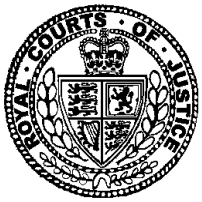

Neutral Citation Number: [2021] EWHC 1096 (Admin)

Case No: CO/1759/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2021

**Before** :

**MR JUSTICE CHAMBERLAIN**

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**Between :**

| | |
|---|---|
| **NESIN KADERLI** | **Appellant** |
| **- and –** | |
| **CHIEF PUBLIC PROSECUTOR'S OFFICE OF GEBEZE, TURKEY** | **Respondent** |

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**Hugh Southey QC and Malcolm Hawkes** (instructed by **Taylor Rose MW Solicitors**)
for the **Appellant**
**Alexander dos Santos and Hannah Hinton** (instructed by **Crown Prosecution Service**)
for the **Respondent**

Hearing date: 15 April 2021

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# Approved Judgment

## Mr Justice Chamberlain:

## Introduction

1 The appellant, Nesin Kaderli, is sought by Turkey to serve a prison sentence imposed following his conviction for the rape of a girl who was initially believed to be under 15, but was found by the Turkish court to be 17. He appeals pursuant to s. 103 of the Extradition Act 2003 ("the 2003 Act") against a decision of 16 March 2020 by District Judge Goldspring to send his case to the Secretary of State, who ordered his extradition. Permission to appeal was refused on the papers. However, at a hearing on 27 October 2020, Fordham J granted permission to appeal on two grounds, 1 and 2 below, and ordered that a third, ground 3 below, be considered on a "rolled up" basis.

2 The grounds of appeal are that the judge erred in concluding that extradition was not barred by:

(a) s. 87 of the 2003 Act – because there is a real risk that he will be imprisoned in Turkey on the basis of a trial that was flagrantly unfair (ground 1);

(b) s. 81 of the 2003 Act – because it appears that if extradited he might be punished by reason of the fact that he refused to pay a bribe to the prosecutor, which refusal constitutes an imputed political opinion (ground 2);

(c) s. 85 of the 2003 Act – because the respondent has not proved that the appellant was convicted in his presence, nor that he would be entitled to a retrial (ground 3).

## The evidence about the Turkish proceedings

3 The Turkish proceedings arise from incidents on 3 and 4 April 2007. A girl ran away from home and made her way to Gebze District by minibus. She alighted near a petrol station in the early hours of the morning of 3 April. She met a man who worked there, Ferdun Mutlu. He arranged for another man, Rasim Basaran, to take her to a nearby office where she could sleep. Later that morning, Mr Mutlu joined her there. They had consensual anal sex. Mr Basaran drove them to Darica, on the seaside. In the evening of 3 April, Mr Mutlu and the girl had anal sex again. She left and returned to Gebze by minibus, arriving in the early hours of the morning of 4 April. She was intoxicated and had no money.

4 The appellant was working as a taxi driver. The girl got into his taxi at approximately 0130 hours. She told the police and prosecutor that he drove her to a wooded area, made her get into the back of the taxi, took her clothes off and started kissing her chest and neck harshly. He threatened her with a gun, which he fired twice into the air. He then raped her anally, using force, before taking her back to the service station at around 0400.

5 The girl was medically examined at the Institute of Forensic Medicine. She had injuries consistent with anal intercourse and bruises and lesions to her neck, chest and lips consistent with physical abuse. The victim identified the appellant at an identification

parade. A gun matching the description provided by the victim was found at the appellant's address.

6 The appellant was arrested by the police on 8 April 2007 and taken into custody. He was charged with sexual assault of a minor under the age of 15, contrary to Article 103/1-a of the Turkish Criminal Code. What happened next has to be pieced together from further information documents provided by the Chief Judge of the 1st High Criminal Court of Gebze (on 17 January 2020) and by a liaison judge on behalf of the Turkish Justice Minister and the judicial authorities (on 17 July 2019, 18 October 2019 and 22 January 2020).

7 As is common in civil jurisdictions, trials in Turkey can involve many separate hearings, weeks or months apart. The first hearing of the trial took place on 31 July 2007. The appellant was not present, having "run away from the corridor". A warrant was issued for his arrest. Mr Mutlu pleaded not guilty and provided a defence statement. The victim's father also provided a statement saying that he did not want to press charges against any of the appellants.

8 There was a further hearing on 28 August 2007. The appellant did not attend and is described as being "on the run from police". On 2 October 2007, there was a hearing, not at Gebze but about 50 km away at Uskudar, Istanbul. At this hearing, the girl's father said that he did not want to press charges. There were further hearings on 22 November 2007 and 28 February 2008. In both cases, the appellant is recorded as being "on the run from police". However, the records of the Gebze Chief Public Prosecutor's Office indicate that the appellant had been arrested on 24 February 2008.

9 A hearing on 29 February 2008 is described as the "main trial session" for the appellant. He was brought before the court at Gebze. Counsel was appointed by the Bar Association to represent him. He pleaded not guilty and provided a defence statement in the presence of his counsel.

10 On the same date, in a trial session in Uskudar, Istanbul, the girl said: "I repeat the statement I gave at the prosecution, I am not complainant, I don't want to intervene in the case". The Chief Judge's information states that:

> "because the accused person has been an escapee for a while during the trial process, and because the victim resides outside the jurisdiction of this court, the statement of the victim has been taken by another court, through request for legal assistance. The accused person did not attend the hearing of the assisting court. Therefore the accused person did not in fact use his right to pose questions to the victim."

11 There were three further hearings, on 27 March, 26 June and 3 July 2008. There is conflicting information about whether the appellant attended those hearings. The Chief Judge's information is that he did not; and at the hearing on 27 March 2008 he was not represented by counsel. The Chief Judge adds that his counsel attended each hearing on which essential proceeds [sc. proceedings] have been carried out". The Justice Minister's information, by contrast, is that the appellant did attend all these hearings.

12 On 15 July 2008, the girl sent a letter to the court purporting to withdraw her complaint and saying that her earlier statements about the appellant had been untrue and caused by the drugs she was taking at the time.

