Easter Term
[2021] UKSC 14
On appeal from: [2019] EWHC 934 (Admin)

JUDGMENT

Zabolotnyi (Appellant) *v* The Mateszalka District Court, Hungary (Respondent)

before

Lord Lloyd-Jones
Lord Hamblen
Lord Leggatt
Lord Burrows
Lord Stephens

JUDGMENT GIVEN ON

30 April 2021

Heard on 23 February 2021

Appellant	*Respondent*
Jonathan Hall QC Benjamin Seifert Florence Iveson (Instructed by Sonn Macmillan Walker)	James Hines QC Amanda Bostock (Instructed by Crown Prosecution Service (Appeals and Review Unit))

LORD LLOYD-JONES: (with whom Lord Hamblen, Lord Leggatt, Lord Burrows and Lord Stephens agree)

1. The Mateszalka District Court, Hungary, the issuing judicial authority, has requested the extradition of the appellant Oleksandr Zabolotnyi, also known as Zoltan Dani, pursuant to an accusation European Arrest Warrant ("EAW") as described in the Council of the European Union Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between member states of the European Union ("the Framework Decision").

2. The Extradition Act 2003 has been amended by regulations 53, 55 and 56 of the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (SI 2019/742) ("the 2019 Regulations") so as to give effect to changes resulting from the withdrawal of the United Kingdom from the European Union. However, transitional provisions enacted in regulation 57 provide that those amendments do not apply in a case where a person has been arrested under a Part 1 warrant before commencement day (ie prior to 11 pm on 31 December 2020 (see *R (Polakowski) v Westminster Magistrates' Court* [2021] EWHC 53 (Admin); [2021] WLR(D) 52, paras 19-24 per Dame Victoria Sharp P). The appellant in the present case was arrested on 15 June 2017 and, accordingly, the applicable provisions of the Extradition Act do not include the amendments relating to withdrawal of the United Kingdom from the European Union.

3. Furthermore, although the United Kingdom has ceased to be a member of the European Union, by virtue of article 7(1) of the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom ("the Withdrawal Agreement") references to member states and to competent authorities of member states are to be understood as including the United Kingdom for the purposes of that agreement. By article 62(1)(b) of the Withdrawal Agreement the Framework Decision is to continue to apply in respect of EAWs where the requested person was arrested prior to 31 December 2020. Regulation 57 of the 2019 Regulations, above, was amended by the Law Enforcement and Security (Separation Issues etc) (EU Exit) Regulations 2020 (SI 2020/1408) to refer expressly to article 62(1)(b). Sections 7A to 7C of the European Union (Withdrawal) Act 2018 give effect in domestic law to the directly effective provisions of the Withdrawal Agreement. For the purposes of this appeal, therefore, the Framework Decision continues to apply (see *Polakowski*, per Dame Victoria Sharp P at para 32).

4. As a result, this appeal has proceeded on the basis that Hungary is a designated Category 1 territory pursuant to section 1 of the Extradition Act 2003.

5. The EAW is in the correct form and contains all the necessary information. The appellant, however, resists extradition to Hungary on the ground that there is a real risk that he would be held in prison in Hungary in conditions which do not comply with article 3 of the European Convention on Human Rights ("ECHR").

6. In March 2015 in *Varga v Hungary* (2015) 61 EHRR 30 the European Court of Human Rights ("the ECtHR") upheld a number of complaints of inhuman or degrading treatment contrary to article 3 ECHR arising from prison conditions in Hungary, in particular relating to the lack of personal space in cells. The court considered that there existed a recurrent structural problem throughout detention facilities in Hungary. In view of the persistent nature of the problem, the large number of people it had affected and the urgent need to grant speedy redress at a domestic level, the court considered it appropriate to apply its pilot judgment procedure.

7. In other decisions the ECtHR has addressed the minimum requirement of personal space afforded to prisoners. In *Ananyev v Russia* (2012) 55 EHRR 18 it held that the relevant factors in assessing whether or not there had been a violation of article 3 on account of lack of personal space were that each detainee must have an individual sleeping place, at least 3 square metres of floor space and the overall surface of the cell must be enough to allow the detainees to move freely between the furniture. The absence of one of these elements created a strong presumption that the conditions amounted to degrading treatment in breach of article 3. Similarly, in October 2016, the court held in *Muršić v Croatia* (2016) 65 EHRR 1 that while it was not possible to specify the number of square metres that should be allocated to a prisoner in order to comply with article 3, because other relevant factors relating to the overall conditions of detention played an important part, the minimum standard was 3 square metres of floor space per detainee in multi-occupancy accommodation. If the detainee's personal space fell below this standard, there was a weighty but not irrebuttable presumption of a violation of article 3.

8. In order to maintain extradition in these circumstances where the presumption of compliance of prison conditions with article 3 ECHR may have been lost, EU member states have issued assurances to the executing judicial authorities guaranteeing compliance with article 3 in the case of the requested person, in accordance with the approach explained by the Court of Justice of the European Union ("CJEU") in *Criminal proceedings against Aranyosi* (Joined Cases C-404/15PPU and C-659/15PPU) [2016] QB 921.

9. Following the judgment in *Varga v Hungary*, on 1 June 2015 the Hungarian Ministry of Justice gave a general assurance in relation to all individuals extradited from the United Kingdom that they would be guaranteed 3 square metres of personal space and that they would be detained in conditions which complied with article 3.

