Neutral Citation Number: [2023] EWHC 3089 (Admin)

Case No: AC-2022-LON-003611

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2023

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

JÁNOS ORSÓS **Applicant**

- and –

DR ANTAL GÁBOR, PENITENTIARY JUDGE AT THE PÉCS REGIONAL COURT, HUNGARY **Respondent**

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Sebastian Bates (instructed by **Lloyds PR**) for the **Applicant**
The Respondent did not appear and was not represented

Hearing date: 23 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Julian Knowles:

Introduction

1. This is a renewed application by János Orsós, the Applicant, for permission to appeal under Part 1 of the Extradition Act 2003 (EA 2003) against an order for his extradition to Hungary dated 13 December 2022. Johnson J refused permission on the papers on 21 July 2023.

2. The main bundle runs to nearly 1100 pages. This contains a number of authorities, and there is also a separate Authorities Bundle of over 200 pages. There is a quantity of what is said to be 'updating' or 'fresh' evidence on behalf of the Applicant. This material was served under cover of applications dated 4 January 2023, 27 July 2023, and 30 October 2023 respectively; two were opposed by the Respondent and there was no response in relation to the third. There are Renewal Grounds of Appeal and a Skeleton Argument.

3. The renewal application was listed for the usual 30 minutes, however Mr Bates addressed me for in excess of an hour. I am satisfied that the Applicant via Mr Bates was able to advance before me every point he wished to make either orally, or in writing (or both). At the conclusion of the hearing I reserved my decision and said I would put my reasons into writing, which I now do. I have re-read the necessary material while writing this judgment.

Proceedings below

4. The arrest warrant from Hungary is a conviction warrant. The Applicant has been sentenced to two years and nine months imprisonment, all of which remains to be served, for a number of offences of burglary, attempted burglary and theft. Following his apprehension he admitted at least some of the offences.

5. The Applicant contested extradition before the district judge on a number of grounds: (a) extradition considerations/s 13 of the EA 2003 (discrimination on grounds of his Roma origin); (b) s 14 (delay); (c) s 20/trial in absence; (d) s 21/Article 3/prison conditions/prejudicial treatment because of Roma origins; (e) s 20/Article 8.

6. The district judge rejected each of these challenges.

7. The Applicant's Perfected Grounds of Appeal of 4 January 2023 (see at [9]) were that:

    a. Ground 1: [46]–[108] of Dr Kádár's expert report ought to have been admitted.

    b. Ground 2: there was a reasonable chance, substantial grounds for thinking, or a serious possibility that, in the event of the Applicant's extradition, he would be punished, detained or restricted in his personal liberty by reason of his race.

    c. Ground 3: the Applicant's extradition would not be compatible with Article 3 (taken alone and in conjunction with Article 14).

d. Ground 4: Mr Orsós' extradition would not be compatible with Article 8.

8. I will deal later with Dr Kádár's evidence. In broad terms, his report dealt with prisons/Article 3 and the treatment of Roma people in Hungary.

Decision of the single judge

9. The 'updating' or 'fresh' evidence (which I have considered *de bene esse*) consists principally of evidence from the Applicant's partner, [VS]; his sister, [AO]; and ECtHR material. [VS] was about 21 weeks pregnant as at 18 October 2023, and the baby is due in February 2024. The pregnancy was confirmed in June 2023, after the extradition hearing. The Applicant and his partner also have a young baby born in October 2022, and three other children.

10. In refusing permission, Johnson J said:

> "Fresh evidence: I would not allow the application to rely on fresh evidence. The ECHR decision is from 5 years ago, before the large-scale prison building programme (see at [96]). The District Judge took account of the new-born baby – the evidence does not amount to more than what might have been expected. I have, however, assumed (for the purposes of considering permission to appeal) that the fresh evidence would be admitted.
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> Ground 1 (admission of expert report): This was a case management decision. The report was served grossly late and only shortly before the hearing. An extension of time could have been sought, or a report could have been lodged without/before the assurance. The judge was entitled to exercise his discretion to exclude the bulk of the report (whilst allowing the applicant to rely on discrete passages relevant to Art 3 ECHR).
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> Ground 2 (s13/race discrimination): This ground is largely parasitic on ground 1, for which I do not grant permission. In any event, even if the report had been admitted, I do not consider it is arguable that the judge's decision was wrong. The report deals with the position of Roma people in Hungary generally, but does not support a claim that the appellant in particular will be punished, detained or restricted in his personal liberty by reason of his race.
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> Ground 3 (Article 3): An assurance had been granted in respect of space. Dr Kádár's evidence was out of date in that it was largely based on material that predated a significant prison building programme. The judge was entitled to conclude that the evidence did not establish that there were substantial grounds for believing that there was a real risk of the appellant being subject to inhuman or degrading treatment or punishment.
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> Ground 4 (Art 8): The judge applied the applicable legal principles and had regard to all relevant factors. He had particular

> regard to the children but, as he pointed out, this was not a sole carer case. The applicant was a fugitive sought on a conviction warrant where 2 years and 9 months remained to be served. The judge's conclusion was clearly correct."

The renewed application and discussion

11. As I have indicated, a vast amount of material was filed for this (notionally) 30 minute renewal hearing. I do not propose to deal with every point and authority raised orally or in writing by Mr Bates.

12. Mr Bates took the grounds of appeal in a different order from how they were pleaded in the Perfected Grounds. In summary, he submitted as follows.

