Neutral Citation Number: [2021] EWHC 1107 (Admin)

Case No: CO/4768/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/04/2021

Before :

MR JUSTICE CHAMBERLAIN

- -

Between:

BACAU DISTRICT COURT ROMANIA	**Appellant**
- and –	
ANDY-RICHARD IANCU	**Respondent**

- -
- -

Stuart Allen (instructed by **the Crown Prosecution Service**) for the **Appellant**
Graeme Hall (instructed by **Oracle Solicitors**) for the **Respondent**

Hearing dates: 22 April 2021

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Approved Judgment

MR JUSTICE CHAMBERLAIN:

Introduction

1 The respondent, Andy-Richard Iancu, is sought by the Bacau District Court in Romania pursuant to a European arrest warrant issued on 14 August 2019. The warrant seeks Mr Iancu's surrender to serve a custodial sentence of 2 years and 1 month's imprisonment. The sentence was imposed in respect of several separate offences, including theft of a mobile phone, a laptop computer and certain associated items and two counts of driving without a licence.

2 Mr Iancu was arrested on 3 January 2020. There was an initial hearing at Westminster Magistrates' Court on the following day. On 28 January 2020 Mr Iancu served a statement of issues raising a number of objections to extradition. The only one material for present purposes is that extradition was barred by s. 21 of the Extradition Act 2003 on the ground that it would be contrary to Mr Iancu's rights under Article 3 ECHR because of prison conditions in Romania. The statement of issues drew attention to the lack of an assurance in this respect.

3 The extradition hearing was originally listed for 17 March 2020, but was adjourned on Mr Iancu's application. It was relisted on 18 May 2020, but was vacated again, this time because of the COVID-19 pandemic. It was relisted on 11 September 2020. Shortly before that hearing, the Romanian judicial authority served an assurance dated February 2020 about prison conditions ("the February assurance").

4 At the hearing on 11 September 2020, an expert instructed by Mr Iancu to deal with other points was unavailable, so District Judge Hamilton decided to adjourn the hearing again, but not before considering the Article 3 issue. Without determining whether the February assurance was adequate, he gave directions for the CPS to draft a request for further information in relation to prison conditions, in terms to be approved by him in writing. He directed that the Romanian judicial authority should respond to it by 12 October 2020 and that Mr Iancu could serve any rebuttal evidence by 14 November 2020. The adjourned hearing was listed for 4 December 2020.

5 The request for further information was drafted and sent to the judge on 15 September. The judge emailed on 18 September, saying: "the questions look fine to me and should now be submitted asap". Stuart Allen, who appears for the Romanian judicial authority, told me that when they were submitted it was made clear that they had been approved by the judge.

6 By the time of the hearing on 4 December 2020, there had been no response. The judge heard argument on the Article 3 point only and adjourned to prepare his judgment, noting that no further information was to be served without leave of the court and observing that, given the history of the matter, such leave was unlikely to be given readily.

7 A response to the request for further information containing a further assurance was then prepared by the Romanian judicial authority ("the December assurance"). The CPS sent it to the judge on 14 December 2020. The judge responded by email on the same day in the following terms:

> "I am not prepared to give leave for this additional information to be considered at this stage:
>
> 1. I am sure its admission will be strongly disputed given the history of this case (including the further 3 months given to the JA to correct the assurance) and consideration of all the relevant arguments would therefore require a further hearing rather than my making a unilateral decision. You don't appear to have copied Mr Hall into your email so I have done so now.
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> 2. On 4 December Mr Allen explicitly agreed that I could confine myself to considering the single issue of the adequacy of the prison assurance and did not need to consider the other issues raised by Mr Hall. So my acceptance of this very late-served material would potentially mean the matter being listed again before Westminster for those other unconsidered issues to be dealt with.
>
> 3. On a purely practical and, you might contend, selfish point – I have almost finished the judgment and I don't see why I should be greatly inconvenienced having to produce another judgment just because someone in Romania has suddenly 'woken up'."

8 Judgment was handed down on 16 December 2020. The judge concluded that the February assurance was inadequate, relying on a decision of Steyn J in *Gheorghe v Giurgiu District Court, Romania* [2020] EWHC 722 *("Gheorghe")*. Accordingly, he found that extradition would not be in accordance with Mr Iancu's Article 3 rights and ordered his discharge.