13 There were two further hearings, on 6 November and 25 December 2008. The appellant did not attend either of them. His counsel was present at the second, when the court announced his conviction and sentence.

14 The court consisted of three judges. Reasonably detailed reasons were given. The court recorded the evidence given by the girl. In her "prosecution statement", she had said that she had sexual intercourse with Mr Mutlu twice – the first time at about 09:30 on 3 April 2007 "upon my request"; the second time on the evening of the same day "without my consent but without any use of violence". As to the allegation against the appellant, she had described being threatened with a black gun and then anally raped.

15 The judgment was based on "the allegation, defences, declarations of the victim and complainants, doctor reports, Forensic Medicine report, city police minutes and the whole content of the file considered together". The factual findings were that "the accused took the victim to a woodsy desolate place and there, he took out a gun which was understood to be blank, and asked the victim to get undressed; when the victim refused, he fired twice in the air; scared upon that, the victim gave up her resistance; [the appellant] had anal intercourse with the victim there". The judgment refers to "her psychological report", what the victim had "told all the officials since the beginning", "her statement" and "the declaration of the victim". It appears that the court accepted this evidence as true notwithstanding her letter of retraction.

16 The original charges against all three co-defendants had been under Article 103/1-a and 103/2 of the Turkish Criminal Code. Article 103/1-a makes criminal "all kinds of sexual attempt[s] against children who are under the age of fifteen or against those [who have] attained the age of fifteen but lack [the] ability to understand the legal consequences of such act[s]". Article 103/2 provides that "[i]n case of performance of sexual abuse by inserting an organ or instrument into a body, the offender is sentenced to imprisonment from eight years to fifteen years".

17 The court recorded that during the course of the proceedings, "the age of the victim happened to be subject of doubt". In order to address that doubt, a report to determine her true age was obtained from a hospital. The author or authors of the report determined that the girl was 17 years old. The court accepted this finding. It followed that the charges under Article 103/1-a were not made out. However, Article 103/1-b made criminal "[a]buse of other children sexually by force, fraud, threat of fraud". In context, "other" must be a reference to children who are 15 or over and have the ability to understanding the legal consequences of their acts.

18 As to Messrs Mutlu and Basaran, the court said this:

> "Considering her corrected age, as it was understood that the victim had sexual intercourse with the accused Ferdun Mutlu with her consent and she was not complainant, it was necessary to abate the criminal case brought against that accused and the criminal case brought against the accused Rasim Basaran for aiding that offence by providing place for that offence."

19 As to the appellant, the court said this:

> "However, as explained above, it was accepted that [the appellant] had forced sexual intercourse with the victim without her consent. Although the accused denied the accusation, the victim, despite the cognitive problems the victim experienced and gave disorderly answers in terms of place and time according to her psychological report, told all the officials since the beginning that a taxi driver raped her but she had consensual sexual intercourse with Ferdun Mutlu. She reflected the truth in other aspects, she showed the taxi station she got off at, the gas station she went to. The places mentioned in her statement were visited by the officials, and the people she spoke to were spoken with by the officials, thus her statement in that aspect was also confirmed. She also identified the person who raped her among 5 people at the police. In the face of these, it was concluded that the declaration of the victim was true and sincere and thus her allegations against [the appellant] reflected the truth. These allegations were confirmed with details such as the accused having picked up the victim by commercial taxi at 01:00 and returned to the taxi station at around 04:00 am, the time passed in-between, and the gun mentioned in the statement of the victim having been found in the house of the accused. When the Forensic Medicine Institute report concerning that the victim underwent anal intercourse was also added to the above, it was not possible to credit the defence of [the appellant] towards denial."

20 The court acquitted Messrs Mutlu and Basaran but convicted the appellant under Article 103/1-b. It imposed a sentence in accordance with Article 103/2, 8 years imprisonment, reduced by one sixth pursuant to Article 62 of the Criminal Code for his "good attitude" during the proceedings, giving a total sentence of 6 years and 8 months' imprisonment. The judgment was "read out clearly and duly explained in the face of the defence counsel of the accused persons".

21 The appellant's counsel lodged an appeal in the Court of Cassation. The appellant was not required to surrender to custody pending determination of the appeal. The appeal was dismissed on 12 March 2013, at which point the judgment of the trial court became final. By that time, however, the appellant had left the country. The evidence contains no details of the grounds for the appeal or the reasons for its dismissal.

**Evidence about Turkish law and criminal procedure**

22 The further information provided by the liaison judge includes the following relevant evidence about Turkish law and criminal procedure:

(a) All defendants are required by the Turkish Penal Procedure Law ("TPPL") to attend and be present at all trial sessions before the Turkish criminal courts, unless they are exempt. A defendant who has already been heard by the court at the "main trial session" may request that he is exempted from the trial sessions which follow.

(b) The main trial session cannot start unless the defendant is present. It is at this session that the indictment is read out, the defendant is informed of his rights, and "duly interrogated". This session is conducted by the presiding or trial judge. It is compulsory for Turkish criminal courts to take the defendant's defence statement directly before the court.

(c) As part of the interrogation process, the defendant is notified of his right to appoint defence counsel. If he is not able to retain defence counsel, he may request that counsel is appointed on his behalf by the Bar Association.

(d) Turkish courts are required to present all pieces of evidence to defendants and "the judges/court shall only rely upon evidence that is presented at the main hearing and has been discussed in their presence while forming their judgment.

(e) Whilst it is "ideal" for a criminal court to hear all parties to a criminal case directly, the courts may hold several trial sessions to hear all parties and witnesses.

(f) Parties (defendant, victim, accused) are not placed under oath. They are read their rights and a summary of the indictment. They are then given an opportunity to comment. They are not, however, subject to examination in chief and cross-examination as they would be in common law systems.

(g) Under section 233 of the TPPL, the victim of an offence "shall be summoned by the public prosecutor or the… judge… and shall be heard". The victim has the right, during the prosecution phase to join the case as an intervening party.

(h) A child victim is heard as a witness only once (subject to exceptions). During the hearing as a witness of a child victim, there should be an expert present with expertise in the fields of psychology, psychiatry, medicine or education.