13. *Article 8 ECHR (Ground 4)*. This being a fresh evidence case, it was for me to make my own assessment based on all the material whether extradition would be compatible with the Article 8(1) rights of the Applicant and his family or whether it would be disproportionate and so barred: *Jozsa v Tribunal of Szekesfehervar, Hungary* [2023] EWHC 2404 (Admin), [18]-[19].

14. There had been important developments since the extradition hearing, not least [VS]'s pregnancy. She had had complications with the birth of her fourth child, and she feared complications in relation to the upcoming birth. She would struggle financially and emotionally without the Applicant's support and was fearful of trying to cope without him. The Applicant's sister, who lives near them in a town in the North, is unable to assist and as at July 2023, was in the process of emigrating to Canada with her family. The sister was concerned about the well-being of [VS] and the children if [VS] has to carry, deliver, and care for a new baby on her own and alongside the other children (pp 35–36 of the renewal hearing bundle).

15. Mr Bates said that there was evidence about the Applicant's mental health and the effect of possible extradition, and that he had been missing work and was taking prescribed medication, Propanolol, which is used to treat anxiety and other conditions. There was also evidence that the mental health of his and [VS]'s second son was being adversely affected by the prospect of the Applicant's extradition.

16. Mr Bates therefore said that when the Article 8(1) *Celinski* balancing exercise was re-taken on all the current material, it came down against extradition.

17. I disagree. In my judgment, just like the district judge (and Johnson J), I do not consider there is any arguable basis for saying that extradition would be incompatible with Article 8(1). I do not doubt extradition will have an impact on [VS] and the family, perhaps a significant impact, but it is not of the exceptionally severe type which could properly lead to a finding of incompatibility with Article 8(1). Nor do any of the other matters relied on tip the balance in the Applicant's favour.

18. The relevant principles are well understood and were correctly set out by the district judge at [107] et seq of his judgment. I did not understand Mr Bates to disagree. They were encapsulated by Lady Hale in *H(H) v Deputy Prosecutor of the Italian Republic, Genoa* [2013] 1 AC 338, [8]:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life. (2) There is no test of exceptionality in either context. (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back. (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved. (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life. (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

19. So far as children are concerned, their interests are a primary consideration, but that is not the same as saying they are *the* primary consideration, still less that they are the *paramount* consideration: see at [11].

20. The Applicant is a fugitive from justice, as the district judge found at [32], and as the Applicant admitted. Hence, this observation from *Polish Judicial Authorities v Celinski* [2016]1 WLR 551, [39], is apposite (emphasis added):

> "The important public interests in upholding extradition arrangements, and in preventing the UK being a safe haven for a fugitive as Celinski was found to be, *would require very strong counter-balancing factors* before extradition could be disproportionate."

21. I am prepared to accept I need to weigh matters for myself, per *Celinski*, in light of all of the evidence as it now is.

22. The main factors in favour of extradition are: there is a strong public interest in upholding extradition requests; that has particular force here because the Applicant is a fugitive and strong counter-vailing factors are required; and he has a significant sentence to serve (and so I do not agree with Mr Bates that his offences are not serious: there are 15 of them and some of them involved minors).

23. The main factors against extradition are: the impact of extradition on the Applicant's family, financially, emotionally and practically; [VS]'s pregnancy, and the potential medical impact on her if the Applicant is extradited; that there are four (soon to be five) children in the family who will or may be impacted by the Applicant's extradition; the

Applicant's own mental health; passage of time; and the fact the Applicant has no convictions in this country.

24. In my judgment, however, the impact of these factors can and will be ameliorated in various ways.

25. The impact on the family will be reduced to a significant degree by the care, including post-natal care, which the NHS will provide to [VS], and also by the welfare and social services which this country offers. As the judge said, this is not a 'sole carer' case.

26. So far as the passage of time since the alleged offending is concerned, that can only count modestly against extradition because the Applicant is a fugitive. If he had not fled Hungary, this matter would have been over many years ago. Mr Bates made various time points, but in my judgment they all founder on the same rock of the Applicant's fugitivity.

27. Specifically in relation to the medical aspects which Mr Bates prayed in aid, I can only give them modest weight. No medical evidence (apart from some medical records) had been filed on behalf of the Applicant either below or before me. He merely relied on what the Applicant and family members had said. As I remarked during the hearing, I need to exercise a degree of caution and to assess this evidence with care because of the tendency (which is wholly understandable) of those seeking to avoid extradition to overplay what they say its medical impacts would be, and all the more so because the 'fresh' evidence in this case has not been tested in cross-examination.

28. It follows that there is not, for example, corroborating evidence by way of a psychologist's report on the likely impact of extradition on the Applicant's children (which is a type of report one often sees in cases like this), or an obstetrician's report on [VS] and the impact extradition would have on her pregnancy and post-natal condition. Nor is there a psychiatrist's report on the Applicant's own mental health. A person who wishes to rely on medical conditions needs, as a general rule, to have expert evidence to support their case. I am prepared to accept in general terms the medical points made on the Applicant's behalf, but none of them are of anything like the necessary severity which could weigh to any significant degree against extradition, whether taken alone or in combination with other factors.

29. Overall, the judge's reasoning on Article 8 at [123]-[128] was impeccable on the material before him, and for substantially the same reasons, even with the 'fresh' evidence, I have reached the same conclusion. This ground of appeal is not arguable and it fails.