In *GS v Central District of Pest, Hungary* [2016] EWHC 64 (Admin); [2016] 4 WLR 33 the Divisional Court (Burnett LJ, Ouseley J) accepted that this assurance was a solemn diplomatic undertaking by which the Hungarian authorities considered themselves bound and that the real risks found by the ECtHR could, as a result, be allayed. The court considered that the presumption that the assurance would be honoured had not been displaced and that there was no basis for concluding that the assurance would not be honoured.

10. The Hungarian government subsequently pursued a programme of prison building and refurbishment. In May 2017 the Hungarian Ministry of Justice stated that assurances were no longer required in respect of extradition because of the improvements which had been made to prison accommodation. However, in April 2018 it acknowledged that one of the applicants in *Varga* had been detained in a cell with eight people with net space for each prisoner of 2.8 square metres. This led the Hungarian Ministry of Justice to acknowledge that specific assurances were required once again.

11. In *Fuzesi v Budapest-Capital Regional Court, Hungary* [2018] EWHC 1885 (Admin); [2018] ACD 99 the Divisional Court (Singh LJ, Carr J) observed that there could be no question that there was potent evidence before the court of general shortcomings in the Hungarian prison estate, which were not denied. That was why, although Hungary had at one time discontinued the practice of giving assurances, it was accepted that such assurances should be given for the time being. However, the court (at para 37) considered it crucial that there was no evidence that any assurance to the United Kingdom in respect of an individual had been breached and it held, on the basis of the renewed assurances in the same terms as the assurance considered in *GS*, that extradition to Hungary could continue.

The present proceedings

12. The appellant is a Ukrainian national who was born on 25 January 1985. The accusation warrant alleges that he attended the office of the department of the Hungarian government which issues passports in Mateszalka, Hungary on 15 April 2015 and that, conspiring with a public official, he submitted a fraudulent application for a passport in the name of Zoltan Dani, which he then received.

13. An EAW was submitted to the United Kingdom and was received by the National Crime Agency ("NCA"), an authority designated by the Secretary of State for the purposes of Part 1 of the 2003 Act. On 20 April 2017, the EAW was certified by the NCA under sections 2(7) and (8) of the 2003 Act.

14. The appellant was arrested pursuant to section 3 of the 2003 Act on 15 June 2017. The initial hearing was conducted on the same day at Westminster Magistrates' Court pursuant to section 4 of the 2003 Act. The appellant was initially remanded in custody but granted conditional bail on 20 July 2017.

15. The extradition hearing took place before District Judge Snow at Westminster Magistrates' Court on 1 September 2017. The four grounds of objection to extradition argued before him, all of which were rejected, included the submission that there was a real risk that the extradition of the appellant to Hungary would expose him to inhuman or degrading treatment contrary to article 3 ECHR because of the conditions in Hungarian prisons. No assurance was offered by the Hungarian Ministry of Justice in respect of the appellant's treatment; it stated that such assurances were no longer necessary as a result of the steps taken to comply with the judgment in *Varga*. On the basis of further information supplied by the Hungarian Ministry of Justice, District Judge Snow was satisfied that the Hungarian Ministry of Justice was clearly aware of its international obligations and had taken action to meet them. In particular it had undertaken remedial steps to renovate and expand prisons and to build new prisons. New laws had been enacted and an effective complaints procedure introduced. He was satisfied that Hungary had taken significant steps to improve its prison estate and to reduce overcrowding. The situation had changed since the judgments in *Varga* and *GS* had been delivered. District Judge Snow was satisfied that the presumption of compliance with article 3 had been restored. The burden was on the requested person to produce clear, compelling and cogent evidence to rebut that presumption. He had not done so. An assurance was not required in this case. The appellant's surrender to Hungary was ordered pursuant to section 21A(5) of the Act.

16. On 8 September 2017, the appellant appealed against the order for extradition. On 27 April 2018 Ouseley J granted permission to appeal on all grounds and ordered that the case was not to be heard until after the Divisional Court had delivered its judgment in *Fuzesi*, (see para 11 above) an extradition appeal which raised similar issues.

17. The judgment of the Divisional Court in *Fuzesi*, which, as we have seen, reintroduced the requirement of assurances in relation to prison conditions in Hungary, was handed down on 16 July 2018. On 20 July 2018 the Hungarian Ministry of Justice provided a personal assurance to the appellant that he would be held in conditions that guaranteed at least 3 square metres of personal space and that he would be held in one of two modern prisons, Szombathely or Tiszalök, which are said to conform with the space requirement laid down in *Muršić* as well as providing better conditions generally.

18. On 18 October 2018 the case came before Supperstone J who adjourned the case and joined it to that of Szilvester Ferenc Szalai (CO/2520/2018).

19. By application notice dated 23 November 2018, the appellant sought permission to rely on fresh evidence pursuant to section 27 of the 2003 Act which provides:

> "27. Court's powers on appeal under section 26
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> (1) On an appeal under section 26 the High Court may -
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> (a) allow the appeal;
>
> (b) dismiss the appeal.
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> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
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> (3) The conditions are that -
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that -
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
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> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must -

(a) order the person's discharge;

(b) quash the order for his extradition."

20. The fresh evidence in question comprised the reports of Dr András Kádár which detailed alleged breaches of assurances given to persons extradited to Hungary, after their return, drawn from accounts given by individual prisoners to the organisation for which Dr Kádár works. This evidence had not been adduced before the Magistrates' Court. The evidence concerned three individuals previously extradited from the United Kingdom to Hungary, following the giving of assurances to the United Kingdom authorities, and two individuals previously extradited from Germany to Hungary following assurances allegedly provided by Hungary to the German authorities. The latter assurances were not in evidence and had not been seen by Dr Kádár.