9 The Romanian judicial authority appeals on a single ground: that the judge "fell into error in his conclusion that the extradition of the respondent would not be compatible with his rights pursuant to Article 3 ECHR by dint of the conditions that he may be exposed to within the Romanian prison estate". This ground has three limbs:

(a) If the judge concluded that the February assurance was inadequate, he was obliged by Article 15 of Framework Decision 2002/584/JHA ("the Framework Decision") and the decision of the Grand Chamber of the European Court of Justice ("ECJ") in Joined Cases C-404/12 C-659/15 PPU *Aranyosi* EU:C:2016:140, [2016] QB 921 *("Aranyosi")* to request a further specific assurance before discharging Mr Iancu.

(b) In any event, the judge was wrong to refuse to admit the December assurance.

(c) In any event, the judge misinterpreted *Gheorghe* and failed to give adequate reasons for concluding that the February assurance was inadequate.

10 Permission to appeal was granted by Thornton J on 10 March 2020. Her reasons were as follows:

> "The Judge accepts in his judgment that he was not aware of the 'Aranyosi' process and then states 'I am not sure in any event that anything of real significance turns on this point'. His understanding in this regard may have

> influenced his case management decision not to admit the assurance in question."

11 Graeme Hall, for Mr Iancu, submitted that this meant that permission to appeal was limited to the *Aranyosi* point. I do not accept that submission. The scope of a grant of permission to appeal (or permission to apply for judicial review) is determined by the operative part of the order made by the court, not the reasons given for it. Where permission to appeal (or permission to apply for judicial review) is granted in relation to a specific point only, that will be made clear in the order. The corollary of a grant of permission limited to a particular point or points is that permission is refused on other points. This generally triggers a right to renew the application on these other points at an oral hearing. In this case, Thornton J's grant of permission to appeal was unlimited. There is no indication that she intended to refuse permission in respect of any part of the Perfected Grounds of Appeal. I have therefore considered them in their entirety.

(a): The *Aranyosi* point

12 Article 15 of the Framework Decision provides as follows:

> "1. The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
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> 2. If the executing judicial authority finds the information communicated by the issuing member state to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to articles 3 to 5 and article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in article 17.
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> 3. The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

13 Article 17 provides in material part as follows:

> "1. A European arrest warrant shall be dealt with and executed as a matter of urgency.
>
> 2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given.
>
> 3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person.
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> 4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof,

giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days."

14 In *Aranyosi* , the ECJ was asked what courts in the executing state should do in cases where there is "solid evidence that detention conditions in the issuing member state are incompatible with fundamental rights, in particular with article 4 of the Charter". (The Charter is the EU Charter of Fundamental Rights. The terms of Article 4 are identical to those of Article 3 ECHR.) The answer was that:

(a) "where the judicial authority of the executing member state is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing member state… that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing member state of the individual sought by a European arrest warrant": [88];

(b) "the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing member state and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, *inter alia*, judgments of international courts, such as judgments of the Court of Human Rights, judgments of courts of the issuing member state, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN": [89];

(c) "[n]one the less, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant": [91];

(d) "[t]he mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing member state does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that member state": [93];

(e) therefore, the executing authority "must, pursuant to article 15(2) of the Framework Decision, request of the judicial authority of the issuing member state that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that member state": [95];

(f) "[i]n accordance with article 15(2) of the Framework Decision, the executing judicial authority may fix a time limit for the receipt of the supplementary information requested from the issuing judicial authority. That time limit must be adjusted to the particular case, so as to allow to that authority the time required to collect the information, if necessary by seeking assistance to that end from the central authority or one of the central authorities of the issuing member state, under article 7 of the Framework Decision. Under article 15(2) of the Framework

> Decision, that time limit must however take into account the need to observe the time limits set in article 17 of that Framework Decision. The issuing judicial authority is obliged to provide that information to the executing judicial authority": [97];
>
> (g) "[i]f, in the light of the information provided pursuant to article 15(2) of the Framework Decision… that authority finds that there exists… a real risk of inhuman or degrading treatment… the execution of that warrant must be postponed but it cannot be abandoned": [98];
>
> (h) "[i]f 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": [104].