30. *Article 3*: there was in this case an assurance given by the Hungarian authorities that, if extradited, the Applicant would have at least $3m^2$ personal cell space. Detention in less than that space will raise a strong presumption of a violation of Article 3: see *Grecu v Cornetu Court* [2017] EWHC 1427 (Admin) and the cases there cited.

31. I make the general observation that prison conditions in Hungary have been minutely examined in a number of extradition cases before the Supreme Court and this Court in recent years, and extradition has not been refused on Article 3 grounds in any of them. The examination has gone beyond assurances on cell space, and has included (as I will show) complaints about prison conditions more generally and the treatment of Roma

people in prison in Hungary. Mr Bates' Article 3 submissions in this case were, to a significant extent, a repetition of matters which have already been considered and rejected in these earlier cases.

32. In support of his contention that there were substantial grounds for believing there is a real risk that the Applicant would be subject to treatment in prison in violation of Article 3, Mr Bates submitted at [21] and [22] of his Skeleton Argument:

> "21. A striking fact about the assurance on which the Requesting Authority relies is that it makes no mention of the General Ombudsman, despite the fact that monitoring by this official is a key feature of '*assurances which have been accepted as sufficient in previous Hungarian extradition cases*', having been '*expressly interwoven into the legally adequate assurances given in Hungarian cases*', according to Fordham J in *Nemeth* at [13] and [14(ix)]. There has been no such express interweaving in the present case. For this reason alone, the Requesting Authority cannot rely on the assurance to defeat Mr Orsós' case on Article 3 ECHR.
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> 22. The assurance further fails in that it does not otherwise address either (i) the conditions of detention, other than space, at the Budapest Correctional Facility, the Szombathely or Tiszalök facilities, or the other facilities in which Mr Orsós might be detained or (ii) the maltreatment of detainees by State agents at any such facilities or in the Hungarian criminal justice system generally and the culture of impunity that attends such maltreatment."

33. Mr Bates placed particular reliance on *Nemeth*. There are various decisions of Fordham J in that case: the relevant one here is [2022] EWHC 1024 (Admin), handed down on 4 May 2022. I have considered it again in light of Mr Bates submission. It does not avail the Applicant and in fact is against him.

34. One of the grounds of appeal in *Nemeth,* [4] and [11], was as follows:

> "4… Secondly, it is reasonably arguable that an Article 3 real risk arises in relation to prison conditions, notwithstanding prison assurances which guarantee a minimum floor space of at least 3 m² ("the Prison Assurances"). This second ground arises out of one or both of the following contentions. (i) The scope of the Prison Assurances is inadequate in the light of the evidence relating to the risk of prison conditions other than overcrowding and personal floorspace. (ii) The content of the Prison Assurances is inadequate given the evidence relating to the shortcomings in monitoring by the General Ombudsman on which monitoring they rely. (3) Thirdly, although not relied on as a freestanding ground of appeal, the arguments in (1) and/or (2) are materially supported, to the extent of demonstrating reasonable arguability, by the fact that the Requested Persons are persons of Roma ethnic

> origin, in light of the evidence relating to the discriminatory ill-treatment of such persons in Hungary.
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> …
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> 11. A further set of arguments was advanced by the Requested Persons in support of the contention that it is reasonably arguable that the Requested Persons face an Article 3 real risk in relation to prison conditions, notwithstanding prison assurances which guarantee a minimum floor space of at least 3m²: (a) because the scope of the prison assurances is inadequate in the light of evidence relating to other prison conditions (beyond overcrowding and floorspace); and/or (b) because the contents of the prison assurances are inadequate in the light of evidence relating to the General Ombudsman (on whom they rely for monitoring). In considering those arguments I have, again, had regard to the implications of the materials relating to discriminatory ill-treatment of individuals of Roma ethnic origin."

35. Perusal of the judgment shows that a massive amount of material from numerous sources in relation to prison conditions in Hungary was deployed on behalf of the applicants, as it has been in the case before me. The reader is referred to [2] and [3] of Fordham J's judgment for the lists of material cited to him. They are very extensive indeed.

36. Fordham J said:

> "12. In approaching the submissions being made regarding inadequacy, in scope or content, of prison assurances in Hungarian extradition cases, it makes sense to start by identifying this sequence of domestic cases which relate to Article 3, Hungarian prison conditions and assurances:
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> i) In *GS* (21 January 2016) the Divisional Court held that personal space was the only aspect of Hungarian prison conditions calling for an assurance so as to ensure that extradition was compatible with Article 3. The Court identified personal space as having been the focus of the Strasbourg Court's Article 3 Pilot Judgment in Varga (10 March 2015). The Court concluded that none of the materials which it had seen supported the proposition that there were substantial grounds for believing that there was a real risk of treatment contrary to Article 3, on account of other prison conditions, faced by a requested person detained with a minimum 3m² of personal space (§14). On that basis, floorspace assurances, compliance with which would be monitored by the General Ombudsman as the National Preventative Mechanism for the purposes of the Optional Protocol to the UN Convention against Torture (see §15), were necessary but also sufficient. The monitoring role of the General Ombudsman was specifically emphasised by the Court (§31)

ii) In *Fuzesi* (16 July 2018) the Divisional Court again held that assurances guaranteeing 3m² of personal space, compliance with which would be monitored by the General Ombudsman (see §3), were sufficient and that it was not necessary (see §38) for Article 3 purposes that a Hungarian prison assurance should 'specify the prison at which [the requested person] will be detained if extradited' (see §8). The Court referred (at §30) to the 'Othman criteria' regarding legally adequate assurances (from *Othman v United Kingdom* (2012) 55 EHHR 1 at §189), which criteria include the question of appropriate monitoring mechanisms. The Court specifically had regard to the following: the consideration by the Committee of Ministers' Deputies of the Varga Pilot Judgment on 6 June 2017 (§§18-21) and again in March 2018 (§23); the consideration of the position in November 2017 by the Strasbourg court in *Domjan* (§22), and the HHC report of March 2018 (§25) including the HHC's observations in relation to matters such as the resources, inspections and speed of publication of reports by the General Ombudsman (§25). The Court concluded that there had been 'no material factual change since' *GS* (§37), having made specific reference to the requesting state's submission about the General Ombudsman continuing to constitute an effective, independent monitoring mechanism (§36(viii)).