21. In a document lodged on 3 December 2018, the respondent objected to the admission of Dr Kádár's reports, and provided information concerning the persons extradited from the United Kingdom. The respondent declined to confirm or deny the facts concerning individuals extradited from Germany on the basis of Hungarian data protection laws.

22. The matter was first listed to be heard by a Divisional Court (Bean LJ and Nicol J) on 19 December 2018. On that day the court considered that the issue raised by evidence of breaches of assurances given to foreign courts was of such significance that it should be adjourned to be heard by a three-judge constitution of the court ([2018] EWHC 3840 (Admin)).

23. The appeal was heard by a Divisional Court of the Queen's Bench Division (Irwin LJ, Simler J and Sir Kenneth Parker) on 21 March 2019. The appellants founded their case squarely on the provision of inadequate personal space in Hungarian prisons and on the proposition that assurances of adequate personal space were not reliable. The court considered the evidence of Dr Kádár de bene esse.

24. In its judgment of 16 April 2019 the Divisional Court ([2019] EWHC 934 (Admin); [2019] ACD 68) refused the application to admit the evidence of Dr Kádár and dismissed the appeals. The court approached the reliability of the assurances given to the appellant by applying the principles established by the ECtHR in *Othman v United Kingdom* (2012) 55 EHRR 1. It considered that the evidence concerning persons previously extradited from the United Kingdom demonstrated only limited evidence of breach of assurances which did not demonstrate a systemic problem concerning assurances given to the United Kingdom generally and which did not undermine the mutual trust upon which the system of assurances is based.

25. With regard to the alleged breach of assurances given in respect of the two persons extradited from Germany, the court approved the concession by Mr Hines QC, for the respondent, that there could be circumstances where, exceptionally, proven or admitted breaches of assurances given to other states would or might be relevant. However, Mr Hines had also submitted that the United Kingdom court was not the appropriate forum in which to make factual or evidential findings in relation to whether such alleged beaches had taken place. The court observed (para 37):

> "If a serious issue has been raised as to whether another State will in fact treat a person extradited from the UK in accordance with article 3, this Court is not precluded by any rule of law from having regard to any material evidence bearing on that issue."

But it continued (para 38):

> "However, we believe that this Court should exercise very considerable caution when asked by an appellant to admit and to evaluate evidence relating, not to an alleged breach of an assurance given to the UK authorities or courts, but to foreign authorities or courts."

It gave two reasons for this view. First, citing the CJEU in *Criminal proceedings against ML (Generalstaatsanwaltschaft Bremen intervening)* (Case C-220/18PPU) [2019] 1 WLR 1052, it considered that the task of the executing judicial authority was to assess solely the actual and precise conditions of detention of the person concerned. As a result the focus must be on the question whether the issuing state can be relied upon to comply with an assurance given to the United Kingdom, and on that question alleged breaches of past assurances given to the United Kingdom were, in its view, of obvious and central relevance. Secondly, it considered that there were likely to be real practical difficulties if courts in this jurisdiction were to embark on an exercise of evaluating evidence in respect of alleged breaches of

assurances given to foreign authorities or courts. Although the court has power under article 15(2) of the Framework Decision to request relevant information from foreign authorities and those authorities are obliged to respond, the practical difficulties would not necessarily disappear and the extradition proceedings would thereby inevitably be prolonged. In its view the practical difficulties were illustrated in the present proceedings by the reliance of the Hungarian authorities on Hungarian data protection law. The court concluded (at para 44):

> "Having regard to these considerations, we conclude that a Court would have to satisfy itself that the evidence relating to assurances given in extradition elsewhere is manifestly credible, is directly relevant to the issue to be decided and of real importance for the purpose of that decision, before the Court should be invited to admit and consider such evidence."

26. The Divisional Court considered (at para 69) that it was not appropriate to make findings of fact in relation to the German cases given the paucity of evidence before the court. Furthermore, while observing (at para 70) that it was "tolerably clear that Hungary's obligations under article 15(2) of the Framework Decision would override their domestic law of privacy of information", it declined to ask further questions of the Hungarian authorities. In its view the evidence relating to the two German cases was not directly relevant to the issue the court had to decide and it was not of real importance for the purpose of deciding the core question in the case (at para 71).

27. The Divisional Court did not consider that the limited evidence on which the appellants sought to rely demonstrated a systemic problem affecting assurances given to the United Kingdom generally nor that it undermined the mutual trust upon which the system of assurances was based (paras 73-74). Taking account of all the evidence available, the court was satisfied that there were no substantial grounds to believe that the appellants would be at real risk of a breach of their article 3 rights during any period of detention in Hungary.

> "In light of our conclusion, it is clear that, even if admitted, we do not consider that the fresh evidence advanced would afford a ground of allowing the appeals, still less that it would be decisive. Accordingly, notwithstanding the degree of latitude to be afforded in cases involving human rights, we have concluded that no purpose would be served in admitting this fresh evidence and that it would not be unjust to refuse to do so in all the circumstances." (at para 78)

28. On 9 October 2019, the High Court certified that the following point of law of general public importance was involved in its decision, pursuant to section 32(4)(a) of the 2003 Act:

> "Where a Court is obliged to assess an assurance given to the United Kingdom relevant to extradition, is it is correct that the Court should exercise very considerable caution before admitting evidence which does not relate to an alleged previous breach of an assurance to the United Kingdom, but rather to an alleged breach of assurance to another EU member state? If yes, is it a correct approach that the Court should satisfy itself that such evidence is manifestly credible, directly relevant to the issue to be decided and of real importance for the decision in question?"

