Neutral Citation Number: [2022] EWHC 230 (Admin)

Case No: CO/4726/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE JULIAN KNOWLES

- -

Between :

LORENC SULA	**Appellant**
- and -	
PUBLIC PROSECUTOR OF THE THESSALONIKI COURT OF APPEAL, GREECE	**Respondent**

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David Perry QC and George Hepburne Scott (instructed by **Bark & Co**) for the **Appellant**
Louisa Collins (instructed by **the CPS**) for the **Respondent**

Hearing date: 27 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30am on 7 February 2022.

Mr Justice Julian Knowles:

This is the judgment of the court.

Introduction

1. At the conclusion of the hearing on 27 January 2022 we announced that the appeal would be dismissed and that we would put our reasons in writing. This we now do.

2. This is an appeal against the order for the Appellant's extradition made by Deputy Senior District Judge Ikram on 17 December 2020. Permission was granted by Holman J at a renewal hearing following refusal on the papers.

3. The single issue raised on this appeal is that the judge below should have concluded that, if extradited, the Appellant would face a real risk of a violation to his right under Article 3 of the European Convention on Human Rights (the Convention) not to be subjected to inhuman or degrading treatment owing to the conditions at the prison/s at which he would be held in Greece, and accordingly that extradition was barred under s 21A(1)(a) of the Extradition Act 2003 (EA 2003).

The facts

4. The European arrest warrant (EAW) for the Appellant was issued in January 2018 and he was arrested in this country in July 2020. It is an accusation warrant. It alleges that the Appellant transported over 31kg of cannabis with a value in excess of €400 000. The Framework list is ticked in respect of illicit trafficking of narcotic drugs.

5. The two issues raised in the court below were that extradition would violate the Appellant's rights under Article 3 because of prison conditions; and proportionality (s 21A(1)(b)). The proportionality argument has not been renewed before us.

6. In his careful judgment, the Deputy Senior District Judge directed himself correctly that it was for the Appellant to demonstrate that there are strong grounds for believing that, if returned, he will face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment contrary to Article 3: see *R (Ullah) v Special Adjudicator* [2004] AC 323, [24]. He also referred, again correctly, to the strong presumption that members of the Council of Europe are able and willing to fulfil their obligations under the Convention. Clear, cogent and compelling evidence to the contrary is required to rebut that presumption. That presumption is stronger still in the case of Member states of the European Union in relation to the EAW scheme. The judge referred to the decision of this Court in *Owda v Court of Appeals, Thessaloniki, Greece* [2017] EWHC 1174 (Admin), which considered prison conditions in Greece and in particular at the detention facility in Thessaloniki, which is one of the prisons in which the Appellant may be held if he is extradited.

7. In [4] of his judgment in *Owda*, Burnett LJ (as he then was) said:

> "4. There have been numerous cases in which the Strasbourg Court has considered the question of the nature of conditions in a penal establishment which would found a violation of article 3. Many were collected together in the judgment of the Strasbourg

Court in *Mursic v Croatia* (app. no 7334/13) both in the chamber and Grand Chamber, which relied, in particular, on the earlier decision of the court in *Ananyev v Russia* (2012) 55 EHRR 18. In the Grand Chamber the principles were restated: paragraphs 96 to 101 for general principles; paragraphs 102 to 115 relating to the requirement for "minimum personal space" of $3m^2$; paragraphs 116 to 128 on the question whether less than $3m^2$created a presumption of a violation of article 3; paragraphs 129 to 135 on compensating factors. The court confirmed (135) the "strong presumption" in cases with personal space of less than $3m^2$ and reaffirmed that it could be rebutted having regard "to factors such as the time and extent of restriction; freedom of movement and adequacy of out-of-cell activities and general appropriateness of the detention facility." The court then summarised the position between paragraphs 136 and 141:

> "136. In the light of the considerations set out above, the Court confirms the standard predominant in its case-law of 3 sq. m of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the Convention.
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> 137. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space (see paragraphs 126-128 above).
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> 138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:
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> (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor (see paragraph 130 above):
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> (2) such reductions are accompanied by sufficient freedom of 133 above);
>
> (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above).

> 139. In cases where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (see paragraph 106 above).
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> 140. The Court also stresses that in cases where a detainee disposed of more than 4 sq. m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention referred to above (see paragraphs 48, 53, 55, 59 and 63-64 above) remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under Article 3 of the Convention (see, for example, Story and Others v. Malta, nos. 56854/13, 57005/13 and 57043/13, §§ 112-113, 29 October 2015).
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> 141. Lastly, the Court would emphasise the importance of the CPT's preventive role in monitoring conditions of detention and of the standards which it develops in that connection. The Court reiterates that when deciding cases concerning conditions of detention it remains attentive to those standards and to the Contracting States' observance of them (see paragraph 113 above)."

8. At [5] Burnett LJ went on to say:

> "5. The cases in Strasbourg, including *Mursic*, involve *ex post facto* evaluations of conditions which a prisoner has endured. In a case involving an extradition request from a Member State of the European Union there is a strong presumption that it will abide by its legal obligations, which can be displaced only by strong evidence, usually amounting to an international consensus, that support strong grounds for believing that it will not or cannot do so. If that proves to be the case, then further information must be sought from the requesting state in accordance with the judgment of the Luxembourg Court in *Aranyosi and Caldararu* [2016] QB 921, decided by reference to article 4 of the Charter (the analogue of article 3 ECHR), between paragraphs 94 and 103:

'94. Consequently, in order to ensure respect for article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing member state, he will run a real risk of being subject in that member state to inhuman or degrading treatment, within the meaning of article 4.