iii) In *Szalai* (16 April 2019) the Divisional Court revisited the question of Hungarian prison assurances. The outcome was that they remained legally sufficient, as before. The Court recognised the 'sharper focus' given to the question of prison conditions in Hungary, by the Strasbourg court's analysis in *Mursic*, including as to the 'grey area' where personal space between 3m² and 4m² could result in an Article 3 violation when in 'combination' with other aspects of inappropriate physical conditions of detention, including: access to outdoor exercise, natural light or air; availability of ventilation; adequacy of room temperature; access to toilets and compliance with basic sanitary and hygienic requirements (see §9). The Court treated the 3m² prison assurances as still being legally adequate. The principal focus of the case was an issue regarding whether evidence of previous breaches of assurances in other cases (including non-UK cases) was evidence which had materially undermined the reliance that could be placed on such assurances.

iv) In *Zabolotnyi* (30 April 2021) the Supreme Court decided an appeal from one of the cases dealt with by the Divisional Court in Szalai. The outcome was that Hungarian prison assurances remained legally sufficient, as before. The Supreme Court decided that the Divisional Court in *Szalai* ought to have permitted reliance on evidence of a breach of an assurance in a non-UK case but reasoned that, if admitted, the evidence would not have made a material difference to the outcome (§62).

13. The essence of the argument advanced on behalf of the Requested Persons – as I saw it – was as follows. The assurances which have been accepted as sufficient in previous Hungarian extradition cases – with a guarantee of personal space of 3m² and monitoring by the General Ombudsman – are, on the basis of the materials before this Court, arguably inadequate.

i) So far as concerns other conditions beyond personal space, there are the following. There is the important 'combination' feature in the 'grey area' between 3m² and 4m², emphasised in Mursic. An example of a 'combination' between considerations of personal space and other exacerbating conditions, such as conditions relating to ventilation and outdoor exercise, is seen in *Bandur v Hungary* (5 July 2016) App. No. 50130/12 at §§23, 34 and 39-42. GS is the only case in the sequence which addressed, head-on, the question of other prison conditions beyond personal space. But *GS* pre-dated *Mursic*. Alongside *Mursic* and *Bandur*, there are these important features: the ongoing consideration of the position by the Committee of Ministers' Deputies in light of the Varga Pilot Judgment; the March 2020 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") arising out of a visit to Hungary between 20 and 29 November 2018; the internationally recognised implications of the pandemic; the impact of the Hungarian compensation scheme, necessitated by the Varga Pilot Judgment, in stemming what would otherwise have been a very substantial flow of Article 3 prison conditions cases coming before the Strasbourg Court; the recent restrictive reform in that compensation scheme so as now to limit claims based on other prison conditions to those where there has been personal floorspace below 3m². These and the other materials in the case – at least reasonably arguably – support the conclusion that there is now an Article 3 risk which requires an assurance addressing conditions beyond guaranteeing personal space of 3m².

ii) So far as concerns monitoring by the General Ombudsman, there are the following. There is the HHC report regarding the General Ombudsman dated September 2019, which describes concerns including as to repeated failure to address (or address adequately) pressing human rights issues including those that are politically sensitive and high profile, and a reluctance to investigate detention-related issues brought to his attention by NGOs. There is the Venice Commission opinion (18 October 2021) which raises concerns, including recording that the Sub-committee on Accreditation of the Global Alliance of National Human Rights Institutions had (in June 2021) recommended that the General Ombudsman be ‘downgraded’ to "B status" (connoting "partial" compliance only with "the Paris Principles"). There is the recording in these materials of the merger of the previous Equal Treatment Authority and the General Ombudsman

as having given rise to serious concerns as to resources and effectiveness of the General Ombudsman. And there is the Expert Evidence, which describes concerns as to the adequacy of the General Ombudsman's monitoring activity. These and the other materials in the case – at least reasonably arguably – support the conclusion that there is now an Article 3 risk arising out of the inadequacy as a monitoring body of the General Ombudsman.

iii) All of these features need to be seen individually and in combination, seen in the context of the troubling implications of a general lack of information and data, and seen in the context of the materials relating to discriminatory ill-treatment of individuals of Roma ethnic origin.