15 Mr Allen submits that *Aranyosi* shows that, having reached the view on the materials before him that there was a real risk of treatment contrary Article 3 in Romanian prisons, the judge was obliged to seek further information under Article 15(2) of the Framework Decision. The request which he approved on 18 September 2020 could not satisfy that obligation for three reasons. In the first place, the judge frankly admitted at [22] of his judgment of 16 December 2020 that he had not at that stage been aware of the *Aranyosi* procedure. Secondly, the request came from the CPS, rather than from the "executing judicial authority" as required by Article 15(2). Thirdly, an *Aranyosi* request cannot be made until the issuing judicial authority has found, on the material before it, that there is a real risk that the requested person will be subject to treatment contrary to Article 3. In this case, however, that question was still the subject of argument at the point when the request was made.

16 On this last point, Mr Hall drew my attention to the decision of the Divisional Court (Hamblen LJ and Ouseley J) in *Purcell v Public Prosecutor of Antwerp* [2017] EWHC 1981 (Admin), [2017] 3 CMLR 34. In that case, it was argued for the appellant that the *Aranyosi* procedure for requesting further information "involves an evidential threshold which must be satisfied before such a request is made". Hamblen LJ said this:

> "18. In my judgment, this is an incorrect interpretation of the *Aranyosi* decision. The case emphasises the importance of the court having 'objective, reliable, specific and properly updated evidence' before any determination of a breach of art.3 is made, and in particular information relating to the conditions in which the individual in question will be detained. It is 'to that end' that further information is to be sought. The court must obviously be satisfied that there is a need to seek further information but there is no evidential threshold to be crossed before it can do so. There is therefore no implication from the making of the request for further information that the court has found that art.3 would be breached on the information currently before it, or that a prima facie case to that effect has been made out.
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> 19. This is supported by Criminal Practice Direction 50 A.1, upon which the appellants relied, which refers to requests being made 'where the issues are such that further information from the requesting authority or state is needed…'"

17 Mr Allen did not invite me to depart from this part of the Divisional Court's reasoning in *Purcell*. Even if such an invitation had been made, I would have declined it. Not only was this a judgment of an experienced Divisional Court, it also interprets the Framework Decision in a way which promotes one of its important purposes – the maintenance (to the extent possible) of the strict time limits in Article 17. It would be contrary to the scheme of the Framework Decision if courts were required to adopt a rigid two-stage procedure of first making a formal finding that the generic materials established a real risk and only then going on to ask for supplementary information about the conditions in which the requested person will be held.

18 That being so, the holding in [18] of *Purcell* is fatal to Mr Allen's submission that there could be no Article 15(2) request until the judge had found a real risk on the other material before him. In substance, the request made on 18 September 2020 was precisely the kind of request envisaged in *Aranyosi*. It was made in the context of material of a generic character relevant to the risk faced in Romanian prisons. It sought further information specific to the requested person about the treatment *he* would receive in the issuing state. The judge clearly formed the view at the hearing on 11 September 2020 that further information was "needed". After all, he gave directions which required the draft to be approved by him; and he in fact approved the draft and directed that it be sent.

19 As noted, the judge did not see himself as having sent an *Aranyosi* request on 18 September 2020, because he was not then aware of the *Aranyosi* procedure. But, as I have said, it was in substance such a request. Moreover, although formally made by the CPS rather than by the judge himself, its contents were approved by the judge; that fact was communicated to the issuing state; and a direction was made requiring an answer by a particular date.

20 The Romanian judicial authority did not say, either when the direction was made on 11 September 2020 or at any time thereafter, that the time limit was unreasonable or that there was any reason why it should be extended. Despite that, no response was received within the time limit. By the time of the hearing some six weeks later, there was still no response and no indication that one would be forthcoming. The response came after the hearing, when the judge was about to give judgment. Despite the judge's clear indication at the hearing on 4 December 2020 that he would not readily admit further evidence, no explanation was provided for its lateness. The key question in this part of the appeal is whether, in those circumstances, *Aranyosi* required the judge to afford the Romanian judicial authority a further opportunity to provide information even though that would inevitably mean the hearing being relisted. In my judgment, it did not.

21 First, Article 15(2) confers an express power to set a time limit for the provision by the issuing state of information requested by the executing state. The ECJ made clear at [97] of *Aranyosi* that the time limit was important not least because of the need to observe the time limits in Article 17.

22 Second, *Aranyosi* makes clear that, whilst the executing state is bound in certain circumstances to seek specific information, the issuing state owes a reciprocal obligation to respond. Although *Aranyosi* does not in terms say what is to happen if the issuing state fails to respond within the time limit, it is inherent in the concept of a time limit that failure to comply with it may have consequences. One obvious consequence, if the time limit is not extended, is that the courts of the executing state will discharge their duty to

consider whether extradition would give rise to a real risk of a breach of Article 3 on the basis of such information as they currently have.