95. To that end, that 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.

96. That request may also relate to the existence, in the issuing member state, of any national or international procedures and mechanisms for monitoring detention conditions, linked, for example, to visits to prisons, which make it possible to assess the current state of detention conditions in those prisons.

97. In 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 the Framework Decision. The issuing judicial authority is obliged to provide that information to the executing judicial authority.

98. If, in the light of the information provided pursuant to article 15(2) of the Framework Decision, and of any other information that may be available to

the executing judicial authority, that authority finds that there exists, for the individual who is the subject of the European arrest warrant, a real risk of inhuman or degrading treatment, as referred to in para 94 of this judgment, the execution of that warrant must be postponed but it cannot be abandoned: see, by analogy, *Lanigan's case* [2016] QB 252, 302–303, para 38.

99. Where the executing authority decides on such a postponement, the executing member state is to inform Eurojust, in accordance with article 17(7) of the Framework Decision, giving the reasons for the delay. In addition, pursuant to that provision, a member state which has experienced repeated delays on the part of another member state in the execution of European arrest warrants for the reasons referred to in the preceding paragraph, is to inform the council with a view to an evaluation, at member state level, of the implementation of the Framework Decision.

100. Further, in accordance with article 6 of the Charter, the executing judicial authority may decide to hold the person concerned in custody only in so far as the procedure for the execution of the European arrest warrant has been carried out in a sufficiently diligent manner and in so far as, consequently, the duration of the detention is not excessive: see *Lanigan's case* [2016] QB 252, 305–306, paras 58–60. The executing judicial authority must give due regard, with respect to individuals who are the subject of a European arrest warrant for the purposes of prosecution, to the principle of the presumption of innocence guaranteed by article 48 of the Charter.

101. In that regard, the executing judicial authority must respect the requirement of proportionality, laid down in article 52(1) of the Charter, with respect to the limitation of any right or freedom recognised by the Charter. The issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time.

102. In any event, if the executing judicial authority concludes, following the review referred to in paras 100 and 101 above, that it is required to bring the requested person's detention to an end, it is then required, pursuant to articles 12 and 17(5) of the Framework Decision , to attach to the provisional release of that person any measures it deems

> necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the European arrest warrant has been taken: see *Lanigan's* case, para 61.
>
> 103. In the event that the information received by the executing judicial authority from the issuing judicial authority is such as to permit it to discount the existence of a real risk that the individual concerned will be subject to inhuman and degrading treatment in the issuing member state, the executing judicial authority must adopt, within the time limits prescribed by the Framework Decision, its decision on the execution of the European arrest warrant, without prejudice to the opportunity of the individual concerned, after surrender, to have recourse, within the legal system of the issuing member state, to legal remedies that may enable him to challenge, where appropriate, the lawfulness of the conditions of his detention in a prison of that member state: see *F's case* [2014] 2 CMLR 19, para 50.'

6. The language of 'discounting the existence of a real risk' in paragraph 103 means no more than that, to avoid a refusal of extradition, a judicial authority that has received a request for further information envisaged in paragraph 95, must provide sufficient information to support a determination that substantial grounds for believing there is a real risk do not exist."

9. *Mursic* was considered by this Court in *Grecu v Cornetu Court, Romania* [2017] EWHC 1427 (Admin), [43]-[48]. The Court said:

> "43. Finally, Mr Knowles took us to the decision of the Divisional Court in *Owda v Court of Appeals, Thessaloniki (Greece)* [2017] EWHC 1171 (Admin). Obviously this case did not address the Romanian semi-open regime. The Court emphasised the strong presumption that a member state will abide by its legal obligations (paragraph 5), a presumption:
>
> > "Which can be displaced only by strong evidence, usually amounting to an international consensus, that supports strong grounds for believing that it will not or cannot do so."
>
> If there is such evidence, then further information and/or assurances must be sought from the requesting state, following the decision of the Luxembourg Court in *Aranyosi and Caldararu* [2016] QB 921.

44. In the *Owda* case, the Court went on to consider the "compensating factors" which, when prisoner space falls below the 3m² threshold, might nevertheless avoid a finding of violation of Article 3, quoting the decision in *Achmant v Greece* [2012] EWHC 3470. However, none of this constituted the answer in *Owda*. The answer in that case was supplied by acceptance of the Greek undertaking that the detainee would be provided a minimum of 3m² of space, which saved the Court from considering if the conditions of detention in the Greek prison would be sufficient to dispel the real risk of breach.

45. Mr Knowles also referred us to *Achmant* itself, and to the earlier case of *Dolenec v Croatia* (Application No 25282/06). In each of these cases, of course decided before *Muršic*, the Court found that extensive periods outside the cell, and the identified conditions of detention, were sufficient to avert breach. And in essence Mr Knowles's submission comes to this proposition: the degree of flexibility and movement, and the periods out of the cell under the Romanian semi-open regime, are sufficient, taken together, to mean that there is no real risk of a breach of Article 3.

