Factual background

4. The Appellant is the subject of an accusation extradition request from the Respondent, the Government of Brazil, alleging the commission of two offences of murder.

5. The alleged background facts are set out in detail in the extradition request and documents annexed to it. In summary, on 17 August 2013 at about 3:30am Mr Pimenta is alleged to have killed Claudenor Jose de Carvalho and Carmelo Cavalcante Coelho. On the day in question the victims were at Carmelo's residence for a family celebration. Mr Pimenta arrived at the entrance of that property carrying a firearm at his waist. Carmelo invited him in, Mr Pimenta being his neighbour. He entered the property and started to talk to relatives of Carmelo in the back yard of the house. Claudenor fell asleep in a chair. Words were exchanged which angered Mr Pimenta and he drew his gun and fired three shots at Claudenor. Carmelo said to Mr Pimenta 'That one is my brother.' Mr Pimenta replied 'If I did not miss him, I will not miss you' and shot Carmelo twice in the leg. Carmelo fell to the ground. Mr Pimenta then fired his final shot into Carmelo's head. Carmelo's relatives rushed into the house. Mr Pimenta pointed the gun and tried to take another shot but he had no more ammunition and left. The victims died at the scene from bullet wounds.

6. On 6 February 2013 an Interpol Red Notice was issued and on 25 August 2014 an extradition request was submitted by the Brazilian government.

7. On 17 August 2015 Mr Pimenta was arrested and appeared before the Westminster Magistrates Court.

8. If extradited, the Appellant would be held in pre-trial detention and, if convicted, sentenced to imprisonment for up to 30 years.

The grounds of appeal

9. The grounds of appeal are based on Articles 3 and 6 ECHR, pursuant to s.87 of the Extradition Act 2003.

10. The court is concerned about Mr Pimenta's rights under the ECHR because the responsibilities of the United Kingdom under the ECHR are engaged as the returning state. It is not compatible with the underlying values of the ECHR for a contracting party knowingly to surrender a person to another state where there are substantial grounds for believing that his treatment will infringe relevant rights, however serious the crime alleged to have been committed.

11. In relation to Article 3, Mr Pimenta submits in summary that extradition to Brazil would engender a real risk of detention in prison conditions so materially poor, overcrowded, violent, and detrimental to his welfare as to constitute a breach of Article 3.

12. In relation to Article 6, Mr Pimenta submits in summary that there is a real risk that the his Article 6 right to a fair trial will be breached by reason of lengthy pre-trial delays which are commonplace in the Brazilian criminal justice system, and the conduct of the trial by video-link.

The evidence

13. Before the judge Mr Pimenta relied on an expert report relating to prison conditions in Brazil from Dr Fiona Macaulay.

14. Dr Macaulay is Senior Lecturer in the Department of Peace Studies at the University of Bradford. She has been involved in researching prison conditions since 1997 when she became Brazil research officer in the International Secretariat of Amnesty International. She has visited over 60 penal institutions in Brazil.

15. By the agreement of the parties, there is now a further expert report before the court from Professor Juan Mendez. Professor Mendez is Professor of Human Rights Law at the American University Washington College of Law. He was the UN Special Rapporteur on Torture from 2010-2016. He produced a report dated 25 April 2017 which related to a visit made to Brazilian prisons in August 2015, which included a visit to the prison where it is said Mr Pimenta will be held, the Agreste prison in Arapiraca, Alagoas State.

16. Subsequent to that report Professor Mendez paid a further visit to Agreste in June 2017 and has produced a supplementary report. It is agreed that this report and the Government of Brazil's response to it are to be admitted. He has also provided some further comments in a document dated 23 September 2017, the admissibility of which is challenged. These comments do not involve any significant new evidence and we rule that the document may be admitted.

