THE HIGH COURT

[2016 No. 196 EXT]

[2017 No. 341 EXT]

[2017 No. 356 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

LASZLO KRISZTIAN KUTAS

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 29th day of March, 2019

1. On the 2nd November, 2018, I gave an *ex tempore* judgment in respect of three European Arrest Warrants ("EAW"). These were EAWs in proceedings 2016/196 EXT, 2017/341 EXT and 2017/356 EXT. In that judgment, I rejected almost all the respondent's points of objection to his surrender in respect of each of the European arrest warrants. In respect of two remaining issues, I sought the following information from the issuing state:

> (a) in respect of all three EAWs, information and assurances concerning prison conditions in Hungary and,
>
> (b) in proceedings 2017/341 EXT, information as to the timeframe within which the respondent will have a right to claim a retrial.

Proceedings: 2017/341 EXT

2. The EAW in proceedings 2017/341 EXT is dated 31 March, 2017. This EAW, was transmitted to this state by the central authority of Hungary, the Ministry of Justice. The letter of the central authority transmitting the EAW stated that the Ministry had "*the honour to transmit the corrected version of the European Arrest Warrant Nr.1. Szv. 232/2017/4 of the Court of Justice Kecskemet issued against László Krisztián KUTAS (born in Pécs on 1 June 1980), furnished with translation*." That EAW was endorsed on the 4th day of December, 2017.

3. In reply to the request for additional information on the length of time in which the respondent would have to claim his retrial, the Hungarian central authority sent to this jurisdiction, what was stated to be a "modified EAW" of the Court of Justice Kecskemet issued against the respondent. This information was sent over by letter dated the 15th November, 2018. It was sent through the Ministry of Justice "acting as central authority". The "modified EAW" bore the same date of issue as the EAW that had been endorsed. It was signed by the same representative of the issuing judicial authority. In the English translation of the "modified EAW", it did not appear to contain any new information in point (d) 3.4 in respect of the time within which to seek a retrial or an appeal.

4. At the hearing subsequent to the receipt of that information, counsel for the minister submitted that an informal translation of the original Hungarian document revealed that it contained at point (d) 3.4, a statement that the timeframe was indefinite. Objection was taken to the reliance on the informal translation by the respondent. Further information was sought by this Court from the issuing state, under s. 20 of the European Arrest Warrant Act of 2003 ("the Act of 2003") in respect of the information provided.

5. In a response dated the 28th February, 2019, the Ministry of Justice of Hungary, as central authority, sent over another "modified EAW" from the issuing judicial authority. This document was again similar in form of the EAW which had been sent over originally. It had the same date and was signed by the same judicial representative. It had the added inclusion at point (d) 3.4 of the time limit of one month.

6. The information that is now contained in the additional documentation means that the conditions set out in s.45 of the Act of 2003 have been met. This information demonstrates that he will have a possibility of a retrial/appeal in relation to the offences set out in this EAW, within one month of being served with the decision. However, that does not dispose of the issues arising from the receipt of this "modified EAW". An issue arose as to how this Court should treat this information by virtue of the form in which it had arrived.

The nature of the "modified European arrest warrant"

7. After the first "modified EAW" was transmitted, this Court held an oral hearing on the 6th December, 2018. Counsel for the respondent objected to the reception of that information given the form it which it was sent to this jurisdiction. She submitted that it was inappropriate that the Court would have to scrutinise what appeared on its face to be an EAW for the purpose of extracting information. She queried the concept of a modified European Arrest Warrant. There was some discussion between the Court and counsel which included reference to, but no detailed submissions on, previous case law in which the High Court had been asked to deal with amended or corrected European Arrest Warrants.

8. At the hearing after the second "modified EAW" was received, the respondent stood over his earlier submissions on this matter. Having reserved judgment in respect of all the matters, the Court recalled the parties for submissions on the two, apparently most relevant, cases.

The case law

9. In the case of *Minister for Justice and Equality v. Swacha* [2016] IEHC 796, the High Court (Donnelly J) ruled upon the validity of warrants that had been presented to the court for endorsement. These were identified as "corrected EAWs" issued by a Polish judicial authority. Those EAWs had contained corrections inserted into the original warrant at a later date than the date of the original issuing of the warrant. They were inserted by a judge who had not issued the original warrant. The date of the EAW remained on its face the original date of issue. The High Court accepted those "corrected EAWs" as valid EAWs from Poland. The Court held that the issue of whether the corrected versions of the EAWs were validly issued European arrest warrants under the Framework Decision, was one that was purely a matter for the Polish authorities.

10. At para. 49 of the judgment, the High Court stated:

> *"The Court is satisfied of the following in respect of each of the first and second EAWs:*
>
> *a) That it has been issued by a competent judicial authority,*
>
> *b) That it purports to be an EAW from Poland,*
>
> *c) That an explanation is given as to why the particular EAW is not signed by the original judge who has been indicated as the representative of the issuing judicial authority and as the signatory,*
>
> *d) That an explanation has been given as to how the present EAW has come into existence, i.e. being a corrected version but the original judge is deceased.*
>
> *e) That it is now signed by a representative of the issuing judicial authority who has the same role as that of the judge who is indicated as the representative of the issuing judicial authority.*
>
> *f) That the fact that it is a corrected version of an EAW is also clear on its face."*

11. The High Court went on to hold that it was not helpful to consider what an Irish Court would have done in the same circumstances, nor to consider how an Irish court might "*correct*" or "*amend*" an "*incorrect original order or decision*." The High Court had "*to focus on its role and function in the execution of EAWs as provided for by the Act of 2003 which implements the 2002 Framework Decision. Under the 2002 Framework Decision, it is recognised that the European arrest warrant is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which is the 'cornerstone' of judicial cooperation. The mechanism of the European arrest warrant is based on a high level of confidence between member states. These principles of mutual recognition, mutual trust and a high level of confidence are reflected in s. 12(8) of the Act of 2003."*

12. At para. 57 of the judgment, the High Court held "*the Court is satisfied that there is nothing in the 2002 Framework Decision or in the Act of 2003 or s.11 of the Act of 2003 in particular that requires an issuing judicial authority to issue either, a fresh EAW or to provide additional documentation by other means in order to correct an inaccuracy in the EAW as originally issued. The manner in which an EAW is "corrected" is properly a matter for the issuing judicial authority. A "corrected version" of an EAW may be accepted as a European Arrest Warrant within the meaning of the Act and the 2002 Framework Decision."*

13. In the subsequent decision of *Minister for Justice and Equality v. Zielinski* [2017] IEHC 419, this Court dealt with a different factual situation. In that case, after there had been a hearing before the High Court in respect of an original EAW, the High Court requested further information from the issuing judicial authority. The reply came back by way of an amended EAW. The Court was asked to endorse, and did endorse, that EAW as a new warrant.

14. This Court rejected an argument that the sending over of an amended EAW amounted to an abuse of process of this jurisdiction because of an interference with the earlier proceedings by the issuing of a new EAW. There was also a submission that this "*amended EAW*" was not a valid warrant. as, on its face, it appeared to be the original EAW. Relying upon the *Swacha* decision, the Court held that it was a valid warrant.