My Conclusions

46. I am unable to accept Mr Knowles's argument, however elegantly formulated. It seems clear to me that the ECtHR has stated a deliberately crisp approach in *Muršic*, in the passage from paragraph 138 quoted above [26]. The Court has been careful to stipulate that the factors must be "cumulatively" met. The first "factor" cannot be met here at all, on the present state of the assurances. The assurance is that 2m² will be guaranteed. That cannot be thought a "minor" reduction from a minimum of 3m². And it is the guaranteed minimum for the overall semi-open regime: that is to say, that is the long-term and normal provision of space. It cannot be characterised as either "short" or "occasional".

47. For myself, other things being equal, I would find considerable importance in the degree of freedom of movement and the activities on offer. It seems to me that Mr Knowles overstates his proposition somewhat when he suggests one should ignore completely the period from evening lockdown until morning, on the ground that the prisoner should be asleep all of that time. Nevertheless, the regime does permit a good amount of movement and the facilities appear reasonable. In commonsense terms, this must alleviate the effects of a cramped cell to some degree. But we come back to the fact that the ECtHR has interpreted the application of Article 3 so clearly as requiring all the "factors" to be cumulative.

> 48. I recognise the force of the presumption of compliance by a Member State, and the requirement for "something approaching international consensus", in the language of the Court in *Owda* quoted above. However, it appears to me that it is hard to apply a "presumption" in the face of the lucid test set out in *Muršic*. Moreover, the broad and critical conclusions as to Romanian prison overcrowding and conditions in *Rezmives* must constitute an authoritative and general comment on the regime. I can find no more ambiguity in those observations as to the general prison conditions in Romania, than in the formulation in *Muršic*. I do not see how the presumption of compliance can survive both, taken together."

10. The further information from the Respondent which was before the Deputy Senior District Judge dated 2 September 2020 was that if extradited the Appellant would be held either at 'the Detention Premises of Nigrita', or at the 'General Detention Premises of Thessaloniki', depending on the premises' capacity at the time he was surrendered. In relation to Nigrita, further information from the Respondent dated 12 October 2020 stated:

> "The centre here has a capacity of 600 people (ie 200 cells of three persons) with natural and artificial lighting the centre is facing a serious problem of overcrowding as currently 750 people are detained (ie 25% the percentage of overcrowding in the detention facilities) . In the cells which are strictly for three persons currently four and five persons are kept in many of them for reasons of security and necessary separation . We inform you in this regard that the centre here does not have a permanent doctor but once a week an internal medicine doctor from the Nigrita health centre visits while only one nurse serves in our prison."

11. The judge also had before him an April 2020 report from the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) on Greek prisons, following an inspection visit in March/April 2019.

12. The judge considered the position in respect of Thessaloniki (also known as Diavata), which was the prison at issue in *Owda*. He noted the Court's conclusion in that case that the evidence did not establish a breach of Article 3 notwithstanding that the evidence showed that in-cell space was on the 'cusp' of $3m^2$ or slightly less (taking account of lavatory facilities) (at [14]-[16]).

13. The judge noted the CPT's 2020 conclusion that on the issue of overcrowding, the situation in prisons had not significantly improved since 2011, and that in much of Thessaloniki Prison, 'far too many prisoners continue to be held in conditions that are an affront to their human dignity'.

14. The judge then set out the Greek Government's response to the CPT, in which it pointed out that extra money had been allocated, staff had been trained and healthcare facilities improved.

15. In relation to Nigrita Prison, the judge referred to the CPT's findings that there was understaffing and that whilst some parts of the prison were 'adequate', the disciplinary unit was inhuman and degrading. It also remarked that some of parts were persistently overcrowded.

16. The judge rejected the Appellant's Article 3 challenge. His reasons for doing so were, in summary, as follows:

    a. There was insufficient material to displace the presumption of compliance with Article 3. He had not been referred to any judgment of any international court or any Greek Court, which suggested that the Appellant would face a real risk of inhuman or degrading treatment if he were extradited. Nor is there any judgment of a UK court to that effect. There was no pilot judgment from the European court on Greek prisons, although he had been shown cases where individual violations had been found. The CPT report did not represent an international consensus.

    b. Overcrowding at Thessaloniki Prison appeared to be about the same as it was when *Owda* was decided. The situation of prisoner space being on the 'cusp' of $3m^2$ had not materially changed.

    c. The 2020 CPT Report and the Government's response suggested no deterioration in conditions but, rather, improvements in prison conditions since *Owda*. The Greek government was taking steps to deal with conditions generally. Therefore, the judge did not find that there was a real risk that prison conditions at Thessaloniki are not Article 3 compliant.

    d. Further information from the Judicial Authority conceded that there was overcrowding at Nigrita Prison. Nonetheless, there was no specific evidence that the space afforded to the RP, were he to be held at Nigrita, would actually be less than $3m^2$. The judge therefore did not find that there was a real risk that prison conditions at Nigrita are not Article 3 compliant.

    e. The further information dated 2 September and 12 October 2020 had been presented in good faith and as to the intentions of the prison authorities. They were a clear indication from the Judicial Authority that if there was a capacity issue at Thessaloniki, the Appellant would, instead, be accommodated at Nigrita Prison.

    f. Overall, the Appellant had failed to persuade the judge that in the event of extradition being ordered, there was a real risk of an Article 3 violation at either Thessaloniki or Nigrita by reason of (i) overcrowding/prisoner numbers/personal space; (ii) staff levels; and/or (iii) healthcare provision.