(i) Upon conviction, a defendant "will be able to easily exhaust all domestic remedies in the Turkish jurisdiction", i.e. there is a right of appeal. There is no requirement to seek leave to appeal.

(j) The Court of Cassation is the final instance court for reviewing decisions and judgments given by the criminal courts.

23 The liaison judge was "strongly of the opinion that [the appellant] received a fair trial during this case in terms of Turkish criminal justice standards", but added:

> "Having said that, in terms of the UK's trial standards, you have the right [to] request re-trial by invoking and relying upon article 3 of the Second Additional Protocol to the European Convention on Extradition to which the Governments of the UK and the Republic of Turkey have been parties since 09/11/1992 and 16/07/1987 respectively.
>
> …

> This is an unequivocal confirmation that article 3 of the Second Additional Protocol to the European Convention on Extradition is a binding rule and directly applicable in the Turkish jurisdiction on condition that the requested Party (the UK in this case) finds the proceedings leading to the judgment in the jurisdiction of the requesting Party (the Republic of Turkey in this case) did not satisfy the minimum rights of defence, in accordance with the provisions laid down in Article 90 of the Turkish Constitution.
>
> If you are still unsatisfied with my explanations above and if you still request that the RP should be provided a re-trial, we will be advising our local judicial authorities of this request by invoking the Second Additional Protocol to the European Convention on Extradition to which the Governments of the UK and the Republic of Turkey have been parties since 09/11/1992 and 16/07/1987 respectively."

24 Article 3 of the Second Additional Protocol to the European Convention on Extradition ("ECE 2AP") provides in material part as follows:

> "When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence. This decision will authorise the requesting Party either to enforce the judgment in question if the convicted person does not make an opposition or, if he does, to take proceedings against the person extradited."

**The appellant's evidence before District Judge Goldspring**

25 The appellant did not give oral evidence. In his brief written statement, he said this:

> "14. I was arrested for this offence in Turkey. I denied it at the time. The lack of proper evidence against me was ignored as I did not pay the bribe. I was the only one convicted of the three defendants who were originally arrested. The other two were acquitted. This was because they paid bribes to the Prosecutor. The Prosecutor requested a bribe from me which I did not pay. I refused on principle. This is a commercial enterprise for the Prosecutor. I have no doubt that he makes a great deal of money from bribes using his profession. The evidence of this must be there somewhere in his bank or standard of living.
>
> 15. The two co-defendants admitted they had sexual intercourse with her. I do not understand why they were not punished. I told the truth and said I did not have intercourse with her and I received a lengthy prison sentence.

> 16. I voted for the Republican Peoples Party. It is obvious in Turkey that I am not a supporter of The Justice and Development Party, abbreviated officially as AKP. This is a conservative political party in Turkey and is Islamic in identity.
>
> 17. The prosecutor Faik Ates supports AKP. I can say that he was right wing. He was very religious (for example would support the regime in Iran). I consider myself tolerant and hold more European values. I do not agree with the oppression of women for example, that they should not work and stay in the home. etc. My partner for the past 5 years is Bulgarian. She works and we have a free existence like Europeans.
>
> 18. The Prosecutor's family is known to me and I have also fallen out with them about competing business arrangements.
>
> 19. My view is that he did not agree with the fact I did not pay the bribes and that I do not hold his extreme views. He would have been happy to abuse his power.
>
> 20. The complainant in this case did not give any evidence at all against me in the court proceedings, as far as I was aware. She did not give evidence in person. At least I never saw this. I do not know what evidence she is meant to have subsequently withdrawn because she never gave evidence as far as I was aware."

26 The appellant relied in addition on the expert report and oral evidence of Prof. William Bowring. He considered the position in 2008. His evidence was that, at that time, Turkey was a country with a high level of corruption. He cited the US State Department's report for 2008, which found that "officials engaged in corrupt practices with impunity" and cited evidence of the very close relationship between prosecutors and judges. In his oral evidence, he noted:

> "… the bottom line is you do not have an independent judiciary… we are talking about payments to judges… what we are talking about in this case there is an issue of bribery with the prosecutor, but I've already said to the judges and prosecutors, and as a matter of criticism, appear to be together and to work very closely together".

27 In addition, reference was made to the March 2019 Interim Compliance Report of the Group of States Against Corruption ("GRECO"), which at para. 90 recommended the development of a code of ethics for prosecutors, and to a report published in May 2020 and updated in September 2020 by Kevin Dent QC for the Bar Human Rights Committee following observation of the "Gezi Park" trial of sixteen leading civil society individuals between June 2019 and February 2020. This contains at para. 247 an example of evidence being taken in the absence of the accused.

## District Judge Goldspring's judgment

28 The judge said that Prof. Bowring was well known to the extradition courts and was a pre-eminent expert in his field. At [209], he found that the combination of Prof.

Bowring's expertise and the sources he cited clearly established an "international consensus… that corruption has and continues to be a problem in Turkey". The phrase "international consensus" was, the judge said, borrowed from the language used in relation to challenges to prison conditions in *Krolik v Regional Court in Czestochowa, Poland* [2012] EWHC 2357 (Admin), [2013] 1 WLR 490. Nonetheless, the judge said that "the question is not whether corruption does exist in Turkey or that it can sustain an Art 5/6 ECHR challenge but whether the evidence in this case supports the [appellant's] assertion that he refused to take up an offer of a bribe and was convicted and his co-defendants (who did bribe the prosecutor) were acquitted because he refused". The judge referred to the decision of the Supreme Court in *Kapri v Lord Advocate* [2013] UKSC 48, [2013] 1 WLR 2324.

29 The judge identified five difficulties with the evidential foundation for the appellant's submission about the request for bribes:

(a) The only source of information was the appellant. There was no corroboration: [211].

(b) The acquittal of the co-defendants did not show that something untoward had occurred, because "one explanation that the details disclose is that the court could not be sure as to whether the complainant consented to sexual activity with the co-defendants, where is the [appellant] is said to threaten the victim with a gun, consent was clearly not forthcoming": [212]-[213].