14, In my judgment, it is not reasonably arguable – having regard to all the materials – that there is an Article 3 real risk of being subjected to prison conditions, which the Hungarian prison assurances guaranteeing a minimum floor space of at least 3m², monitored by the General Ombudsman, have now become inadequate to address. The key points, as I see it, are these:

i) The starting point is that the 'other conditions of detention' were the direct subject of the Divisional Court's assessment in January 2016 in the *GS* case, and that the nature of the Hungarian assurances identified in that case as necessary but also sufficient have endured the assessment in *Fuzesi* (16 July 2018), *Szalai* (16 April 2019) and *Zabolotnyi* (30 April 2021).

ii) It is significant that in March 2020 there was a Report by the CPT arising out of a November 2018 visit. And it is important to consider with care what that CPT 2020 Report says, and does not say. That Report recorded that the co-operation which the visiting delegation received throughout the visit had been excellent; that a number of previous CPT recommendations had been taken into account; and that the Hungarian authorities appeared to have taken action to address the long-standing issue of prison overcrowding. I was not shown any passage in the Report which expressed a view which could stand as evidence to support a finding of a general risk of Article 3 ill-treatment based on other prison conditions. It is, in my judgment, highly material that the 2020 CPT Report does not support the contention that there are prison cell conditions violating Article 3 standards.

iii) The particular passages in the 2020 CPT Report, on which reliance was placed on behalf of the Requested Persons, were these. Reliance was placed on passages in the CPT Report relating to an outdoor exercise yard in centralised police holding facilities in which remand prisoners were typically spending 23 hours a day locked up (see the Report at §34). That was in the context of an observation that, at those centralised police holding facilities, as

had been the case during previous visits, material conditions of detention were generally satisfactory; the cells were in a reasonable state of repair and clean; they were sufficient in size for their intended occupancy; they were equipped was sleeping platforms shelves and bedding; they were adequately heated and ventilated and had suitable artificial lighting; the delegation had received no complaints about access to the sanitary facilities; and three meals were served daily (see §33). Reliance was placed on observations, again in the context of centralised police holding facilities, of persons being placed in police holding facilities and then taken to court or other premises while "exposed to public view" including photographers and TV journalists with their hands cuffed and attached to a lead which was held by escorting police officers, which was described as "clearly demeaning" and something which could be considered as "degrading" (see §39). Finally reference was made by the Requested Persons to a passage in the CPT Report relating to "manifestly deficient" outdoor exercise yards in special regime units housing prisoners serving lengthy sentences (see §§82 and 99), where criticism is made of the dimensions of the exercise yard at two such special regime units. In my judgment these observations do not, even arguably, stand as evidence capable of crossing the threshold of an Article 3 risk of ill-treatment barring extradition absent other prison assurances.

iv) The meeting (11 March 2021) of the Committee of Ministers' Deputies, supervising the *Varga* Pilot Judgment, refers to "other detention related violations" and "aspects other than overcrowding". But that March 2021 decision has a number of striking features. The first is that the reference (at §2) to "other unsuitable conditions of detention" is a reference to the judgment in the *Domjan* case §30 (23 November 2017) and to the preventive and compensatory remedies introduced by the Hungarian authorities in 2017 which had been welcomed by the Committee of Ministers. The reference to addressing "aspects other than overcrowding" (§5) is a reference to the Hungarian authorities taking the opportunities presented by the eradication of overcrowding. A reference to outstanding issues related to "other" violations which had been found (§8) concerns the treatment of disabled detainees, special security regimes and visits, and a lack of effective remedies "in these respects". All of this was said in a context in which the number of pre-trial detentions had started to rise again recently (Minutes of the meeting at p.2). A description of "material conditions of detention" was a reference to "a substantial number of inmates [who] still appear to be held in inadequate material conditions, notably in cells infected with insects, having no proper ventilation or sufficient natural light, or equipped with on partition toilets". That was a reference to what had been said in communications in 2020 and 2021 written by the HHC. These March 2021 materials – like the 2020 CPT Report –

nowhere express or evidence the view that there are general conditions of detention which involve a violation of Article 3 standards. The March 2021 materials also have to be seen against the backdrop of the earlier similar materials in which the *Varga* Pilot Judgment was considered and supervised by the Committee of Ministers' Deputies. For example, the reference to what the HHC was saying in 2020 had been included in the materials for the supervision meeting of 3 September 2020.

v) The equivalent June 2017 materials the Committee of Ministers' Deputies had specifically referred to the *Mursic* point ("material conditions of detention where the available living space is between 3 and 4m² per inmate"). They had specifically referred to *Varga* and the preventative and compensatory remedy regarding poor material conditions of detention, giving a description of the preventive and compensatory measures which it entered into force in Hungary in January 2017. They had discussed "overcrowding and material conditions of detention".

vi) As has been seen, the Divisional Court considered in *Fuzesi* (16 July 2018) whether an assurance ought to specify a prison, and not simply specify the minimum guaranteed 3m² floor conditions. That was in the context of an argument that there were only two named prisons "which reliably guarantee compliance with article 3". By that time the Strasbourg Court had decided *Bandur*, in which ventilation and access to outdoor exercise had 'combined' with lack of personal space to constitute a violation of article 3. Moreover, the Divisional Court specifically considered the June 2017 supervising materials of the Committee of Ministers' Deputies (see *Fuzesi* at §§18 to 21), including the references made to the "poor material conditions of detention" which were the subject of the new preventative and compensatory remedy (§21), and the equivalent March 2018 supervision materials (§23). The Court (at §22) also specifically considered *Domjan*, §34 of which is cited in the March 2021 materials. *Domjan* was a case in which the Strasbourg Court was considering a compensatory remedy under which an applicant could allege "not only that he or she had not been provided with the living space provided for by law", but also other conditions involving "torture or cruel, inhuman or degrading treatment" (*Domjan* §24). The Court (at §24) also considered an HHC report (March 2018). Any general concern relating to other prison conditions was and would have been directly relevant to the question in *Fuzesi* of whether – in addition to personal floorspace guarantees – named prisons needed to be identified within a Hungarian prison assurance, as a necessary condition to the Court being satisfied that there was a sufficient Article 3 guarantee. It is clear that the Divisional Court did not, in July 2018, overlook evidence arising from the Committee of Ministers' supervision

materials, or from the HHC, or from *Domjan*, or relating to the subject matter of the remedies discussed in *Domjan*.