15. In rejecting the respondent's arguments, the High Court held that: -

> *"71. In the circumstances of this case, there is no lack of clarity in respect of the present European arrest warrant. As regards the issue of whether it is indeed a fresh EAW and thereby valid as an EAW upon which the High Court must exercise its function, the dicta from* Swacha *referred to above is relevant in that it confirms that '[t]he manner in which an EAW is 'corrected' is properly a matter for the issuing judicial authority' and that such a 'corrected version' may be accepted as a European arrest warrant. The word 'may', being used to indicate that there could be other reasons why the EAW is not a valid European arrest warrant.*
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> *72. This Court has no doubt that the previous (first and second) EAWs were withdrawn by the issuing judicial authority as they were no longer the EAWs upon which surrender was sought. In turn, what was placed before this Court by the issuing judicial authority, was a 'corrected' European arrest warrant. This brought to an end each of the previous proceedings in respect of the earlier (first and second) European arrest warrants. The Court was then obliged in turn to consider the issue of the endorsement of the 'corrected' European arrest warrants. The present 'amended' or 'corrected' EAW is the subject matter of these proceedings. In those circumstances, the present EAW is undoubtedly an EAW for the purposes of the Act of 2003.*
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> *73. The Court takes the opportunity to observe that the phrase 'fresh warrant' may indeed be an unhelpful shorthand to describe the process which may or may not occur in the issuing state. The High Court is obliged to consider whether the surrender of the respondent is required under the provisions of the Act of 2003. When the High Court is presented with what purports on its face to be an EAW emanating from an issuing judicial authority within the meaning of the Act of 2003, the High Court is bound to act upon that European arrest warrant. It is the receipt by the central authority of a 'European arrest warrant' meaning 'a warrant, order or decision of a judicial authority of a Member State, issued under such laws as give effect to the Framework Decision in that Member State, for the arrest and surrender by the State to that Member State of a person in respect of an offence committed or alleged to have been committed by him or her under the law of that Member State', that triggers the procedures set out in the Act of 2003. If an EAW is sent in an amended or corrected form, it is on that EAW that the authorities in this State must act. In that sense, the EAW is 'a fresh warrant' in this jurisdiction, when compared with earlier versions of the European arrest warrant. Whether the issuing state regards it as a 'fresh warrant' or an 'amended warrant' is not entirely germane to the duty on the High Court as executing judicial authority to take appropriate steps on the EAW that is presented to it.*
>
> *74. The Court does not accept that the dicta in* J.A.T. (No. 2), *relied upon by the respondent, which states that as regards warrants there is no process of amendment, requires a finding that the present EAW cannot be regarded as a new, separate or fresh EAW which required a fresh endorsement. In the view of this Court, the dicta in J.A.T. (No.2) must be read in light of its context, which was to demonstrate a difference between the process of adjudication upon warrants and that of civil proceedings generally. Indeed, the dicta can be understood as supporting the position that, in this jurisdiction, when an 'amended warrant' is presented to the High Court, the court must consider it a 'fresh warrant' to be dealt with anew in accordance with the provisions of the Act of 2003.*

75. Most importantly, this Court does not accept, however, that the dicta in J.A.T. (No. 2) must be taken as a binding statement that every other" issuing judicial authority is prohibited from engaging in a process by which they can amend or correct their EAWs and transmit those corrected or amended versions to this court for execution of that version of the European arrest warrant. The purpose of the 2002 Framework Decision is not to harmonise substantive or even procedural criminal laws but to provide for a system of simplified surrender based on mutual recognition of judicial decisions based upon the principles of mutual trust and confidence. Where other jurisdictions permit amendments to EAWs and an amended EAW is presented to the authorities in the jurisdiction for execution, the central authority and the High Court as executing judicial authority are bound to carry out their functions under the Act of 2003 in respect of the EAW in its amended form."

16. The dicta from the decision in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 is that of O'Donnell J. in which he stated at para 6, having referred to the principle of *res judicata* and the associated principles in *Henderson v Henderson* (1843) 3 Hare 100, as applied to civil cases, that:-

"6. . … The position in relation to warrants is fundamentally different. Importantly, there is no process of amendment. The issue is the validity of the warrant as issued. Strictly speaking, when a fresh warrant is issued, its validity becomes a separate issue. It is not res judicata *because the issue under the new warrant has not been decided. Technically (and this is a technical issue) the issue now is the validity of the new warrant. Nor is it appropriate to try to apply the concepts of bringing all claims at the same time. In the case of warrants, that would amount to saying that only one warrant could ever be issued.."*

Further submissions

17. At the further hearing, counsel for the respondent repeated her earlier submissions. In so far as she referred to either of the above cases, she submitted that there was no indication of how or when this EAW had been "modified" as there had been in *Swacha*. Counsel submitted that this was a document upon which the Court could not or should not place any reliance.

18. Counsel also submitted that in the present case there was no indication that this document had emanated from a judicial authority. She submitted that the only indication was that at an "administrative level" an insertion had been made into a document.

19. Counsel for the minister submitted that the "modified EAW" was information sent in response to a request from this Court for further information. The document must be understood in that context. There was no indication that it was being presented as a fresh warrant. Counsel sought to distinguish the previous cases where, it was submitted, the indication was that they were fresh warrants. Counsel submitted that if the Court was to hold that this was a fresh warrant, the whole process would be set at nought. Surrender under the Framework Decision was said to be a simple and simplified procedure. To hold this was a fresh warrant would be to contradict this.

Analysis and decision on the "modified EAW"

20. In the view of this Court, the submission of counsel for the respondent that this should not be accepted as coming from the issuing judicial authority but instead should be considered as an insertion made at administrative level does not withstand scrutiny. It is a document that has been transmitted by the central authority of Hungary. It is expressly stated by the central authority that it is a "modified EAW" issued by the relevant issuing judicial authority. That is a clear statement that the document is from the issuing judicial authority. To that extent the submission can be rejected.

21. Moreover, the principle of mutual trust and mutual confidence is much broader than the principle of mutual recognition. The latter applies to the judicial decisions of the judicial authority of the issuing member states in issuing the arrest warrant. The principles of mutual trust and confidence apply to the issuing member state and its organs (see for example recital 10 of the Framework Decision and the Supreme Court decisions in *Minister for Justice v Altaravicius* [2006] 3 IR 148 and *Minister for Justice v Stapleton* [2008] I IR 669). Those principles require this Court to accept the statement of the central authority that this has come from the issuing judicial authority. Furthermore, even if it did not come from the issuing judicial authority, but was being provided by another organ of the member state as information about the legal situation, the Court would be entitled to assess that guarantee or assurance in the context of all the information before it. There is no reason to doubt that in the present case, he will have a one month period in which to exercise his right to a full retrial or appeal.

22. Finally, s. 11(2A) of the Act of 2003 permits any of the information to which s.11(1A) refers, if not specified in the EAW to be specified in a separate document. Section 12(8) provides, *inter alia*, that a document that purports to be a document referred to as a document in s.11(2A), shall be received in evidence without further proof. No further proof is required in respect of the reception of that document. I am satisfied that this document emanates from the issuing judicial authority.

23. In understanding how this document, the "modified EAW", must be treated, it is necessary to consider the difference in context between the cases of *Swacha* and *Zielinski* and in turn the difference between those cases and the present one. In those cases, what was at issue was whether the "corrected" or "amended" EAWs were validly endorsed for execution in this jurisdiction. Having considered the facts in those cases, the High Court held that they were validly endorsed for execution. In *Swacha*, it was held that the validity of the "correction" of the EAW was a matter that depended on the law in the issuing state. In *Zielinski*, a different argument had been made and the Court held that acceptance of the "amended warrant" as a fresh warrant under the Act of 2003 was a matter for consideration in this jurisdiction.

24. Article 15 of the Framework Decision anticipates that during surrender procedures further information may be required. Section 20 of the Act of 2003 implements that Article. In accordance with what the Court held in *Swacha*, there is nothing in the 2002 Framework Decision or the Act of 2003 that requires an issuing judicial authority to provide additional information in one single manner. It is left up to the issuing state to determine how it provides the information. It may issue a fresh EAW or it may provide additional documentation by other means. Each member state may have its own procedures which permit or indeed require it to respond in a certain manner. To construe each response as the proffering of a new EAW, would take from the simplified surrender procedures envisaged by the Framework Decisions.