(c) There was no evidence that the appellant had raised bribery or judicial corruption in the proceedings or subsequently, for example through his Turkish lawyer. It was raised for the first time as a bar to extradition: [214].

(d) Most problematically, the appellant had not given evidence. This meant that "I am asked to accept his account without the opportunity for the Govt of Turkey to test his account by cross examination or me to assess him as a witness". This, and the absence of corroborative evidence, made it "impossible for me to make a positive finding in his favour even on the balance of probabilities". His proof was "entirely self-serving, lacking in detail, the issue appears to never have been raised in any other context and is untested": [215].

(e) The submission seemed to have been made on the basis of a misunderstanding that the charges against the three defendants all arose from the same incident, which led to the "mistaken view" that verdicts acquitting Messrs Mutlu and Basaran, but convicting the appellant, were irrational: [216]-[217].

30 Thus, the judge found at [219] that "the corruption to which [the appellant] alluded most likely **did not occur**" (emphasis in original).

31 So far as relevant to this appeal, the judge drew these conclusions:

(a) As to s. 81 of the 2003 Act, he recorded that the appellant's counsel had accepted that, before considering whether the request was based on extraneous factors, such as the appellant's purported anticorruption stance, it was necessary to make a finding whether it was more likely than not that the corruption described had

occurred. In the light of his findings that it had not, he rejected the submission that extradition was barred under s. 81: [221]-[222].

(b) As to s. 85 of the 2003 Act (see [223]):

> "The clear and unequivocal evidence in this case is that the RP was present at some hearings but when he was not it was he chose to deliberately absent himself. He cannot be said to have been convicted in absentia on the authorities but even if I am wrong and he should be considered to have been tried in absentia it is nonetheless clear his absence was deliberate. I do not need to assess the veracity of the retrial right offered as it is inapplicable where he deliberately absented himself as he did here. The challenge must therefore fail."

**Submissions for the appellant**

Grounds 1 and 2

32 For the appellant, Hugh Southey QC and Malcolm Hawkes (who did not appear below) relied on the observation of Thomas LJ in *Dudko v Russia* [2010] EWHC 1125 (Admin) at [42] that the fairness of the trial process depends on the "integrity, impartiality and good-faith of the prosecutor" and that "it may be difficult to see how the rights under article 6 of their trial can be met, if the prosecutor is corrupt or acts in bad faith". Systemic judicial corruption means that no tribunal that operates within the system can be relied upon to be independent and impartial. This can amount to a flagrant breach of Article 6 ECHR: *Kapri v Lord Advocate*, [32]. Whilst there is a rebuttable presumption in the case of states parties to the ECHR that Convention rights will be upheld, "an international consensus" of the kind the judge held to exist here can rebut it: *Krolik*, [7]. Extradition is prohibited where there is a real risk of a flagrant breach of Article 5. That will be the case where there is a risk of a substantial period of detention following a flagrantly unfair trial: *Othman v United Kingdom* (2012) 55 EHRR 1, at [233].

33 In this case, having found that there was an international consensus that corruption was common in the Turkish judicial system, the judge erred in holding that it was for the appellant to prove on the balance of probabilities that the corruption alleged had occurred. The true test involved the application of a lower standard: whether there was a real risk that the appellant's conviction was based on a trial tainted by corruption. This was consistent with the approach to the fact-finding in the immigration context (see *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449) and the approach to questions of apparent bias in domestic law (which requires a "real possibility" that the tribunal was biased): see *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [103].

34 Once the international consensus is accepted, and it could be shown that there were unexplained flaws in the approach of the Turkish court, strong inferences should have been drawn about corruption. It was for the Turkish authorities to rebut these inferences. The material provided does not do so.

35 This means that there is a real risk that the appellant's trial was flagrantly unfair and, therefore, that his detention in Turkey on the basis of a conviction entered at that trial would constitute a flagrant breach of Article 5 ECHR. In addition, refusing to pay a state official a bribe is or could be perceived to be the expression of a political opinion. The test under s. 81 is whether it "appears" that the requested person "might" be prejudiced on account of his political opinion. The burden is on the requested person to show that there is "a reasonable chance" or "reasonable grounds for thinking" or "a serious possibility" that he might be prejudiced at trial or punished for a political reason: *Adamescu v Romania* [2020] EWHC 2709 (Admin), [67].

36 After the hearing, Mr Southey drew to my attention the judgment of the Grand Chamber of the European Court of Justice in Joined Cases *L* (C-354/20 PPU) & *P* (C-412-20 PPU), ECLI:EU:C:2020:1033, handed down on 17 December 2020. That was a preliminary reference from the District Court of Amsterdam in two European arrest warrant cases where it was said that the courts of the requesting State (Poland) were no longer independent because of systemic and generalised deficiencies arising from legislation governing the appointment and tenure of judges. The questions referred concerned the interpretation of Article 19(1) of the Treaty on European Union, Framework Decision 2002/584 and Article 47 of the EU Charter of Fundamental Rights. One of the warrants in issue was a conviction warrant: see [2]. Mr Southey submitted that, even so, the real "risk test" was applied: see [54], [66] and [67].

Ground 3

37 In his oral submissions, Mr Southey pointed to inconsistencies in the information provided by the Turkish authorities about whether the appellant attended certain hearings. The focus of his submissions, however, was on the hearing on 29 February 2008, which was described as the "main trial hearing". If the appellant and his counsel were present in Gebze for that hearing, it is difficult to see how they could also have been present in Uskudar, Istanbul, some 50 km away, where – on the same day – the victim gave oral evidence before a different court. Mr Southey submitted that this also amounted to a flagrant breach of Article 6 ECHR.

**Submissions for the respondent**

Grounds 1 and 2

38 For the respondent, Mr dos Santos submitted that, to show that his extradition is barred under s. 87 of the 2003 Act, the appellant must establish that "he has suffered or risks suffering a flagrant denial of a fair trial in the requesting country": *Soering v United Kingdom* (1989) 1 EHRR 439, [113]. This was described as an "exacting test": *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [24] (Lord Bingham).