17. There were two sets of documents from the Brazilian authorities before the judge. The first set was provided on 27 January 2016 under cover of an email from Frederico Bauer, Secretary of the Embassy of Brazil in London. Its attachments included the following documents: a Letter Officio of 22 January 2016 from the Penitentiary department of the Ministry of Justice to Vladimir Barros regarding Mr. Pimenta; a spreadsheet showing the population and breakdown of prisoners at Agreste prison in December 2014, and an inspection report on Agreste carried out on 22 May 2014 by the National Council of Criminal and Penitentiary Policies, Prison System Ombudsman Agency, Judiciary and Prosecution Service. The second set was received on 28 June 2016. It included an overview document from Carlos Bruno Ferreira Da Silva, Federal Prosecutor, Acting Head of the International Cooperation Unit of the office of the Prosecutor-General of Brazil dated 23 June 2016, together with supporting documents.

18. For the appeal, the Brazilian authorities have provided four additional sets of further information in accordance with the court's directions. The first set of documents is dated 26 January 2017. It is provided by a Federal Prosecutor in the International Co-operation Unit and relies on information provided by the Judge of the Court of Petrolina's Jury. The second set is dated 15 February 2017 and consists of information provided by a Federal Prosecutor in the International Co-operation Unit

and Cicero Silva, a trial judge of the Judicial Branch of the state of Pernambuco. The third document is provided by Marcos Sergio De Freitas Santos, Secretary of Reformation and Social inclusion of the State of Alagoas, dated 18 May 2017 and it responds to the report of Professor Mendez. The fourth document was provided on 13 September 2017 by Marcos Sergio De Freitas Santos, responding to various questions raised in the light of Professor Mendez's supplementary report.

19. For the purpose of this judgment it is not necessary to set out the evidence in detail. When addressing the appeal relating to Article 3 and Article 6 we shall refer to such evidence as is mainly relied upon by each party in relation thereto.

Article 3

20. The relevant legal principles are helpfully summarised in the Divisional Court decision in *Elashmawy v Italy* [2015] EWHC 28 (Admin).

21. In that case Aikens LJ set out at [49] a number of general propositions which he described as being "very well established by ECtHR case law and accepted by the courts of England and Wales in relation to Article 3 and its application to prison conditions in the context of extradition". These were:

(1) "The extradition of a requested person … can give rise to an Article 3 issue, which will engage the responsibility of the state from which the extradition 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 $3m^2$, the overcrowding must be considered to be so severe as to justify of itself a finding of a violation of Article 3.

(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."

22. In the present case there is a good deal of evidence about serious overcrowding and related problems in Brazilian prisons generally. The position in the majority of Brazilian prisons is described by Dr Macaulay as follows: "the majority of Brazil's prisons continue to suffer from long-run, structural problems that have been repeatedly documented over the last 20 years: overcrowding, poor legal assistance, poor medical care, tolerance of gangs and prisoner-on-prisoner violence; use of police/guard violence to control prisoners".

23. Professor Mendez's evidence is to similar effect. He summarised the findings made in his report to the UN report on his visit to Brazilian prisons in 2015 as follows:

> "In my report on my mission to Brazil, I identified some troubling observations including issues with conditions of detention, primarily severe overcrowding in prisons and its effects on the rights and security of persons incarcerated. My conclusion was that conditions of detention in Brazil frequently "amount to cruel, inhuman or degrading treatment. Severe overcrowding leads to chaotic conditions inside the facilities, and greatly impacts the living conditions of inmates and their access to food, water, legal defence, health care, psychosocial support, and work and educational opportunities, as well as sun, fresh air and recreation"".

24. Underlying many of these problems has been the huge growth in the Brazilian prison population since 2000. Dr Macaulay reports that the prison population grew from 232,755 in 2000 to 607,731 by 2014. She stated in her report that there was a shortfall of 231,062 beds for prisoners. She noted that this level of overcrowding makes life extremely tense and volatile behind bars and that in the past life in prison was a free for all with prisoners killing inmates for perceived infractions of group norms. She further noted that this "chaos" had more recently been replaced by a different kind of order imposed by prisoner gangs which have come to monopolise control within many of the country's prisons.

25. In the light of various assurances which the Brazilian authorities have given in relation to the extradition of Mr Pimenta, much of the general evidence relating to Brazilian prisons is not directly relevant to the issues on the appeal, but it is material background evidence.