25. In the present case, the "modified EAW" does not contain a statement that it is a corrected warrant. It does not indicate the kind of information that was present in the warrant in *Swacha* as set out in paragraph 49 of the judgment. It is a document that was sent in answer to a request for information by this Court. The information provided an answer to the question of the timeframe within which to claim the right to retrial or appeal. The Court accepts that it is information provided by the issuing judicial authority. There is nothing in the "modified EAW" or the accompanying documentation that signifies that it is a document intended by the issuing judicial authority to be a fresh warrant. There is no indication in the document that it has in fact been corrected or amended on a given

date. Instead, this is a document which has been sent over in response to a request from the High Court, as executing judicial authority for further information.

26. On the other hand, it is possible that legal principles in a particular member state might require a process to be undertaken that amounts to the issuance of a new warrant. In *Zielinski*, the High Court decided that the question of whether a fresh warrant had been received is a matter for the determination of the High Court in its role as executing judicial authority.

27. In the present case, unlike in *Swacha* and *Zielinski*, the new document was not presented in a manner which indicated that it was a "fresh warrant". The High Court in each of those cases was in a position to make a determination that the warrant was a fresh warrant. In *Zielinski*, the High Court decided that the production of the fresh warrant had brought the earlier proceedings to an end and the fresh warrant incorporating the amendments, was endorsed for execution in this jurisdiction in accordance with s.13 of the Act of 2003.

28. As the manner in which an issuing judicial authority transmits information requested pursuant to Article 15 of the Framework Decision, is for the issuing judicial authority to decide, relying upon its own practices and procedures, this Court must proceed on the basis of the information received. The duty of this Court, as an executing judicial authority, based upon principles of mutual trust and confidence, is to accept such information when provided by an issuing judicial authority (save of course that there may be exceptional cases where the circumstances override that duty). That information should be relied upon for the purpose of clarifying whether the conditions for surrender under the Act of 2003 have been met where the information is clear and unambiguous.

29. Contrary to the respondent's submission, there is no lack of clarity in the information provided. Furthermore, there is no difficulty in extracting the information from within the "modified EAW". It is now clear and unambiguous (now that the translation issue has been rectified), that the information required to be provided under point (d) of the EAW has now been given.

30. In all the circumstances, I am satisfied that no fresh warrant or new warrant was sent by the Hungarian issuing judicial authority. I am also satisfied that although it is indicated to be a "modified European arrest warrant", it is not in fact a fresh or new EAW within the meaning of the Act of 2003. It was the response to the information sought by this Court pursuant to s. 20 of the said Act. The manner of that provision of information was a matter for the issuing judicial authority. It is not for this Court to determine whether the manner of such provision was valid within the issuing state. I am therefore satisfied that the provisions of s. 45 of the Act of 2003 have been met in light of the provision of the information in the form of the "modified European arrest warrant."

31. Finally, the Court observes that if this was to be considered a fresh EAW by this Court, the Court would have endorsed the EAW and in due course the respondent would have been arrested in relation to it. All the other issues determined by this Court in relation to that EAW would have been determined in the same manner.

Article 3 European Convention on Human Rights and Prison Conditions

32. Under this point of objection, the respondent submitted that his surrender was prohibited under the provisions of s.37 of the Act of 2003 due to the state of prison conditions in Hungary. He submitted that there was a real risk of him being subjected to inhuman and degrading prison conditions in Hungary should he be surrendered on any or all of these European Arrest Warrants.

33. At an earlier stage in the proceedings, this Court had made an *ex tempore* decision that, in light of the pilot decision of the European Court of Human Rights ("ECtHR") in *Varga and Others v. Hungary* [2015] ECHR 422 further information to prison conditions was required. The request for information pursuant to s. 20 of the Act of 2003, referred to the fact that his surrender was sought in respect of two EAWs for prosecution purposes and in respect of the third EAW which referred to his conviction.

34. This Court request required the following information regarding the specific prison(s) in which the respondent would be detained if surrendered:

> *"(a) Can the Hungarian authorities guarantee that Mr. Kutas will be held in conditions of detention of at least 3m2 floor space (as understood by the European Court of Human Rights in Mursic v. Croatia application no. 7334/13, decision of 20th October 2016)?*
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> *(b) If Mr. Kutas is to be kept in conditions of detention of between 3m2 and 4m2 floor space, can guarantees be given in relation to the in cell toilet facilities, in cell ventilation, out of cell activities and access to fresh air that Mr. Kutas would have?"*

35. A reply was sent to this jurisdiction by the Hungarian central authority dated the 14th November, 2018. The reply contained a letter of the Deputy Director General Security and Incarceration from the Hungarian Prison Service addressed to the Head of Department at the Ministry of Justice. The Deputy Director General referred in his letter to the request of the British authorities. He also said that the consular and diplomatic staff of the United Kingdom in Hungary could enter upon prior notice the given prison and inspect the circumstances of the prisoner's detention. This Court would not accept those guarantees as they were addressed to the authorities of another member state.

36. In those circumstances, a further request was sent over to ask for such assurances. On the 26th November, 2018, a letter in similar terms was transmitted by the Hungarian central authority. This time the letter referred to the Irish authorities. The respondent requested further time to deal with the assurances in that letter.

37. The respondent obtained a further report from Andras Kadar who is the Co-Chair of the Hungarian Helsinki Committee, which is a human rights watch dog non-governmental organisation focussing on, amongst other matters, detention conditions in prisons. He is an attorney who has litigated cases relating to conditions of and treatment in detention in Hungarian prisons before domestic forums and also the European Court of Human Rights. Dr. Kadar had produced an earlier report dated 27th August, 2018 in respect of the conditions. That report, as well as the decision in the *Varga* case, had formed part of the basis for the decision of this Court to seek further information about the conditions of detention in which this respondent would be held should he be surrendered to the issuing state. This report will be considered in more detail below commencing at paragraph 63.

The letter containing assurances

38. The reply to the s. 20 request came in the form of an initial letter from the issuing state headed "Ministry of Justice Department of International Criminal Law". That letter stated:-

> *"The Ministry of Justice of Hungary acting as central authority presents its complement to the Department of Justice and Equality and – with reference to your request dated 23rd November, 2018 – has the honour to send the requested*

supplementary information regarding László Krisztián KUTAS (born in Pécs on 1 June 1980)".

Then underneath it said:

> *"The Ministry of Justice of Hungary avails itself of this opportunity to express the assurances of its highest consideration".*

39. The central authority sent with it a letter headed "*Hungarian Prison Service Deputy Director General Security and Incarceration"*. Under the heading "Subject" it states "Guarantee undertaking". It is sent to the Head of Department at the Ministry of Justice of the Department of International Criminal Law and Human Rights, Dr. Tünde Forman. It is signed by Major General János Schmehl. The letter lists the respondent's name, place and date of birth.

40. In the letter the Major General states that:-

> *"…the Hungarian Prison Services* ***continues to undertake the guarantee*** *(bolded in original) of placing [the respondent] either at the Szombathely National Prison or at the Tiszalök National Prison providing conditions consistent with the European and Hungarian legislation, in accordance with the request of the Irish authorities."*

41. The letter proceeds to state that *"[u]pon acceptance for placement with the Hungarian Prison Service, the [requested person] will be placed at the* ***Budapest Remand Prison*** *(bolded in original) for the duration of the transfer process, and after that either at Szombathley National Prison or at the Tiszalök National Prison*." It then stated as follows:

> *"The information on the guarantee undertaking is registered (both manually and electronically) in the records of the relevant detainees. Making sure that the conditions set out and the guarantee are met from the beginning and throughout the whole duration of the detention is our top priority, including the appropriate circumstances of the detainee in the designated facility or that of his temporary transport. The detainee may be permanently transferred into a facility where the guarantees are not or partially assured, only if the detainee signs a waiver form".*

Thereafter the reply sets out information about all three prisons in which the respondent may be held. That information will be detailed below.