39 In *Othman*, the Strasbourg Court said at [259] that the term "flagrant denial of justice" was synonymous with a trial which is "manifestly contrary to the provisions of article 6 of the principles embodies therein". At [260]-[261], the Court said that this was "a stringent test of unfairness". It was "for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a

Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice."

40 In a case where the trial has already occurred, "[i]t is clear that the requested person must establish that his trial was ***flagrantly*** unfair, not merely that it contravened ***Article 6***": *Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin), [38] (emphasis in original). Thus, the judge was correct to apply the ordinary civil standard of proof to the question whether the prosecutor had asked for a bribe.

41 But, even if the ordinary civil standard did not apply, it would still be necessary to adduce evidence showing that there were substantial grounds for believing that there was a real risk that the corruption alleged occurred. The appellant has not met this burden. His proof of evidence is vague. It contains no detail, for example, about when, where or how the request for a bribe was made. There is no evidence from the appellant's lawyer. There is nothing to show that complaint was ever made about this, or about the respects in which the court's reasons are said to be incoherent, whether in the first instance proceedings or on appeal before the Court of Cassation. General references in the evidence to the fact corruption did at the relevant time occur in Turkey does not absolve the appellant of the burden of adducing evidence showing that it occurred here (or at least that there is a real risk that it did).

42 Mr dos Santos submitted that this court should not seek to assume the role of an appellate court. He relied on *R (Sobczak) v Judicial Authority in Poland* [2011] EWHC 284, where Toulson LJ said this at [13]:

> "It is no longer any part of the function of the requesting state to investigate if there is a sufficient case on which to prosecute the person concerned in cases of an accusation warrant. It would equally inconsistent with the framework of the Convention if it were for the requested state to investigate the fairness of the conviction in the case of a conviction warrant. Those are matters for the requesting state. In this case, the matter was considered at an appellate level. Ultimately, of course, a citizen aggrieved by the trial process in the courts of the country subscribing to the European Convention can bring a complaint to the Strasbourg Court."

43 This was applied in *R (Georgiev) v Sofia Prosecutor's Office* [2012] EWHC 3979 (Admin), [24] (Wilkie J).

44 Even if the court were to scrutinise the Turkish trial process in the manner deprecated by Toulson LJ in *Sobczak*, the appellant's principal basis for the submission that something had gone awry was the fact that Messrs Mutlu and Basaran had been acquitted while he had been convicted. But once it is understood that the factual basis for the charges against them was quite different from the basis for the charge against the appellant, the different verdicts cannot be relied upon as showing inconsistency. Certainly, there was nothing that would meet the test applied by the Court of Appeal (Criminal Division) in England and Wales – that "no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion": *R v Durante* [1972] 1 WLR 1612, 1617D (Edmund Davies LJ).

45 In short submissions contained in an email after the end of the hearing, Mr dos Santos submitted that the decision of the ECJ in *P and L* did not, on a proper analysis, lend to support to the proposition that the "real risk" test applied to the question whether a trial that has already happened was flagrantly unfair.

Ground 3

46 The respondent's submissions on ground 3 were made by Hannah Hinton. She accepted that, under s. 85 of the 2003 Act, the respondent bore the burden of proving that the appellant was convicted in his presence. In this regard, the Strasbourg Court had held that, although proceedings that take place in the accused's absence are not themselves incompatible with Article 6 ECHR, a denial of justice undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court a fresh determination of the merits of the charge, unless it is established that he waived his right to appear and defend himself: *Sejdovic v Italy* (App. No. 56581/00), 1 March 2006 [GC], [82]. But an accused who has instructed a lawyer to represent him in the trial is not, however, absent from it: *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin), [34(iii)]. In this case, the information from the Turkish authorities establishes that the appellant was represented from 29 February 2008 onwards.

47 In this case, the victim made statements to the police and the prosecutor. The only thing she is recorded as having said at the hearing on 29 February 2008 in Uskudar was that she did not wish to be a complainant or intervener. This was favourable to the appellant. In any event, it is not unknown even in this jurisdiction for evidence in chief to be taken other than in the presence of the accused. Achieving Best Evidence ("ABE") interviews are an example of this. There is no evidence to suggest that the appellant's lawyer did not know what was happening or that he asked to question the girl or complained about not having been given the opportunity to do so, whether in the first instance proceedings or on appeal.

48 As to Article 6 ECHR, Ms Hinton relied on the judgment in *Murtazaliyeva v Russia* (App. No. 36658/05), 18 December 2018 [GC], where the Strasbourg Court rejected an allegation that a trial had been unfair because of a failure to allow questioning of a witness. The rejection was based in part on the fact that the applicant's lawyer had not objected to the witness's statement being read: see at [122]. In this case, the court can draw the inference that there was no objection. If so, the complaint about non-attendance on 29 February 2008 is not made out.

## Discussion

Ground 1

49 The focus of the appellant's submissions was not on any trial that might happen in the future, but on the trial that has already taken place in 2007 and 2008. As the Strasbourg Court has made clear, however, the UK would be in breach of Article 5 ECHR if the appellant were extradited to a State where he was "at real risk of a flagrant breach of that article". A flagrant breach might occur if an applicant would be "at risk of being imprisoned for a substantial period in the receiving state, having previously been convicted after a flagrantly unfair trial": *Othman,* [233].

50 Normally, where a trial has already taken place, there will be no dispute about what happened, even if there is a dispute about whether that made it "flagrantly unfair". If the court concludes that the trial was indeed flagrantly unfair, the question will be whether there is a real risk that the applicant will be detained on the basis of it (rather than, for example, having a retrial). Here, however, the dispute is about what happened at the trial (in the past), not about whether he will be detained on the basis of it (in the future). The formulation used by the Strasbourg Court at [233] of its judgment in *Othman* is unclear as to whether the "real risk" test applies to the question whether a trial that has already taken place was flagrantly unfair or only to the risk of what is still to happen (i.e. the risk of being imprisoned for a substantial period in the future).