vii) It is equally clear that the Divisional Court did not, in deciding *Szalai* in April 2019, overlook evidence of risks relating to other prison conditions. In that case, indeed, the co-chair of the HHC was giving evidence to that Court (see *Szalai* at §30) and had submitted reports dated 13 October 2018 and 14 November 2018 about which the Divisional Court said: "these reports to some degree deal with other conditions than the amount of personal space afforded" but "the thrust of the evidence is to suggest that assurances have not been observed in relation to personal space". Furthermore, the fact that the HHC was reporting, in 2020 and again in 2021, (as recorded in the Committee of Ministers' Deputies supervision materials from September 2020 and March 2021) that substantial number of inmates were "still" held in inadequate material conditions is clearly indicative of the continuity in the sorts of points had been raised as the "poor material conditions of detention" (June 2017), as the "other inadequate conditions of detention" (*Domjan* §10), and as the "other unsuitable conditions of detention" (*Domjan* §30: cited by the Committee of Ministers' Deputies in March 2021).

viii) What the materials recognise is that there were and still are issues relating to prison conditions, both as regards conditions within cells and as regards arrangements such as exercise facilities, which give rise to concerns. These have been identified and reported. They were and are reflected in the relevant materials. All of that was a feature of *Varga* itself. It was directly in play as a feature of the analysis in *GS*. It remained as a known feature of the factual picture in *Fuzesi* and *Szalai*. What the concerns of that kind, and the materials expressing them, have at no stage done – and in my judgment beyond argument still do not do – is to provide a basis for the Court to conclude that what is now required is an assurance which goes beyond a guarantee of 3m² and now requires further specificity in the context of other prison conditions, in order for extradition to Hungary to be compatible with Article 3.

ix) So far as the General Ombudsman is concerned, I have already indicated that this too has been a clear feature of the line of the relevant cases. The General Ombudsman, which stands as the National Preventative Mechanism for the purposes of the Optional Protocol to the UN Convention against Torture (*GS* §15), has been expressly interwoven into the legally adequate assurances given in Hungarian cases. Points relating to effectiveness, such as resources, and the incidence of visits, are not new. For example, in *Fuzesi* (at §25) the Divisional Court explained that a passage in the HHC report of March 2018, "to which we should specifically

draw attention", had "considered the office of" the General Ombudsman and had "commented that the resources available to the [General Ombudsman] were relatively small; that he had a large number of facilities that he had to inspect under his mandate; … that he could only in fact inspect a small number of those in each year… [and] that the publication of the arms was reports were slow". Those points are very much with the grain of the points made about the General Ombudsman, relied on by the Requested Persons, in this case. The Divisional Court in *Fuzesi* found no basis for now rejecting the General Ombudsman as an effective independent mechanism as identified in GS and, having recorded that specific point (§36(viii)), expressed the general conclusion that there had been "no material factual change" since GS to "undermine" the reliance on the assurances recognised as necessary and sufficient in GS.

x) In my judgment, beyond argument, the points arising from the HHC September 2019 Report on the General Ombudsman involve similar concerns to those which were considered in *Fuzesi*. Indeed, the 2019 Report explains that it is presented as an analysis of the General Ombudsman "between 2014 and 2019". It is also relevant that this report contains a section on the General Ombudsman's performance as the National Preventive Mechanism (or "NPM") and the rights of detainees (see §4.5). The description that follows makes no reference to any failure so far as General Ombudsman's monitoring of assurances is concerned. Moreover, given the clear focus in the domestic case-law after *Fuzesi* (decided in July 2018) on the question of breaches of assurances, and given that the relevant assurances had been straight guarantees of 3m² minimum space, it would be very striking indeed if there were evidence that the General Ombudsman were failing to perform the monitoring role for the purposes of such assurances, and this had escaped the attention of those solicitors, barristers and judges dealing with the Article 3 compatibility of extradition to Hungary on assurances in *Szalai* (April 2019) and in *Zabolotnyi* (April 2021).

xi) So far as the Venice Commission's October 2021 report is concerned, it records a recommendation of a downgrading of the General Ombudsman to "partial compliance" with "the Paris principles", giving 12 months to June 2022 for the General Ombudsman to "provide the documentary evidence necessary to establish continued conformity with the Paris principles" (§30). I was shown no evidence or material that suggests a shortcoming relating to the function of monitoring floorspace assurances given in extradition cases.

xii) Finally, so far as concerns the materials relating to discriminatory ill-treatment of individuals of Roma ethnic origin, I was shown no material that supports the conclusion – even

> arguably – that there is a real risk of breach of Article 3 standards in relation to prison conditions, or a real risk of the General Ombudsman failing to monitor the minimum personal space assurances, in the case of a requested person who is of Roma ethnic origin, arising out of this feature of the case."

37. Therefore, the short answer to Mr Bates' submission about the General Ombudsman is that although it is right that in some previous Hungarian cases s/he was *referred to* in the cell-space assurance as a prison monitoring mechanism: (a) as I read the assurances, no assurance was given that the General Ombudsman *would* monitor compliance in the particular case, and the reference to the Ombudsman was not part of the assurances themselves; (b) no case has found that the absence of any reference to monitoring by the Ombudsman in an assurance about cell-space results in a violation of Article 3.