23 Third, this is consistent with the overriding objective, which includes dealing with the case efficiently and expeditiously (Crim PR r. 1.1(2)(e)), and with dicta in this jurisdiction about the need for procedural rigour on the part of issuing states. In *Alexander v Public Prosecutor's Office, Marseille District Court of First Instance* [2017] EWHC 1392 (Admin), [2018] QB 408, Irwin LJ said this at [77]:

> "At all stages, the principal responsibility for the provision of information required by the EAW lies on the state requesting extradition. That responsibility is not transferred to the English court considering extradition. Nothing in the frame a decision or the act carries any different implication."

In *M & B v Preliminary Investigation Tribunal of Napoli, Italy* [2018] EWHC 1808 (Admin), Gross LJ observed pithily at [74] that "[t]he requesting state must be expected to get its tackle in order". More recently, the Divisional Court upheld a refusal by the Chief Magistrate to adjourn to consider an assurance provided on the day she was to hand down her reserved judgment: *Government of India v Dhir and Raijada* [2020] EWHC 200 (Admin).

24 I would accordingly hold that the question whether to admit the further information more than 2 months after the time limit had expired and 10 days after the hearing had concluded was a matter to be considered by the judge in the exercise of his case management discretion. Nothing in *Aranyosi* required the judge to exercise his discretion in favour of admission.

(b): The judge's exercise of his case management discretion

25 The starting point when evaluating the Romanian judicial authority's challenge to the judge's decision to refuse to admit the December assurance is that the decision was taken in the exercise of the judge's case management discretion. In *Director of Public Prosecutions v Petrie* [2015] EWHC 48 (Admin), Gross LJ considered a challenge to a decision to refuse an adjournment to the prosecution in a case before a Magistrates' Court. At [20], he said this:

> "It is essential that parties to proceedings in the magistrates' court should proceed on the basis of a need to get matters right first time; any suggestion of a culture readily permitting an opportunity to correct failures of preparation should be firmly dispelled."

At [21], he continued:

> "A necessary corollary of exhorting robust case management from the magistracy and District Bench is that appellate courts should be slow to interfere with case management decisions which have endeavoured to give effect to the approach outlined above. In any event, the grant or refusal of an adjournment is a paradigm example of a discretionary case management decision where an appeal ought only to succeed on well-recognised but

> limited grounds (for example, error of principle, error of law or where the decision can properly be characterised as plainly wrong).

26 The need for procedural rigour applies as much in extradition as to other cases before the magistrates: see e.g. *Antonov v Prosecutor General's Office, Lithuania* [2015] EWHC 1243 (Admin), [74 (Aikens LJ). The decision in this case involved many of the same considerations as would arise on an application for an adjournment. When the judge first permitted the judicial authority to serve further information, he also gave directions for rebuttal evidence from Mr Iancu. Admitting the further information would mean allowing Mr Iancu to serve that rebuttal evidence and, almost certainly, another hearing, in circumstances where there had already been many adjournments and the time limits set out in Article 17 had long ago been exceeded.

27 Against that background, the matters to which the judge adverted at paras 1 and 2 of his email were ones that he could properly take into account. It was relevant that, as the judge recorded at [24]-[25], the CPS had on 3 December 2020 emailed the court noting that the further information had not been produced and seeking an adjournment of the hearing listed on the following day; but the adjournment application was not pursued at the hearing. On the contrary, there had been an express agreement on the part of the Romanian judicial authority that the hearing on 4 December 2020 would be confined to the Article 3 issue. As the judge recorded in his judgment:

> "12. There was a consensus that the s. 21/Article 3 [issue] was a compelling issue which ought rightly to be considered first. I expressed concern to the parties that in the absence of any concessions from the JA I ought properly to consider all the issues raised by Mr Hall and not just one. Mr Allen and Mr Hall however very helpfully indicated that they would both be content if, having heard submissions, and if I concluded that Mr Iancu should be discharged by reason of the s. 21/Article 3 argument, I did not then proceed to consider the two further issues.
>
> 13. With that helpful agreement the hearing on 4 December proceeded on that basis."