On the same day the High Court refused the application for permission to appeal to the Supreme Court.

29. On 4 June 2019, the High Court was informed by the NCA that the EAW issued in relation to Mr Szalai had been withdrawn and, accordingly, it discharged Mr Szalai pursuant to section 42 of the Extradition Act 2003.

30. On 12 March 2020, the Supreme Court (Lord Hodge, Lord Sales and Lord Hamblen) granted the appellant leave to appeal to the Supreme Court pursuant to section 32(7) of the 2003 Act.

The principle of mutual trust

31. The Framework Decision states in article 1(2) that "Member states shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision". Recital (10) of the Framework Decision states that "The mechanism of the European arrest warrant is based on a high level of confidence between member states". As Lord Sumption explained in *Zakrzewski v Regional Court in Lodz, Poland* [2013] UKSC 2; [2013] 1 WLR 324, para 7, the underlying purpose of the Framework Decision and Part I of the Extradition Act 2003 is to create a simplified and accelerated procedure based on the mutual recognition by the requested state of the antecedent decision to issue the warrant by the judicial authority in the requesting state.

32. In a line of judgments the CJEU has emphasised the importance of the principle of mutual trust in the context of the EAW and, in almost identical terms, the way in which the possibility of violation of fundamental rights should be addressed (*Aranyosi* at paras 88, 89; *ML* at paras 62, 63; *Proceedings concerning Dorobantu* (Case C-128/18) [2020] 1 WLR 2485, paras 51, 52; see also *Criminal proceedings against LM* (Case C-216/18PPU) [2019] 1 WLR 1004, paras 60, 61).

33. In *Dorobantu*, the CJEU explained (at paras 46 and following) that the principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each member state, save in exceptional circumstances, to consider all the other member states to be complying with EU law and in particular with the fundamental rights recognised by EU law (*LM*, para 36; *ML*, para 49). Thus, save in exceptional circumstances, when implementing EU law, member states may not check whether another member state has actually, in a specific case, observed the fundamental rights guaranteed by the European Union. So far as the EAW is concerned, the court emphasised that execution constitutes the rule, while refusal to execute is intended to be an exception which must be interpreted strictly. Nevertheless, the CJEU had recognised that subject to certain conditions the executing judicial authority had an obligation to bring the surrender procedure established by the Framework Decision to an end where surrender may result in the requested person being subjected to inhuman or degrading treatment within article 4 of the Charter of Fundamental Rights of the European Union ("the Charter") (the equivalent of article 3, ECHR) (*Aranyosi*, para 84; *LM* para 44, *ML*, para 57). The CJEU then stated:

> "51. Accordingly, where the judicial authority of the executing member state is in possession of information showing there to be a real risk of inhuman or degrading treatment of individuals detained in the issuing member state, in the light of the standard of protection of fundamental rights guaranteed by EU law and, in particular, by article 4 of the Charter, that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing member state of the individual concerned by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment *(Aranyosi*, para 88 and *ML*, para 59).
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> 52. To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing member state and that demonstrates that there are deficiencies, which may be systemic or generalised, or which

> may affect certain groups of people, or which may affect certain places of detention. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the issuing member state, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations (*Aranyosi*, para 89 and *ML*, para 60)."

34. The principle of mutual trust also applies to assurances given as to the conditions in which a returned person will be held. In *ML* [2019] 1 WLR 1052, the CJEU referred (at para 110 and following) to the fact that the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing member state. It explained (at para 111) that an assurance provided by the competent authorities of the issuing member state that the person concerned, irrespective of the prison in which he is detained, will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention is a factor which the executing judicial authority cannot disregard. A failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing member state. The CJEU continued:

> "112. When that assurance has been given, or at least endorsed, by the issuing judicial authority, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing member state, as referred to in article 7 of the Framework Decision, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 4 of the Charter." (See also *Dorobantu* at para 68)

In that case, however, as in the present case, the assurance given by the Hungarian Ministry of Justice was neither provided nor endorsed by the issuing judicial authority. The CJEU accordingly stated:

> "114. As the guarantee that such an assurance represents is not given by a judicial authority, it must be evaluated by carrying

> out an overall assessment of all the information available to the executing judicial authority."

35. In the present case the assurance was provided by the Hungarian Ministry of Justice, a non-judicial authority.

A special rule for assurances given to third states?

36. In the present case the Divisional Court (at paras 38, 44, set out at para 25 above) concluded that a court would have to be satisfied that evidence relating to assurances given by a requesting state to a third state was manifestly credible, directly relevant to the issue to be decided and of real importance for the purpose of that decision before the court should be invited to admit and consider such evidence. On its face, this passage seems to introduce a special test of admissibility for evidence relating to an alleged breach of an assurance given to a third state. Although Mr Hines, on behalf of the respondent, did not seek to justify such a rule of admissibility of evidence, he suggested, rather, that the Divisional Court was here applying the existing test for admission of any evidence seeking to challenge a diplomatic assurance to the type of evidence which was before it. In his submission the test applied is found in clear and established case law and is in direct accord with the overarching principle of mutual trust. In considering whether the heightened test suggested by the Divisional Court to an alleged breach of an assurance given by a requesting state to a third state is required or justified, it is necessary to consider the approach of the ECtHR, the CJEU and domestic courts in this jurisdiction.

