Neutral Citation Number: [2021] EWHC 427 (Admin)

Case No: CO/4025/2019 & CO/3912/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2021

**Before** :

**LORD JUSTICE SINGH**
**MR JUSTICE JAY**

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**Between :**

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|---|---|
| **RICHARD CHECHEV** | **1st Appellant** |
| **- and-** | |
| | **2nd Appellant** |
| **RAYKO VANGELOV** | |
| **- and -** | |
| **THE PROSECUTOR'S OFFICE IN KARDZHALI, BULGARIA** | **1st Respondent** |
| **- and –** | |
| **THE DISTRICT PROSECUTOR'S OFFICE OF PETRICH, BULGARIA** | **2nd Respondent** |

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**Robin Tam QC and Saoirse Townshend** (instructed by **Lloyds PR Solicitors**) for the **1st Appellant**
**Robin Tam QC and Daniel Sternberg** (instructed by **ABV Solicitors**) for the **2nd Appellant**
**Helen Malcolm QC and Stuart Allen** (instructed by the **Crown Prosecution Service**) for the **Respondents**

Hearing date: 10 February 2021

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# Approved Judgment

**Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10 a.m. on Friday, 26 February 2021. A copy of the judgment in final form as handed down can also be made available after that time, on request by email to: listoffice@administrativecourtoffice.justice.gov.uk;**

**Lord Justice Singh :**

Introduction

1. These are two appeals under section 26 of the Extradition Act 2003 ("the 2003 Act") against the decision of District Judge ("DJ") Fanning, sitting at Westminster Magistrates' Court, dated 2 October 2019, to order the extradition of the Appellants to Bulgaria.

2. The cases were joined in the Magistrates' Court as they both raise an issue about prison conditions in Bulgaria and whether assurances given by the Bulgarian authorities are sufficient to allay concerns about those conditions. The main issue in these appeals is whether the return of the Appellants to Bulgaria would contravene Article 3 of the European Convention on Human Rights ("ECHR"). There are other, discrete issues in each case.

3. Permission to bring these appeals was granted on the papers by Steyn J on 8 January 2020.

4. It was common ground before us that, although the United Kingdom left the European Union on 31 January 2020 and the implementation (or transition) period ended on 31 December 2020, nothing material has changed for the purposes of these appeals.

5. At the hearing we had oral submissions by Mr Robin Tam QC for the Appellants and Ms Helen Malcolm QC for the Respondents. I would like to express the Court's gratitude to them and their teams for their helpful written and oral submissions.

Factual Background

6. The First Appellant's extradition is sought pursuant to a conviction European Arrest Warrant ("EAW") issued by the First Respondent on 29 November 2016. It was certified by the National Crime Agency ("NCA") on 7 December 2016. The EAW seeks the First Appellant's return to Bulgaria to serve two prison sentences, of 8 months (handed down on 20 October 2016) and 5 months and 29 days (handed down on 4 October 2016). The first offence was one of drink driving, committed on 25 November 2015, and the second was driving without a licence within one year of being sentenced for a similar offence, committed between 24 and 30 March 2016.

7. The Second Appellant's extradition is sought by a conviction EAW issued by the Second Respondent on 29 June 2018 and certified by the NCA on 3 July 2018. The EAW seeks the return of the Second Appellant to Bulgaria to serve two sentences, of 4 months and 17 days and 11 months respectively, imposed for the offences of theft and cigarette smuggling.

8. On 7 November 2018, the First Appellant was arrested on the EAW and appeared before a judge at Westminster Magistrates' Court for an initial hearing. On 15 November 2018, he did not consent to his extradition.

9. On 14 February 2019, the Second Appellant was arrested on the EAW. On 15 February 2019, he appeared for an initial hearing, where he did not consent to his extradition.

10. The cases of both Appellants were formally joined on 31 May 2019.

11. On 12 August 2019, the hearing before DJ Fanning took place. He gave his decision, in a detailed judgment, on 2 October 2019, the date on which he ordered the Second Appellant's extradition. The judgment was handed down in relation to the First Appellant on 9 October 2019 and his extradition ordered on that date.

12. The Second Appellant lodged an appeal against the decision of DJ Fanning on 8 October 2019, and the First Appellant lodged an appeal on 15 October 2019.

13. Permission having been granted, the appeals were listed for hearing on 5 November 2020 before Nicola Davies LJ and Fordham J. The case was adjourned with directions that further information be sought from the Judicial Authorities in Bulgaria: the questions asked by the Court were set out in an Annex to its judgment, [2020] EWHC 3115 (Admin).

Grounds of Appeal

14. There are six grounds of appeal, not all of which have been the subject of permission as yet. In summary they are as follows:-

**Ground 1:** Extradition would contravene Article 3 ECHR.

**Ground 2**: One of the offences relating to the Second Appellant (cigarette smuggling) is not an extradition offence and therefore the dual criminality rule is not satisfied: see section 10 of the 2003 Act.

**Ground 3:** Extradition would disproportionately interfere with the Article 8 ECHR rights of the Second Appellant. This ground only arises if Ground 2 and/or Ground 5 succeeds.

**Ground 4:** The Respondents are not Judicial Authorities. This ground has been stayed pending the decision of the Divisional Court in *Aleksandrov* (CO/1965/2019).

**Ground 5:** The Second Appellant's extradition is an abuse of process.

**Ground 6:** Extradition would be incompatible with the First Appellant's Article 8 ECHR rights and therefore unlawful under section 21 of the 2003 Act.

Applications to adduce fresh evidence

15. The Appellants also apply for permission to adduce fresh evidence in support of Grounds 1, 5 and 6, including evidence that assurances given by the Bulgarian Authorities have been breached in a number of other cases.

16. The principles on the admission of fresh evidence in extradition cases are well-known and were set out by this Court (Sir Anthony May PQBD and Silber J) in *Szombathely City Court and Others v Fenyvesi* [2009] EWHC 231 (Admin), at paras. 2-11.

17. The reality of the present cases is such that this Court must grant the applications so that it can do justice in these appeals. The evidence was not available at the time of the hearing before DJ Fanning. Furthermore, it is clear that, when it adjourned these appeals on 5 November 2020, this Court considered it necessary to have up-to-date information from the Bulgarian authorities. The consequence is that, in the circumstances of these particular cases, the Court is not confined to asking itself whether the decision of the District Judge was wrong. We must decide the relevant issues for ourselves in the light of all the information which we now have. It follows that it is unnecessary to delve into some of the particular criticisms which have been made of DJ Fanning's judgment (at great length in the Appellants' skeleton argument).

The decision of this Court dated 5 November 2020

18. When this Court (Nicola Davies LJ and Fordham J) adjourned the substantive hearing of these appeals, it did so because it required current information as to the prisons in which each Appellant is to be held and the conditions therein. As a result the Court determined to seek such information and specific assurances from the Bulgarian authorities so as to be in a position to promptly determine the appeals on ground 1: see para. 11 of the judgment. The information and specific assurances sought were set out in the Annex to the judgment. It is unnecessary for present purposes to set out the Annex here because the relevant parts appear from the information which was subsequently provided by the Bulgarian authorities in respect of each of the two Appellants.

The information provided by the Bulgarian authorities

19. The following information has been provided by the Bulgarian authorities since the decision of the Court on 5 November 2020.