26. In considering these assurances we have been referred and have regard to the well known guidance provided in the case of *Othman v United Kingdom* [2012] 55 EHRR 1 at paragraph 189:

"More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:

(1) whether the terms of the assurances have been disclosed to the Court;

(2) whether the assurances are specific or are general and vague;

(3) who has given the assurances and whether that person can bind that receiving state;

(4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;

(5) whether the assurances concerns treatment which is legal or illegal in the receiving state;

(6) whether they have been given by a Contracting State;

(7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;

(8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

(9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;

(10) whether the applicant has previously been ill-treated in the receiving state; and

(11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State."

27. In relation to where Mr Pimenta will be held, the Brazilian authorities have given clear, specific and authoritative assurances that it will be at Agreste prison. This has been confirmed in a number of the documents provided, including a letter dated 21 March 2016 from the Head of Department of the State Department of Rehabilitation and Social Inclusion for the State of Alagoas, a judicial letter dated 17 March 2016 that he "must be assigned there" and a letter dated 23 June 2016 from the Federal Prosecutor. It is not suggested that these assurances cannot be relied upon.

28. The evidence is that Agreste is a modern prison which opened in November 2013. An inspection report on Agreste, relating to an inspection carried out on 22 May 2014 by the National Council of Criminal and Penitentiary Policies, Prison System Ombudsman Agency, Judiciary and Prosecution Service, noted as follows. It is run by a different management system: a public private partnership between the state and a

private company. The capacity of the prison is 789 male prisoners. There are 21 individual cells and 96 collective cells, which are 3 x 5m. Collective cells are occupied by a maximum 8 prisoners at a time. There is no division between prisoners serving sentences and those on remand, nor by age or recidivism. Instead division is based on conviviality. There is separation into a safe unit for those under threat (the Seguro). The inmates have exposure to sun and visitations at different times. Cells are insulated. Each cell has a toilet, a shower and cold water for 20 minutes per hour. Details are given of the provision of bedding, mattresses and hygiene kits to prisoners. Food is of a high quality compared to other prisons in the state. Health assistance is available; patients with medical conditions receive required medication. Free legal counselling is available. Education, sports and exercise activities are provided; 130 prisoners attend physical training. Social assistance is provided, there is a religious service and some prisoners are paid for work. In relation to discipline and punishment, drugs and phones are seized. There were two alleged murders in December 2013 and May 2014 which were being investigated. There are signs of the PCC and Firma gangs in prison. Visits, the information and security systems are described. Various recommendations are set out regarding the contract award; the separation of prisoners between remand, serving, first time and repeat offenders; the separation of rival gang members; the numbering of uniforms; the granting to segregated prisoners similar outdoor time; the hiring of additional prison agents and the expansion of work opportunities.

29. In relation to Agreste, Dr Macaulay noted that:

> "The Presidio do Agreste is a relatively new facility, co-administered by the state authorities in partnership with a private company, Reviver, which has operated in the prison system for a decade, and signed a five-year contract to administer this particular jail in November 2013. The prison is constructed from pre-fabricated cells that are four times stronger that the normal materials used in prison construction (a building system called SISCOPEN). The prison has 96 communal cells (to hold 8 prisoners apiece) and 21 individual cells. The prison has a capacity for 769 prisoners. In mid-2014 it held 772 prisoners – 576 on remand and 198 sentenced to a closed regime. As of March 2016 it held 809 prisoners, 40 over its capacity.
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> ….
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> The inspection report conducted in May 2014 (supplied by the Brazilian government) is very positive overall about the unit in terms of conditions, praising its cleanliness and orderliness. Sheets and towels are changed every 3 days and prisoners receive free hygiene kits at regular intervals as well as food and uniforms.
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> ….
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> Like many new and purpose-built high security prisons, it makes full use of the kinds of security technologies used in US super-max prisons. For example, prison staff use infra-red cameras, mobile phone-blocking devices, x-ray belts, metal detecting portals, inspection benches and manual detectors in order to search staff, prisoners and visitors for contraband, instead of the strip searches still used routinely in many other prisons. There have apparently been no escapes or riots in the facility."

30. Although Dr Macaulay raised certain relatively minor complaints relating to matters such as the quality of food, the hygiene kit, open air time and limited cold water supply, she concluded that it nevertheless appeared to be compliant with Article 3 "at the present time".