ECtHR

37. In proceedings before the ECtHR, that court engages in a free evaluation of all the evidence before it. In *Ananyev v Russia* 55 EHRR 18, a case on prison conditions and article 3 ECHR, the ECtHR emphasised (at para 121) that allegations of ill-treatment must be supported by appropriate evidence and continued:

> "… In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion

> necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake."

See also *Varga* at para 68; *Muršić* at paras 127-128.

38. In *Othman v United Kingdom*, the ECtHR addressed more specifically its approach to the manner of testing an assurance. In that case it was submitted on behalf of the United Kingdom that assurances from the Kingdom of Jordan constituted a safe basis on which to deport the applicant to Jordan. The court observed that 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." (at para 187)

The court considered (at para 188) that it would only be in rare cases that the general situation in a state will exclude accepting any assurances whatsoever. It explained that 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. It then identified some relevant factors, certain of which had particular relevance to the facts of that case:

> "In doing so, the Court will have regard, inter alia, to the following factors:
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> > (1) whether the terms of the assurances have been disclosed to the Court;
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> > (2) whether the assurances are specific or are general and vague;
> >
> > (3) who has given the assurances and whether that person can bind the receiving state;

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

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

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

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

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

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

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

(11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State." (at para 189)

It can be seen therefore that the approach of the ECtHR is a fact sensitive approach under which the weight to be given to any particular feature will vary from case to case. It certainly does not prescribe any preconditions to the admissibility of relevant evidence.

39. This approach of the ECtHR is reflected in a particularly apposite passage in the judgment of Burnett LJ in *GS* [2016] 4 WLR 33. Referring to the application of the Strasbourg jurisprudence by courts in this jurisdiction to the facts of individual cases concerning whether prison conditions generally are such as to generate a real risk of degrading treatment and whether an assurance provided by a Convention State is sufficient to satisfy doubts in the event that the first question is answered in the affirmative, he continued (at para 22):

> "Observations by judges in individual cases, which stem from the circumstances before them, should not be read as requiring particular types of evidence to render an assurance effective. The Strasbourg court has been careful to avoid identifying 'bright lines' both with respect to whether prison conditions violate article 3 standards and whether an assurance is adequate to mitigate any established risk."

Burnett LJ went on to observe (at para 24) that there is no hierarchy of factors and that the impact or weight of any one of the given factors set out by the ECtHR in *Othman* will vary depending on the individual circumstances of each case. He considered it obvious that a history of compliance with assurances was a factor for consideration.

CJEU

40. I have drawn attention earlier in this judgment (at paras 33-35) to the consistent approach of the CJEU in *Aranyosi*, *ML* and *Dorobantu* to the presumption in EU law of compliance by member states with fundamental rights and the circumstances in which that presumption may be rebutted. In this regard, the CJEU has accepted that limitations on the principles of mutual recognition and mutual trust between member states can be made in exceptional circumstances (*Aranyosi* para 82). In particular, the CJEU has stated that the principle of mutual trust requires member states, save in exceptional circumstances, to consider all other member states to be complying with EU law and the fundamental rights recognised by EU law and also that, save in exceptional cases, they may not check whether another member state has actually in a specific case observed the fundamental rights guaranteed by EU law (*Aranyosi*, paras 78, 82; *ML*, paras 49, 50; *Dorobantu*, paras 46, 47, 61, 69; *LM*, para 54). The repeated references to exceptional circumstances are, to my mind, no more than a reflection of the existence of a presumption of compliance.

41. These decisions of the CJEU do, however, go further in that they indicate that evidence capable of rebutting the presumption of compliance with article 4 of the

Charter must be of a certain quality (*Aranyosi*, para 89; *ML*, para 63; *Dorobantu*, para 52, set out above at para 33). Thus in each of these judgments the court requires that the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing member state and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention. The court then goes on in each case to indicate where such information may be found. The non-exhaustive list which follows refers to judgments of international courts such as the ECtHR, judgments of courts of the issuing member state, and decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. Here it does seem, as Mr Hall QC, for the appellant, put it in his submissions, that the court is looking for internationally authoritative evidence. It is not necessary, however, to express a concluded view on this issue because it does not arise directly in the present case.

42. In the present case we are concerned not with rebutting the presumption of compliance with fundamental rights but with a later stage of the analysis. The presumption having been rebutted, the present case concerns what weight can be given to an assurance of compliance by the requesting state. So far as that issue is concerned, the case law of the CJEU establishes that when an assurance has been given or endorsed by the issuing judicial authority, the executing judicial authority must rely on that assurance, "at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 4 of the Charter" (*ML* at para 112; see also *Dorobantu* at para 68). This is rooted in the mutual trust "which must exist between the judicial authorities of the member states" (*ML* at para 112). Where, however, as in the present case, the assurance is not given or endorsed by a judicial authority, the only guidance provided is that "it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority" (*ML* at para 114). Accordingly, the case law of the CJEU to which we have been referred does not support the existence of any rule requiring evidence of any particular type or quality when assessing an assurance not given or endorsed by the issuing judicial authority.

Domestic courts

43. In general, the normal rules of criminal evidence apply to extradition proceedings in the United Kingdom (*R v Governor of Brixton Prison, Ex p Levin* [1997] AC 741 per Lord Hoffmann at pp 746F-747C; *R (B) v Westminster Magistrates' Court* [2014] UKSC 59; [2015] AC 1195, per Lord Mance at para 19 and Lord Hughes at para 68(ii)). It is, however, well established that in extradition proceedings the courts will allow a relaxation of the ordinary rules of evidence in relation to issues of human rights where a broad approach is taken to the nature and

basis of the expert evidence that is admissible (*B*, per Lord Mance at paras 6, 21, 23; per Lord Hughes at para 70).