20. In a letter dated 20 November 2020 they said:

> "In case that the permanent address of the person Richard Emilov Chechev is on the territory of the town of Kardzhali, district of Kardzhali according to Art. 58 of the Implementation of Penal Sanctions and Detention in Custody Act (IPSDCA) on the grounds of item 4.7 /for closed type/ and item 3.6 /for open type/ of Order No. L-919/08.03.2017 of the Chief Director of the Chief Directorate of Implementation of Penal Sanctions, he should be serving his sentence in the prison of Pazardzhik city.
>
> With a total capacity of 348 of the Pazardzhik prison building, 270 inmates are currently accommodated, in open prison hostel

> 'Pazardzhik' with a total capacity of 64, 70 inmates are currently accommodated.
>
> In case the permanent address of the person Rayko Borisov Vangelov is on the territory of the town of Petrich, district of Blagoevgrad according to Article 58 of the Execution of Penalties and Detention in Custody Act (ESDCA) on the grounds of item 4.2/for closed type/ and item 3.1 /for open type/ of Order No. L-919/08.03.2017 of the Chief Director of the Chief Directorate of Implementation of Penal Sanctions, he should be serving his sentence in the prison of Bobov Dol town.
>
> With a total capacity of 549 of the Bobov Dol prison building, 277 inmates are currently accommodated, in open prison hostel 'Samoranovo' with a total capacity of 179, 124 inmates are currently accommodated.
>
> In all places of imprisonment the rule of Art. 43, para 4 of the Implementation of Penal Sanctions and Detention in Custody Act (IPSDCA) new-no. 13/2017 is applied, in force since 07.02.2017/, according to which the minimum living area in the bedroom for each inmate cannot be less than 4 sq.m. According to Art. 62, para 1, item 5 /amended. no. 13/2017, in force from 07.02.2017/ of the Implementation of Penal Sanctions and Detention in Custody Act (IPSDCA), if necessary in order to comply with the requirements for minimum living space in the bedroom for each inmate not less than 4 sq. m., the Director General of the Directorate-General Execution of Sentences may transfer them to another place of imprisonment, taking into account their wishes."

21. At the same time, in response to the specific information sought in the Annex to this Court's judgment the following information was provided in respect of Mr Chechev:

> "In response to your request for additional information, according to Annex A, I inform you of the following in respect of Richard Emilov Chechev:
>
> a. According to his permanent address in the Republic of Bulgaria, Richard Chechev will be placed to serve the remainder of his sentence in the Pazardzhik prison.
>
> b. In 2020 A major repair of the Pazardzhik prison has been completed, and already everyone accommodated there has a minimum area of 4 square meters, as are the standards. All bedrooms are equipped with separate sanitary facility and bathroom. This means that Richard Chechev will also be accommodated in a cell which:

i. provides him with an area of 4 square meters the whole time; and

ii. has a private sanitary facility.

c. There is a mechanism for monitoring and verification both for the conditions and for all issues related to the execution of the imposed punishment. The inspections are carried out by the relevant competent state bodies - such as the Minister of Justice, the Deputy Minister responsible for the Directorate-General for the Execution of Sentences, the Director General and Deputy Directors General, the heads of prisons and others. The President and Vice-President, Members of Parliament, judges and prosecutors, the Ombudsman and his representatives, representatives of the Council of Europe and others may also be admitted to prisons.

d. On the territory of the Pazardzhik prison all anti-epidemic measures are applied, according to the orders of the Minister of Health of the Republic of Bulgaria, to limit the spread. As a result, no one has been diagnosed with Covid-19. The shared facilities are used by the inmates on a schedule. The buildings are disinfected twice a day.

i. the time allowed for each inmate to stay outside their cell - there are no restrictions on this, except for the hours between 8.30 pm in the evening and 6.30 am in the morning.

ii. The inmates are provided with daily access to:

(a) fresh air - a minimum of 1 hour and 30 minutes;

(b) exercises - during the stay in the open air all the inmates are provided with fitness equipment, as well as places for various sports events;

(c) education/training/activities - the prison has a library, a school, various courses are held, various programs for social activities are worked on, there is an accessible chapel. Every inmate is included if he wishes to do so,

(d) medical treatment - a medical center has been set up in the prison, with a qualified doctor, dentist and two paramedics available to the inmates on a daily basis. If necessary, an external specialist is provided. As the prison is within the city limits, is necessary it is served by an ambulance within a few minutes.

(e) communicating with family and/or friends outside prison – the inmates are entitled to at least two visits per month, and according to the orders of the Minister of Health related to

Sovid-19, there is a limit on the number of visitors - up to two adults and one child per inmate at a time. The contact is made through a transparent barrier, by phone. The premises are disinfected after each visitor. There are no restrictions on lawyers meeting with the inmates. There are public telephones in the prison, and prisoners have complete freedom to use them (which is done through prepaid cards).

e. Restrictions related to Covid-19 only affected the visiting regime - the number of visitors allowed per prisoner was reduced from up to five to up to two adults and one child at a time.

f. Specific guarantees:

**A.** Guarantees for the accommodation of Richard Chechev in the said prison, in a cell providing the minimum international standards with regard to:

i. area - the required minimum area is provided in all bedrooms of Pazardzhik prison. This standard has been introduced in full in accordance with the Implementation of Penal Sanctions and Detention in Custody Act (IPSDCA).

ii. sanitary facilities - all sanitary facilities in the prison are independent, renovated. There is no bedroom without a separate sanitary facility.

iii. effective monitoring system - the mechanism described above, in point c., works, as a result of which the conditions in the prison have been improved and now fully comply with international standards. There are no obstacles to carrying out inspections.

**B.** Guarantees that Richard Chechev will not be transferred to another prison where the minimum standards are not met:

According to Art. **62** of the Implementation of Penal Sanctions and Detention in Custody Act (IPSDCA), *persons deprived of their liberty shall be transferred from one prison to another by order of the Chief Director of the Chief Directorate of Implementation of Penal Sanctions:*

*1. upon enrolment in training or in courses for acquisition of specialist qualifications, for upgrading existing qualifications or for an occupation – provided that the inmate expresses such wish;*

*2. upon admission for medical treatment to a hospitalfacility by direction of a doctor;*

*3. at the request of the relatives or of the person deprived of his or her liberty upon change of the permanent address of the family or of the persons wherewith the sentenced person maintains contacts;*

*4. on a proposal by the director of the prison upon occurrence of psychological incompatibility, conflicts with personnel members or with persons deprived of their liberty who are victims or relatives to victims of the criminal offence committed, or on other important considerations related to resocialisation, to the safety of the person and to security at the places of deprivation of liberty;*

*5. if necessary, in order to comply with the requirements for a minimum living area in the dormitory room; in this case, the desire of the inmate is also taken into account.*

*(2) Persons deprived of their liberty may not be transferred if there is a risk of a serious deterioration of the health status thereof.*

*(3) Transfer orders and refusals shall be subject to challenge as provided for by the Administrative Procedure Code before the administrative court exercising jurisdiction over the location where the sentence is served. The court's decision shall be final.*

*(4) The Chief Director of the Chief Directorate of Implementation of Penal Sanctions may issue an order delegating powers referred to in Paragraph 1, Items 1-3 and Item 5, to the deputies thereof or to a head of department at the Chief Directorate who holds a degree of higher education in Law.*