38. The position is clear. The assurance upheld by the Supreme Court in *Zabolotnyi* v *Mateszalka District Court, Hungary* [2021] 1 WLR 2569, [17], made no mention at all of the General Ombudsman. The assurances for him and Mr Szalai were set out by the Divisional Court in its judgment at [2019] EWHC 934 (Admin)**,** [24]-[25] (emphasis as in original):

> "24. On 20 July 2018, Zabolotnyi was given a personal assurance, issued by the Hungarian Department of Justice in the following terms:
>
> > 'The Ministry of Justice of Hungary and the National Headquarters of the Hungarian Prison Service, which has jurisdiction in Hungary to provide this binding assurance, guarantees that **the person known to the Hungarian authorities as Zoltan DANI, his real name ZABOLOTNY OLEKSANDRY (born known as in Uzhhorod, known as on the 12th July 1987, known as Ukranian – Hungarian national**) will, if surrendered from Scotland, Northern Ireland, England and Wales pursuant to the Hungarian European arrest warrant **No. 11.Bny.265/2016/2**. Issued by the **Court of Mátészalka**, during any period of detention for the offences specified in the European arrest warrant, be detained in conditions that guarantee at least 3 square metres of personal space.
> >
> > **The person known to the Hungarian authorities as Zoltan DANI, his real name ZABOLOTNY OLEKSANDRY** will at all times be accommodated in a cell in which he will personally be provided with the guaranteed personal space.
> >
> > It is guaranteed that **the person known to the Hungarian authorities as Zoltan DANI, his real name ZABOLOTNY OLEKSANDRY** will be accommodated either in the Penitentiary Institute of Szombathely or in the

> Penitentiary Institute of Tiszalök, after his surrender to Hungary.'

The Appellant Szalai

> 25. The Appellant Szalai's extradition is sought pursuant to an EAW issued by the Tribunal of Veszpre, Hungary on 15 February 2018 and certified by the NCA on 27 March 2018. The warrant relates to a conviction in relation to two joint enterprise offences of theft. The judgment became final on 30 October 2012 and sentence to be served is one year in prison. Szalai was arrested on 8 May 2018 and remanded in custody, where he has remained throughout. Following earlier provision of information, a specific assurance was given in relation to the Appellant Szalai on 7 June 2018 in the following terms:
>
> '… the Ministry of Justice of Hungary provides you with the following guarantee in connection with the surrender proceedings being conducted in the United Kingdom on the basis of the European arrest warrant No. Szv.925/2012/9 issued by the Regional Court of Veszprém:
>
> **The Ministry of Justice of Hungary and the National Headquarters of the Hungarian Prison Service**, which has jurisdiction in Hungary to provide this binding assurance, **guarantee** that **Szilveszter Ferenc Szalai** (born 31/12/1972 in Veszprém, Hungary, Hungarian national) will, if surrendered from Scotland, Northern Ireland, England and Wales pursuant to any of the above Hungarian European arrest warrants, during any period of detention for the offences specified in the European arrest warrants, be detained in conditions that guarantee at least 3 square metres of personal space. Szilveszter Ferenc Szalai will at all times be accommodated in a cell in which he will personally be provided with the guaranteed personal space."

39. Instead, the complaint has been that the General Ombudsman is too weak and/or under-resourced to ensure compliance with a particular cell-space assurance, and it is *that* weakness which leads to the violation of Article 3 because of the risk of a breach of an assurance on space. That complaint has not been upheld in any case.

40. The fact is, as the cases make clear, the General Ombudsman was set up as part of Hungary's international human rights obligations under the Optional Protocol to the UN Convention against Torture (the Ombudsman is the National Preventative Mechanism), and so s/he will continue to perform their inspection functions independently, whether or not s/he is specifically mentioned in a cell-space assurance.

41. The Ombudsman's independence is guaranteed by Articles 17 and 18 of the Optional Protocol (emphasis added):

> "Article 17

> Each State Party shall maintain, designate or establish, at the latest one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.
>
> Article 18
>
> *1. The States Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel.*
>
> 2. The States Parties shall take the necessary measures to ensure that the experts of the national preventive mechanism have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country.
>
> 3. The States Parties undertake to make available the necessary resources for the functioning of the national preventive mechanisms.
>
> 4. When establishing national preventive mechanisms, States Parties shall give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights."

42. The point occurs to me that, given the Ombudsman is independent, there could be difficulties in the Hungarian prison authorities giving an assurance that s/he *would* monitor a assurance, when the decision when and what to monitor is for the Ombudsman alone. The Ombudsman might refuse to be bound by any such 'assurance'. But I need not decide the point.

43. It is plain that all the points which Mr Bates raised for this Applicant were raised and considered and rejected in *Nemeth*. I have not overlooked [16] and footnote 1 of Mr Bates' Perfected Grounds of Appeal, in which he argued that there are decisions of the ECtHR findings violations of Article 3 in Hungarian prisons even where sufficient cell-space had been guaranteed. He cited many authorities. He says some of these were not cited in *Nemeth*. But nearly all of the material he cites goes back some years and was available to be deployed. Given the extensive material which *was* cited in *Nemeth*, and the exhaustive consideration which Fordham J gave to it, it is unrealistic to suggest the additional materials which Mr Bates cited would have led to a different outcome.