31. In the light of the evidence before her, the judge justifiably found that "the conditions in Agreste Prison will not breach Article 3".

32. This conclusion is supported by Professor Mendez's first report. When he visited Agreste in August 2015 he found that the conditions in this privately run facility were "very different" from those in the Government facilities he visited. He noted that:

> "…the privately managed facility was not overcrowded. The conditions were decent and there were both doctors and nurses available. The Alagoas State Government has a contract with the facility that stipulates that the prison cannot be forced to receive inmates beyond capacity plus 10%.
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> ….
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> Agreste is a recently-built prison, with a design that favours security controls as well as basic services to inmates. Perimetral security is performed by State law enforcement agents that are heavily armed; security inside the facility is conducted by guards employed by the corporation, and assisted by the prison's architecture, that allows for round-the-clock surveillance of and rapid access as necessary to common areas which ensuring the staff's security. As I mentioned in my report, health care, educational and work opportunities and other benefits that Brazilian law allows for inmates were, at the time of my visit, adequately rendered."

33. As a result of his further visit in June 2017 Professor Mendez has raised Article 3 concerns as set out in his supplementary report and additional comments. In particular:

(1) He notes that there has been an increase in the prison population since his first visit, and again since his second visit, and that the prison population is currently at 113% of capacity.
(2) He notes that there had been an influx of gang members who had been responsible for riots in other prisons and that there was now a PCC gang presence in a number of the modules, observing that "the presence and overt control by a dangerous gang was emphatically not the case when I visited Agreste in August 2015".
(3) Whilst it was possible for the Brazilian government to fulfil its promise of holding Mr Pimenta in one of the individual cells, this would mean that he would spend 22-24 hours alone in his cell, with no meaningful social contact even when allowed out of his cell. This effectively amounts to indefinite solitary confinement.
(4) If he is to be allowed significant social contact he would have to be moved to one of the other modules with multiple occupancy cells. These comprise 8 bed cells measuring 14.25 square metres, which is considerably less than the international standard per inmate. It would also potentially expose him to the controlling gang.
(5) Monitoring will present a serious challenge.

34. As to (1), the letter dated 18 May 2017, from the Secretariat of Reformation and Social Inclusion, states that the agreement relating to the management of the prison has been amended to permit it to be over capacity by no more than 171 inmates (currently the over capacity is 108). It also notes that when additional inmates have been transferred there, others have been reallocated out of the prison.

35. In any event, any over capacity will not affect Mr Pimenta since he has been guaranteed a single occupancy cell. This guarantee is set out in the 18 May 2017 letter which states that it "guarantees" that Mr Pimenta "will be held in an individual cell in that prison unit". This is confirmed by a further letter from the Secretariat of 11 September 2017 which states that "one of these cells can be used exclusively by Mr Pimenta, so that it is possible to guarantee that he remains in an individual cell".

36. In his supplementary report Professor Mendez confirms that "it is possible for the Brazilian government to fulfil its promise of holding Mr Pimenta in one of the individual cells in the Seguro cellblock".

37. The "guarantee" provided is an important assurance and one which we consider can be relied upon.

38. We do not accept the submission made on behalf of Mr Pimenta that, given the recent and continuing expansion of the prison population in Brazil with the pressures that will inevitably create on prison space, the assurances as to conditions will not be durable, particularly if Mr Pimenta is imprisoned and given a lengthy term of imprisonment. It is obvious that we cannot be sure of what the future will bring. However we note the repetition of the assurances. Whilst we do not accept Mr Sternberg's submission that because extradition was ordered in *Da Silva v Government of Brazil* [2014] EWHC 1018 (Admin) we can discount concerns, the fact that there is no evidence to suggest that the assurances offered in that case were not met provides some comfort that the assurances will be durable. The office of Prosecutor General has a material interest in showing that assurances provided to this court are durable.

39. As to (2), the 18 May 2017 letter explains that there are only members of one faction of a criminal gang in the prison, that this action was taken to prevent conflicts and riots occurring in other prisons, and that Agreste was not affected by riots that occurred elsewhere in Brazil in 2017. It is to be noted that Dr Macaulay's evidence is that prisons are safer where there is a single gang as opposed to competing gangs.