*Art. 63. Persons deprived of their liberty may be transferred from a prison to a closed prison hostel functioning as a division of the prison and back by order of the director of the prison in the cases referred to in Items 1, 4 and 5 of Article 62 (1) herein.*

*(2) Transfer orders and refusals shall be subject to challenge as provided for by the Administrative Procedure Code before the administrative court exercising jurisdiction over the location where the sentence is served. The court's decision shall be final.*

*Art. 64. (1) Inmates exhibiting good behaviour who have served at least one-fourth but no less than six months of their sentence at a prison or closed prison hostel may, upon the prison director's initiative or upon their own request, be transferred to open prison hostels to serve the remainder of their sentence.*

*(2) The prison director shall issue an order, with reasons stated therein, after taking into account the opinions of the head of the social and reformatory work unit, the deputy security chief and the director of the relevant prison hostel on the convict's behaviour while serving his/her sentence, subject to the requirement under Article 43(4). A copy of such order shall be served to the convict, which he/she shall acknowledge by his/her signature, and shall be forwarded to the prosecutor supervising the enforcement of his/her sentence.*

*(3) In such transfer order, the prison director shall determine the regime of sentence service as provided for in Article 65.*

*(4) Such order shall be subject to challenge within 14 days of being served as provided for by the Administrative Procedure Code before the administrative court exercising jurisdiction over the location where the sentence is served, through the prison director. The court's decision shall be final. Where the court does not grant the appeal, a further transfer request may not be submitted prior to the lapse of 6 months of the entry into effect of the order.*

*Art. 64a. Inmates serving a sentence at an open prison hostel may be transferred to a prison or to a closed prison hostel where: 1. they grossly or systematically breach the established order; 2. there is evidence that they are preparing to escape or to commit another crime; 3. they systematically shirk work; 4. they exert a bad influence on others.*

*(2) The transfer referred to in Paragraph (1) shall be effected by the district court exercising jurisdiction over the location where the sentence is served on a proposal by the prison director after the opinions of the persons referred to in Article 64(2) are taken into account.*

*(3) The district court, sitting in a single-judge panel, shall decide the issue with a ruling, which shall be unappealable.*

*(4) After drawing up a transfer proposal, the prison director may order the transfer of the convict to a prison or closed prison hostel awaiting the court's ruling.*

It is clear from the above that the law does not allow indiscriminate and unjustified transfer of inmates. The minimum international standards are provided in Art. 43 of ESDCA and in the Regulations for application of the same law. The Directorate-General for the Execution of Sentences maintains an up-to-date database on the capacity of the places of imprisonment and monitors compliance with the standards.

> If Richard Chechev had any of the grounds described in the law for transfer to another prison, he would be transferred to the nearest prison to the one in Pazardzhik - and these are the prisons in Plovdiv, Stara Zagora or Bobov Dol. All these prisons have been renovated and meet the minimum international standards - for area, for sanitary facilities and for an effective monitoring system."

22. In relation to Mr Vangelov additional information was provided in a letter dated 11 December 2020 as follows:

> "The court has determined Rayko Borisov Vangelov to serve the sentence of imprisonment under general regime and he will be accommodated in the Prison in the town of Bobov Dol. We requested information from Bobov Dol Prison on the questions you sent us and after receiving an answer from the Prison, I inform you the following:
>
> a. The initial accommodation of detainees and defendants in the Prison in the town of Bobov Dol is in a reception section, located on the second floor of a residential building, which also houses the security zone regardless of where he will be assigned to serve his sentence 'imprisonment': either in the Open Type Prison Dormitory of 'Samoranovo' or the Prison in the town of Bobov Dol.
>
> b.i. The designated premises in the reception section are five in number for the different categories of detainees and defendants and are designed to fully meet the basic minimum standards for personal living space in the prison institution in cells for multiple accommodation - with dimensions of 13-21 sq.m. living space / excluding the area of the bathroom. They provide direct access to daylight suitable for work and reading. There is also the possibility for natural ventilation while meeting safety requirements, which in no way impede the access of light and fresh air. The windows in the premises are made of PVC material, The artificial lighting which is providing the necessary light in the dark part of the day, meets the technical standards.
>
> b.ii. The premises have a private sanitary unit, a sink and constant access to water for drinking and sanitation. The sanitary units with dimensions of 2-3 sq.m. are located inside the bedrooms and are equipped with a toilet pan and a toilet cistern. They are separated from the rest of the cell. To maintain good hygiene, the sanitary units are lined with faience tiles.

c. According to the Law on Execution of Sentences and Detention, control over the execution of sentences is exercised by state bodies, organizations and non-profit legal entities registered in public benefit. The control and monitoring of the activity of the penitentiary bodies is carried out in cooperation with international state bodies and non-governmental organizations. The Ombudsman of the Republic of Bulgaria has access to places of detention at any time and may speak in private with convicted persons. The Prosecutor's Office exercises supervision over the observance of the law in the execution of the sentences, and with regard to the Prison in the town of Bobov Dol, this is the District Prosecutor's Office in the town of Kyustendil.

d. ln relation to the emergency situation related to the spread of the coronavirus / Covid-19 / and the risk of its introduction to the places of imprisonment, we are informed by the Prison in Bobov dol, that they execute and comply with the instructions and orders of the Minister of Health, respectively the instructions and orders of the Chief Director of the General Directorate Execution of Sentences in Sofia in order to limit and prevent the introduction of the virus on the territory of the prison in the town of Bobov Dol and in the Open Type Prison Dormitory ‘Samoranovo’.

i. The distribution of the time of the prisoners in the prison - the Open Type Prison Dormitory ‘Samoranovo’ is according to the schedule approved by the Head of the dormitory for waking up, personal toilet, morning check, 3 meals a day, stay outdoors, bathroom, visiting, warehouse, etc.

ii.a, b. The prisoners of the Open Type Prison Dormitory ‘Samoranovo’ have the right to stay in the open after the end of the morning inspection from 07,30 to 12.00 and from 13.00 to 18.00. Exercise facilities and sports games are provided at the outdoor arca. According to the schedule, they have the opportunity to use the gym and a kiosk called Lavka.

ii.c. Prisoners have access to the library and the chapel every day if they wish so. On the territory of the Bobov Dol Prison there is also a secondary school ‘Dr Petar Beron’, in which those accommodated in the Open Type Prison Dormitory ‘Samoranovo’ can enroll as students in an individual form of education.

ii.d. The access to the medical center is according to an approved schedule – every Wednesday the Open Type Prison Dormitory ‘Samoranovo’ is visited by a medical assistant of the Bobov Dol Prison. ln case of emergency, the Open Type Prison Dormitory Samoranovo is visited by medical personnel from the Emergency Medical Center in the town of Dupnitsa. The

> prisoners receive dental care every Monday in the Bobov Dol Prison and, if they so wish, they are escorted for treatment by an external specialist,
>
> ii.e. Visits with relatives are held according to an approved schedule by the Head of the Open Type Prison Dormitory 'Samoranovo' twice a month. ln the Open Type Prison Dormitory 'Samoranovo' 4 telephones are installed for telephone communication with relatives daily from morning check to evening check, with diplomatic services, lawyers and others. The right of correspondence is ensured, without restrictions on the number of letters received and sent. Correspondence of prisoners is sent and received every working day,
>
> e. All rights of prisoners by law - for visits, prizes - home leave, work on external work sites and other events are carried out in compliance with anti-epidemic measures for physical distance, wearing protective masks, remote thermometry, hand disinfection.
>
> f. The Open Type Prison Dormitory 'Samoranovo' does not have a sanitary unit in the bedrooms, but they are not locked and the prisoners have 24-hour access to the sanitary units in the corridor, the sanitary units are with separate doors, running and drinking water. Prisoners have daily access to a bathroom and hot water daily according to an approved schedule. In order to improve the conditions in Open Type Prison Dormitory 'Samoranovo', a planned reconstruction of the building is due, with the idea of having a sanitary unit in each bedroom fitted.
>
> Rayko Borisov Vangelov will not be transferred to a prison where the minimum standards are not met."

