Neutral Citation Number: [2021] EWHC 735 (Admin)

Case No: CO/1905/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2021

Before :

LORD JUSTICE BEAN
MRS JUSTICE McGOWAN

- -

Between :

Ion Sekrieru	**Appellant**
- and -	
The Government of Azerbaijan	**Respondent**

- -

David Josse QC and David Williams (instructed by **SMW Law**) for the **Appellant**
Richard Evans (instructed by **CPS**) for the **Respondent**

Hearing date: 03/02/2021

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Approved Judgment

References to documents in the bundle are given in the format [Tab], [Tab/Page in bundle], or [Tab/Page in bundle/Paragraph].

Mrs Justice McGowan:

1. Mr Ion Sekrieru ("the appellant") is a citizen of Moldova. He appeals with limited leave granted by Holman J against the decision of District Judge Baraitser of 16 March 2020 to grant a request to extradite him to Azerbaijan. The Secretary of State ordered extradition on 12 May 2020.

2. The Government of Azerbaijan ("the respondent") requests the extradition of the Appellant to stand trial for the crimes of *theft* and "*illegal interference in a computer system or computer information"*. The offences carry maximum sentences of 12 years and six years respectively.

3. Azerbaijan has been designated as a Category 2 territory for the purposes of the Extradition Act 2003 (the "Act"). Accordingly, the applicable provisions are set out in Part 2 of the Act. Azerbaijan is a state party to the European Convention on Human Rights, ("ECHR"). It is therefore subject to the obligations imposed by the ECHR.

4. The appellant appeals under sections 103, 104 and 108 of the Act on the grounds that his extradition would unnecessarily interfere with his rights under article 3 and article 6 of the ECHR. The appellant also seeks to rely on fresh evidence which he says was not available in the court below. Leave to appeal was refused on grounds that extradition would necessarily interfere with his article 5 and 8 rights. He does not renew his application for leave on either of those two grounds.

History of Proceedings

5. The appellant faces charges in Azerbaijan with five others, (one a Ukrainian citizen and four other Moldovan citizens) They are accused of theft contrary to Article 177 of the Republic of Azerbaijan Criminal Code and illegal interference in a computer system or computer information contrary to Article 273 of that Code. He is said to have been an organiser within the group; providing mobile telephones and giving instructions to others to visit particular automatic teller machines, the system would be interfered with at a point in time and cash would be dispensed. One of the co-accused, Mr Dorin, has already been extradited to Azerbaijan, where he was convicted, sentenced and has been returned to Moldova to serve the remaining part of his sentence of imprisonment. He has provided a statement, said to amount to fresh evidence.

6. It is alleged that, in July 2016, the accused stole money to the value of 1,464,500 manats (some £630,000) from 26 Unibank Commercial Bank OSS cash machines located in the Azerbaijani cities of Baku, Khirdalan and Sumgayit. The appellant is said to have left Azerbaijan after the offences were committed.

7. Following a criminal investigation in Azerbaijan that began on 30 July 2016, the appellant was charged on 31 July 2017 and an arrest warrant was issued in respect of him. On 1 August 2017, the Sabail District Court of Baku ordered that the appellant be held in custody for four months following his arrest.

8. The Judicial Authority in Azerbaijan issued an extradition request which was certified by the Secretary of State on 10 May 2018. He was arrested in the United Kingdom

under a domestic warrant on 6 November 2018. The hearing took place on 5 September 2019 and 20 January 2020.

Legal framework

Test on Appeal

9. Section 104 of the Act defines the court's powers on appeal under section 103,

> *(1) On an appeal under section 103 the High Court may—*
>
> *(a) allow the appeal;*
>
> *(b) direct the judge to decide again a question (or questions) which he decided at the extradition hearing;*
>
> *(c) dismiss the appeal.*
>
> *(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.*
>
> *(3) The conditions are that—*
>
> *(a) the 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;*
>
> *(b) the issue or evidence would have resulted in the 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.*

Article 3

10. Article 3 ECHR provides:

> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

11. In R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323, Lord Bingham said at [24]:

> *In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being*

> *subjected to torture or to inhuman or degrading treatment or punishment……..*

Prison conditions

12. In Muršić v Croatia (2017) 65 EHRR 1, the Grand Chamber discussed the principles relevant to Article 3 challenges to prison conditions at [96]-[141]. It held as follows:

> *96. Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour ……*
>
> *99. ……The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured……*
>
> *115. The Court would also observe that no distinction can be discerned in its caselaw with regard to the application of the minimum standard of 3 sq. m of floor surface to a detainee in multi-occupancy accommodation in the context of serving and remand prisoners……..*

13. In 2013 a Divisional Court heard the only reported case involving the requesting state, Ragul and another v Azerbaijan [2013] EWHC 2000 (Admin), Moses LJ and Burnett J, as he then was, considered an article 3 challenge to an extradition request by the respondent in this case. Dealing with prison conditions in Azerbaijan, the Court held at [35] and [36]:

> *35. It is clear from the totality of the evidence that was before the District Judge and the additional evidence before us that the prison conditions inherited by the Republic of Azerbaijan from the Soviet Union were of poor quality and that the medical facilities provided to prisoners were sub-standard. The general position has substantially improved since Azerbaijan became a state party to the Convention and continues to improve. The District Judge concluded that the appellants would be located in the detention facility in Baku which was described as conforming to all international standards. I infer that this is the facility which Professor Bowring visited in 2006. If that conclusion was correct, and there is no basis to suppose that it was not right, then there is no reason whatsoever to suppose that the appellants would be subjected to poor prison conditions at all whilst on remand. Even allowing for the possibility that the appellants may find themselves detained in another facility, the evidence establishes no more than that within the Azerbaijani prison estate there is a diminishing number of establishments where the conditions of detention are 'harsh'. I have*

> *already recorded that there is no feature of the appellants' case, or any personal characteristic of the appellants, which suggests that they are vulnerable to particular ill-treatment. Professor Bowring's conclusion that appropriate medical treatment would be provided to TN, particularly because of the potential oversight of the British Embassy, holds good for KR also. It accords with the obligations recognised by the Government of Azerbaijan and referred to in their response to the CPT report. The prison system is the subject of increasing oversight within Azerbaijan, by human rights organisations (domestic and international) and the Council of Europe. There has been a more recent visit by the CPT but its report and the Government's response have not yet been published. The picture that emerges from the material is that the accession to the Convention has had a positive impact on prison conditions in Azerbaijan with, in particular, considerable improvements being made in the last five years. It is also of note that none of the features identified by the Strasbourg Court in para 130 of its judgment in Harkins and Edwards (see para 17 above) is present. In my judgment, there is no clear and cogent evidence that the Azerbaijani authorities would not honour their obligations under article 3 of the Convention.*
>
> *36. The submission is that nobody can be extradited to Azerbaijan because of the state of its detention facilities. In my judgment, the material relied upon in support does not establish strong grounds for believing that extraditees, including these appellants, would face a real risk of being subjected to inhuman or degrading treatment on account of the general conditions of detention or the medical facilities attached to them.*

Assurances

14. In Othman v United Kingdom (2012) 55 EHRR 1, the Strasbourg Court held, in respect of assurances made by a requesting state that a requested person would not be subject to treatment violating their article 3 rights, at [186]-[189]:

> *186. ……..However, it not for this Court to rule upon the propriety of seeking assurances, or to assess the long term consequences of doing so; its only task is to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment……..*
>
> *187. In any examination of whether an applicant faces a real risk of ill treatment in the country to which he is to be removed, the Court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the Court will consider. However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment. There is an obligation to examine whether assurances provide, in their practical*

application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time ……

188. In assessing the practical application of assurances and determining what weight is to be given to them, the preliminary question is whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances……..

189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:

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

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

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

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

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

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

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

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

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

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

15. In The Court in Mures and Bistrita-Nasuad Tribunal v Zagrean; Petru Sunca v Iasi Court of Law, Romania; Stelian Chihaia v Bacau Court of Law, Romania [2016] EWHC 2786 (Admin), Sharp LJ and Cranston J, distilled the law on assurances into the 'Zagrean criteria' at [51]-[53]:

> *51. Our consideration of these submissions turns on the reliance which can be placed on the assurances from the Romanian authorities. Our focus must be on those ordered to be extradited by our courts, not on extraditees from elsewhere or on others who may be in prison in Romania. Even if there is cogent evidence of a real risk, indeed something approaching an international consensus, about persons being subject to treatment in breach of Article 3 ECHR in a requesting state, UK extraditions are permissible if there is an assurance sufficient to dispel the risk in their case.*
>
> *52. We accept that the factors which Mitting J identified in BB v. Secretary of State for the Home Department, SC/39/2005, and approved by the Court of Appeal, are those for evaluating the assurance in this case. Mitting J said:*
>
> > *Without attempting to lay down rules which must apply in every case, we believe that four conditions must, in general, be satisfied.*
> >
> > *(i) the terms of assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3;*
> > *(ii) the assurances must be given in good faith;*
> > *(iii) there must be a sound objective basis for believing that the assurances will be fulfilled;*
> > *(iv) fulfilment of the assurances must be capable of being verified.*
>
> *Mitting J's analysis is consistent with the Strasbourg jurisprudence; Othman v. United Kingdom,……..*
>
> *53. The evaluative exercise Mitting J identified occurs in a context, which includes the nature of the relationship between the UK and the jurisdiction in issue, the human rights situation there, the subject matter of Article 3 ECHR assurances, and the risks involved. ……..*

16. In Krolik v Polish Judicial Authorities [2012] EWHC 2357 (Admin); [2013] 1 WLR 490, a Divisional Court (Sir John Thomas PQBD and Globe J) discussed the presumption that a Member State of the Council of Europe will abide by its obligations under the ECHR. The Court held at [5]-[7]:

> *5. Third, the presumption is of greater importance in the case of Member States of the European Union in relation to a European Union Instrument. In N.S. v Secretary of State for the Home Department (C-411/10 and 493/10, 21 December 2011), the Luxembourg Court in a decision in relation to the removal of an asylum seeker to Greece, held there was a strong but rebuttable presumption that a Member State would abide by the Convention, as the common European asylum system was based on the assumption that states would abide by the*

Convention and that other states could have confidence in that regard. The court said at paragraph 83:

> *At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.*

The court drew a distinction between minor infringements and systemic flaws which might result in inhuman or degrading treatment.

6. Fourth, the type of evidence necessary to rebut the presumption and establish a breach was made clear by the Luxembourg court – a significant volume of reports from the Council of Europe, the UNHCR and NGOs about the conditions for asylum seekers (see paragraph 91 of the decision in N.S.). The Luxembourg court also had the decision of the Strasbourg Court in M.S.S v Belgium and Greece (21 January 2011) as evidence before it.

7. The reasoning of the decision in N.S. is plainly applicable to the Framework Decision which forms the basis of Part I of the Extradition Act 2003. It reinforces the decisions of this court in Targonsinski and Agius. It also confirms the observations of Mitting J in Tworskowski v Judicial Authority of Poland [2011] EWHC 1502 at paragraph 15 as to the type of evidence required, namely that something approaching an international consensus is required, if the presumption is to be rebutted.

17. In Elashmawy v Italy [2015] EWHC 28 (Admin), a Divisional Court (Aikens LJ, Ouseley J and Mitting J) said at [90]:

> *90. The Article 3 test in the context of extradition is whether there are substantial grounds for believing that there is a real risk that the person extradited would be subjected to inhuman or degrading treatment or punishment by reason of the prison conditions upon his return and (if convicted) during any imprisonment. To make a conclusion based on this test the court has to examine the present and prospective position as best it can on the materials now available. In "prison condition" cases the factual position is unlikely to be static. There may be new evidence about the conditions in a country generally or a particular prison where the position has already been considered by a court. The view of any court, even the ECtHR, on prison conditions in a country or a particular prison at any time is only definitive at the time that the view is expressed. If cogent evidence is adduced which demonstrates that the view a court took previously about prison conditions generally or in a particular prison can no longer be maintained, then the court must review again the evidence*

> *about the relevant prison conditions. Evidence is unlikely to be treated as cogent unless it demonstrates something approaching an international consensus that the position has changed. To adopt a lower threshold would introduce an unacceptable degree of uncertainty in the area. But, an obvious example where the test may well be satisfied is where the Strasbourg or Luxembourg courts have held a Contracting or Member State to be in breach of its Article 3 obligations regarding prison conditions, has required that remedial measures be undertaken, which have then been implemented and upon which the Committee of Ministers or the ECtHR have then indicated views.*

18. In Yilmaz and Yilmaz v Turkey [2019] EWHC 272 (Admin) at [15]-[19], a Divisional Court (Bean LJ and Ouseley J) commented on the passage from Krolik cited above as follows:

> *15. We make the following observations about this passage from Krolik. Firstly, …….. what is required is clear, cogent and compelling evidence showing not that the fugitive will be subjected to torture or inhuman or degrading treatment if returned to the Requesting State but that there is a real risk that he will suffer such treatment……..*
>
> *16. Second, the language of paragraph 5 of Krolik indicates that the presumption is stronger in the case of an EU Member State than in the case of other member states of the Council of Europe: see also Elashmawy at paragraph [50].*
>
> *17. Third, Krolik was a judgment in six appeals raising the issue of prison conditions in Poland following a long series of decisions of this court on the same issue. It was not a case in which there was a need to seek assurances or further information from the Requesting State. Such assurances or further information have been sought in several recent cases involving EU countries including, for example, France (Shumba [2018] EWHC 1762 (Admin)) and Portugal (Mohammed [2017] EWHC 3237 (Admin)), neither of them subject to a pilot judgment. In Florea v Romania [2014] EWHC 2528 (Admin) this court observed that the absence of a pilot judgment does not negate the existence of systemic or structural difficulties in the prison estate of the Requesting State.*
>
> *18. Fourth, although an "international consensus" of a real risk of treatment in breach of Article 3, or something approaching it, is one way of rebutting the presumption, it is not the only way. We note the different wording used by the CJEU in Aranyosi [2016] QB 921 as to when it is appropriate to seek assurances or further information from a Requesting State:-*
>
> > *88……where the judicial authority of the executing Member State is in possession of evidence of a real risk*

> *of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter (see, to that effect, judgment in Melloni, C-399/11, EU:C:2013:107, paragraphs 59 and 63, and Opinion 2/13, EU:C:2014:2454, paragraph 192), that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.*
>
> *89. 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 ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.*

19. In Purcell v Public Prosecutor of Antwerp, Belgium [2017] EWHC 1981 (Admin) Hamblen LJ said at [17]-[19]:

> *17. Mr Fitzgerald QC submitted that the process of obtaining further information which is here described involves an evidential threshold which must be satisfied before such a request is made, namely, as referred to in [94], that there is "objective, reliable, specific and properly updated evidence" of a real risk of a breach of Article 3.*
>
> *18. In my judgment, this is an incorrect interpretation of the Aranyosi decision. The case emphasises the importance of the court having "objective, reliable, specific and properly updated evidence" before any determination of a breach of Article 3 is made, and in particular information relating to the conditions in which the individual in question will be detained. It is "to that end" that further information is to be sought. The court must obviously be satisfied that there is a need to seek further information but there is no*

> *evidential threshold to be crossed before it can do so. There is therefore no implication from the making of the request for further information that the court has found that Article 3 would be breached on the information currently before it, or that a prima facie case to that effect has been made out.*

19. In Targosinski v Judicial Authority for Poland [2011] EWHC 312, Toulson LJ said, at [5] and [11]:

> *5. ..... The framework of the European Arrest Warrant scheme is constructed on a basis of mutual trust between the parties to the Convention, all of whom belong to the Council of Europe. The starting point is therefore an assumption that the requesting state is able to, and will, fulfil its obligations under the Human Rights Convention.*
>
> *……..*
>
> *11. Given the presumption with which the court starts, it will require clear and cogent evidence to establish that in a particular case the defendant's extradition would have contravened his human rights. See the observations of Lord Bingham in Ullah [2004] 2 AC 323, particularly at paragraph 24. ...*

20. The correct approach to the weight to be attached to assurances was set out by Hickinbottom LJ in Georgiev and others v Bulgaria, [2018] EWHC 359 (Admin) at [8],

> ……..
>
> *iii) The initial burden is upon the requested person to establish, by clear and cogent evidence, that there are substantial grounds for believing that he would, if surrendered, face a real risk of being subjected to inhuman or degrading treatment in the receiving country.*
>
> *iv) If such grounds are established, then the legal burden shifts to the requesting state, which is required to show that there is no real risk of a violation: as it has been said, the burden upon the requesting state is "to discount the existence of a real risk" (Aranyosi at [103]) or "to dispel any doubts about it" (Saadi at [129]). Requiring a party to dispel any doubts as to a particular risk undoubtedly imposes a very heavy burden, although I am unconvinced that it is necessary or appropriate to put it formally in terms of the criminal standard of proof.*
>
> *v) The requesting state might satisfy that burden by evidence that general prison conditions are in fact article 3-compliant. However, even where it cannot show that, that does not result in a refusal to surrender, because the assessment of whether there will be a breach of human rights is necessarily fact-specific. Therefore, where the court finds that there is a real risk of inhuman or degrading treatment by virtue of general prison conditions, it must then go on to assess*

whether there is a real risk that the particular individual will be exposed to such a risk.