28 The judge was entitled to take this express agreement into account. If he had known that the Romanian judicial authority was planning to serve further information on the Article 3 issue 10 days later, he would no doubt have insisted that all issues were argued at the same time – as they normally would be. As the passage quoted above shows, it was understood by all concerned that the judge might well conclude that the existing information was inadequate and, on that basis, discharge Mr Iancu.

29 Paragraph 3 of the judge's email has given me pause for thought. The language used in that paragraph was unfortunate. Inconvenience to the judge is seldom, if ever, a matter that can properly be taken into account in a case management decision. The reference to someone in Romania having "suddenly 'woken up'" was inappropriate because it expressed frustration. The frustration was understandable, as Mr Allen accepted, but it would have been better not to give vent to it in this way. Nonetheless, overall, the language used was not such as to vitiate an otherwise proper exercise of the judge's case management discretion.

30 In any event, the reasons given by the judge in his email must be read alongside those in [35]-[39] of the judgment, where he carefully considered whether an *Aranyosi* request should be made. The history of adjournments was relevant, even though they were not the fault of the judicial authority. It was also relevant that the judicial authority had had three months to provide the further information sought and had failed to do so or to provide any explanation for their failure.

31 Mr Allen suggested at one point that the judge had erred in failing expressly to mention the strong public interest in favour of extradition. However, it is clear from the judge's judgment, although he had been unaware of it on 11 September 2020, he was now aware of the ECJ's judgment in *Aranyosi*. It is also clear from his discussion of *Gheorghe* that he well understood that the question was whether this was "an exceptional case" in which "the surrender procedure should be brought to an end". He decided that it was.

32 In my judgment, it is not possible to say that the judge's decision to refuse to admit the material involved an error of law or principle or could be characterised as "wrong".

(c): The judge's decision that the existing assurance was inadequate

33 Mr Allen's challenge to the judge's decision on the materials before him focussed on what he said was the judge's conclusion that *Gheorghe* effectively determined the issue in Mr Iancu's favour. Mr Allen submitted that a proper reading of *Gheorghe* showed that Steyn J had made no decision on the question whether a generic assurance materially similar to the February assurance in this case was sufficient to allay Article 3 concerns. That being so, he argued that there were no adequate reasons given for rejecting the adequacy of the February assurance.

34 For my part, I would accept that, in *Ghoerghe*, Steyn J did not in terms decide whether the first assurance given by the Romanian authorities in that case (materially similar to the February assurance here) was adequate. As the judge noted at [31] of his judgment, Steyn J had granted permission to appeal on the basis that it was reasonably arguable that it was not. He did not, however, fall into the error of concluding that this was equivalent to a finding that the original assurance was inadequate: see at [32]. Rather, he noted that Steyn J "takes 8 paragraphs of her judgment to carefully consider the arguments for and against admissibility" of the new material, which she would not have needed to do if the original assurances were adequate. Thus, "[t]he overwhelming inference from Mrs Justice Steyn's consideration of admissibility is that without that additional information assurance would have been considered inadequate": see at [34].

35 That reasoning seems to me to be correct. Steyn J did not need to consider whether the original assurance was adequate, but her judgment would make very little sense if she had considered it to be so. In addition to the careful consideration of the admissibility of the new material, I would point to [42] *et seq*, where she gave her reasons for concluding that the new material provided adequate assurances. Those paragraphs make absolutely clear that the reason for dismissal of the appeal was that the specific concerns about exercise time, ventilation, natural light and air, heating arrangements, private toilet facilities and basic sanitary and hygiene requirements at Rahova Prison in Bucharest

were addressed satisfactorily by the new material: see at [45]. That reasoning is, in my judgment, inconsistent with the view that the original assurance was sufficient.

36 If (contrary to my view), there were any doubt about the inadequacy of generic assurances (such as the February assurance) at the time when the judge gave judgment, any such doubts are to my mind conclusively dispelled by the very recent decision of the Strasbourg Court in *Bivolaru and Modovan v France* (App Nos 40324/16 and 12623/17), 25 March 2021, which confirms the existence of a real risk of treatment contrary to Article 3 in Romanian prisons and cautions against exclusive reliance on generic assurances by the Romanian authorities to address these risks: see esp. at [10] and [122]-[126] ("la Cour… ne pouvait dès lors s'en remettre exclusivement aux déclarations des autorités roumaines").

37 In my view, it is impossible to say that the judge was wrong to find that the February assurance was inadequate to address the systemic risk which the case law identifies.

Conclusion

38 For these reasons, the appeal will be dismissed.