Relevant legal principles on Article 3 ECHR

23. It is common ground that the position in relation to prison conditions in Bulgaria is such that, in the absence of satisfactory assurances, there is a real risk of treatment contrary to Article 3. This was the effect of the pilot judgment of the European Court of Human Rights in *Neshkov and Others v Bulgaria* (judgment of the Fourth Section, 27 January 2015). That principle has been applied by the courts of this country since that time: see e.g. *Vasilev v Regional Prosecutor's Office, Silistra, Bulgaria* (Burnett LJ and Mitting J) [2016] EWHC 1401 (Admin), at para. 9. In giving the judgment Mitting J said the following, at para. 25:

> "The approach to be adopted to assurances given by an EU Member State in extradition proceedings was exhaustively analysed by this Court in *GS v Hungary* [2016] EWCA 64 (Admin) at paragraphs 18 to 27. It is unnecessary to repeat the

> analysis here. The approach which can be distilled from it is as follows:
>
> i) Assurances can in principle be accepted;
>
> ii) The factors identified by the Strasbourg Court in *Othman v United Kingdom* should be considered, but are not a 'tick list';
>
> iii) The fact that an assurance is given by a territory designated for the purposes of Part 1 of the Extradition Act 2003 by an order made by the Secretary of State under Section 1(1) is a highly relevant factor;
>
> iv) In the case of an assurance given by such a State, there is a rebuttable presumption that it can be relied upon;
>
> v) There is no requirement that an assurance must contain any particular form of words or promise; what matters is whether or not the assurance 'dispels all doubts' about the existence of a real risk of inhuman or degrading treatment if the requested person is extradited."

24. At para. 54, Mitting J said that for the future District Judges should make it clear that extradition to Bulgaria would not have been ordered but for the fact that the assurances had been given and accepted by the court in respect of the individual concerned. That has become common practice and was done in the present case by DJ Fanning.

25. In *Othman v United Kingdom* (2012) 55 EHRR 1, to which Mitting J made reference, the European Court of Human Rights set out general principles in relation to the expulsion of a person from a Contracting State to another State where there is a risk of treatment contrary to Article 3, at paras. 183-189. Of particular relevance here is para. 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 the 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."

26. The relevant principles on Article 3 ECHR as it applies to the extradition context were summarised by Hickinbottom LJ in *Georgiev and Others v Regional Prosecutor's Office, Shuman, Bulgaria* [2018] EWHC 359 (Admin), at para. 8:

> "For the purposes of these appeals, it is unnecessary either to drill down into these authorities or to quote from them at length. The following principles deriving from them are well-established and uncontroversial.
>
> i) Article 3 (as reflected in section 21 of the 2003 Act) makes it unlawful for the United Kingdom to extradite an individual to a country where he is at real risk of being subjected to inhuman or degrading treatment.
>
> ii) In the prison context, treatment will offend article 3 if the suffering or humiliation involved goes beyond the suffering and humiliation inherent in imprisonment as a legitimate punishment. For these purposes, the conditions of incarceration

have to be looked at as a whole; but detention for more than a few days in space measuring less than 3m2 is, in itself, likely to be a contravention – sometimes spoken of in terms of a strong presumption – as is a lack of proper toilet facilities that (e.g.) regularly requires the use of a bucket in a multi-occupant locked cell.

iii) The initial burden is upon the requested person to establish, by clear and cogent evidence, that there are substantial grounds for believing that he would, if surrendered, face a real risk of being subjected to inhuman or degrading treatment in the receiving country.

iv) If such grounds are established, then the legal burden shifts to the requesting state, which is required to show that there is no real risk of a violation: as it has been said, the burden upon the requesting state is 'to discount the existence of a real risk' (*Aranvosi* at [103]) or 'to dispel any doubts about it' (*Saadi* at [129]). Requiring a party to dispel any doubts as to a particular risk undoubtedly imposes a very heavy burden, although I am unconvinced that it is necessary or appropriate to put it formally in terms of the criminal standard of proof.

v) The requesting state might satisfy that burden by evidence that general prison conditions are in fact article 3-compliant. However, even where it cannot show that, that does not result in a refusal to surrender, because the assessment of whether there will be a breach of human rights is necessarily fact-specific. Therefore, where the court finds that there is a real risk of inhuman or degrading treatment by virtue of general prison conditions, it must then go on to assess whether there is a real risk that the particular individual will be exposed to such a risk.

vi) Given the importance of extraditing persons who face criminal charges or sentence in another jurisdiction and the principle of mutual respect, that fact-specific exercise requires the court to make requests of the requesting judicial authority under article 15(2) of the Framework Decision for information concerning the conditions in which the individual will be held that it considers necessary for the assessment of that risk, including information as to the existence of procedures for monitoring detention conditions.

vii) The information provided may include assurances from the requesting contracting state, designed to provide a sufficient guarantee that the person concerned will be protected from treatment that would breach article 3. In the evaluation of such assurances, relevant factors include the nature of the relationship between the requesting and requested judicial authorities and the states of which they are a part, the human

rights situation in that other jurisdiction, the subject matter of the assurance and the nature of the risk involved. It also has to be conducted in the light of the principle of mutual recognition and trust between those authorities and states: where the requesting state is a signatory to the ECHR and a Member State of the European Union, there is a strong presumption that it is willing and able to fulfil its human rights obligations and any assurances given in support of those obligations. An assurance given by such a state must be accepted unless there is cogent reason to disbelieve it will not be fulfilled.

viii) In particular, assurances have to be evaluated against four conditions (identified by Mitting J in *BB* at [5], and approved in *Zagrean* at [52] as being consistent with Strasbourg jurisprudence in the form of *Othman*) which must generally be satisfied if the court is to rely upon them, namely:

> '(i) the terms of assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to article 3;
>
> (ii) the assurances must be given in good faith;
>
> (iii) there must be a sound objective basis for believing that the assurances will be fulfilled;
>
> (iv) fulfilment of the assurances must be capable of being verified.

I shall refer to these as 'the *Zagrean* criteria'.

ix) Where the further information (including any assurances given) satisfy the court that, should the individual be extradited, there is no real risk of him being subjected to inhuman or degrading treatment, then the court will order his surrender. Where it is not satisfied, generally, the individual will still not be discharged: the execution of the EAW and extradition will be postponed until the requesting state is able to satisfy the court that the risk can be discounted by, e.g., providing further information, including further assurances.

x) However, where the risk is not (or, prospectively, cannot) be discounted within a reasonable time, then the court may be bound to discharge."