The objections to the letter of assurance

42. At the hearing, counsel for the respondent objected to reliance being placed upon this letter for both procedural and substantive reasons. Counsel relied upon the decision of the ECtHR in the case of *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1, in which the ECtHR stated that inter-governmental assurances could be relied upon to overcome concerns about a real risk of being held in inhumane or degrading circumstances. In particular, counsel for the respondent relied upon the statement by the court at para. 186 that the task of the court was to "*examine whether the assurances obtained in a particular case are sufficient to remove any real risk*".

43. As to the process by which this Court should address the assurances, counsel for the respondent relied upon the following paragraphs in the judgment in *Othman*:-

> *"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 (see Saadi, cited above, § 148). 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 (see, for instance, Gaforov v. Russia, no. 25404/09, § 138, 21 October 2010; Sultanov v. Russia, no. 15303/09, § 73, 4 November 2010; Yuldashev v. Russia, no. 1248/09, § 85, 8 July 2010; Ismoilov and Others, cited above, §127).*
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> *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 (Ryabikin v. Russia, no. 8320/04, § 119, 19 June 2008; Muminov v. Russia, no. 42502/06, § 97, 11 December 2008; see also Pelit v. Azerbaijan, cited above); (ii) whether the assurances are specific or are general and vague (Saadi¸ cited above; Klein v. Russia, no. 24268/08, § 55, 1 April 2010; Khaydarov v. Russia, no. 21055/09, § 111, 20 May 2010); (iii) who has given the assurances and whether that person can bind the receiving State (Shamayev and Others v. Georgia and Russia, no. 36378/02, § 344, ECHR 2005-III; Kordian v. Turkey (dec.), no. 6575/06, 4 July 2006; Abu Salem v. Portugal (dec.), no 26844/04, 9 May 2006; cf. Ben Khemais v. Italy, no. 246/07, § 59, ECHR 2009-... (extracts); Garayev v. Azerbaijan, no. 53688/08, § 74, 10 June 2010; Baysakov and Others v. Ukraine, no. 54131/08, § 51, 18 February 2010; Soldatenko v. Ukraine, no. 2440/07, § 73, 23 October 2008); (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 (Chahal, cited above, §§ 105-107); (v) whether the assurances concerns treatment which is legal or illegal in the receiving State (Cipriani v. Italy (dec.), no. 221142/07, 30 March 2010; Youb Saoudi v. Spain (dec.), no. 22871/06, 18 September 2006; Ismaili v. Germany, no. 58128/00, 15 March 2001; Nivette v. France (dec.), no 44190/98, ECHR 2001 VII; Einhorn v. France (dec.), no 71555/01, ECHR 2001-XI; see also Suresh and Lai Sing, both cited above) (vi) whether they have been given by a Contracting State (Chentiev and Ibragimov v. Slovakia (dec.), nos. 21022/08 and 51946/08, 14 September 2010; Gasayev v. Spain (dec.), no. 48514/06, 17 February 2009); (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 (Babar Ahmad and Others, cited above, §§ 107 and 108; Al-Moayad v. Germany (dec.), no. 35865/03, § 68, 20 February 2007); (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 (Chentiev and Ibragimov and Gasayev, both cited above; cf. Ben Khemais, § 61 and Ryabikin, § 119, both cited above; Kolesnik v. Russia, no. 26876/08, § 73, 17 June 2010; see also Agiza, Alzery and Pelit, cited above); (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 (Ben Khemais, §§ 59 and 60; Soldatenko, § 73, both cited above; Koktysh v. Ukraine, no. 43707/07, § 63, 10 December 2009); (x) whether the applicant has previously been ill-treated in the receiving State (Koktysh, § 64, cited above); and (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State (Gasayev; Babar Ahmad and Others¸ § 106; Al-Moayad, §§ 66-69)."

44. Counsel did not suggest that the above was a tick list that had to be met in every case. It was accepted that Hungary was a state party to the ECHR and also a member of the European Union.

Procedural Objections

45. Counsel for the respondent submitted that this was not an assurance from the Hungarian Ministry of Justice. It was an assurance from the Hungarian Prison Service. Counsel submitted that it did not provide an assurance at all. In that regard it was submitted that there was no specific assurance or guarantee with respect to Budapest Remand Prison. It was also submitted that at the point where there was a reference to a guarantee undertaking, that the letter did not name the respondent herein but simply referred to a detainee.

46. Counsel for the minister submitted that the starting point to analyse the assurance had to be the decision in *ML (Generalstaatsanwaltschaft Bremen)* [2018] C-220/18 PPU. Assurances can be given either by a judicial authority or by an organ of a member state. It is matter for the executing judicial authority to assess the entirety of the information if the guarantee has not been given by the issuing judicial authority. Counsel submitted that this was an assurance and could and should be accepted at face value.

47. In the view of this Court, there is no point of substance in the argument that the guarantee undertaking cannot be accepted as a guarantee undertaking in relation to this respondent merely because it does not use his name at the point in the letter where the guarantee is given. The letter itself clearly relates to this respondent including as it does his name, date of birth and place of birth. The reference to the fact that the information is in the record of the relevant detainee does not take from that fact. It is simply an amplification of it. It is not a cogent argument to suggest that, because this letter is in a standard format, it must be given lesser consideration. The letter does refer to him and the references thereafter to the detainee must be taken to include the person to whom the letter relates, namely, the respondent.

48. Insofar as the respondent has stated that there is no guarantee in respect of his placement in Budapest Remand Prison for the duration of the transfer, this must also be rejected. The entire matter is headed 'Guarantee Undertaking'. It is a direct statement that he will be placed at Budapest Remand Prison and it would defy logic to reject that statement, in the context of the letter as a whole, as being indicative of a guarantee or assurance.

49. In relation to the respondent's submission that this is not a guarantee by the Ministry of Justice, the decision of the Court of Justice of the European Union ("CJEU") in the case of *ML* is of some importance. In that case, which also involved a Hungarian assurance, the CJEU said that as the guarantee was 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. (See para. 114 of *ML*).

50. In the present case, the assurance has been given by the Deputy Director General Security and Incarceration of the Hungarian Prison Service. This was an undertaking that was transmitted to the Head of Department at the Ministry of Justice Department of International Criminal Law and Human Rights, Dr. Tünde Forman. The Ministry of Justice, acting as central authority, sent that information to this state. It was sent in the form of a letter signed by the same Head of Department, Dr. Tünde Forman who had received the letter from Major General János Schmehl. In the *ML* decision, the CJEU noted at para. 33 that the Hungarian Ministry of Justice (in conjunction with the Directorate General for the Enforcement of Sentences) gave a further assurance that wherever *ML* was incarcerated, he would not be subjected to inhumane or degrading treatment within the meaning of Article 4 of the EU Charter during his detention in Hungary.

51. In the view of this Court, the assurance being given is one by the Hungarian Prison Service. It is the prison service who will be detaining the respondent. The assurance has however been transmitted through the Hungarian Ministry of Justice. The principle of mutual trust requires this Court to have confidence in the organs of the issuing state. That principle is broader that the principle of mutual recognition of judicial decisions.