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

vii) The information provided may include assurances from the requesting contracting state, designed to provide a sufficient guarantee that the person concerned will be protected from treatment that would breach article 3. In the evaluation of such assurances, relevant factors include the nature of the relationship between the requesting and requested judicial authorities and the states of which they are a part, the human rights situation in that other jurisdiction, the subject matter of the assurance and the nature of the risk involved. It also has to be conducted in the light of the principle of mutual recognition and trust between those authorities and states: where the requesting state is a signatory to the ECHR and a Member State of the European Union, there is a strong presumption that it is willing and able to fulfil its human rights obligations and any assurances given in support of those obligations. An assurance given by such a state must be accepted unless there is cogent reason to disbelieve it will not be fulfilled.

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

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

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

……

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

Article 6

21. Article 6 ECHR provides:

> *1. In the determination ……of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…….*
>
> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
> *(b) to have adequate time and facilities for the preparation of his defence;*
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

22. In Soering v United Kingdom (1989) 11 EHRR 489, the Grand Chamber held at [113]:

> *113. ……The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country……*

23. In Ahorugeze v Sweden (2012) 55 EHRR 2, the Strasbourg Court held at [114]-[116]:

> *114. The term "flagrant denial of justice" has been considered synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein (see, among other authorities, Sejdovic v. Italy [GC], no. 56581/00, § 84, ECHR 2006-II).*

> *115. It should be noted that, in the twenty-two years since the Soering judgment, the Court has never found that an extradition or expulsion would be in violation of Article 6. This indicates that the "flagrant denial of justice" test is a stringent one. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.*
>
> *116. In executing this test, the Court considers that the same standard and burden of proof should apply as in the examination of extraditions and expulsions under Article 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06, § 129, ECHR 2008-...).*

24. In Othman v United Kingdom (2012) 55 EHRR 1, the Strasbourg Court held at [259]:

> *259. In the Court's case-law, the term "flagrant denial of justice" has been synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein ……..*
> *Although it has not yet been required to define the term in more precise terms, the Court has nonetheless indicated that certain forms of unfairness could amount to a flagrant denial of justice. These have included:*
>
> *-……..*
> *- a trial which is summary in nature and conducted with a total disregard for the rights of the defence ….*
> *- detention without any access to an independent and impartial tribunal to have the legality the detention reviewed ……*
> *- deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country…….*

Fresh Evidence

25. By virtue of section 104(4) of the Act we can only allow the appeal on the basis of fresh evidence if three conditions are met: (a) the evidence was not available at the extradition hearing; (b) it would have resulted in the district judge deciding an issue before her differently; and (c) if she had decided the issue in that way, she would have been required to order Mr Sekrieru's discharge: see also the judgment of this court given by Sir Anthony May P in Szombathely v Fenyvesi [2009] EWHC 231 (Admin).

The Decision

26. The District Judge heard evidence and had reports accepted into evidence, on prison conditions and the trial process. She found that the appellant had not discharged the burden on him to show that the prevailing circumstances in the requesting state would violate his rights under articles 3 or 6. Further, she held that if she was wrong in that assessment, she had received a number of assurances from Azerbaijan which she found would discharge the legal burden on the Requesting State to show that there is no real risk of breach of his rights. [22]. The District Judge summarised the three sets of assurances she had received at [62];

> *62. The assurances are specific and detailed relating to location, personal space and material conditions:*
>
> *a. In relation to Baku Pre-Trial detention facility:*
>
> *i. The assurance of 19 April 2019 and 27 January 2020 confirms that Mr. Sekrieru will be placed in a cell providing no less than 4 m² of personal space including the ability to move freely around the furniture;*
>
> *ii. The assurance dated 3 September 2019 confirms that if extradited, Mr. Sekrieru will be held during the pre-trial stage of proceedings in the cells specifically set aside for extradited persons. These cells have 4m² in living space per person, excluding sanitary facilities;*
>
> *iii. The assurance of 19 April 2019 confirms the following will be provided: in-cell sanitary facilities; medical facilities equivalent to those provided to the general population are provided; adequate natural and artificial light; adequate ventilation; heating through a central heating system; three meals are provided a day; 9.75m² of outside space next to two-person cells and 14.55m² next to the four person cell; sports facilities and an hour per day to use the football pitch or elsewhere to exercise.*
>
> *b. In relation to Sheki Penitentiary*
>
> *i. The assurances dated 19 April 2019 and 27 January 2020 confirm that Mr Sekrieru will be detained in cells specifically set aside for those who have been extradited providing no less than 4m² of personal space.*
>
> *ii. The assurance dated 19 April 2019 confirms that the following will provided: in-cell sanitary facilities; medical units for treatment; adequate lighting through windows for natural light and artificial light; adequate ventilation; heating through a central heating system; three meals a day; access to sports facilities between 6:00 and 17:00 including two volleyball halls, a mini football pitch, gym hall and table games room; 11.3m2 of outside space if in a two- person cell and 13.6m² if in a four person cell; pest control procedures are applied once or twice a month.*