51 In my judgment, the authorities show that a requested person sought pursuant to a conviction warrant who claims that extradition would be contrary to Article 5 because of a flagrant breach of Article 6 standards in the trial which led to his conviction must establish that the trial was flagrantly unfair, not merely a real risk that it was:

(a) The concept of "real risk" is generally used in a forward-looking sense to refer to the probability that an adverse event which has not yet occurred will occur in the future. When addressing the standard of proof for establishing how likely it is that something happened in the past, other concepts – such as proof beyond reasonable doubt, proof on the balance of probabilities or reasonable suspicion – are generally used.

(b) This usage seems to accord with the language of the Strasbourg Court in *Soering*, the case which established the "real risk" test in extradition and removal cases. The Court referred at [113] to the possibility that an issue under Article 6 might arise in the case of an extradition "where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" (emphasis added). This suggests a dichotomy between cases where the flagrant denial of justice relied on was in the past (in which case the applicant must show that he "has suffered" it) and cases where a flagrant denial of justice is feared in the future (in which case what must be established is a real risk that it will occur).

(c) This is consistent with the language used in subsequent authority of the Strasbourg Court. Thus, in *Drozd v France* (1992) 14 EHRR 745, the applicant complained about imprisonment in France following conviction by a court said not to have complied with the requirements of Article 6 ECHR in Andorra. The Strasbourg Court noted at [110] that contracting States are "obliged to refuse their

cooperation if it emerges that the conviction is the result of a flagrant denial of justice" (emphasis added).

(d) In *Ullah*, at [24], Lord Bingham summarised the Strasbourg authorities as establishing that "[w]here reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state" (emphasis added).

(e) In *Elashmawy*, a case in which the appellant was sought pursuant to a conviction warrant, the Divisional Court held that, in order to establish that extradition would be contrary to Article 5 ECHR, "[i]t is clear that the requested person must establish that his trial was ***flagrantly*** unfair" (underlining added).

52 A requirement to show that the trial was flagrantly unfair is also consistent with this principle. As Toulson LJ said at [13] of his judgment in *Sobczak*, a person who claims that his trial was flagrantly unfair can be expected to bring his complaint before the appellate courts of the State in which he was convicted and, if that State is party to the ECHR, can apply to the Strasbourg Court. It would be surprising if an allegation of the sort advanced here could found a successful domestic appeal unless it were established that the bribe had in fact been requested. The appellant's analogy with the test for apparent bias in domestic law rests, in my judgment, on a confusion between two stages of the enquiry in a case where bias is alleged. The first stage is to ascertain the facts; the second is to ask whether, on those facts, an objective observer would conclude that there was a real possibility that the judge was biased. See, for example the excerpt from Lord Goff's speech in *R v Gough* [1993] AC 646, 670, cited in *Porter v Magill* at [99] (Lord Hope). Ordinary standards of proof continue to apply at the first stage. The "real possibility of bias" test applies only once facts have been found, when considering what inferences an objective observer would draw from those facts.

53 Nor do I consider apt the analogy with the approach in *Karanakaran* to proof in immigration cases. There, the court is concerned primarily with an evaluative question: "does the applicant have a well-founded fear of persecution for a convention reason?" This is a question about the likelihood of future events. Here, by contrast, the entire focus of the appellant's challenge to extradition is on an alleged historic breach of ECHR rights. In this kind of case, the court must reach a conclusion about what happened. In general, this is done by "segregat[ing] past events and apply[ing] the civil standard of proof to them": see at 477e (Sedley LJ). Only once the facts are ascertained can one reach a view about whether it amounted to a flagrant denial of justice.

54 The same approach would be applied by the Strasbourg Court if a complaint were made against the State where the trial took place. If an applicant alleges a breach, he must establish that it occurred, not merely a real risk that it did. It would be surprising if an appellant could avoid extradition to an ECHR Contracting State on the basis of a lower test than would apply if he had complained directly to the Strasbourg Court about the fairness of the proceedings in which he was convicted.

55 I would therefore hold that the judge applied the right test by asking whether the appellant had proved the corruption alleged on the balance of probabilities.

56 The decision of the ECJ in *P & L* does not, in my view, affect this conclusion. Mr Southey is correct to say that one of the two cases *(L)* involved a conviction warrant. The ECJ said at [66] that in an accusation warrant case, the executing judicial authority must examine "to what extent the systemic or generalised deficiencies… are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which that person will be subject". At [67], it said that this would also be the case in a conviction warrant case "when, following his or her possible surrender, he or she will be subject to new court proceedings…" (emphasis added). At [68], the ECJ said that, in *L's* case, the executing judicial authority must "also examine to what extent the systemic or generalised deficiencies… have, in the particular circumstances of the case, affected the independence of the court… which imposed the custodial sentence or detention order the execution of which is the subject of that European arrest warrant". This language is consistent with the analysis at para. 51 above: the "real risk" test is appropriate for cases where new proceedings are envisaged after surrender; but when looking backwards at a conviction or sentence already imposed, the question is to what extent the deficiencies relied on have in fact affected the independence of the court.

57 I have gone on to consider whether, if the judge had applied the test advanced by Mr Southey, he would have been required to order the appellant's discharge: s. 104(3) of the 2003 Act. That requires me to ask whether the appellant would have succeeded if it were necessary to show only that there was a real risk that the trial was flagrantly unfair. In my judgment, the answer is "No". I have reached that view for five reasons.

58 First, even where the "real risk" applies, "it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice" (emphasis added): *Othman*, [261].

59 Second, the matter on which the judge found an international consensus was "that corruption has [been] and continues to be a problem in Turkey". This was not, however, a finding of "systemic judicial corruption" of a kind that "affects everyone who is subjected to [the system]" such that "[n]o tribunal that operates within it can be relied on to be independent and impartial": see *Kapri v Lord Advocate* [2013] UKSC 48, [2013] 1 WLR 2324, [32]. For example, Prof. Bowring's evidence established that in 2007 Turkey ranked 64th out of 179 on Transparency International's Corruption Perceptions Index. This was very much better than Albania in 2012, the time relevant to the decision in *Kapri* (see [27]), and (incidentally) better than some European Union countries.