52. In the context of what has been asked and how it has been answered, this Court has no basis for rejecting that assurance on the basis that it has not been given by an issuing judicial authority in the issuing state. Furthermore, in light of the decision in *ML*, the Court is entitled to accept an assurance given by a competent authority in the member state. It is for the court to assess the assurance. This is an assurance that has been transmitted by the Hungarian Justice Ministry which acts as central authority. This assurance was contained in a letter from the Hungarian Prison Service addressed to the Ministry of Justice.

53. For the reasons set out above, I reject the point made by the respondent that the letter cannot, for procedural reasons, be accepted as containing valid assurances upon which this Court may rely.

Substantive Objections

54. The assurances given in the letter were broken down into three parts. In respect of the Budapest Remand Prison, it stated this was the largest county level institution in Hungary consisting of three geographically separate building complexes. It described the three buildings. It said that the maximum number of prisoners was 1353 and, at the time the assurance was issued, there were 1331 detainees. It stated that the appropriate placement of the detainee subject to guarantee undertaking, is possible in all three building complexes in spite of differences of the floor space of the cells unique to each building in accordance with the relevant European and Hungarian legislation.

55. The assurance went on to describe the cells as being "*well equipped, with separate toilets washbasin, clothes airer, waste bin, cleaning set, bed, seat and cell covered according to the number of inmates placed in each cell.*" It described how each of the buildings was "*equipped with a computer controlled state of the art building engineering, controlling the heating system, the hot water supply, the ventilation and the electricity. Bathing facilities are available in shower rooms on each floor.*" It described the different "*yards for outdoor activities complete with sports course*." It described visitation arrangements. It said that "*reintegration officers psychologists and support officers were working under supervision."* It then described that medical care was "*available to detainees at all times following their acceptance of the prison."* Those *"[m]edical examinations are performed at the latest within 72 hours from acceptance or in justified cases immediately*". It also described ongoing medical care.

56. In terms of Szombathely National Prison, this was opened in 2008 and was operated under a PPP arrangement. It said that the maximum number of prisoners was 1476 and at the time the assurance was issued there were 1422 detainees in the facility in 327

cells. It described the different types of cells where in excess of 5m2 was being provided per person.

57. It described the cells as being well equipped and with various hygiene facilities. Ventilation again was "*state of the art*". There were various offices in the health buildings there were various offices including a doctor's and dentist's office. This included a separate ward for detainees with infectious diseases. Again it described the medical care available to detainees at all time. It also described "*separate yards for outdoor activities complete with a sports course.*" There is also space on the roof for outdoor activities. There is an auditorium for sports and cultural events.

58. In relation to Tiszalök National Prison, this was also a PPP arrangement which opened in 2008. The maximum number of prisoners there was 700 but at the time of the assurance was issued there was 732 detainees. It said that there were "*208 one person cells and 270 two-persons' cells all of which have a toilet separated from the rest of the room by walls and a door."* Bathing facilities were also "*available in four shower rooms per floor with a total of 16 showers per floor*." It said that in the two person cells there was 5.7m2 living space (per person) and in the one-person cell there was 7.8m2 living space. The response then set out in considerable detail, the physical conditions of the cells and the wider prison. It also set out the various spaces for activities including outdoor activity and the position with regard to medical care.

59. The assurance went on to state that should the transfer be completed, "*the detention will be carried out in a detention facility providing conditions consistent with the provisions of the European Convention on Human Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners and the Recommendation No. R (87) 3 on the European Prison Rules adopted by the Council of Europe*." It also gave an assurance that "*the consular and diplomatic staff of Ireland in Hungary can enter - upon prior notice - the given prison and inspect the circumstances of the prisoners' detention."*

60. Counsel for the respondent submitted that in fact this was a general assurance rather than a specific assurance. A general assurance was a matter that the Court must take into careful account prior to being satisfied that this respondent would be held in conditions which were not inhumane and degrading.

61. In the view of the Court, the assurances given are specific in some parts and more general in others. They are specific as to the places in which he will be held on surrender. The Court accepts he will be held in Budapest Remand Prison and either Szombathely or Tiszalök prisons. The assurance is specific also as to the physical conditions of those prisons and the available activities. It is more general, however, with regard to the precise living space that he will be provided with in the course of his detention in those prisons.

62. Perhaps because of the fluctuating nature of the prison population, the authorities have not given a specific assurance as to the amount of space the respondent will have if he is surrendered. However, they have given an indication in clear terms that if the respondent is surrendered, he will be kept in conditions which are consistent with European and Hungarian legislation. In particular, they stated that he will be kept in a detention facility providing conditions consistent with the provisions of the European Convention on Human Rights, the United Nations Standard Minimum rules for the Treatment of Prisoners and the Recommendation on the European Prison Rules adopted by the Council of Europe. That is a very significant assurance given by an organ of a member state of the European Union. This Court must have due regard to that assurance in light of the provisions of mutual trust which apply under the Framework Decision.

63. The respondent challenged the assurance by relying upon the report of Dr. Kadar of the Hungarian Helsinki Committee. He also relied upon a summary of a case report of the Optional Protocol to the Convention against Torture ("OPCAT") Visit to Unit 1 of the Budapest Remand Prison dated 28th March, 2017. The National Preventative Mechanism of Hungary ("NPM") under OPCAT had visited that unit when they were joined by the sub-committee on the prevention of torture and other cruel and inhumane or degrading treatment or punishment as an observer. There was a concern expressed by the NPM that a number of guards continuously made notes and stayed within hearing when they sought to have interviews with detainees and staff members. The guard had to be warned many times to move further away and several interviews were carried out in a strained atmosphere.

64. The NPM noted that there were 258 persons in the authorised 153 person capacity of the institution. They had a complaint about the level of empathy provided during the course of a medical examination. It was felt to be humiliating by the detainees that guards were present during the examination. The NPM had concerns about the conditions in the institution. There were wet walls in the basement and water and electrical network needed permanent maintenance. It was said that in some private cells the living space per capita did not reach 6m2. They had complaints about the conditions in the showers where walls were covered in mould and certain faucets were missing. There was graffiti in the shower which had been caused by sharp objects which in turn raised an issue about security.

65. The NPM also had concerns about the fact that not everybody went out in the fresh air daily on their hour leave. They also had concerns about the fact that inmates were given poor quality plastic cutlery which broke and left them without use of cutlery for some period of time. There was a complaint that detainees were handcuffed to a radiator. The staff members of the NPM examined the scenes of the alleged handcuffing where painting had been worn off from the pipes of a radiator and they considered that this could confirm the detainee's allegations. They requested and analysed several rando*m*ly chosen CCTV recordings. One of those showed that an inmate had been handcuffed to the radiator almost for half an hour and a head protector had been put on his head. It seemed that the incident did not shock people who had been passing by. It was said that he had been handcuffed to prevent self-harming and a possible attack. The NPM viewed this as exceeding their mandate so they requested the general prosecutor to investigate that case. There were some issues with legal highs perhaps being available in custody. There appeared to have been no issues with the use of coercive measures.

66. In Dr. Kadar's report dated 13th February 2019, under the heading "General observations concerning assurances", the first thing stated was that:

> *"While the situation seems to have improved in the past years, my research has shown that the Hungarian authorities do not always comply with the assurances they give".*

Dr. Kadar then referred to five separate cases in which people had been extradited to Hungarian on the basis of assurances.

67. In a case concerning a Mr. Kulcsar, Dr. Kadar said even the official records underlie his complaints. It appeared that he was kept in unit one of Budapest Remand Prison between 30th September, and 21st November, 2016. The prosecutor's letter records that the net surface are of the cell where he was placed together with five other inmates was 10.47m2. According to Dr. Kadar this means that the moving space per inmate was 1.75m2 in that period. It appeared that there was also a week in another penitentiary institution where he was kept in less than 3m2 in June 2017.