The application for permission to appeal

17. The Appellant lodged perfected grounds of appeal against the order for his extradition in December 2020. In a Respondent's Notice dated 12 January 2021, the Judicial Authority sought to uphold the district judge's decision, essentially for the reasons that he gave. In due course Sir Ross Cranston, sitting as a High Court judge, refused permission to appeal on the papers.

18. The Appellant then sought an oral renewal hearing. In a Note dated 22 June 2021 Ms Collins, counsel for the Respondent, very properly disclosed further information from Greece dated 10 March 2021 which had been disclosed in three linked Greek prison cases which were then ongoing before Westminster Magistrates Court (*Greek Judicial Authority v Andjus Neli*; *Greek Judicial Authority v Florjan Hysa*; and *Greek Judicial Authority v Raad Jalil*). Those cases raised common issues concerning the prisons of Thessaloniki (Diavata) and Nigrita. The Greek authorities conceded, as the Note explained at [4], that there was overcrowding at those prisons and a risk that the personal space per detainee may fall below $3m^2$. The Note explained that the CPS had requested an assurance to guarantee that those persons extradited would be afforded at least $3m^2$ of personal space.

19. Accordingly, in the present case, the Respondent conceded that the position as set out in its Respondent's Notice could not now be maintained in light of this further information. It was conceded that the judge would have reached a different conclusion on the Article 3 challenge had this further information been before him. The Respondent therefore proposed that permission be granted, and the appeal then be stayed pending the outcome in *Neli and others*. On 1 July 2021 Holman J granted permission.

20. We understand that, in fact, in *Neli and others* the assurances which the CPS sought from the Greek authorities were not received in time, the court refused an adjournment, and the three defendants were discharged. The assurances were eventually received, and we further understand that the Judicial Authority is seeking permission to appeal against the orders for discharge in cases CO/4073/2021, CO/4075/2021 and CO/4076/2021.

21. The present appeal came on for hearing before Edis LJ and Jay J on 26 October 2021. The Respondent made an application to vacate the hearing and for a court-led *Aranyosi* request for an assurance. The Court agreed to vacate the hearing. Ms Collins' note of the Court's ruling is to the effect that it was anticipated that an assurance would be provided, although the date when it would be supplied was unknown. The Court referred to the three cases then before the Westminster court and noted that assurances were awaited in that case. Given the same prisons were involved in the two cases, the Court said consistency was desirable. The Court noted the Appellant was in custody and ordinarily an adjournment would not have been granted. An order was made containing the following questions (formulated by counsel) to the Greek authorities:

> "1. Will the Requested Person be accommodated in a cell which provides him with at least 3 metres squared of personal space (excluding any in cell sanitary facility) at all times throughout his

> detention? If the answer is yes, will he have between 3 metres squared and 4 metres squared?
>
> 2. Will the overall surface of the cell allow the Requested Person to move freely between the furniture items in the cell at all times throughout his detention?
>
> 3. Given the questions above, will the Requested Person be detained at the general Detention Premises at Thessaloniki?
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> 4. In the period from April 2019, what steps have been made to improve staffing levels in Thessaloniki prison?
>
> 5. How many custodial officers are employed in Thessaloniki prison and how many are on duty in the day shifts?
>
> 6. What facilities are available for the provision of healthcare at Thessaloniki prison?"

22. A response was requested by 19 November 2021.

23. On 19 November 2021, the Respondent submitted a written application to the Court seeking an extension of time for the service of a response to these questions. This was on the basis that a response had only been provided in Greek. The Greek liaison magistrate had advised the CPS that, due to a significant backlog, it had not been possible to obtain an official translation by the requested date. Indeed, the backlog meant that the translation would not be available for several months. Accordingly, the CPS took steps to obtain an official translation through other channels and sought a further 10 working days to obtain this.

24. When the translated document (dated 18 November 2021) was received, it transpired that it did not provide the relevant assurances regarding space. There also appeared to be a disparity between the contents of that letter (which stated that Thessaloniki Prison is overcrowded and provides figures on the space of cells and their occupancy), as against the information contained in the letter of 9 November 2021 (which stated that the condition of $3m^2$ of space was met).

25. Accordingly, the Greek authorities were asked whether, notwithstanding the terms of the letter of 18 November 2021, the Appellant would be guaranteed at least $3m^2$ of personal space (excluding sanitary facilities) at all times in the Detention Establishment of Thessaloniki; that the overall surface area of the cell would allow the Appellant to move freely between the furniture items in the cell at all times and throughout his detention; and that if he required to be moved to another detention establishment the Central Transfer Committee would ensure that he will still have $3m^2$ personal space in that establishment.

26. An application was made on 3 December 2021 for an extension of time (to 17 December 2021) for service of the response to these queries which would form part of the response to the *Aranyosi* questions.