40. Further, the evidence shows that gangs have been separated in Agreste, and that those in the Seguro who are sharing cells include those who have not joined a gang, and who do not want to join a gang. Mr Pimenta will not have to share a cell, and it is likely that it will be these persons with whom Mr Pimenta would associate. This does not suggest that Mr Pimenta will be at risk from gangs given the specific location at which he will be kept.

41. As to (3) and (4), this is disputed on the evidence. The 11 September 2017 letter from the Secretariat states that Mr Pimenta will be entitled to 8 hours a day outside his cell. It is stated that "Inmates detained in individual cells also have access to sunbathing and socialising with other prisoners (during sunbathing time). In this regard they have the same rights as the other prisoners, in other words, two periods of four (04) hours, totalling eight (8) hours of daily sunbaths".

42. Although Professor Mendez was apparently told differently by inmates he talked to on his visit, in our judgment there is no reason to doubt this specific assurance given in

relation to Mr Pimenta. It accords with the general rights of prisoners at Agreste. Further, the 11 September 2017 letter frankly accepts a number of the points made by Professor Mendez in his report, but clearly contracts his evidence on this particular point.

43. There is also evidence that Mr Pimenta will be able to receive visits, and that there is a possibility (which we accept may be remote because of numbers) of out of cell work. This is not the continual solitary confinement that would amount to an infringement of article 3.

44. As to (5), Dr Macaulay noted as follows in relation to the monitoring of prison conditions generally:

> *"Inspection and monitoring regimes*. Besides the courts and the Public Ministry/Prosecution Service, a number of local and national bodies are empowered to conduct prison inspections and look out for the welfare of prisoners in Brazil. These include the state-level prison service ombudsman's offices (where they exist), the internal affairs body (*corregedoria*) of the prison service, and representatives of the state judiciary's general inspection team.
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> ….
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> A number of international NGOs – such as Human Rights Watch and Amnesty International – have closely monitored the prison system, whilst a number of inspections have been carried out by Inter-American and United Nations human rights bodies, such as the Special Repporteur on Torture. Monitoring and research is also conducted by local universities and think tanks, such as the FBSP, and other advocacy groups in civil society, such as the Catholic Church's Pastoral Outreach to prisoners, one of the civil society groups with most regular contact on a day-to-day basis with prisoners as they carry out their religious ministry and pastoral offices. There are therefore a great many generally reliable and accurate sources of information on prison conditions in Brazil…"

45. With regard to Agreste, Professor Mendez noted in his supplementary report that NGOs are regularly allowed into the prison. He stated that the prison authorities answered all his questions, that he was allowed unrestricted access to many parts of the prison, but reported that restrictions were placed on his ability to talk to inmates in an unimpeded manner. The Secretariat stated in its letter of 11 September 2017 that this was due to "current difficulties" but described the general position as follows:

> "This Secretariat has always made itself available to answer all questions from the PGR (Office of the Prosecutor General) and all the agencies involved in the monitoring of the Alagoan Penitentiary System. In this regard there are no obstacles to the regular monitoring of the prisoner's conditions. The current difficulties are related to the number of prisoners and the conditions of the prison units.
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> ….
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> There has never been any obstacle to the access of the prison unit by external visitors. The Secretariat of Social Security and Social Inclusion values the transparency of its actions and constant dialogue with all those who want to know, visit and / or inspect our facilities."

46. In relation to who will be responsible for monitoring matters, an assurance has been provided by the Prosecutor General in a letter dated 27 June 2016 which states as follows:

> "The Office of the Prosecutor-General of the Republic affirm the commitment to oversee the jail time as served by Mr. Alisson Soares Pimenta in Brazil, both in its preventive phase or whether he is convicted of his crimes, in order to preserve his fundamental rights as set forth by the Federal Constitution of October 5, 1988, by the Brazilian legislation and the international treaties that Brazil is a party of, such as the 1969 American Convention Human Rights, the 1966 International Covenant on Civil and Political rights and the 1984 Convention against Torture and Other Treatments or Cruel, Inhuman or Degrading Treatment or Punishment.
> Attached to this statement the assurances given by the Alagoas State Secretary of Resocialisation and Social Inclusion, where he confirms that the fundamental rights of the extradited shall be abided by should he be extradited to the State of Alagoas.
> These are the concrete guarantees that the Office of the Prosecutor-General of the Republic has to provide to facilitate the extradition and surrender of Mr. Alisson Pimenta Soares to the Brazilian Justice."