44. Prior to the decision of the Divisional Court in the present case there had been no suggestion in the case law in this jurisdiction that any special test of admissibility should be applied to evidence relating to the reliability of an assurance from a non-judicial authority of a requesting state or, in particular, to evidence relating to an alleged breach of an undertaking given to a third state. On the contrary, courts in this jurisdiction have adopted an open, fact-based approach to the assessment of assurances. In my view the position is correctly stated by Sir Brian Leveson P in *Shankaran v Government of India* [2014] EWHC 957 (Admin) (at para 59):

> "… the scale both of immigration and of extradition decision-making have made undertakings and assurances not merely normal but indispensable in the operation of English extradition law. Such undertakings regularly are taken into account, and given whatever weight is appropriate on the facts of the particular case; that is as it should be. Each case will depend on its own facts and, for my part, I would not identify a restriction as a matter of law as to who may or may not give undertakings, nor to prescribe when they will be sufficient to obviate the risk of flagrant breaches of article 5 ECHR."

This approach is entirely appropriate as the factors relevant to the evaluation of assurances will vary from case to case. Nevertheless, having regard to the decisions of the ECtHR and the CJEU on the subject, it is clear that where the requesting state is a party to the ECHR and a member state of the European Union there is a presumption that it will comply with its human rights obligations and assurances given in support of those obligations, and that cogent evidence will be required to rebut that presumption (see *Ilia v Greece* [2015] EWHC 547 (Admin), para 40 per Aikens LJ; *Georgiev v Bulgaria* [2018] EWHC 359 (Admin), paras 8, 61 per Hickinbottom LJ). Even if the requesting state has lost the general presumption that it will comply with its obligations under article 3 in relation to its prison estate as a whole, it will still normally enjoy a presumption that it will comply with specific assurances given in individual cases (see *Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 1122 (Admin), paras 54-55 per Hickinbottom LJ; *Fuzesi* [2018] EWHC 1885 (Admin), para 33 per Singh LJ).

No special rule for assurances given to third states

45. Both the EAW scheme as developed by the case law of the CJEU and the ECHR as implemented by the Human Rights Act 1998 place a duty on courts in this

jurisdiction in certain circumstances to evaluate and test assurances given by a requesting state as to the conditions in which persons whose extradition is sought will be held. There is no room here for the operation of any exclusionary rule which would prohibit the court from ruling on the reliability of an assurance given by a foreign state (see generally *Belhaj v Straw (United Nations Special Rapporteur on Torture intervening)* [2017] AC 964).

46. A critical consideration here is whether evidence is relevant to the determination of a fact in issue (see generally *Shagang Shipping Co Ltd v HMA Group Co Ltd (Liberty intervening)* [2020] UKSC 34; [2020] 1 WLR 3549, para 104 per Lord Hamblen and Lord Leggatt). In deciding whether an assurance can be relied upon, evidence of past compliance or non-compliance with an earlier assurance will obviously be relevant. A state's failure to fulfil assurances in the past may be a powerful reason to disbelieve that they will be fulfilled in the future. (*Jane* per Hickinbottom LJ at para 55; *Georgiev* at para 61). The weight to be attached to a previous breach of assurance would be likely to vary from case to case depending on all the circumstances, including how specific the previous assurance was and whether the breach was deliberate or inadvertent (see, for example, *Klenovski v Hungarian Judicial Authority* [2017] EWHC 2560 (Admin), paras 21-22 per Bean LJ). The breach would, however, clearly be relevant (see *GS*, per Burnett LJ at para 32). In the same way, the absence of evidence that a state has ever acted in breach or in disregard of an assurance of this nature would be relevant (*Duarte v The Comarca De Lisboa (A Portuguese Judicial Authority)* [2018] EWHC 2995 (Admin), para 44 per Holroyde LJ).

47. I am unable to accept that a sound distinction can be drawn in this regard between breach of a prior assurance given to the United Kingdom and breach of a prior assurance given to a third state. On the contrary, the fact of a prior breach of such an assurance, if established, is clearly relevant regardless of the identity of the state to which it was provided. As Mr Hall submits on behalf of the appellant, such a distinction would be illogical and unprincipled. The same requesting state is acting in the same context and there is no material distinction between a willingness to breach assurances given to state A and assurances given to state B. Moreover, contrary to the view expressed by the Divisional Court in the present case (at para 39), it is clear that in *Fuzesi* (at para 37) Singh LJ was not proposing such an approach.

48. Furthermore, I can see no justification for adopting a different test of admissibility of evidence of a breach of a prior assurance given to a third state or for otherwise limiting the ability of an applicant to rely on such evidence. As I have indicated, I can find no trace of authority for such an approach in the case law of the ECtHR, the CJEU or of our domestic courts. If such evidence is relevant and probative is should be admissible.

49. In its judgment the Divisional Court drew attention (at para 40) to the possible practical difficulties which might arise if the court were to undertake an assessment of an alleged breach of an undertaking provided to a third state. In particular, it observed that the court may not have before it all relevant information, including the specific terms of any relevant assurances, the exact nature and full scale of any alleged breaches, the full context in which any breach may have occurred, the position of the third state and the detail of any remedial action on the part of the third state. To my mind, the Divisional Court overstated the possible difficulties. Under article 15(2) of the Framework Decision, the court has the power to request that necessary supplementary information be furnished by the requesting authority as a matter of urgency and may fix a time limit for its receipt. While the CJEU has ruled (*Criminal proceedings against Piotrowski* (Case C-367/16) [2018] 4 WLR 72, paras 60-61; and *ML*, at para 79) that a request under article 15(2) should be regarded as "a last resort, to which recourse may be had only in exceptional cases in which the executing judicial authority considers that it does not have all the formal elements necessary to adopt a decision on surrender as a matter of urgency", it may in appropriate circumstances properly be employed to request information in relation to allegations of breach of undertakings provided to third states. Having evaluated the evidence before it, the court would have to ask itself whether it could rely on the assurance or whether it was necessary to seek further information. The requesting authority would be bound to respond to such a request (*Aranyosi*, para 97). Moreover, the requesting authority owes a duty of sincere co-operation and would be required to make full disclosure.