68. In relation to a Mr. Szabo, Dr. Kadar said that during the first period of his detention which commenced in March, 2016 he was kept in circumstances that did not meet the requirements of the assurance. Between 25th April and 8th May 2016 he was placed in a cell where the moving space alternated between 1.65m2 and 2.64m2 depending on the actual number of inmates placed in the cell. For a further period between 26th September and 6th October, 2016 he was provided with 2.4m2 of moving space. During certain periods in 2016. he also shared with other inmates, different cells where the toilet was only partitioned with a curtain and thus ventilated into the air space of the cell. He also appears to have suffered from bed bugs to the extent that he required medical assistance.

69. A regional court made a decision on Dr. Szabo's claim for compensation and held that it had violated fundamental rights during a certain period between March 2016 and July 2017 for altogether 131 days. Eighteen days of this was while he was in the Budapest Remand Prison, 69 days on the Szombathely National Penitentiary Institution and one day in the Tiszalök National Penitentiary Institution. According to Dr. Kadar, the decision does not detail the actual conditions and moving spaces during these times but it showed that not even the institutions mentioned in the assurance can guarantee full compliance with the Hungarian laws at all times for a person who has the additional guarantee that he was extradited to Hungary on the basis of an assurance.

70. Dr. Kadar said that his case also demonstrated the importance of how space per inmate is calculated. There is a difference between post 2017 calculation which is on the basis of living space and pre-2017 calculation which is on the basis of moving space. The living space was above 3m2 at all times whereas the moving space remained below 3m2 throughout the entire detention.

71. Dr. Kadar has a particular concern about moving space and how it is less than the amount of space set out by the European Court of Human Rights. Counsel did not dispute (and it appears that Dr. Kadar does not dispute) that living space is not the same as moving space. According to the ECtHR in *Mursic v. Croatia* [2015] ECHR 420, the living space can include the furniture in the cell. Dr. Kadar has concerns that this does not provide adequate space to a prisoner. It may indeed not be an optimal situation where a prisoner's moving space is reduced by taking into account furniture, but this Court is required to assess whether the proposed conditions are inhuman and degrading. This Court is not of the view that the provision of living space in accordance with the calculations set out by the European Court of Human Rights is of itself inhuman and degrading. In other words, the views of Dr. Kadar as to living space, do not amount to cogent evidence that there is a real risk that providing a person with moving space, as distinct from living space, of less than 3m2 amounts to inhuman and degrading treatment.

72. In relation to a Mr. Lampert, Dr. Kadar said he was extradited in October 2015 on foot of an assurance. In his case there was a significant difference between the moving space he had which was 2.68m2 and the net living space of 3.61m2. He submitted that according to the pre-2017 way of calculating the space his assurance was breached but the more recent method of calculation would mean that there was no breach. In Dr. Kadar's view as he was extradited before the amendment in the ministerial decree as to the way in which the space per inmate will be calculated, it was his view that the terms of his assurance were not complied with.

73. Dr. Kadar also stated that his case was illustrative of the problem that no state authority takes responsibility for the breaches of assurances. It appeared that Mr. Lampert sued the Hungarian State and Budapest Remand Prison for damages on the basis of the assurances given in his respect had been breached. Although it was accepted that he had indeed not been provided with the required personal space his claim was rejected in both instances. The Court of Second Instance concluded that the Hungarian state was not responsible for the assurance provided by the Ministry of Justice since on the one hand the Ministry is a separate legal entity although the assurance given on behalf of the state but more importantly on the basis that the assurance is a declaration that is addressed to the extraditing state and not to the requested person so the requested person may not base any claim on the assurance. The penitentiary institution could not be held liable on the basis that it had not been at fault for not providing the required moving space as it was under an obligation to admit Mr. Lampert into detention irrespective of the level of occupancy. Dr. Kadar said that the interpretation had the consequence that no remedy can be sought in Hungary for a violation of assurance before civil courts.

74. The next person to whom Dr. Kadar referred was a Mr. Torma. He was a Hungarian citizen extradited in March 2018 from the Netherlands on the basis of an assurance. He wrote complaining about perceived breaches of the assurance but was informed by the Ministry of Justice that they were not responsible for overseeing compliance with assurances since the assurance ultimately comes from the penitentiary administration (which is under the supervision of the Ministry of Interior and not the Ministry of Justice) and the body vested with the task of overseeing compliance with assurances was the Ombudsman.

75. Based on that he contacted the Ombudsman. The Ombudsman however said that he was not responsible for overseeing compliance with assurances either since in his capacity as the NPM under OPCAT he does not look into individual complaints but monitors detention conditions in general. The Ombudsman said he should refer to the Ministry of Justice.

76. According to Dr. Kadar, previously collected information seemed to suggest that the Ombudsman took up individual complaints concerning the violation of assurances. These had apparently led to complainants being transferred to different institutions where compliance with the assurance could be met. Dr. Kadar said that this seems to signal a shift in the Ombudsman's previous approach which had been to look into individual complaints.

77. The final case Dr. Kadar referred to was the case of a Mr. Salikh who had been transferred in March 2018 on the basis of an assurance. He was detained in a unit of Szeged Prison. Dr. Kadar said that this case showed that assurances only concerning the size of the moving space may not be sufficient to guarantee Article 3 compliant detention where the physical conditions are substandard. He said that it appeared for at least eight days the living space in the cell was less than 3m2.

78. In a further letter which is appended to his report and written in English, Mr. Salikh described the physical conditions of his detention. No decision as to his complaint has yet been made. It appeared that Mr. Salikh was offered the possibility to be transferred to Szombathely prison which Dr. Kadar stated was in a much better physical condition. It is said that Mr. Salikh refused to be transferred but Dr. Kadar said that when he contacted Mr. Salikh's lawyer he said he was not aware of any such offer or refusal.

79. Dr. Kadar then stated:-

> *"The above information shows that although the authority's awareness of assurances and what obligations assurances place on them has improved since 2015 when the first assurances started to be issued, there can still be instances where assurances are not properly complied with".*

80. Dr. Kadar also complained about the termination of the Hungarian Helsinki Committee's prison monitoring programme. That termination became effective in October 2017. The reasoning was that the enforcement of the right of detainees can be insured also without keeping the present agreement in force. He disputed the basis for that determination. He said that the only novelty in the system of controls was that of the NPM under OPCAT was now regularly examining the treatment of persons deprived of their liberty.

Dr. Kadar said that as the NPM's responsibility was much wider than just penitentiary institutions, this did not permit the NPM to visit penitentiary institutions as often as the Hungarian Helsinki Committee had done. He also said that the Hungarian Helsinki Committee was able in some important cases to provide legal assistance to detainees whose fundamental rights had been violated.

81. Finally, he made certain points regarding the specific assurances that had been granted. In relation to the Budapest Remand Prison, he said that in February, 2019 a response to his Freedom of Information request was that the National Prisons Authority ("NPA") had said that the official capacity of Budapest Remand Prison was 1183 (as opposed to 1353 indicated in the assurance) and the average occupancy in 2018 was 1411. He said that that meant an average personal space of 3.35m2 based on the new calculation. He also said that Budapest Remand Prison's three different units can provide very different physical conditions. He did not have up to date information on units two and three but the Ombudsman's report on unit one had identified many problems with the detention as set out above.