47. As the judge stated, "this is a formal and important assurance". In the light of this assurance, and the general ease of access to Agreste for NGOs, we are satisfied that it will be possible to carry out satisfactory monitoring.

48. Mr Pimenta raised a further Article 3 argument relating to the conditions in which he might be held if he attends his trial in person at Petrolina. It would appear that his trial could be carried out by video-link which would mean that he could remain at Agreste. Mr Pimenta may, however, insist on being present in person in which case he would have to be held elsewhere during the currency of any court hearing. It is accepted by the Brazilian government that the prisons in Petrolina are not ECHR compliant, but it is said that he would be held in a compliant location, without the proposed location(s) being specified. It is submitted that this is insufficient and that there is equally no detail provided about the conditions in which Mr Pimenta would be transferred.

49. The main assurances which have been given are that:

> "The Judge of the Court of Petrolina's Jury informs you that, since the local penitentiary does not meet the requirements laid down by British authorities, an administrative procedure has been instituted in order to indicate a proper location to keep the charged during the trial, in compliance with the recommendations of the European Court of Human Rights." (Federal Prosecutor's letter of 23 June 2016)

> "As previously mentioned, the extraditee is not forced to appear before an eventual trial session and may be interrogated through video-conferencing. Should he wish to appear before the court in person, all necessary security measures shall be taken for his well-being and safety while proceedings are taking place." (Federal Prosecutor's letter of 26 January 2017)

> "The defendant will appear at the trial only if he agrees to participate, and, in this case, a specialised organ (SERES) will provide his safe transfer." (Judicial letter of 16 January 2017)
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> "…all security measures will be taken so as to ensure that the defendant's transportation takes place as smoothly and uneventfully as possible." (Federal Prosecutor's letter of 15 February 2107)

50. Assurances have accordingly been given in relation to both the transportation and the detention of Mr Pimenta, should he choose to attend his trial in person. It is right that specific details are not given about whether he will be kept in a police cell or a court cell, nor are details given about precisely how he will be transported from Agreste prison. However the evidence before us shows problems in the prison system as a whole in Brazil, but it does not deal with the specific conditions in which persons are held during a trial. Even taking the generality of the evidence into account, and drawing inferences from an overcrowded detention system where pre-trial delays occur, specific assurances have been provided for Mr Pimenta. As yet, it is not known when Mr Pimenta's trial will be, if he is extradited. Until that is known it may well be difficult, if not impossible, to identify where may be both appropriate and available. In circumstances where Mr Pimenta has not yet been returned to Brazil we do not consider that the absence of details of the police station or court cell in which he will be held during his trial undermines the assurances. There is no material before us to justify the conclusion that his transport from Agreste will infringe the provisions of article 3.

51. For all the reasons outlined above we are not satisfied that the judge's decision on Article 3 was wrong or that the correctness of that decision has been thrown into doubt by the further material provided. In our judgment it has not been shown that there are substantial grounds for believing that there is a real risk that Mr Pimenta will be will be subjected to inhuman or degrading treatment and an infringement of Article 3.

Article 6

52. In *Othman v UK* the European Court of Human Rights set out the test for violation of article 6 in the extradition context at paragraphs 258-261:

> "258. It is established in the Court's case-law that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country. That principle was first set out in *Soering v. the United Kingdom*, 7 July 1989, § 113, Series A no. 161 and has been subsequently confirmed by the Court in a number of cases (see, *inter alia*, *Mamatkulov and Askarov*, cited above, §§ 90 and 91; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 149, ECHR 2010-...).
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> 259. In the Court's case-law, the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (*Sejdovic v. Italy* [GC], no. 56581/00, § 84, ECHR 2006-II; *Stoichkov*, cited above, § 56, *Drozd and Janousek* cited above, § 110). Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:

> - conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge (*Einhorn*, cited above, § 33; *Sejdovic*, cited above, § 84; *Stoichkov*, cited above, § 56);
> - a trial which is summary in nature and conducted with a total disregard for the rights of the defence (*Bader and Kanbor*, cited above, § 47);
> - detention without any access to an independent and impartial tribunal to have the legality the detention reviewed (*Al-Moayad*, cited above, § 101);
> - deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country (ibid.).
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> 260. It is noteworthy that, in the twenty-two years since the *Soering* judgment, the Court has never found that an expulsion would be in violation of Article 6. This fact, when taken with the examples given in the preceding paragraph, serves to underline the Court's view that "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.
>
> 261. In assessing whether this test has been met, the Court considers that the same standard and burden of proof should apply as in Article 3 expulsion cases. Therefore, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, *mutatis mutandis*, *Saadi v. Italy*, cited above § 129)."

53. In summary, the applicant has to show that there are substantial grounds for believing that he would be exposed to a real risk of a flagrant denial of justice. A flagrant denial of justice is a breach of the principles of fair trial which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by Article 6.

54. Mr Pimenta submits that he would not have a trial within a reasonable time and that his appearance by video-link would be akin to being absent from his trial.

55. The judge rejected these submissions. She found that:

> "61. Mr Hawkes is concerned that the RP will be held in lengthy pre-trial custody and that an appearance or trial by video-link would be like being absent from his trial. Whatever happens to other defendants, as stated above, I am satisfied that the RP will not be forgotten about. He is charged with very serious offences and there are a limited number of witnesses who will have to be heard if the RP does not plead guilty. He is the subject of the assurances from a number of officials in the criminal justice system.
>
> 62. I find that Brazilian law guarantees trial in the defendant's presence. If preliminary matters are dealt with by video link there will be no breach of Article 6. In the light of the assurance given the RP can be present at trial in Petrolina

> and be accommodated within an Article 3 compliant establishment. There is no evidence placed before this court which would lead this court to find a total nullification of the RP's right to a fair trial such as would prevent extradition."

56. On behalf of Mr Pimenta it is stressed that there is no limit on the duration of pre-trial detention and that there is a systemic shortage of public defenders to represent defendants at trial, as explained in the evidence of Dr Macauley. Further, the Brazilian Government has not answered specific requests made as to when Mr Pimenta will be tried.

57. Mr Pimenta is facing serious charges for which purpose he will have been extradited. The evidence against him has been gathered and is seemingly ready for trial. There is no evidence of chronic or systemic delays in the courts trying murder cases in Petrolina. The evidence from the Brazilian authorities is that prisoners at Agreste have access to free legal counsel and that the state public defender has a strong presence in the penitentiary that monitors re-education and performs its duties with full diligence. As an extradited person facing murder charges it is inherently unlikely that Mr Pimenta would become 'lost' in the Brazilian justice system. In any event, assurances have been given by the Brazilian authorities that Mr Pimenta will be monitored and his jail time "overseen".

58. As to when his trial will be, it is not surprising that this question has not been answered in circumstances where he has yet to be extradited. It has been made clear that there will be a Phase 1 trial which will determine whether the evidence is sufficient to proceed to Phase 2. The prosecution evidence for that Phase 1 trial would appear to be largely ready.

59. As to appearance by video-link, whilst it is recognised that Mr Pimenta will be able to choose to attend in person should he so wish, it is submitted that this is not a real choice in circumstances where it would involve him being held in conditions which breach Article 3. For reasons already given, we do not accept that there is a real risk of him being held in such conditions. If so, the choice remains a real one and the complaint made falls away.

60. If Mr Pimenta chooses trial by video-link doubts are raised as to his ability to communicate effectively with his lawyers. However, assurances have been given that in such circumstances he would be allowed two lawyers; one at court and one at the prison.

61. In the above circumstances, we agree with the judge that the evidence does not come close to establishing that there are substantial grounds for believing that he would be subject to a real risk of nullification of his right to a fair trial.

Conclusion

62. For the reasons outlined above the appeal is dismissed.