27. A response was received from Greece in the form of an assurance dated 9 December 2021. This was served on 14 December 2021. It provides as follows:

> "Following your email of 6-12-2021 in order to inform the British Judicial/Prosecution Authorities, we confirm the following:
>
> l. ln the Detention Establishment of Thessaloniki, the condition of 3 sqm living space, which includes the individual equipment of the prisoner (for instance: bedside table) but not the toilet which is shareable, is met. The wanted person will have between 3m.s and 4m.s, throughout his detention. In case he cannot be provided with the 3 sq.m. living space in the above mentioned Detention Establishment, the Central Transfer Committee will ensure the transfer of the detainee to another Detention Establishment where the necessary condition of 3sq.m. living space will be met."

28. On the same date this assurance was served, an order was made by Edis LJ and Jay J refusing the application for an extension of time. The Court ordered: (a) that the appeal be heard in early February 2022; and (b) that the Respondent would have to make an application to rely on the assurance at that hearing.

29. There is also before us an application by the Appellant to rely on a report from Dr George Tugushi dated 20 September 2021. Dr Tugushi was a member of the CPT between 2005 and 2017. He continues to serve as an expert to the Committee. His overall conclusion at [67]-[68] is that:

> "67. Taking into consideration the information set out above, the Greek authorities are not in a position to: (i) ensure the security of Mr. Sula, (ii) protect him from inter-prisoner violence, (iii) provide him living conditions compliant with basic European Standards, (iv) ensure that he is provided with at least 4m2 personal living space, or (v) ensure that he is provided with access to adequate healthcare.
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> 68. Therefore, if extradited, there is a real risk if not a probability that Mr Sula will be held in conditions that breach the prohibition on inhuman or degrading treatment as provided by Article 3."

30. The Respondent opposes this application. Whilst not doubting Dr Tugushi's status as an expert, Ms Collins submitted that his report in reality adds little to the CPT report.

Submissions

31. On behalf of the Appellant, it was submitted that there is a real risk of a violation of Article 3 because of a combination of: (a) overcrowding; (b) general conditions at Nigrita; (c) conditions in the Disciplinary Unit at Nigrita; (d) staffing levels at Nigrita; (e) lack of prison medical staff at Nigrita; (f) generally poor conditions at Thessaloniki.

32. In his submissions, Mr Perry pointed to some discrepancies on space per prisoner in the 2021 further information from Greece (a point which Ms Collins acknowledged on behalf of the Respondent, as we have said). He said the district judge had misread the CPT report when he said the trajectory was for prisons to become less overcrowded when that was not the case, and the CPT report showed the opposite. But, he said, space was just one issue. Mr Perry also emphasised understaffing and the impact this would have on inter-prisoner violence. He said the issue of understaffing fed directly into the Article 3 risk which he said the evidence established. He pointed out that this Court last October had asked six questions, two of which related to staffing. The lack of staff – and the lack of increase in staffing since 2019 - had been acknowledged in the further information from Greece (although not in the most recent assurance). He said the Appellant would be at increased risk of violence if he were seen to be receiving special treatment in terms of space, especially if this were to result in the space available to other prisoners being reduced.

33. On behalf of the Respondent, in her Updated Skeleton Argument dated 24 January 2022 Ms Collins concedes that, absent the December 2021 assurance, the appeal should be allowed, the extradition order quashed, and the Appellant's discharge ordered under s 27(1) and (5) of the EA 2003, on the grounds of lack of adequate space (and only on that basis; she does not concede other points, eg, understaffing, relied on by the Appellant). However, she says that if we receive the December 2021 assurance then that is sufficient to dispel any risk of an Article 3 violation, and the appeal should be dismissed.

Discussion

Should we receive the Greek assurance dated 9 December 2021?

34. On behalf of the Appellant, Mr Perry QC invited us to deal 'head on' with the assurance, which he said was not sufficient in any event to dispel the risk of an Article 3 violation.

35. The question of assurances, and in particular those served in connection with appellate extradition proceedings, was recently considered by this Court presided over by the Lord Chief Justice in *Government of the United States of America v Assange* [2021] EWHC 3313 (Admin). In that well-known case the district judge had discharged Mr Assange because of the risk of suicide she found would exist if he were extradited to the United States. On appeal, the United States offered various assurances relating to the conditions in which Mr Assange would be held if extradited, and other matters.

36. Mr Assange argued the Court should not accept the assurances. Among the arguments advanced on his behalf, it was submitted that by offering the assurances at a late stage the United States was trying to change its case, and that it was too late to do so. It was also said that the criteria for the receipt of fresh evidence on appeal established in *Municipal Court of Szombathely v Fenyvesi* [2009] 4 All ER 324 had not been met. Mr Assange relied on the statement in *Fenyvesi* at [35] that the appeal court will not readily admit fresh evidence which should have been adduced before the lower court and which is tendered to try to repair holes which should have been plugged before that court.