50. In summary, the issue before the Divisional Court was whether the specific assurance provided by the requesting state was sufficient to dispel any real risk that the appellant would on his extradition be held in conditions which violated his rights under article 3 ECHR. Where an assurance is not given or endorsed by a judicial authority the court is required to undertake a free evaluation of the assurance, which requires the court to examine and assess all relevant evidence. Past breaches of similar assurances by the requesting state, whether provided to the United Kingdom or to a third state, are relevant to the question whether the requesting state can be relied upon to comply with its assurance on this occasion. There exists no special rule of admissibility or other heightened legal test which prevents an appellant from relying on evidence of breach of assurances given to a third state. The approach of the Divisional Court (at para 44) which requires that it be satisfied that the evidence is manifestly credible, directly relevant and of real importance is wrong in principle. Such evidence should be approached on the same basis as any other evidence of breach of such undertakings by the requesting state. Thereafter, the weight to be given to such evidence is a matter for evaluation by the court, having regard to all the circumstances of the particular case and bearing in mind that cogent evidence is required to rebut the presumption of compliance.

Fresh evidence

51. It is important, however, not to lose sight of the fact that in the present case the evidence on which the appellant sought to rely was fresh evidence which had not been before the District Judge at the extradition hearing. The evidence was in the form of two reports prepared by Dr András Kádár, a Hungarian attorney, who is the co-chair of the Hungarian Helsinki Committee, a human rights organisation which maintains a focus on detention conditions in Hungary. The two reports, dated 13 October 2018 and 14 November 2018 and which had been prepared for use in another case, suggested that assurances given by the Hungarian government in relation to personal space of prisoners had not been observed in the case of three individuals extradited from the United Kingdom and two from Germany. For the purposes of this appeal we are directly concerned only with the evidence in relation to the two persons extradited from Germany, János Szikszai and Peter Kulscár.

52. On behalf of the appellant it was contended before the Divisional Court that Mr Szikszai was extradited from Germany on 21 July 2016 with an assurance to the German authorities that he would be placed in a single occupancy cell. It was not suggested that an assurance was given in relation to minimum personal space. The Divisional Court was not provided with a copy of any assurance given in his case. The Divisional Court noted that, while it was alleged that he was required to share a cell with other inmates (varying from one to nine at different times) for at least five periods in different prisons in breach of the assurance in his case, there was no evidence that his article 3 rights were breached.

53. So far as Mr Kulscár was concerned, it was alleged that he was extradited from Germany on 27 September 2016 with assurances that he would be guaranteed 3 square metres of space, natural light, ventilation and a partitioned toilet and would be detained in either Szombathely of Tiszalök National Prisons. Dr Kádár stated that the original assurance was not available in this case. The appellant relied on seven alleged breaches of assurances in the case of Mr Kulscár. These included allegations that there were substantial periods during which he was not held at either of the named prisons and relatively long periods during which he was not provided with the minimum guaranteed personal space.

54. The Hungarian Ministry of Justice, relying on Hungarian data protection laws, had provided no information to contradict the evidence in these two cases.

55. The appellant invited the Divisional Court to conclude from the available evidence and the absence of even a generalised denial from the Hungarian authorities that breaches of the assurances given to Germany in these two cases had indeed taken place. In the alternative, the appellant invited the Divisional Court to

request further information from the Hungarian authorities pursuant to article 15(2) of the Framework Decision.

56. The appeal to the Divisional Court was pursuant to section 26 of the 2003 Act. The effect of section 27 of that Act (set out at para 19 above), so far as material to this appeal, is that an appeal under section 26 may be allowed only if all of the following conditions within subsection 27(4) are satisfied: (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing; (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently; and (c) if he had decided the question in that way, he would have been required to order the person's discharge.

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* (at para 33):

> "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 para 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."

The President went on to observe that, while section 29(4) was not expressed in terms which appear to give the court a discretion, there may occasionally be cases where what might otherwise be a breach of the ECHR 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. He continued, however (at para 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."

59. In the present case the respondent objected to the admission of the evidence of Dr Kádár. The Divisional Court did not admit this evidence but considered it de bene esse. (I note that this approach appears to have been followed in *Hafeez v Government of the United States of America* [2020] EWHC 155 (Admin); [2020] 1 WLR 1296, paras 27-37 per William Davis J; cf *Visha v Criminal Court of Monza, Italy* [2019] EWHC 400 (Admin), paras 53-59 per Rafferty LJ.) In practice, however, this difference in approach is not material if the evidence is nevertheless properly evaluated against the criteria in section 27(4) (see generally in this regard the observations of Lord Hamblen and Lord Leggatt in *Shagang Shipping* [2020] 1 WLR 3549, at paras 57-59).