27. In *Georgiev* Hickinbottom LJ also said the following, at paras. 61-62:

> "61. The issue before us is as to the reliability of the Bulgarian authorities in complying with the assurances. In

> relation to prison conditions, Mr Summers submitted that, given the history of failure in compliance with their general obligations under the ECHR and as a Member State of the European Union, and their particular failures to honour the assurances they gave in respect of those extradited post-*Vasilev* and post-*Kirchanov No 3*, this court should not begin with the presumption that they will comply with the assurances they have given in relation to the Appellants. However, although this may not matter a great deal in practice, I do not consider that to be analytically correct. As a signatory to the ECHR and a Member State of the European Union, there is a strong presumption that Bulgaria is willing and able to fulfil any assurances it gives in support of its obligations as a signatory and Member State. Its assurances must be accepted unless there is cogent reason to believe they will not be honoured. However, of course, I accept that *a failure to fulfil assurances in the past may be a powerful reason to disbelieve that they will be fulfilled in the future*. It is noteworthy in *Vasilev*, that a factor considered strong in favour of the proposition that the presumption of compliance had not been displaced was the fact that there was no evidence that Bulgaria had ever failed to fulfil a bilateral assurance about an extradited person to an EU Member State.
>
> 62. However, on the basis of all the evidence, despite the substantial and able efforts of Mr Summers, I am satisfied that the presumption that the Bulgarian authorities will honour the assurances it has given in respect of the Appellants has not been displaced; and I am satisfied that the Respondents have discounted the risk of the Appellants, after surrender, suffering inhuman or degrading treatment. I am persuaded that, on the basis of the assurances given, there is no real risk of a breach of article 3." (Emphasis added)

28. At the end of his judgment Hickinbottom LJ added a postscript, at paras. 74-76, in the following terms:

> "74. Finally, given the failures of the Bulgarian authorities to comply with assurances in the past, I would reiterate and enforce the observations of the Divisional Court in *Vasilev* at [54].
>
> 75. In cases of extradition to Bulgaria, district judges should make clear in their written judgment that extradition would not have been ordered but for the assurances that have been given, which should be set out in a prominent part of the judgment. A copy of that judgment, with the assurances emphasised, should be sent by the NCA to the Bulgarian authorities on surrender, with an indication that the assurances

> should be brought to the attention of the governor of any prison to which the extradited person may be sent. That should be reinforced by the Crown Prosecution Service, as agent of the requesting Bulgarian judicial authority, who should make it clear that extradition would not have been ordered but for the assurances.
>
> 76. I have concluded that, on the basis of the assurances that have been given, there is no real risk of breach of article 3 on the surrender of the Appellants. If, in respect of these or any persons surrendered to Bulgaria in the future, any breach of assurance is alleged, the Bulgarian judicial authority should, in its response, not only contest any allegation which it contends is not a breach but, if it accepts any breach, also explain how, given the history and the terms of this judgment, such a breach has occurred; and, if appropriate, the steps that have been taken to ensure that such a breach will not be repeated."

Ground 1 in relation to the Second Appellant

29. DJ Fanning had expert evidence before him from Mr Stanimir Petrov, who is a researcher working at the Bulgarian Helsinki Committee ("BHC"). The BHC is a non-governmental organisation established in 1992, which has maintained a programme for monitoring prisons in Bulgaria since 1994. Mr Petrov has worked for the BHC since 1997. The evidence of Mr Petrov included his report dated 10 June 2019. He also gave live evidence before DJ Fanning and was cross-examined. At para. 40 of his judgment, DJ Fanning noted that Mr Petrov's expertise was not challenged and that the tone and content of his report, as well as the manner in which he gave his evidence, suggested that he "takes care to be subjective [that must clearly be a drafting error for "objective"] and accurate".

30. At para. 49 of his judgment, DJ Fanning said the following:

> "This is a report into the conditions at Bobov Dol prison, and its satellite prison at Samoranovo. This is the prison which RP Vangelov will be held if the assurance offered in respect of him is honoured. I will take this shortly: Mr Petrov confirmed that the conditions of the main building are Article 3 compliant. Until renovation work at the satellite prison is complete, the conditions there are unlikely to be Article 3 compliant."

31. At para. 54, DJ Fanning said:

> "Turning to Bobov Dol prison, he confirmed that access for him was very easy, not problematic and something he did often. He confirmed he had a good relationship with the managers and governors and that he personally knew them. He confirmed that

> at the time of his visit all prisoners had more than 4 m² personal space. His concerns in respect of breach of Article 3 related not to overcrowding but to conditions in the reception and satellite units. His concerns about the satellite prison were more fixed. In particular, he confirmed the issue with access to water affected not just the satellite prison, but the whole village in which it was situated and which could not be easily remedied."

32. At para. 101, he said:

> "The skeleton argument then critiques Bobov Dol prison–the prison at which RP Vangelov is likely to be held. I have already set out the details of Mr Petrov's evidence in respect of that, and Mr Petrov's conclusion -which is to the effect that if Mr Vangelov is held in the main prison at Bobov Dol, that will be in conditions that will be Article 3 compliant, but if held in the satellite prison Article 3 compliance is unlikely."

33. At paras. 109.5 and 109.6, he said:

> "109.5 Regarding Mr Vangelov–he will be held in a reception unit at Bobov Dol and thereafter transferred either to the main prison or to the satellite prison. The assurance guarantees that he will be transferred to another prison if conditions at Bobov Dol fall beneath the minimum standards.
>
> 109.6 The main unit of Bobov Dol is, on Mr Petrov's evidence, Article 3 compliant, although that at the satellite is not."

34. At para. 127, he said:

> "Where does that leave us? I have an assurance that RP Vangelov will be held at a prison which can both comply (if he is held in the restrictive regime) or not comply (is he is held in the 'open' regime) with Article 3. But that Assurance confirms RP Vangelov will NOT be held in non-Article 3 compliant conditions. If necessary he will be moved to an alternative prison."

35. At para. 132, he said:

> "I do not conclude that there is sufficient evidence before me of systematic breaches by Bulgaria of the assurances it offers in

> respect of persons whose extradition from the UK is sought by it such that I should reject the assurances provided in respect of the RP's. Nor do I conclude that I require further assurances that each RP will be held in Article 3 compliant conditions. I already have adequate assurances upon which I can rely."

36. Returning to the report by Mr Petrov dated 10 June 2019, he dealt specifically with conditions in the Bobov Dol prison. He explained that Bobov Dol prison is located some 80 km south of Sofia. There is a Reception Unit, where prisoners are initially kept for 14-30 days. He also explained that there is a satellite facility, which is a dormitory in Samoranovo village, which is located 15 km away from Bobov Dol. Mr Petrov had visited the facilities before writing his report, on 3 June 2019.

37. In his report he explained that the dormitory in Samoranovo is located at a former military unit. Doors are not locked during the night. Prisoners can move freely during the day. There are no toilets in the cells but there are shared toilets on each corridor. At night prisoners have access to the sanitary unit.