27. On the article 3 submissions she found, first, that as a member of the Council of Europe there was a strong presumption the respondent would abide by its obligations [22/49]. Second, there was no previous finding, albeit in a limited number of cases, to the effect that Azerbaijani prison conditions violated article 3. Third, there was a

demonstrated willingness to cooperate with international monitoring. Fourth, it had been guaranteed that the appellant would not be held in police custody or interviewed in the absence of his lawyer at any stage in proceedings. Fifth, Mr Tugushi, an expert called by the appellant, had reported positively on the conditions of the prisons in which it was intended to detain the appellant upon arrest and imprison if convicted and sentenced. Sixth, the conditions in the Baku Pre-Trial Detention Facility, would not amount to de facto solitary confinement. Seventh, the conditions in the Baku Pre-Trial Detention Facility were acceptable in other respects. Eighth, Sheki Penitentiary, in which the appellant would be held if convicted, was operating well below capacity during Mr Tugushi's visit. Ninth, the conditions at Sheki Penitentiary were generally acceptable [22/48-58/349-354].

28. She found that the assurances had been provided in good faith; they met the "Zagrean criteria"; there was a sound objective basis for believing they would be met, and fulfilment was capable of independent verification.

29. On the article 6 submissions she found that the appellant had not established that there were substantial grounds for believing that he would be exposed to a real risk of being subject to a flagrant denial of justice. She found, first, the respondent had guaranteed that Moldovan officials would have unlimited access to the appellant from his arrival in Azerbaijan. Second, Witness X's evidence was not directly relevant to a criminal trial in respect of which assurances had been provided in advance of extradition. Third, another of the co-accused, having been extradited from Spain on the basis of assurances, had been treated in compliance with the assurances given. Fourth, that the clear and unequivocal assurances provided by the respondent could be relied upon. Fifth, this was not a "political" case. Sixth, Witness X's concerns about the status of the judiciary and the legal profession in Azerbaijan were not sufficient or sufficiently relevant to establish substantial grounds for believing that the appellant would be exposed to a real risk of being subjected to a flagrant denial of justice [22/360-363/73-80].

30. It is a clear and detailed decision which attaches the evidence, further information and reported material before the court in a series of annexes. [22/342-384].

Grounds of Appeal

31. Ground 1: The judge erred in not finding that extradition would be incompatible with the appellant's rights under article 3.
Ground 2: The judge erred in not holding that extradition would lead to a flagrant denial of the appellant's right to a fair trial and thus be incompatible with his rights under article 6.

32. In addition to the grounds of appeal Mr Josse Q.C. submits that there is credible, determinative, fresh evidence which was not available at the extradition hearing. The co-accused, Danila Dorin Constantin, referred to throughout as Mr Dorin, has made a statement alleging that he was kept in "inhuman and unbearable" conditions [17/276]. He was held in the SGB isolator and then moved to Ciurdahana (Baku). In both institutions the standards were appalling and the assurances provided to the Spanish court considering the request for his extradition were not met. He says that the cell in which he was confined was much smaller than the permitted international standard.

Further that he was denied proper access to his lawyer, his family and independent visitors such as the Red Cross. He says he was denied access to necessary medical treatment. He claims he was convicted "without any direct evidence of his guilt". He says he was tortured by the use of electrocution and that needles were inserted under his fingernails. A statement in support explains that the new material could not be provided until Mr Dorin had safely been returned to Moldova to serve the balance of his sentence. [18/281].

33. Mr Josse argues that, if accepted, this evidence would have caused the judge to have decided the case differently. He submitted that, rather than look at the case to decide if the grounds were made out before considering whether the fresh evidence would alter the position, this court should look at the picture as a whole and if the court accepted the fresh evidence the decision of the District Judge would be completely vitiated.