37. At [39]-[42] of its judgment the Court said this:

> "39. A diplomatic note or assurance letter is not "evidence" in the sense contemplated by section 106(5)(a) of the 2003 Act: it is neither a statement going to prove the existence of a past fact, nor a statement of expert opinion on a relevant matter. Rather, it is a statement about the intentions of the requesting state as to its future conduct: see *USA v Giese* [2016] 4 WLR 10 at paragraph [14]. For the purposes of section 106(5), an offer of an assurance at the appeal stage is an "issue": see *India v Chawla* [2018] EWHC 1050 (Admin) at [31].
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> 40. In *India v Dhir* [2020] EWHC 200 (Admin), a Part 2 case in which the issues related to article 3 of the Convention, at paragraphs [36] and [39] the court said –
>
> > '36. The court may consider undertakings or assurances at various stages of the proceedings, including on appeal, and the court may consider a later assurance even if an earlier undertaking was held to be defective: see *Dzgoev v Russia* [2017] EWHC 735 at paragraph 68 and 87 and *Giese v USA (no 4).*
> >
> > …
> >
> > 39. Where a real risk of inhuman and degrading treatment is established, it is not appropriate to discharge the requested person but to enable the requesting state 'to satisfy the court that the risk can be discounted' by providing assurances, see *Georgiev v Bulgaria* [2018] EWHC 359 (Admin) at paragraph 8(ix). If such an assurance cannot be provided within a reasonable time it may then be necessary to order the discharge of the requested person, see … *India v Chawla* at paragraph 47.'
>
> 41. We respectfully agree. Other cases relied on by Mr Assange including *India v Ashley* [2014] EWHC 3505 (Admin) at paragraphs [42] and [43], do not provide support for the argument to the contrary. In *Romania v Iancu* [2021] EWHC 1107 (Admin) further information and a related assurance had been submitted outside a time limit and after the conclusion of the hearing. The District Judge refused to admit it when to do so would result in a further hearing and in further delay to proceedings. As Chamberlain J said at paragraph [22], "it is inherent in the concept of a time limit that failure to comply with it may have consequences". The present case is different.

> 42. In our view, a court hearing an extradition case, whether at first instance or on appeal, has the power to receive and consider assurances whenever they are offered by a requesting state. It is necessary to examine the reasons why the assurances have been offered at a late stage and to consider the practicability or otherwise of the requesting state having put them forward earlier. It is also necessary to consider whether the requesting state has delayed the offer of assurances for tactical reasons or has acted in bad faith: if it has, that may be a factor which affects the court's decision whether to receive the assurances. If, however, a court were to refuse to entertain an offer of assurances solely on the ground that the assurances had been offered at a late stage, the result might be a windfall to an alleged or convicted criminal, which would defeat the public interest in extradition. Moreover, as Mr Lewis QC pointed out on behalf of the USA, a refusal to accept the assurances in this case, on the ground that they had been offered too late, would be likely to lead only to delay and duplication of proceedings: if the appeal were dismissed on that basis, it would be open to the USA to make a fresh request for extradition and to put forward from the outset the assurances now offered in this appeal, subject, of course, to properly available abuse arguments."

38. We are aware that the Divisional Court certified a question of law of general public importance under s 32(4)(a) of the EA 2003, namely, 'In what circumstances can an appellate court receive assurances from a requesting state which were not before the court of first instance in extradition proceedings ?'. Leave to appeal to the Supreme Court was refused.

39. In light of this, whilst not resisting that we should consider the assurance on its merits, Mr Perry formally reserved his position on the question whether we should receive the assurance, so as to safeguard the Appellant's position in the event that Mr Assange prevails in the Supreme Court. He invited us, if we dismissed the appeal (as we have), to make an order that the Appellant not be extradited to Greece until after the application for leave in *Assange* (and the appeal, if leave is granted) is determined. Ms Collins did not resist such an order being made. Therefore, we will make such an order.

40. Applying the approach in *Assange*, we have no doubt that the Court should receive and take into account the assurance from Greece, notwithstanding its lateness. It should be made clear that non-compliance with deadlines set by the courts of this country for the receipt of material from issuing judicial authorities is to be deprecated. Co-operation in extradition matters works both ways; just as our extradition partners rightly expect co-operation from courts here in the processing of their EAWs and extradition requests, so our courts should be able to rely upon requesting authorities to supply material in accordance with any deadlines which are set.

41. That said, there is no question of Greece having acted in bad faith or having delayed serving the assurance for tactical reasons. Moreover, little would be gained by refusing to accept the assurance, for essentially the reasons given by the Court in *Assange*, a point which Mr Perry candidly accepted. Were we to do so, and the

Appellant discharged, then it would be open to the Greek authorities to begin fresh proceedings for the serious drugs offence with which the Appellant is charged, with all of the delay and expense that would entail (and perhaps with the Appellant again remanded in custody, as he is presently). In our view that would not be in the interests of justice.

42. So far as Dr Tugushi's report is concerned, we have considered this *de bene esse* and discuss it later.

Is the assurance sufficient to dispel any risk of an Article 3 violation due to lack of space?

43. In my judgment the outcome of this appeal depends upon whether we can be satisfied that the Appellant will have at least $3m^2$ of personal space in whichever prison he is detained in. Like the district judge, and like this Court in *Owda*, and despite Mr Perry's submissions, we are not persuaded that any of the other matters relied upon by the Appellant, such as lack of staffing, or inter-prisoner violence, whilst they were of concern to the CPT, give rise to any arguable Article 3 issue.

44. These issues were specifically considered in *Owda* at [17]-[22], and whilst problems were acknowledged, the Court held that they did not give rise to any arguable Article 3 claim. The Court distinguished the decision in *Marku and Murphy v The Nafplion Court of Appeal, Greece* [2016] EWHC 1801 (Admin), where the appellants' discharge was ordered on Article 3/prison conditions grounds. The Court noted at [18] that in *Marku* there had been very specific evidence about the two prisons involved (Korydallos and Nafplio) which had led to the appeal being allowed.