38. In his conclusion Mr Petrov set out his concerns about the Reception Unit and the Samoranovo dormitory in the following way:

> "1. After establishing the conditions in the prisons and the concrete facts, the court decides whether there is or isn't a violation of Article 3 depending on the cumulative negative effect on the prisoners. In my opinion there is a real risk of violation of Article 3 regarding the conditions in the Reception Unit due to hygiene and amortized furniture and equipment, together with the constantly locked cells, but the violation will not have a long duration having in mind the short stay of prisoners in the reception unit.
>
> 2. In the event that Mr Vangelov is accommodated in the reconstructed main building of the prison in Bobov Dol there is no real risk of violation of Article 3 ECHR regarding the material prison conditions.
>
> 3. In the event that Mr Vangelov is accommodated in the prison dormitory in Samoranovo, there is a real risk of violation of Article 3 (lack of independent sanitary units, regular suspension of water, lack of meaningful activities as there is only one social worker and he is very busy), but this violation would be less severe in comparison with the violation in paragraph 1."

39. Clearly this Court felt, when it adjourned the case on 5 November 2020, that further, up-to-date and specific information was required in relation to the conditions at Bobov Dol and the satellite dormitory. On behalf of Mr Vangelov Mr Tam has

subjected the answers given on 11 December 2020 to a detailed critique: see in particular para. 60(iii) and (iv) of his skeleton argument. For present purposes there are two material points which need to be emphasised.

40. The first is that, in answer to the Court's question (b)(i), the response given does not clearly answer the question. The dimensions of the cells are given as being 13-21 square metres excluding the bathroom but, with respect, that is not what this Court asked for. This Court asked for a specific assurance that Mr Vangelov would be accommodated in a cell which provides him with 4 square metres of space at all times.

41. The second significant point is that, in answer to this Court's paragraph (f), there is simply reference to the fact that cells in the dormitory at Samoranovo do not have toilets in the cells.

42. I accept Mr Tam's submission that no assurance has been provided that Mr Vangelov will be held at the identified section of the identified prison in a cell which complies with the minimum international standards, in particular as to space and sanitary facilities. In those very particular circumstances, therefore, I have reached the conclusion that the real risk of a breach of Article 3 has not been dispelled by the assurances given by the Respondents in respect of Mr Vangelov.

Ground 1 in relation to the First Appellant

43. I have not reached the same conclusion in relation to prison conditions where Mr Chechev is likely to be held if returned to Bulgaria. There is no reason in the evidence before the Court to doubt the specific assurances given in respect of Mr Chechev.

44. As the information from the Bulgarian authorities which I have quoted above makes clear, Bulgarian law contemplates that a prisoner will be held at the prison nearest to his address of residence. Even if he were to be transferred Bulgarian law places limits on the reasons why that can take place. The sentence which Mr Chechev is likely to serve even if returned would be very short, given that, while he has been on remand in this country, he has already served almost 10 months of the total sentence of 14 months.

45. For reasons that will become apparent later, I would allow Mr Chechev's appeal on Ground 6. In the circumstances which have arisen it is therefore unnecessary to address in great detail the broader submissions that were made by Mr Tam on behalf of both Appellants. He took us at length to the facts of other cases (in particular the cases of Mr Petrov, Mr Georgiev and Mr Zdravkov), in which he submitted there were breaches of assurances given by the Bulgarian authorities as to where, for example, a returned person would be held in prison.

46. On behalf of the Respondents Ms Malcolm accepts that there have sometimes been breaches of assurances in the past but does not accept the full breadth of the factual allegations made on behalf of the Appellants. She also submits, with some force, that

not all of the evidence was before DJ Fanning and therefore some of it has not been the subject of cross-examination.

47. In essence Mr Tam submits that, whatever assurances are given by the Bulgarian authorities cannot be relied upon by this Court in view of the history of breaches of assurances in other cases in the past. Mr Tam submits that there has been such a persistent pattern of breaches that the time has come for this Court to say "enough is enough". He submits that the position might be different if the Bulgarian authorities had taken the opportunity, as recommended by Hickinbottom LJ in the postscript to his judgment in *Georgiev*, and had explained in detail the reasons why breaches had taken place in the past and set out the steps which had been taken to ensure that breaches do not take place again in the future.

48. Powerfully though the submissions were made, I am unable to accept them. First, Mr Tam accepted at the hearing before us that he does not submit that it is no longer possible for anyone to be extradited to Bulgaria in any case in which extradition is contested. But it seems to me that would be the practical effect if his broad submission were accepted. This is because his submission amounts to the proposition that, whatever assurances are given in a specific case, they cannot be relied upon.

49. Secondly, it is clear that the Bulgarian authorities have sought to answer requests for information which have been made. In the present case Ms Malcolm informed us that there have been 14 requests that have been answered and a fifteenth request has been made, to which a response is awaited. This Court did not refer to the past breaches or ask for an explanation about them when it set out its detailed questions in the Annex to its judgment of 5 November 2020. In those circumstances, I do not consider that it would be right for this Court now to criticise the Bulgarian authorities for not addressing those matters.

50. Thirdly, the evidence before the Court is clear that conditions in Bulgarian prisons have improved and are improving. That is borne out by the evidence of Mr Petrov of the BHC: as I have noted earlier, his evidence was objective and accurate in its tone and content.

51. Fourthly, there is evidence before the Court that there are quarterly reports produced in relation to people who have been extradited to Bulgaria on the basis of assurances.

52. Fifthly, there is evidence before the Court that there are independent mechanisms in Bulgaria for monitoring compliance with assurances and more generally for monitoring prison conditions. These include the national ombudsman and the BHC, which is an independent NGO. Mr Petrov confirmed in his evidence to the District Judge that the BHC has no difficulty gaining access to prisons and other facilities.

53. Finally in this context, the law in Bulgaria has itself changed in recent years, not least to comply with the pilot judgment in *Neshkov*. Article 3 is taken seriously both as a matter of law and as a matter of practice.

54. For the above reasons I would allow this appeal on Ground 1 in relation to Mr Vangelov but dismiss it in relation to Mr Chechev.

Ground 2

55. Ground 2 relates only to Mr Vangelov. Permission was refused on this ground by Steyn J. A renewed application for permission is made to advance this ground.

56. Mr Tam complains that the relevant EAW does not sufficiently give particulars of the offence in relation to possession of cigarettes so as to satisfy the dual criminality rule. He submits that the offence as described would not constitute an offence in English law.