60 Third, the judge's criticisms of the credibility of the appellant's evidence about what happened in this case were, in my judgment, justified:

(a) The judge was correct to say that the appellant's proof of evidence was vague. It did not explain where, when or how the bribe had been requested.

(b) The judge was also entitled to regard the appellant's failure to give evidence as relevant and problematic. As the judge said, it denied the respondent the opportunity to probe the appellant's account and denied the judge the opportunity to assess him as a witness.

(c) There was no evidence, whether from the appellant's Turkish lawyer or otherwise, to suggest that the request for a bribe was raised in Turkey – either at first instance or in the appeal to the Court of Cassation. Nothing in the appellant's proof of evidence casts any light on whether the point was raised – or, if not, why not. There was, for example, nothing to indicate that he felt unable to complain about the alleged corruption because of feared repercussions.

61 Fourth, a close analysis of the reasoning of the Turkish court does not establish any incoherence or irrationality sufficient to support the inference that the appellant's conviction was the result of his failure to pay a bribe:

(a) The argument addressed to the judge was, as he said, based on the misapprehension that the case against the three co-defendants arose from the same incident. It did not. The allegations against Messrs Mutlu and Basaran arose from incidents on 3 April 2007 which did not involve the appellant. The allegations against the appellant arose from a quite separate incident in the early hours of 4 April 2007.

(b) The argument addressed to Fordham J at the permission hearing, on the basis of which permission was granted on grounds 1 and 2, was that the acquittal of Messrs Mutlu and Basaran relied on a finding that the girl was 17, whereas the conviction of the appellant required a finding that she was under 15. In fact, the court's judgment makes clear that it found the girl to be 17, based on medical evidence. This finding was applied to all three co-defendants. Messrs Mutlu and Basaran were acquitted not just because the girl was no longer a complainant but also because "it was understood that the victim had sexual intercourse with Ferdun Mutlu with her consent". The appellant, by contrast, "had forced sexual intercourse with the victim without her consent". He was convicted not under Article 103/1-a (which he had been charged with violating) but under Article 103/1-b, which applies to sexual abuse of a child of 15 or over "by force, threat or fraud".

(c) Whilst it is true that the complainant had written to the court retracting her complaint, the court's reasons make clear that they regarded her retracted testimony as truthful, given that the accounts she had given to the police and prosecutor were detailed and consistent. There is nothing irrational or incoherent about this: it is not unusual for a vulnerable complainant to retract true testimony, whether because of the stress of the proceedings or pressure from others or for other reasons. Courts are not required to ignore testimony simply because it has been retracted. In this case, the offence of which the appellant was convicted, under Article 103/1-b, did not require a live complaint.

(d) As to the explanation for the acquittal of Mr Mutlu in respect of the second instance of anal intercourse, it is important not to make assumptions as to the requirements of Turkish law. In England and Wales, it is clear that intercourse without consent, given the requisite *mens rea*, is rape even if it occurs "without any use of violence". In Turkey, there are several offences. The offence under Article 103/1-b requires "force, threat or fraud". So, the girl's statement that there was no violence *might* have been enough to prevent Mr Mutlu from being guilty

of that offence. Or it may be that the Turkish court made a factual finding that the girl, having admittedly consented on the first occasion, also consented on the second. Juries in this jurisdiction are cautioned not to assume that consent on one occasion entails consent on another, but that is not to say that the former is categorically irrelevant to the latter.

(e) Although there is nothing in the information from the Turkish authorities to explain why Mr Mutlu was not convicted under Article 104(2), it is unclear (i) whether it would have been open to the prosecutor or the court to proceed under that provision when the indictment charged an offence under Article 103 or (ii) what is the significance of the words translated as "without seeking raise of complaint" at the end of Article 104(2).

62 Fifth, it is not surprising that points (c), (d) and (e) above leave some questions to which the answers are not obvious to this Court. The courts of a sending State do not have access to all the trial papers – and they are not expected to be experts in the law of the requesting State. In any event, as Toulson LJ said in *Sobczak*, points of this kind are ordinarily for the appellate courts of the requesting State or for the Strasbourg Court. Although those remarks were made in a European arrest warrant case, they are equally applicable to cases involving other ECHR contracting States. Here, the points in (c), (d) and (e) could and should have been advanced on appeal in the Court of Cassation if there was any merit in them. In the absence of any evidence to show that they were, they supply no proper basis to conclude that the verdicts were irrational.

63 Mr dos Santos took an additional point that, even if it were shown that the prosecutor had requested a bribe (or there was a real risk that he had), this would not in and of itself show that the trial was flagrantly unfair, unless it could be shown that the judges who decided the case were also tainted by corruption. I accept that prosecutorial misconduct would not necessarily make a trial flagrantly unfair, particularly if the trial and/or appeal process provided an opportunity to complain about that misconduct. But it would be unsafe to place too much weight on this point in the light of Thomas LJ's observations at [41]-[43] of his judgment in *Dudko*. In this case, the relationship between prosecutorial misconduct and the fairness of the trial does not matter, because the evidence does not establish reasonable grounds for believing that there is even a real risk that the prosecutorial corruption alleged actually occurred.

Ground 2

64 Fordham J granted permission to appeal on ground 2 making clear that it was "entirely parasitic on the Court first arriving at a conclusion that the real risk of corruption aspect of Articles 6 and 5 is made out in this case": see [2020] EWHC 2893 (Admin), [13]. The appellant made reference to the Divisional Court's judgment in *Adamescu v Bucharest Appeal Court, Criminal Division, Romania* [2020] EWHC 2709 (Admin), where Holroyde LJ and Garnham J held at [67] that s. 13 of the 2003 Act (the equivalent of s. 81 for Part 1 cases) required the appellant to show that "there is a reasonable chance (alternatively expressed as reasonable grounds for thinking, or a serious possibility) that he might be prejudiced at his trial or punished, detained or restricted in his personal liberty on account of his political opinions". This applied both to what might happen in the future and to the reason for it happening.