34. I prefer to adopt the conventional approach to the appeal. If there is merit in either or both of the grounds, then the District Judge should have decided the case differently on the material before her and the fresh evidence would be superfluous. If there is no merit in the grounds then the question is whether the fresh evidence, had it been available and accepted, would have caused the District Judge to decide the case differently.

35. In general terms Mr Josse argues that the District Judge was in error in placing significant reliance on the international consensus test laid down in Krolik, (ibid). He submits that presumption that a Council of Europe Member State will abide by its obligations is less strong when that state is not an EU Member State: Yilmaz (ibid).

36. Further he submits that the District Judge conflated the evidence of the assurances provided with the evidence of "real risk". She should have considered the issue of "real risk" before looking to the evidence of the assurances to see if they would answer that risk.

Submissions on Article 3 Ground

37. The appellant argues that the District Judge erred by relying on evidence of the overall occupancy levels of the relevant prisons to conclude that the appellant would not be detained in the overcrowded conditions. She placed insufficient weight on the evidence of Professor Bowring that torture and ill-treatment are endemic in the Azerbaijani law enforcement system.

38. Considering all the factors set out in Othman (ibid) at [189] she was wrong to rely on the assurances provided. In particular:

    a. The documents disclosed to the Court do not sufficiently address all areas of risk. There is no explanation of how the appellant will be provided with an individual leisure regime against the background of reports that remand prisoners are not given access to sport or outdoor recreation.

b. The respondent may simply be incapable of meeting obligations to detainees as a result of practical and resource limitations, it should not be assumed that the respondent will be capable, whatever the intention to comply.

c. There is insufficient certainty in the assurances provided. The respondent has not excluded the possibility of the appellant being held at an institution other than those identified in the assurances.

d. It would be impossible to objectively verify the respondent's compliance with its assurances. Detainees do not have unfettered access to lawyers.

e. There exists no effective system of protection against torture in Azerbaijan and the state has shown itself to be unable or unwilling to investigate allegations of torture.

Submissions on Article 6 Ground

39. The appellant submits that the judicial system is unfair, corrupt and will inevitably deny him a fair trial. It is submitted that the District Judge was wrong to fail to accept the evidence of Witness X. It is argued that she knows nothing about the system in Azerbaijan and therefore should have accepted the account of Witness X about its inherent failings. The reasoning of the District Judge is criticised because it is said that she looked for reasons not to accept it, rather than assessing its reliability and credibility.

40. It is submitted that a conviction rate of 99% demonstrates, without more, that the system is unfair. Mr Josse did acknowledge that the figure may not be quite as significant as first argued. This is an inquisitorial system; there is often a higher bar before cases reach the court and cases are 'sent back' for further investigation.

41. The appellant referred this court to the first instance decision of the Chief Magistrate in Azerbaijan v Hajiyeva given on 26 September 2019. [Authorities Bundle 1/1-49]. Professor Bowring and Witness X (known in that case as Witness A) gave evidence. It appears to be that the Chief Magistrate found that in 'cases of interest to the state' it could not be held that there was no real risk of a breach of article 6. In that case she found that Mrs Hajiyeva was, by extension of her husband's position, of 'interest to the state' and accordingly discharged her. That case undoubtedly turns on its own facts. The article 3 arguments raised by the Requested Person failed and the article 6 arguments succeeded on submissions defined by the position of the Hajiyeva family in Azerbaijan.

Fresh Evidence

42. A new statement has been provided by Mr Dorin, since his transfer to Moldova to complete his sentence. It is submitted by the appellant that this was not available at the time of the hearing and should be admitted at this stage in the proceedings to avoid an unfair disposal of the appeal. Mr Josse argues that the new material bears out the concerns raised by Professor Bowring about prison conditions and Witness X about the unfairness of the judicial system and the risk of torture and other inhuman

treatment. Further it is submitted that the allegations could not be safely made whilst Mr Dorin was held in Azerbaijan.

43. The respondent argues that this material was available to the appellant at the time, Mr Dorin was not in jeopardy, had access to lawyers and consular support and could have made these allegations at the same time as he gave his original statement. Further the respondent argues that, in any event the material would not be decisive of the issue. Mr Evans submits that Mr Dorin had been visited by the Moldovan authorities twice and could have raised complaints with them. He could have given them his evidence and it would have been available at the hearing in the court below. On the question of whether the material could be decisive he argues that we do not know what assurances were provided to the Spanish authorities in relation to Mr Dorin. We do have specific assurances in this case, and further we have evidence that Dr Tugushi met another individual who was extradited with assurances and where those assurances were honoured.