57. It was common ground between the parties that the test for dual criminality is as set out by the House of Lords in *Norris v Government of the USA* [2008] UKHL 16; [2008] 1 AC 920. Having considered the rival contentions, that the test was either the "offence test" or the "conduct test" (see para. 65), the House of Lords adopted the conduct test. It summarised the position as follows, at para. 91:

> "The Committee has reached the conclusion that the wider construction should prevail. In short, the conduct test should be applied consistently throughout the 2003 Act, the conduct relevant under Part 2 of the Act being that described in the documents constituting the request (the equivalent of the arrest warrant under Part 1), ignoring in both cases mere narrative background but taking account of such allegations as are relevant to the description of the corresponding United Kingdom offence. …"

58. In the case of Mr Vangelov the EAW set out the relevant conduct as follows:

> "On 20 March 2014 in Petrich Municipality in the area of Customs Point of Zlatarevo, the requested person was in possession of the following goods without excise label affixed thereto hidden in a Mercedes A-Class with license plate No E 4288 KH owned by Atanas Zlatinov Vlahov; 999 packs of cigarettes brand 'YORK', each containing 16 cigarettes at 7,125 BGN per packet. The total value of the packets amounts to 7 117,88 BGN. All cigarette packets are without excise label of the Ministry of Finance of Republic of Bulgaria when such is required bylaw pursuant to article 2, paragraph 2, article 4, items 1 and 7, article 19, paragraph 1, article 64, paragraphs 1, 4 and 5 of Excise Duty and Tax Warehouses Act, which states: subject to excise tax shall be tobacco products – article 2 item 2 of Excise Duty and Tax Warehouses Act;
>
> Under the same Act excisable goods are those set forth in article 2 – article 4, item 1 of Excise Duties and Tax Warehouses Act;
>
> 'Excise label' shall be a government security proving payment of excise duty due for excisable goods released for

> consumption, which shall be purchased from the Ministry of Finance and may not be subject to further transaction – article 4 item 7 of Excise Duties and Tax Warehouses Act;
>
> The goods under Article 2 shall be subject to excise duty taxation, unless they are subject to excise duty suspension arrangement: at their manufacturing on the territory of the country, at their bringing into the territory of the country from the territory of another Member State, at their importation on the territory of the country – article 19, paragraph 1 of Excise Duties and Tax Warehouses Act;
>
> Producers of tobacco products intended for sale on the domestic market, shall affix excise labels on the consumer package. The excise label shall be affixed on the consumer package in a manner displaying the information indicated thereon and ensuring that it is impossible to use the good without destroying the excise label by tearing it off. The excise label shall contain the series, number, the other durable signs and symbols. The selling price shall also be indicated on the excise label of tobacco products – article 64 paragraph 1, paragraph 4 and paragraph 5 and paragraphs 6 and 28 paragraph 1 of Tobacco and Tobacco Products Act: Tobacco products shall be sold in the domestic market with an excise band affixed to the packaging in such a manner as to render the product unusable unless the band is torn; Excise bands shall be government securities and shall consist of a paper band evidencing payment of excise tax; Excise bands shall be issued pursuant to models approved by the Minister of Finance; Excise bands shall be ordered, printed, purchased and distributed under procedures established by the Minister of Finance – article 25 paragraph 1, paragraph 2, paragraph 5, and paragraph 6 of Tobacco and Tobacco Products Act, and 'Tobacco products shall be transported, transferred, stored, offered for sale or sold in trade warehouses and outlets only with an excise band affixed to the consumer packaging as provided for in Article 25' – article 28 paragraph 1 of Tobacco and Tobacco Products Act. This constitutes a significant crime – crime under article 234, paragraph 1 of the Criminal Code/the crime on the second judgement."

59. Further information was provided by the prosecution authorities in a letter dated 26 August 2019, which reads as follows:

> "On 20 March 2014 in Petrich Municipality in the are of Customs Point of Zlatarevo (this is the border with Republic of North Macedonia), the requested person was in possession of the following goods without excise bands affixed thereto hidden in a Mercedes A-Class with license plate No E4288 KH

> owned by Atanas Zlatinov Vlahov: 999 packs of cigarettes band 'YORK', each containing 19 cigarettes at 7.12 BGN per packet. The total value of the packets amounts to 7,117.88 BGN. All cigarette packets were without excise band of the Ministry of Finance of Republic of Bulgaria when such is required by virtue of law (the Excise Duties and Tax Warehouses Act) – this constitutes an offence under article 234, paragraph 1 of the Criminal Code.
>
> In order to sentence Rayko Borisov Vangelov pursuant to the above cited article of the Criminal Code and to impose a Custodial sentence on said person, the District court of Petrich had established that this conduct was committed deliberately, i.e. Vangelov had known that said amount of cigarettes was located in the vehicle be was driving on 20 March 2014 at the Customs Point of Zlatarevo.
>
> Under the Criminal Code of the Republic of Bulgaria, keeping in store excise commodities without excise band constitutes a crime pursuant to article 234 of the Criminal Code only when such conduct has been deliberately committed."

60. Mr Tam submits that all that was alleged in describing the relevant conduct was that Mr Vangelov was in possession of the cigarettes in his car and knew that they were there. He submits that it was not alleged that he had acted dishonestly and in particular that he knew that relevant duty had been evaded on the cigarettes. In my view, there is an air of unreality about Mr Tam's submissions.

61. The reality of the situation as alleged was that a large quantity of cigarettes was found in Mr Vangelov's car without the relevant "tax band" being on the cigarettes which would show that the relevant duty had been paid. When the allegation alleged that this was deliberately committed, that clearly meant that the Defendant knew that the tax band was absent and therefore the duty had not been paid.

62. Such conduct, if it occurred in this jurisdiction, would constitute an offence under section 170 of the Customs and Excise Management Act 1979.

63. Accordingly, like Steyn J, who refused permission to advance this ground on the papers, I have reached the conclusion that Ground 2 is not reasonably arguable. I would therefore refuse permission on this renewed application.

Ground 3

64. Ground 3 also applies only to Mr Vangelov. It is alleged that there would be a breach of Article 8 ECHR. It is accepted that this ground in entirely dependent on Ground 2 or Ground 5. For reasons that will be apparent, I have reached the conclusion that

Ground 5 also is not reasonably arguable. Accordingly, I would refuse permission on this renewed application to advance Ground 3.

Ground 5

65. Ground 5 also relates also only to Mr Vangelov. On his behalf Mr Tam applies for permission to amend his grounds of appeal to argue a new point, which was not available to him either before the DJ Fanning or before Steyn J. It arises from a decision of the Bulgarian Supreme Court of Cassation dated 2 December 2019. The basic facts are not in dispute.

66. The original sentence in relation to the cigarettes matter was quashed by the Supreme Court on the ground that the original court had exceeded its jurisdiction by activating a suspended sentence of another court when it had no power to do so. The sentence was then remitted to the Petrich District Court, which passed the same sentence of 11 months on Mr Vangelov. That sentence was appealed but has now been confirmed by the relevant court.

67. The factual position is set out in two documents, namely a letter dated 12 June 2020 and a letter dated 10 November 2020. First, the letter of 12 June 2020 states:

> "Pursuant to Adjudgement No 241.02.12.2019 rendered in Criminal Case 933/2019 under the records of the Supreme Court of Cassation, II Criminal Division, criminal proceedings have indeed been reinstate in private Criminal Case 1247/2017 under the records of the Burgas District Court, but they concern only the part where a suspended deferred sentence of imprisonment pursuant to article 68 of the Penal Code has been enforced in Public Criminal Case 525/2014 under the records of Petrich District Court. The adjudgment in pursuance of article 43a item 2 of the Penal Code concerning the substitution of the remainder of the unserved probation of nine months and five days, which was imposed on the sentenced Rayko Borisov Vangelov pursuant to an agreement that came into force in public criminal case No 1302/2015 under the records of Petrich Regional Court, with a sentence of imprisonment of four months and seventeen days under initial general treatment has not been reserved.
>
> On 3 January 2020 the administrative director of Petrich Regional Prosecutor's Office submitted at Petrich District Court a proposal under article 306, paragraph 1 of the Criminal Proceedings Code to enforce article 68 para 1 of the Penal Code. The Court found that the proposal had grounds, and with Decision No 48/10.02.2020 rendered in private criminal case 4/2020, the court held that Rayko Borisov Vangelov with Personal Identification No 8709260009, is to serve a sentence of imprisonment of 11 / eleven/ months imposed with Adjudgement No 439/1507.2014 rendered in Public Criminal

> Case 525/2014 under the record of Petrich District Court which came into force on 31 July 2014 under initial general treatment.
>
> Decision No 48/10.02.2020 in private criminal case No 4/2020 under the records of Petrich District Court has not come into force yet due to it being appealed before Blagoevgrad Regional Court."