65 I do not regard *Adamescu* as authority for the proposition that the argument under s. 81 in a case such as the present could succeed without a finding that the prosecutor did in fact request a bribe. As the court in *Adamescu* made clear, the test of "reasonable chance" or "reasonable grounds for thinking" or "serious possibility" is appropriate when considering what may happen in the future. But where the claim is based on a factual allegation about past corruption, the court would expect to see the allegation proved before considering the likelihood that some future action might be taken based on it.

66 In any event, it was not suggested that there was any material difference between the tests set out at [67] of *Adamescu* and the "real risk" test derived from *Soering*. If, as I have found, the evidence in this case did not establish a real risk that the corruption alleged occurred, it would also be insufficient to satisfy the *Adamescu* test.

Ground 3

67 Ground 3 challenges the judge's conclusion that s. 85 of the 2003 Act did not bar extradition in this case. That section prescribes the questions that must be asked and answered in conviction cases. The judge was required to ask:

(a) "whether the person was convicted in his presence" (s. 85(1));

(b) if not, "whether the person deliberately absented himself from his trial" (s. 85(3));

(c) if not, "whether the person would be entitled to a retrial or (on an appeal) to a review amounting to a retrial" (s. 85(5)).

68 In each case, Ms Hinton accepts that, because of s. 206, it is for the respondent State to prove to the criminal standard that the answer is "Yes". If it cannot prove that the answer to at least one of these questions is "Yes", the judge must order the person's discharge: s. 85(7).

69 In this case, the judge dealt with the issue briefly by holding at [223] that the "clear and unequivocal evidence" was that the appellant "was present at some hearings but when he was not it was [because] he chose to deliberately absent himself". That being so, it was not necessary to consider whether he would be entitled to a retrial.

70 The difficulty with this conclusion was crisply identified by Fordham J at [15] of his permission judgment: it does not account for what happened on 29 February 2008. On the information supplied by the liaison judge on 22 January 2020, the appellant was on that day "brought before the court" at Gebze pursuant to an arrest warrant. The extradition request from the Gebze Chief Public Prosecutor says that the appellant had been arrested on 24 February 2008 and was released on 29 February 2008 during his trial at Gebze. It would therefore appear that he was produced from custody. If that is so, it is not obvious how he could have attended the hearing that took place on 29 February 2008 at another location, Uskudar, where the girl gave evidence. Nor is it obvious how his lawyer could have attended, given that the lawyer was appointed at court in Gebze, where he remained with the appellant for his "main trial session".

71 Ms Hinton submitted that the only thing the girl said on that occasion was favourable to the appellant. But, although there is a discrepancy in the records about exactly what she said, the court, in its judgment, recorded her as saying: "I repeat the statement I gave at the prosecution", before going on to say that she did not wish to be a complainant or to intervene as a party in the proceedings. If the appellant or his lawyer had been there, questions could have been asked of her with a view to showing that the statement she had given to the prosecutor, and avowed before the court, was unreliable. In evaluating the submissions now made on behalf of the respondent, it is important to recall that the Chief Judge did not say that the proceedings in Uskudar were purely formal, nor that there was no need for the appellant to attend because no evidence adverse to him was taken there. On the contrary, he said: "The accused person did not attend the hearing of the assisting court [at Uskudar]. Therefore the accused person did not use in fact his right to pose questions to the victim."

72 Bearing in mind that the burden is on the respondent to prove to the criminal standard that the appellant deliberately absented himself from this hearing, and despite the very clear identification of the problem in Fordham J's permission judgment, the respondent had no satisfactory answer to this point. On the material produced to the court, the respondent has failed to prove that the appellant deliberately absented himself from the hearing in Uskudar on 29 February 2008, the only occasion on which the victim and main witness for the prosecution gave evidence.

73 Ms Hinton's reference to the Strasbourg Court's decision in *Murtazaliyeva* does not assist her in relation to s. 85. In that case, the issue was whether the applicant had waived her Article 6 right to question a witness by failing to object to the reading of her evidence. But the question posed by s. 85 is not whether there was a breach (or flagrant breach) of Article 6 rights. It is whether the respondent has proved that the appellant deliberately absented himself. The answer is "No". It follows that the appellant must be discharged under s. 85 unless the respondent can prove that he has a right to a retrial or (on appeal) a review amounting to a retrial. In these circumstances, it is not necessary to consider the arguments under Article 6 ECHR separately at this stage.

74 On the basis of the information currently before the court, it is not possible to say that the appellant will be entitled to a retrial. The judge at [220] recorded Prof. Bowring's evidence to the contrary. There was an email from Prof. Basak Cali to the same effect. However, the further information dated 22 January 2020 from the liaison judge contains what is in effect an invitation to the UK authorities, if they consider that there has been a breach of the appellant's procedural rights, to request a retrial pursuant to Article 3 ECE 2AP.

75 The respondent has been on notice since Fordham J's permission judgment that ground 3 would be considered on a rolled-up basis. Mr Southey says that, if the respondent has not satisfied the court as to the matters arising under s. 85, the appellant is entitled to be discharged. However, the offence of which the appellant was accused was serious. There is a powerful public interest in favour of extradition. Moreover, the Turkish authorities have expressly referred to Article 3 ECE 2AP as creating "a binding rule… directly applicable in the Turkish jurisdiction on condition that the requested Party (the UK in this case) finds the proceedings leading to the judgment in the jurisdiction of the requesting Party (the Republic of Turkey in this case) did not satisfy the minimum rights of defence".

76 In those circumstances, I consider it appropriate to adopt the procedure followed in *Grecu v Cornetu Court (Romania)* [2017] EWHC 1427 (Admin), [49]-[51] and *Zelenko v Latvia* [2019] EWHC 3840 (Admin), [25]-[26]. I shall grant permission to appeal on ground 3 and adjourn the appeal without making a final order, so as to allow a final opportunity to the Turkish authorities (i) to supply an undertaking that, in the light of this judgment, the appellant will be offered a retrial and (ii) to identify the domestic legal provisions under which this undertaking will be given effect. The respondent will have 28 days in which to provide the undertaking and explanation, together with any written submissions. There will then be an opportunity for the appellant to respond in writing as to the adequacy of the undertaking within a further 21 days. The appeal will be finally determined thereafter.