45. The principles concerning the provision of assurances in cases concerning potential breaches of the Convention were set out in the Strasbourg decision of *Othman (Abu Qatada) v United Kingdom* [2012] 55 EHRR 1. The case concerned Article 6 and not Article 3, but the Court's approach to assurances is of general application. It said at [187]-[189] (citations omitted):

> "187. In any examination of whether an applicant faces a real risk of ill-treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time …
>
> 188. In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the

receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances …

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:

(i) whether the terms of the assurances have been disclosed to the Court …

(ii) whether the assurances are specific or are general and vague …

(iii) who has given the assurances and whether that person can bind the receiving State …

(iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them …

(v) whether the assurances concerns treatment which is legal or illegal in the receiving State …

(vi) whether they have been given by a Contracting State …

(vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances …

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

(ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible …

(x) whether the applicant has previously been ill-treated in the receiving State … ; and

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

46. Applying these criteria, we have no hesitation in concluding that the assurance from Greece is sufficient to dispel any Article 3 concerns which might otherwise exist. We bear firmly in mind what Lord Burnett CJ said in *Giese v Government of the United States of America* [2018] EWHC 1480 (Admin)**,** [38]:

> "… whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept".

47. Greece is a friendly foreign state governed by the rule of law. It is a long-standing extradition partner of the United Kingdom and it is a member of the Council of Europe and the European Union. It is signatory to a number of international human rights instruments. The assurance is clear, specific and precise. It was offered to the Court following the Court's request and it was communicated by the CPS on behalf of the Respondent. The Greek authorities understood what they were being asked, and why they were being asked it. The assurance is capable of being monitored; the Appellant will have the assistance of a lawyer in Greece, and in the unlikely event of any alleged breach, appropriate action can be taken. Greece cooperates with international bodies such as the CPT. The Greek government responded positively to the CPT's inspection and report, and it is clear that it is working on improving prison conditions.

48. The Court in *Owda* found the assurance in that case to be sufficient to dispel any Article 3 risk arising from lack of space (at [16]), and in our judgment the same conclusion follows in this case.

Dr Tugushi's report

49. So far as Dr Tugushi's report is concerned, we decline to receive this as fresh evidence. Section 27(4)(a) of the Act permits this Court to consider evidence that was not raised or available at the extradition hearing. In *Fenyvesi*, which we referred to earlier, the Court said at [28]-[35]:

> "28. The appeal is brought under section 28 of the 2003 Act. The relevant conditions for a successful appeal in this case are in section 29(4) to the effect that:
>
> > '(a) … evidence is available that was not available at the extradition hearing;
> >
> > (b) the … evidence would have resulted in the judge deciding the relevant question differently….'
>
> so that he would not have been required to order the respondents' discharge.
>
> 29. The statutory provenance and obvious parliamentary intent of the 2003 Act does not favour a liberal construction of these

provisions. One aim of the European Framework Decision, as given in paragraph 5 of its preamble, was to remove complexity and potential for delay inherent in extradition proceedings – see also the opinion of Lord Hope of Craighead in *Dabas v High Court of Justice, Madrid* [2007] AC 31 at paragraph 53; and Lord Neuberger in *Mucelli v Albania* [2009] UKHL 2 at paragraph 66. Article 17 of the Framework Decision provides in terms that a European Arrest Warrant shall be dealt with and executed as a matter of urgency. Time limits are provided for and section 31 of the 2003 Act and the resulting practice direction (paragraph 22.6A of the Part 52 Practice Direction) predicate a speed of proceeding which was scarcely achieved before the district judge in the present case, let alone upon an appeal at which large amounts of fresh evidence might freely be admitted. As we say, Mr Caldwell accepted that it was beyond the real contemplation of the legislation – if not literally beyond its technical scope – that fresh evidence might generate the need for a full rehearing in this court.

30. Mr Caldwell rightly did not contend that evidence that "was not available at the extradition hearing" simply meant evidence which was not adduced at the extradition hearing. He referred to paragraph 3 of the judgment of Latham LJ in *Miklis v Lithuania* [2006] EWHC 1032 (Admin) concerning section 27(4) of the 2003 Act, which is the materially identical provision to section 29(4) for appeals against an extradition order. Latham LJ said that the word "available" makes it plain that the court will require to be persuaded that there is some good reason for the material not having been made available to the district judge. He did not consider that the requirements of *Ladd v Marshall* had to be met, where not only the liberty of the individual, but also matters relating to human rights are in issue. Any suggestion of an appellant keeping his powder dry would be viewed with some scepticism. Latham LJ was prepared to accept that the material provided by one person in *Miklis* could not have been obtained in time for the hearing before the district judge. He was less convinced about other medical evidence, but in the circumstances was prepared to admit it.

32. One reading of this passage suggests a discretionary latitude which the wording of the section does not readily provide. In addition, the passage does not address the further restrictive condition in section 29(4)(b) that the fresh evidence would have resulted in the judge deciding the relevant question differently, which is more restrictive than the parallel considerations in *Ladd v Marshall* or section 23 of the 1968 Act.