68. Secondly, the letter dated 10 November 2020 states:

> "In regard to your letter of 26.10.2020, with which you requested information regarding Rayko Borisov Vangelov whether the sentence of imprisonment for 11 months is enforceable, I assure you that at present the sentence imposed on Vangelov under criminal case of general nature No. 525/2014 according to the docket of the Regional Court of Petrich is subject-to execution. A court act has entered into force - ruling No. 48 of 10.02.2020, held on private criminal case No. 4/2020 of the Regional Court of Petrich, which was confirmed by decision No. 903924 of 29.09.2020 of the District Court of Blagoevgrad."

69. Mr Tam submits that the EAW in this case is both incorrect and misleading because it seeks the return of Mr Vangelov to serve a sentence which has been quashed. He submits that in those circumstances the request for his extradition now is an abuse of process.

70. The relevant legal principles are also not in dispute. That the Court has a jurisdiction to prevent extradition in circumstances where it would be an abuse of its process has been made clear by the Supreme Court: see in particular *Zakrzewski v Regional Court in Lodz, Poland* [2013] UKSC 2; [2013] 1 WLR 324, at paras. 11-13 (Lord Sumption JSC).

71. Again it seems to me that this submission has an air of unreality about it. The fact remains that Mr Vangelov committed an offence for which he has yet to serve the sentence of 11 months. The nature of the offence is as set out in the EAW and the length of the sentence is also as set out in the EAW. The only difference is that the correct court has now imposed the relevant sentence, after the matter was remitted to it by the Supreme Court of Cassation. In one sense it can be said that some of the particulars in the EAW are out of date and therefore wrong. But Mr Tam expressly disavowed any suggestion that the EAW was invalid. As was made clear by Lord Sumption in *Zakrzewski*, the abuse jurisdiction is distinct from any question affecting the validity of an EAW. Furthermore, as Lord Sumption also made clear, in principle information contained in an EAW can be corrected by the provision of further information. That is precisely what has occurred in the present case. There is nothing inaccurate, misleading or unfair in the process which has been adopted. It would

elevate formalism to an unacceptable degree to regard what has occurred in this case as being an abuse of process.

72. Accordingly, I would refuse the application for permission to amend the grounds to include Ground 5, because that ground is not reasonably arguable.

Ground 6

73. Ground 6 only relates to Mr Chechev. On his behalf Mr Tam applies for permission to amend his grounds of appeal out of time so as to include an argument which was made before DJ Fanning but was not initially pursued on appeal (although it was included in the original grounds of appeal). The application is made on the basis of new facts which have occurred since the decision of the District Judge. The facts are not in dispute.

74. On 24 April 2020 Mr Chechev was arrested for breach of bail. He has remained in custody in this country ever since. The consequence is that, by the time of the hearing before us he had already served some 9 and a half months of the sentence imposed on him in Bulgaria, which is a total of 14 months. It is common ground that a period spent in custody in this way must be deducted from the total period of detention to be served in the issuing State: see Article 26 of the Framework Decision.

75. Inevitably it has taken some time for this Court to consider and hand down its judgment. Furthermore, it is inevitable that there will be some further delay before Mr Chechev can be returned because Ground 4 has been stayed pending another decision of the Divisional Court, which in turn is waiting for a relevant decision of the Court of Justice of the European Union. The reality is therefore that the large part, if not all, of the total sentence in Bulgaria will have been served by Mr Chechev before he can be returned if that occurs at all.

76. Ms Malcolm made two concessions before this Court. First, she does not oppose the application for permission to advance this ground. Secondly, although she submits that no criticism can properly be made of the balancing exercise which DJ Fanning conducted on the Article 8 issue, at paras. 163-172 of his judgment, she accepts that this Court must now conduct the balancing exercise for itself in the light of the circumstances as they now are.

77. In relation to Article 8 it is common ground that the relevant principles were set out by this Court (Lord Thomas CJ, Ryder LJ and Ouseley J) in *Polish Judicial Authority v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, at paras. 5-17. In particular a "balance sheet" approach to the factors both in favour of and against extradition was recommended at paras. 16-17. The correct approach to be taken by this Court on appeal was set out at paras. 18-24. In particular it was said, at para. 24, that the single question for the appellate court is whether or not the District Judge made the wrong decision. However, as I have said, in the present case it is common ground that this Court must consider for itself whether Article 8 would be breached in the light of the circumstances as they now are.

78. Ms Malcolm did not make any positive submissions to resist the appeal on this ground and was content to leave the matter to the judgement of this Court.

79. There is undoubtedly an interference with the right to respect for private life although it is not a particularly severe one. Mr Chechev has been in the UK for approximately 4 years. He has been in steady employment. He has not been convicted in respect of any offences committed in the UK. He has a partner although the relationship has not existed for a long time. On the other side of the balance it is important to respect the system of mutual trust and cooperation between States to ensure that offenders serve their due sentences. Although the offences are not particularly serious (as the District Judge acknowledged), they are serious, in particular driving whilst intoxicated. I also take into account the most recent statement from Mr Chechev about how well he has been doing in prison since his arrest in April 2020, including attending various courses and obtaining a qualification in English. In my view, the crucial factor which now tips the balance in his favour is that he has already served in actual custody the large part of his sentence. If the sentence had been imposed in this jurisdiction, he would have been released on licence after serving 7 months (the halfway point). In Bulgarian law he would be entitled to apply to be released at the halfway point, although this would not be a matter of right since the decision would be a discretionary one: see Article 439a of the Criminal Procedure Code. The likelihood is therefore that, even if he were to be returned in the next four months or so, he would be released from custody almost immediately.

80. In the circumstances I have reached the conclusion that the interference with his Article 8 rights would now be disproportionate and therefore unlawful under section 21 of the 2003 Act. If this information had been before the District Judge he would have been required to order this Appellant's discharge: see section 27(4) of the 2003 Act.

## Conclusion

81. For the reasons I have given I have reached the following conclusions:

(1) I would allow the appeal of Mr Vangelov on Ground 1 but dismiss the appeal of Mr Chechev on that ground.

(2) I would refuse the renewed application for permission to advance Ground 2 on behalf of Mr Vangelov.

(3) I would refuse the renewed application for permission to advance Ground 3 on behalf of Mr Vangelov.

(4) I would lift the stay on Ground 4, which has become academic in the light of my conclusions on Grounds 1 and 6.

(5) I would refuse Mr Vangelov permission to amend the grounds of appeal to include Ground 5.

(6) I would grant permission to Mr Chechev to amend his grounds of appeal out of time to include Ground 6; and would allow his appeal on that ground.

**Mr Justice Jay:**

82. I agree.