82. In relation to Szombathely National Penal Institution, Dr. Kadar referred to the NPM report on a visit in July, 2016. That report had said that while the required personal moving space was guaranteed for all detained persons and the hygienic conditions were generally acceptable, the physical conditions of detention were not fully satisfactory. It stated that view blockers had been installed into cell windows to prevent natural light from coming in and block proper ventilation although the location of the prison would not require the installation of view blockers in order to prevent the forbidden communication of the inmates with the outside world. Bed bug bites were described as frequent at the time of the visit and five inmates were under treatment due to the consequences of those. There had been criticism of insufficient levels of employment and not enough meaningful activities.

83. Perhaps of most concern was the fact that there appeared to be a lack of personnel in the prisons. At a national level only 87.2% of penitentiary positions were filled. He referred to the fact that two inmates had committed suicide in the institution one in November 2017 and one in June 2018. In May, 2017 it appeared that inmates had killed a cell mate after having tortured him for some weeks without the guards noticing. This is a case under prosecution and the bill of indictment submitted by the prosecution alleges that the inmates repeatedly beat him, tied him down, jumped on him, strangled him until he lost consciousness, burnt his skin with cigarettes and forced him to eat fibres of the mopping rag. In order to cover what they were doing, they forced the victim to go to the toilet every time the cell was inspected, burnt his wounds with lighters so that the bleeding would not be noticed by the guards, and forced him to mop up his own blood with towels then they threw out the window. Dr. Kadar said the fact that this went on for weeks indicated that the number of personnel is not sufficient compared to the number of inmates.

84. In relation to Tiszalök National Penitentiary Institution, Dr. Kadar stated that, according to his Freedom of Information request, the average occupancy rate in 2018 was 772 so the average occupancy level was 110%. He accepted that according to information available from inmates the physical conditions in the prison are generally acceptable. Again he stated however that the data provided in the assurances as regards cell sizes does not seem to be accurate. He said that the net floor space was smaller and more persons were placed in the cells than the assurance states. He referred to the records of placement of Mr. Szabo which showed that the net moving space in larger cells was only 11.8m2 and in smaller cells only 5.8m2 and sometimes there were three inmates in the larger cells.

85. Dr. Kadar said that whenever three persons are placed in the larger cells in Tiszalök only according to the new manner of calculation where furniture and fixtures are not deducted from the floor space is the net space of 3m2 provided.

Case-law of the United Kingdom

86. Counsel for the minister referred to a number of cases from the courts of England and Wales dealing with the approach to assurances under the surrender procedures. Some of these cases concerned assurances from Hungary while another case concerned assurances from Bulgaria. Counsel urged this Court to adopt the position taken in the courts of England and Wales.

87. The cases referred to were *Georgief v Regional Prosecutor's Office, Shuman, Bulgaria,* [2018] EWHC 359 (admin), *Klenovszki v. Regional Court of Law in Debrecen (Hungary)* [2017] EWHC 2560 (admin), *Fuzesi v. Budapest Capital Regional Court, Hungary* [2018] EWHC 1885 (admin), and *GS v. Central District of Pest Hungary* [2016] EWHC 64 (admin).

88. In *GS* the High Court observed that intergovernmental assurances had been a feature of extradition law for a very long time. The High Court referred to a number of cases and ultimately to the *Othman* decision quoted above. The judgment refers also to the decision *Saadi v. Italy* (2008) 24 BHRC 123 where the ECtHR had considered what might be described as general assurances in that case provided by the Tunisian government. Those assurances had done no more than restate domestic, legal and international treaty obligations and confirm that they will be complied with. The court in that case had considered that such assurances "*are not in themselves sufficient to ensure adequate protection… where… reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary*" to the European Convention on Human Rights.

89. The judgment in *GS* then went on to consider how assurances given by Convention states had been considered in many extradition appeals. In some cases, there had been an acceptance of assurances and in other there was rejection of those. In *GS* what had been at issue was a general assurance which did not state where the appellants would be held. It specifically did not state that the appellants would not be held in one of the prisons considered by the ECtHR in *Varga*. It is to be noted that in *GS*, the prison of Szombathely was considered an institution which did not suffer from systemic failings. In that case, the UK High Court had also considered the evidence of Dr. Kadar. The Court had stated that a starting point was that there had to be an acceptance of the good faith in which the assurances had been provided. The court accepted the assurances that had been given in the particular case even though they were general in nature.

Analysis and determination of the Court on Prison Conditions

90. In the view of this Court, the starting point in this jurisdiction in considering the acceptance of assurances in the context of European arrest warrant cases is the decision of the Supreme Court in *Minister for Justice, Equality & Law Reform v. Rettinger* [2010] 2 IR 783. The Supreme Court stated that it was permissible for issuing states to dispel of any doubts about the real risk of a requested person being subjected to treatment prohibited by Article 3 of the Convention. That reasoning is supported by the CJEU in the case of *Aranyosi and Caldararu v. Generalstaatsanwaltschaft Bremen* (C-404/15 and C-659/15 PPU, Grand Chamber, 5th April 2016). That decision of the CJEU obliges the executing judicial authority to go back to the issuing state to seek sufficient information to satisfy itself with regard to the conditions that the particular individual face.

91. Following the decision in *Aranyosi and Caldararu*, the CJEU in the case of *ML* considered, *inter alia*, whether an executing judicial authority must take into account information provided by authorities in the issuing member state, other than the executing judicial authority. They had particular regard to whether this would cover an assurance that the person concerned will not be subjected to inhumane or degrading treatment within the meaning of Article 4 of the Charter (Article 3 of the European Convention on Human Rights).

92. The CJEU stated as follows with respect to the giving of assurances:

> *"108 It should be recalled that Article 15(2) of the Framework Decision explicitly enables the executing judicial authority, if it finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, to request that the necessary supplementary information be furnished as a matter of urgency. In addition, under Article 15(3) of the Framework Decision, the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.*
>
> *109 Moreover, in accordance with the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, the European Union and the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties (judgment of 6 September 2016, Petruhhin, C-182/15, EU:C:2016:630, paragraph 42).*
>
> *110 In accordance with those provisions, 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.*
>
> *111 The assurance provided by the competent authorities of the issuing Member State that the person concerned, irrespective of the prison he is detained in in the issuing Member State, 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. As the Advocate General has noted in point 64 of his Opinion, 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.*
>
> *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.*
>
> *113 In the present instance, the assurance given by the Hungarian Ministry of Justice on 20 September 2017, and repeated on 27 March 2018, that the person concerned will not be subjected to any inhuman or degrading treatment on account of the conditions of his detention in Hungary was, however, neither provided nor endorsed by the issuing judicial authority, as the Hungarian Government explicitly confirmed at the hearing.*
>
> *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.*
>
> *115 In that regard, the Court observes that the assurance given by the Hungarian Ministry of Justice appears to be borne out by the information in the possession of the Bremen Public Prosecutor's Office. In response to questions put by the Court, that office explained at the hearing that that information, which has been gleaned, in particular, from the experience gained in the course of surrender procedures carried out before delivery of the judgment of 5 April 2016, Aranyosi and Căldăraru (C-404/15 and C-659/15 PPU, EU:C:2016:198), gives grounds for considering that detention conditions within Budapest prison, through which every person who is the subject of a European arrest warrant transits, are not in breach of Article 4 of the Charter.*
>
> *116 That being so, it appears that the person concerned may be surrendered to the Hungarian authorities without any breach of Article 4 of the Charter, a matter which must, however, be verified by the referring court."*

93. In my view, therefore, the Framework Decision and the Act of 2003 requires this Court to carry out an overall assessment of all the information available to it when considering whether surrender is prohibited on fundamental rights grounds. The information to be considered includes the assurance given by the authorities of the issuing state. The assessment of those assurances should be carried out in accordance with the principles laid out in the *Othman* decision by the European Court of Human Rights. It is noted, and was accepted by the respondent in the present case, that the list set out in that case at para. 189 was not a "tick list" to be applied in every case. For example, in the present case not only is Hungary a party to the European Convention on Human Rights, but it is a member of the European Union and has specific obligations arising from that membership. The Court considers that this assurance has been given by the competent authority dealing with prisons in Hungary. It has been transmitted by the Hungarian Ministry of Justice. These are competent organs of the member state. The principle of mutual trust and confidence must apply to the granting of those assurances.