33. In our judgment, evidence which was ‘not available at the extradition hearing’ means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not

with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available. It may on occasions be material to consider whether or when the party knew the case he had to meet. But a party taken by surprise is able to ask for an adjournment. In addition, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge. This is a strict test, consonant with the parliamentary intent and that of the Framework Decision, that extradition cases should be dealt with speedily and should not generally be held up by an attempt to introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing. A party seeking to persuade the court that proposed evidence was not available should normally serve a witness statement explaining why it was not available. The appellants did not do this in the present appeal.

34. The court, we think, may occasionally have to consider evidence which was not available at the extradition hearing with some care, short of a full rehearing, to decide whether the result would have been different if it had been adduced. As Laws LJ said in *The District Court of Slupsk v Piotrowski* [2007] EWHC 933 (Admin) at paragraph 9, section 29(4)(a) does not establish a condition for admitting evidence, but a condition for allowing the appeal; and he contemplated allowing fresh material in, but subsequently deciding that it was available at the extradition hearing. The court will not however, subject to human rights considerations which we address below, admit evidence, and then spend time and expense considering it, if it is plain that it was available at the extradition hearing. In whatever way the court may deal with questions of this kind in an individual case, admitting evidence which would require a full rehearing in this court must be regarded as quite exceptional.

34. Section 29(4) of the 2003 Act is not expressed in terms which appear to give the court a discretion; although a degree of latitude may need to be introduced from elsewhere. As Latham LJ said in *Miklis*, there may occasionally be cases where what might otherwise be a breach of the European Convention on Human Rights may be avoided by admitting fresh evidence, tendered on behalf of a defendant, which a strict application of the section would not permit. The justification for this would be a modulation of section 29(4) with reference to section 3 of the Human Rights Act 1998. But such Human Rights Act considerations do not extend for the benefit of judicial authorities seeking the enforcement of a European Arrest Warrant for whom section 29(4) is of no avail if they are unable to come within its clear terms. This apparent imbalance between defendants and judicial authorities arises from the fact that a defendant may have the benefit of Human Rights considerations which the judicial authorities do not. We say this without overlooking the decision

> of a division of this court in *Bogdani v Albanian Government* [2008] EWHC 2065 (Admin), where the court admitted in the interests of justice a further explanation of Albanian statutory law to assist in its construction in an appeal which raised an issue under section 85(5) of the 2003 Act – see paragraphs 45 and 46 of the judgment of Pill LJ. The court at an earlier hearing had contemplated the admission of this material without objection at that stage. Technically evidence of foreign law is regarded as evidence of fact in this jurisdiction. But we doubt whether such evidence was a significant parliamentary concern underlying section 29(4). The court would naturally wish to be properly informed as to relevant legal principles of the law of a foreign state.
>
> 35. Even for defendants, the court will not readily admit fresh evidence which they should have adduced before the district judge and which is tendered to try to repair holes which should have been plugged before the district judge, simply because it has a Human Rights label attached to it. The threshold remains high. The court must still be satisfied that the evidence would have resulted in the judge deciding the relevant question differently, so that he would not have ordered the defendant's discharge. In short, the fresh evidence must be decisive."

50. *Fenyvesi* was recently considered by the Supreme Court in *Zabolotnyi v Mateszalka District Court, Hungary* [2021] 1 WLR 2569, [57]-[58]. Lord Lloyd-Jones said:

> "57. In my view these conditions in subsection 27(4) are, strictly, not concerned with the admissibility of evidence. I agree with the observation of Laws LJ in *District Court of Slupsk v Piotrowski* [2007] EWHC 933 (Admin), with regard to the parallel provision in section 29(4) which applies to an appeal against discharge at an extradition hearing, that it does not establish conditions for admitting the evidence but establishes conditions for allowing the appeal. In my view this applies equally to section 27(4) which is not a rule of admissibility but a rule of decision. The power to admit fresh evidence on appeal will be exercised as part of the inherent jurisdiction of the High Court to control its own procedure. The underlying policy will be whether it is in the interests of justice to do so (*Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin); [2009] 4 All ER 324, a decision in relation to section 29(4) of the 2003 Act, paras 4 and 6 per Sir Anthony May P; *FK v Germany* [2017] EWHC 2160 (Admin), para 26 per Hickinbottom LJ). In this context, however, an important consideration will be the policy underpinning sections 26-29 of the 2003 Act that extradition cases should be dealt with speedily and not delayed by attempts to introduce on appeal evidence which could and should have been relied upon below (*Fenyvesi* at paras 32-33)."

> 58. Parliament in enacting sections 26-29 of the 2003 Act clearly intended that the scope of any appeal should be narrowly confined. The condition in section 27(4)(b) that the fresh evidence would have resulted in the judge deciding the relevant question differently is particularly restrictive. This is reflected in the judgment of the Divisional Court in *Fenyvesi*…"

51. In our judgment, Dr Tugushi's report fails a number of the *Fenyvesi* criteria. Principally, it adds little to the CPT report which was before the district judge. In large part Dr Tugushi simply repeats matters set out in that report, which did not persuade the district judge to find a violation of Article 3, and does not persuade me. Also, whilst we do not doubt Dr Tugushi's expertise, it does not appear that he has visited Greek prisons in recent years (certainly not as a member of the CPT: his last visit in that capacity was in 2013). He does not deal with the December 2021 assurance (despite his statement in [66] that he would be able to do so, were one to be provided). His evidence is not therefore 'decisive'.

Conclusion

52. For these reasons, the appeal is dismissed.