60. In *Fenyvesi* the President explained (at para 32), with regard to the condition in section 27(4)(a), that evidence which was "not available at the extradition

hearing" meant 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. In the present case the Divisional Court considered ([2019] EWHC 934 (Admin); [2019] ACD 68, para 32) that it was unlikely that this evidence could have been obtained before the extradition hearing. Furthermore, at the date of the extradition hearing on 1 September 2017, the Hungarian government was not offering assurances in respect of the conditions in which extradited persons would be detained because it maintained that such assurances were no longer necessary. As a result, the reliability of any assurance provided by the Hungarian government was not and could not be an issue at that hearing. However, by the time the appeal was heard by the Divisional Court on 21 March 2019, another Divisional Court had decided in *Fuzesi* that assurances were indeed required in relation to prison conditions in Hungary and, as a result, the reliability of any such assurance had become a live issue in these proceedings for the first time. The appeal therefore satisfied both limbs of the condition specified in section 27(4)(a) of the 2003 Act: an issue was raised on the appeal that was not raised at the extradition hearing and evidence was available on the appeal that was not available at the extradition hearing.

61. The Divisional Court concluded that it was not appropriate to make findings of fact in relation to the German cases given the paucity of the evidence. It also declined to ask questions of Hungary pursuant to article 15(2) of the Framework Decision. It stated (at para 71) that the evidence relating to the two German cases was not directly relevant to the issue before the court which was whether Hungary could be relied upon to comply with an assurance given to the United Kingdom. For reasons set out earlier in this judgment, I consider this to be erroneous. However, having examined the evidence in Dr Kádár's reports, it went on to state (at para 78, set out at para 27 above) that it did not consider that the fresh evidence, even if admitted, would afford a ground for allowing the appeals, still less that it would be decisive. Accordingly, notwithstanding the degree of latitude to be afforded in cases involving human rights, it concluded that no purpose would be served in admitting this fresh evidence and that it would not be unjust to refuse to do so in all the circumstances. Although there is no reference in this section of the judgment to section 27 of the 2003 Act or to *Fenyvesi*, it is clear, in particular from the references to whether the fresh evidence would be decisive and to the latitude to be applied in human rights cases, that in para 78 the Divisional Court was purporting to apply the test in section 27(4) as explained in *Fenyvesi*.

62. In my view, the Divisional Court correctly applied that test and came to the only conclusion that was open to it. The fresh evidence could not be considered decisive in favour of the appellant on the issue of the reliability of the assurance provided by the Hungarian Ministry of Justice for the following reasons:

(1) The assurances which were alleged to have been given to Germany in the case of Mr Szikszai and Mr Kulscár were not in evidence and had not been seen by Dr Kádár.

(2) There was no direct evidence of breaches of assurances, the allegations in the reports of Dr Kádár being hearsay, the reliability of which is incapable of being tested.

(3) In the case of Mr Szikszai the complaint was of breach of an assurance that he would be held in a single occupancy cell. However, no copy of the assurance was before the court and it was not suggested that an assurance had been given in relation to the minimum personal space he would enjoy. Dr Kádár was unclear as to the assurance provided, stating in his first report that he had contacted Mr Szikszai's German lawyer to see what exactly the assurance given by Hungary contained. He had also submitted a request for information on the size and occupancy level of the cells in which Mr Szikszai had been detained. Although there were complaints of overcrowding and of the conditions in general, there was, as the Divisional Court pointed out, no evidence that his article 3 rights had been breached. In the second report of Dr Kádár there was some evidence that Mr Szikszai had been held in overcrowded conditions for a total period of eight days in 2016.

(4) In the case of Mr Kulscár the original assurance was not available. The complaints concerning breach of undertaking as to personal space were made in qualified terms. Dr Kádár stated in his first report that requests had been made on behalf of Mr Kulscár to obtain a copy of his assurance and official information on the size and occupancy levels of the cells where he had been detained between September 2016 and June 2017. The second report of Dr Kádár did refer to some evidence in the form of a prosecutorial decision that Mr Kulscár had been held in overcrowded conditions between 30 September and 21 November 2016.

(5) The Divisional Court did find that there were short term breaches of assurances, mainly in the period following arrival in Hungary, in two of the four cases relied upon in which assurances had been given to the United Kingdom. Those breaches had been remedied and not apparently repeated.

(6) The Divisional Court correctly took account of "the clear evidence of actual improvement in the prison estate in Hungary and, in particular, the reduction in the level of overcrowding in prisons" (at para 73). It also correctly took account of the role of the Commission for the Protection of Fundamental Rights which has power to deal with complaints concerning the

conduct of prison authorities, the system of public prosecutors in charge of supervising the lawfulness of the execution of sentences and protecting the rights of prisoners, and the role of penitentiary judges.

(7) The Divisional Court did not consider that the limited evidence demonstrated a systemic problem affecting the reliability of assurances given by the Hungarian Ministry of Justice. Furthermore, it considered that it remained possible for the Hungarian authorities to detain the appellant consistently with the assurances given to the court.

63. Whether the evidence in relation to alleged breaches of assurances provided to Germany is considered in isolation or in conjunction with the evidence in relation to alleged breaches of undertakings provided to the United Kingdom, the Divisional Court was entitled to conclude that it was not sufficiently cogent to rebut the presumption that the assurance provided by the Hungarian Ministry of Justice could be relied upon. The condition specified in section 27(4)(b) was clearly not satisfied. Furthermore, the fresh evidence was not such as to require the Divisional Court to make a request for further information pursuant to article 15(2) of the Framework Decision. In these circumstances, the Divisional Court was bound to dismiss the appeal in accordance with section 27 of the 2003 Act.

Conclusion

64. For these reasons I would dismiss the appeal.