94. The Court must also take into account the other information it has in respect of the prisons. It is striking that in respect of Budapest Remand Prison, the decision in *ML* records that this is a prison through which every person who has been subject to the European Arrest Warrant passes (see para 88). That fact alone gives support to the finding that this Court has already made; that the letter is a guarantee that he will be held in that Remand Prison on surrender. It also appears that the CJEU was not satisfied in that case, on the basis of the information before it, that the conditions in that prison violated Article 4 of the Charter. That is a factor that this Court can also take into account as it is a more up to date position than most of the information that the respondent has put before this Court. It is also noted that the assurance in the present case appear to be similar to the assurances given in the *ML* case (see para 113).

95. I am satisfied that Dr. Kadar's concerns about breaches of undertakings in general and his reference to the five cases do not amount to a rebuttal of the mutual trust that this Court should place in the assurances given on behalf of the Hungarian authorities. In the first place, it must be noted that even Dr. Kadar has accepted that, the compliance with undertakings has greatly improved since they started to be given in 2015. Furthermore, even in the cases he cited where it appears there was a breach, these breaches were remedied reasonably quickly. Those cases do not amount to evidence of any systematic failure to observe assurances that have been given in the past.

96. These assurances also contain a procedure where they can be objectively verified through diplomatic monitoring mechanisms. Dr. Kadar has not referred to a failure on the part of the Hungarian authorities to allow such monitoring. Counsel for the respondent has laid great emphasis on the failure to allow the Hungarian Helsinki Committee to continue its monitoring. That may again be a regrettable matter but it is not evidence of an intention to circumvent these assurances. It seems that the Ombudsman provides monitoring under is role as the NPM pursuant to the Optional Protocol under the Convention Against Torture. There is now an internal

mechanism for ongoing review. It is not for this Court to dictate what, if any, other organisations should be permitted to carry out monitoring. It is important to note that there has been no evidence that the Hungarian state has tried to restrict international treaty bodies from carrying out monitoring. I am also satisfied that while there appears to have been an over officious guard present at the 2017 inspection by the NPM, there is no evidence that this is a systematic practice that has resulted in an inability of the NPM to carry out its duties.

97. Counsel for the respondent also relied upon that part of Dr. Kadar's report which said that the NPM no longer appeared to be taking individual cases. That may be a matter that is dependent on its own statutory roles. There is another issue with regard to the question of assurances and the reliability in the domestic courts. That is a factor to be considered under *Othman*. It appears from Dr. Kadar that the court has taken the view that the assurances are given to the issuing state rather than the requested person. That appears to be a correct proposition in so far as the assurance is given to the executing judicial authority. On the other hand, the nature of the assurance given in this case is that the respondent will be protected from inhuman and degrading conditions.

98. The information from Dr. Kadar demonstrates that there is a mechanism within the legal system for pursuing the breach of fundamental rights. While the existence of such a mechanism does not relieve this court of its duty to carry out an assessment of the risk of exposure to inhuman and degrading conditions, it is a mechanism which may provide some relief from the consequences of a broken assurance. This Court is not however satisfied that in the overall assessment of the information before it, that the absence of a court process to enforce the assurance is a reason for rejecting the assurance given in the present case. It can also be noted that the case of Mr. Lampert concerned an assurance that went beyond the minimum requirements of living space but concerned assurances in respect of moving space (i.e. the pre 2017 Hungarian position). It does not appear that he was deprived therefore of an opportunity to enforce his fundamental rights but rather of an opportunity to enforce the assurance through the civil courts. There is no indication of whether he sought to pursue that through the use of diplomatic channels.

99. I am also satisfied that Dr. Kadar's reference to the conditions in Budapest Remand Prison do not establish that there will be a violation of the cell space to be provided. The concerns of the ombudsman, while of importance, are dated to a visit in 2017 and do not necessarily reflect the position as of now. Furthermore, some of the conditions he referred to, while they are substandard, do not necessarily make a detention in all the circumstances, amount to a violation of the right not to be subjected to inhuman and degrading treatment. This Court is not satisfied that there is cogent evidence to conclude that there would be a real risk of his detention in Budapest Remand Prison violating his right to freedom from inhuman and degrading treatment.

100. In terms of Szombathely and Tiszalöki prisons, it is important to note that from the beginning of this process, Dr. Kadar accepted that these were the two institutions in Hungary which protected against overcrowding. At para. 37 of his report dated 27th August, 2018, he stated as follows in respect of those institutions:-

> *"These are the two institutions which are – at the moment – safeguarded against overcrowding, as these have been built and operated in a PPP construction, and according to the partnership agreement between the state and the private investors, the placement of inmates over the statutory limit would be possible only at a very high cost, significantly exceeding the available financial resources of the penitentiary administration."*

101. Furthermore, in his updated report, Dr. Kadar does not indicate that even with the current levels of occupation that there would be a breach of the minimum rules of living space that must be provided. These amount to a minimum of 3m2 living space provided that other detention conditions are met. It appears in both of these prisons that the physical conditions of the prisons are entirely satisfactory. Therefore, there is simply no basis for this Court, having accepted the assurances that this respondent would be sent to those prisons, to conclude that there is a real risk that he would be subjected to inhumane and degrading treatment on the basis of the overcrowding in those prisons or indeed the physical condition of those prisons. Furthermore, he would appear to have access to activities and medical treatment as appropriate in those prisons.

102. It is of concern to the Court that in Szombathely penitentiary, there was an incident which is currently the subject of a prosecution, where an inmate was tortured over a period of weeks and then killed by his cellmates. There appears to have been a breakdown in supervision of inmates perhaps due to a lack of personnel. This is an extreme event for which the authorities appear to have taken action against alleged perpetrators. I am not satisfied that it displayed a pattern of disregard for inmates safety that would mean there is a real risk to this respondent's life or to exposure to inhuman and degrading treatment. I am not satisfied that this incident amounts to cogent evidence that there is a real risk to the life and/or bodily integrity of this respondent due to the potential for violence by his co-inmates. I am not satisfied that the incident in May, 2017, was other than an aberration in the operation of a prison which appears from other accounts to be an acceptable prison from the point of view of the safety and wellbeing of its inmates.

103. Dr. Kadar also referred to two suicides in the prison. It is highly regrettable that this has occurred. Prisons must take appropriate steps to identify those who are at risk and give them appropriate treatment and support to try to ensure their safety and wellbeing. The Court also notes that there is no suggestion that this particular respondent is a vulnerable person by virtue of mental ill health. This evidence is not of sufficient cogency to establish a real risk that this respondent will be exposed to inhuman and degrading treatment should he be detained in this prison.

104. In all the circumstances of this case, there is no basis for this Court to reject the assurances that have been given as to conditions in the prisons in which he will be held in Hungary and the assurances that his rights under Article 3 ECHR and Article 4 of the Charter will be respected. I therefore reject the respondents claim that his surrender is prohibited under s. 37 of the Act of 2003 on the basis of a real risk that on surrender he will be exposed to inhumane or degrading treatment.

Conclusion

105. I am satisfied therefore that this respondent's surrender is not prohibited under the provisions of s. 16 of the Act of 2003. I therefore may make an order for his surrender to such other person as is duly authorized by the issuing state to receive him.