44. Further, Mr Evans submits that the fresh evidence is not true: first, Mr Dorin could have told his Moldovan visitors about any allegations of torture. There is clear evidence that Moldovan visitors came to see him in the isolator, that was during the pre-trial investigation period. Second, when he was interviewed, it was in the presence of two lawyers and an interpreter. Any issue of torture would have been raised then. Third, no allegations of mistreatment were made while he whilst he was in detention in Baku (Ciurdahana). Fourth, Mr Dorin, as the appellant's co-accused, has a strong incentive to provide untruthful evidence, as he may wish to assist his co-conspirator. Additionally, we note that once sentenced Mr Dorin was returned to his native Moldova to serve his sentence.

Discussion

45. As outlined above I do not accept the proposition that the fresh evidence, if admitted, should be used to demonstrate that the District Judge was in error in reaching the decision she did on the material before her in the court below.

46. Her assessment of the evidence and her application of the law to her findings must be the first area of scrutiny for this court. If she was in error in her findings, then she ought to have decided the case differently. If she was correct in her findings then this court must consider whether the fresh evidence, if available and credible, would have obliged her to decide the case differently.

47. Accordingly, it is necessary to consider the grounds upon which the appellant has leave first. Should the District Judge have decided that extradition to Azerbaijan would place the appellant at real risk of torture or other inhuman treatment so that his article 3 or 6 rights would be violated?

48. The District Judge heard the evidence and submissions. She gave careful consideration to the competing arguments. She found for all the reasons articulated in her ruling that the conditions in the places of detention did meet minimum international standards. She also reasoned, that if she was wrong in that assessment and the appellant ought to have succeeded in his argument that he was at real risk, that the detailed assurances provided by the Requesting State, as to places and conditions

of detention; access to consular support; provisions of adequate facilities for exercise and medical attention whilst in detention; access to independent lawyers both before and during the trial process would meet the requirements to protect his article 3 rights. She found that there was no reason not, after critical analysis, to accept those assurances; to accept the expressed intention to comply and meet standards re-iterated by the requesting State.

49. In regard to the provisions for a fair trial, she accepted the submissions of the Requesting State as to the trial process. She did not find the evidence to the contrary persuasive. Further she accepted that the process of the appellant's trial through the system would be monitored by officials from the Moldovan consular services. That after all, was the evidence about the co-accused Mr Dorin at the hearing. He was returned by Spain following assurances, he was visited by Moldovan officials, he had legal representation, he was tried, convicted and after sentence was passed, he appealed his sentence. Later he was returned to Moldova to serve the balance of his sentence.

50. Whether the fresh material from Mr Dorin was 'available' in the sense contemplated by section 104(4)(a) and in cases such as Fenyvesi (ibid) only needs to be decided if this court was to take the view that it would be determinative of the appeal. To assess whether the material is capable of being decisive it is necessary to look at the material 'de bene esse'. There is no material to show that Mr Dorin had ever raised any of these concerns before the new statement. Of course, if he is truthful then it might be unrealistic to have expected him to raise these points with the authorities in Azerbaijan; but there is no evidence from the Moldovan authorities to show that he has raised these issues with them, either whilst being visited in detention in Azerbaijan or since his return to Moldova. There is no medical evidence to support his allegations of very serious torture by electrocution and having needles inserted under his fingernails. There is no medical evidence to support his assertion that he contracted tuberculosis which remained untreated whilst in detention in Azerbaijan.

51. Rather, on his own evidence, the Spanish court was provided with assurances and ordered his extradition. He received visits from his consular officials, he was legally represented. He provided evidence to the authorities in some detail of the offences he was alleged to have committed, such evidence forming the basis of his own conviction and the evidence implicating the appellant. Further, he had exercised a right of appeal. He was returned to Moldova to complete his sentence. That sentence has not been over-turned by the judicial authorities in Moldova, nor is there any evidence of that state raising concerns at the treatment of one of its citizens which detained in Azerbaijan. It cannot be said that his evidence is credible and therefore cannot be determinative.

52. The submissions that the District Judge ought to have decided the case differently is not made out on either ground. Nor is the fresh evidence capable of being decisive of the issues in the case. I would therefore dismiss this appeal.

Lord Justice Bean:

53. For the reasons given by McGowan J, with which I agree, I too would dismiss this appeal.