44. This ground of appeal therefore fails.

45. *The expert report* (Ground 1): Mr Bates submitted that it was at least reasonably arguable that the expert report from Dr Kádár should have been admitted in its

entirety and for all purposes, and that this would have led the district judge to discharge the Applicant.

46. This arises out of what the district judge said at [4]-[11]:

> "4. Directions were given on 5 July when the full extradition hearing was fixed for 15 November. Those directions included:
>
> a) Any defence expert evidence to be served by 17 August 2022.
>
> b) A prison assurance to be served by 14 September 2022.
>
> 5. The RP relied upon the evidence of Dr Kádár as part of his challenge pursuant to s13 of 2003 Act and as part of his Article 3 prison conditions challenge. That report was served on 11 November, 2 working days before the full hearing and in flagrant breach of directions (no application
>
> had been made to vary those directions). Miss Stephenson opposed its admission as the JA had been prejudiced by not being able to comment on the contents of the report and had not been able to consider whether it wished to call its own evidence in rebuttal.
>
> 6. Mr Bates explained that the late service had occurred in part because the expert's evidence could not be sought until after the RP had provided his solicitors' with a proof (that proof was also served in breach of directions) and because the prison assurance had not been received by the defence until 8 November even though the assurance was dated 6 September.
>
> 7. It was established that the assurance had negligently been served on the wrong solicitors albeit in compliance with the time limit. The error had only been identified late in the proceedings.
>
> 8. I accepted that the defence could not properly instruct the expert until the assurance had been received, although they had failed in their duty under CPR rule 3 by failing to notify the court of the breach.
>
> 9. Against that background I was satisfied that it was in the interests of justice to admit the parts of Dr Kádár's report that addresses the Article 3 challenge.
>
> 10. The defence could and should have served that part of his report that dealt with the s13 challenge in compliance with the direction. Their failure to do prejudiced the JA. I was satisfied that to grant an adjournment to address that prejudice would undermine part 50.2 of the CPR. I was satisfied that it was not in the interests of justice to admit the parts of his report that addressed the s13 challenge."

47. The judge's decision was an exercise of his case management powers which fell well within the proper bounds of his discretion. The judge allowed reliance on the Article 3 parts of the report, a ground of appeal which fails in any event for the reasons already given.

48. *Section 13 (Ground 2)*: I have approached this renewed ground of appeal on the basis that the district judge should have admitted Dr Kádár's report in full. However, even on that basis, the suggested ground of appeal is not arguable for the reasons set out in the Respondent's Notice at [57]-[65] and for the following reasons.

49. The judge correctly directed himself on the relevant *Fernandez* test at [18] of his judgment, and the contrary is not suggested.

50. The claim of the Applicant that he ought to have been discharged under s 13 because of his Roma heritage is answered by [14(xii)] of Fordham J's judgment in *Nemeth*. He considered the position of Roma people in prison, and rejected the suggestion of adverse treatment based upon their heritage. This is thus a complete answer to [19] of the Applicant's Skeleton Argument, which sought to link Article 13 with s 13:

> "19. The Committee of Ministers of the Council of Europe evidently remains concerned by, and is currently assessing with respect to the so-called *Balázs* group of cases, the extent to which officials in the Hungarian criminal justice system have engaged and continue to engage in discrimination in the context of inhuman or degrading treatment. In these circumstances, it is clearly at least reasonably arguable that there is a reasonable chance, substantial grounds for thinking, or a serious possibility that, in the event of Mr Orsós' extradition, he would be punished, detained or restricted in his personal liberty by reason of his race."

51. But, that aside, there is no evidence to support the Applicant's suggestion (*per* s 13(b) of the EA 2003) that he might be 'punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions'. The core of the argument advanced by Mr Bates was that the Applicant might be detained for longer in prison than he would if he were not Roma, or that he might be held in solitary confinement or treated in some other way in prison that fell within s 13(b). Even if the judge had allowed in those parts of Dr Kádár's report on s 13, the evidence does not bear out any such conclusion. Dr Kádár said [86]-[88]:

> "86. At the end of the interviews in the 2014 research, after researchers asked detainees about their ethnicity, those who identified themselves as Roma/Gypsy were asked whether they had sensed bias from the authorities in the course of the criminal procedure or in the penitentiary system with regard to their affiliation with the Roma/Gypsy minority, and whether in their view they had been put at a disadvantage in the course of the criminal procedure or in the penitentiary system because of their affiliation with the Roma/Gypsy minority.
>
> 87. Every third of those persons who identified themselves as Roma (33%) sensed bias from the authorities, and every fifth

> person (19%) experienced discrimination, with no relevant differences between penitentiary institutions: only convicts detained in the Kalocsa High and Medium Security Prison claimed to have experienced discrimination above the average (35%, as opposed to the average 19%). It also needs to be pointed out that women identifying themselves as Roma reported bias (48%) and discrimination (35%) in a significantly higher proportion than men (29% and 15%, respectively).
>
> 88. At the same time, it must be added that 88% of the 257 inmates choosing to answer the question (altogether 398 interviews were made) described their relationship with the penitentiary staff as good or neutral."

52. This does not begin to provide support for a 13 argument based on adverse treatment in prison

53. I have no doubt that some prison staff in Hungary have discriminatory attitudes towards Roma people, as described by Dr Kádár. These are to be deprecated. But in this case they do not give rise to an arguable ground of appeal based on s 13.

Conclusion

54. It follows that despite Mr Bates' industry, this renewed application is dismissed.