



Neutral Citation Number: [2023] EWHC 479 (Admin)

Case No: CO/1825/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 March 2023

Before :

SIR ROSS CRANSTON
sitting as a High Court judge

Between :

GABRIEL LUCIAN BOBIRNAC	<u>Appellant</u>
- and -	
CONSTANTA TRIBUNAL (ROMANIA)	<u>Respondent</u>

JONATHAN SWAIN (instructed by **Coomber Rich Ltd**) for the **Appellant**
DAVID BALL (instructed by **CPS**) for the **Respondent**

Hearing date: 2 March 2023

Approved Judgment

This judgment was handed down remotely at 10.30 am on 7 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR ROSS CRANSTON:

1. This is an appeal against the extradition order made under the Extradition Act 2003 on 18 May 2022 by District Judge Zani sitting at Westminster Magistrates' Court. The one ground of the appeal concerns prison conditions in Romania and whether if extradited these would be such for the appellant to constitute a violation of his rights under article 3 of the ECHR.
2. This appeal concerns specifically two assurances given by the Romanian authorities in relation to the prison conditions which the appellant will experience on return to Romania, what in this judgment is called 'Dr Halchin's assurance' and 'the October assurance'. Such assurances can provide, in their practical application, a sufficient guarantee that the requested person will be protected against the risk of ill-treatment because of prison conditions in violation of Article 3. The issue in this appeal is the admissibility and application of these assurances.

Background

3. The appellant's extradition is based on a conviction warrant issued on 12 September 2017 and certified by the National Crime Agency on 8 June 2021.
4. The appellant is to be surrendered to serve a sentence of imprisonment of 3 years, 5 months and 29 days pursuant to the order of the Constanta court. That sentence became final in June 2017.
5. The warrant contains convictions for five offences. In brief summary the appellant was part of a gang which in 2009 installed devices for copying magnetic strips and filming pin codes at cash machines. The five offences cover aspects of this fraud.
6. The appellant was present at his trial and was legally represented.

The District Judge's judgment

7. At the appellant's extradition hearing in January 2022, he opposed extradition on various grounds. The only ground surviving before me is Article 3.
8. In the course of his judgment the District Judge stated that the appellant was born in 1986. His evidence was that he came to the UK in 2017. He was trading cryptocurrencies and sending money home to his mother in Romania. He came to the UK at a time when he was aware that he had been sentenced to an immediate prison term of some considerable length. In the District Judge's view the appellant was not a totally honest witness. The District Judge found that the appellant was a fugitive.
9. As regards article 3 the District Judge summarised the domestic and European jurisprudence regarding the need for an executing judicial authority to bring surrender to an end when there are substantial grounds for believing that there is a real risk of a requested person being subjected to inhuman or degrading conditions when in detention. He then went on refer to the jurisprudence that a judicial authority could offer an assurance that a requested person would not suffer inhuman or degrading conditions in prisons where he would be detained.

10. The District Judge had an assurance from the Romanian authorities issued on 23 July 2021 about the prison conditions the appellant would experience ('the First Assurance'). It guaranteed that the appellant would be in a room ensuring a minimum personal space of 3 square metres throughout the execution of his sentence. It also set out the material conditions of the prisons to which he might be transferred, namely Slobozia prison and Constanța-Poarta Albă prison. Those material conditions included matters such as access to outdoor exercise, natural light and air, ventilation, room temperature, pest and insect control, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements.
11. However, the appellant was to be held for an initial 21 day period (called a 'quarantine and observation period') at Bucharest Rahova prison ("Rahova") before being moved to these other prisons, and there was no information about the material conditions there.
12. In line with the principles in *Criminal Proceedings Against Aranyosi and Caldaru* [2016] 3 WLR 807, [108], the District Judge sought further information from the Romanian authorities about all the prisons in which the appellant would be held.
13. As a result the Romanian authorities sent a document giving details of the material conditions in Rahova ('the Second Assurance').
14. For the appellant Mr Swain submitted that the two documents did not constitute an adequate assurance. He also referred to the growing body of litigation before this court, the European Court of Human Rights, and domestic Romanian courts challenging the conditions in Romanian prisons. As well there was a written report by the executive director of the Helsinki committee in Romania about failures in the Romanian prison estate.
15. In his judgment the District Judge said that the two written assurances in the case were similar to those regarded as adequate by Johnson J in *Cretu v Romania* 113 [2021] EWHC 1693 (Admin), [79]. Notwithstanding criticisms of the assurances, particularly the second, the District Judge said that he was entirely satisfied that in all the circumstances extradition would not result in there being a real risk of article 3 breaches arising by reason of the anticipated prison conditions for the appellant.

Post-judgment events

16. In Perfected Grounds of Appeal in early June 2022, Mr Swain argued that the First and Second Assurances, which the District Judge accepted as adequate, only guaranteed a space of three-square meters and did not provide an adequate assurance of material detention conditions. Decisions of the European Court of Human Rights - ably summarised by Mr Swain in the grounds - demonstrated that material conditions of detention in each of the prisons where the appellant would be held amounted to a breach of article 3 for matters over and above mere overcrowding. Having directed further information in light of these matters, the Romanian authorities had failed to provide an assurance and the District Judge ought therefore to have discharged the appellant.
17. Permission was refused on the papers by Fordham J on 14 September 2022. In his view, the appellant's article 3 point fell squarely within the Divisional Court's

decision in *Marinescu & Ors v Romania* [2022] EWHC 2317 (Admin), which had been handed down a few days earlier. The appellant had no realistic prospect of success. I return to *Marinescu* below.

18. Following Fordham J's decision, permission to appeal was renewed on the basis that neither the First Assurance nor the Second Assurance before the District Judge contained an assurance about decent conditions respecting human dignity.
19. As a result, Dr Halchin's assurance of 4 March 2022 was proffered in this case. It is a letter from Dr Halchin, as commissioner of correctional police, to Mrs. Viviana Onaca, as director of international law and judicial cooperation in the Romanian Ministry of Justice. It cross-refers to another letter dealing with the guarantee of 'a minimum personal space of 3m2 while serving the punishment, including the quarantine and observation period...'
20. Dr Halchin's letter details the 'information on the detention conditions ensured to the persons undergoing the 21-day quarantine and observation period at Bucuresti-Rahova Penitentiary.' It sets out the material conditions at Rahova, with at least one specific reference to what 'each detainee' will experience. It concludes in bold that 'the National Administration of Penitentiaries guarantees that the prison punishment, including the quarantine and observation period, will be served in decent conditions which respect human dignity.'
21. Despite several promptings from the Administrative Court Office, however, the CPS did not file an application notice for the admission of Dr Halchin's assurance until the afternoon of 20 October 2022. We now know that the reviewing lawyer was on leave and the matter was overlooked.
22. The matter had come before Lane J at a renewal hearing earlier that day, 20 October 2022. He did not have the application notice so Dr Halchin's assurance was not admitted at that time. In any event the appellant submitted that Dr Halchin's assurance did not apply specifically to this appellant. In line with standard practice the Judicial Authority was not present at the renewal hearing to explain matters. Understandably, Lane J granted permission.
23. As well as Dr Halchin's assurance the Judicial Authority lodged a further application notice the following month, on 18 November 2022, the CPS having received it on 3 November 2022. It was in respect of what was described as an updated assurance. It was dated 19 October 2022. It is called 'the October 2022 assurance' in this judgment.
24. The October 2022 assurance is in a letter signed by chief commissioner of correctional police, Gabriel Paun, to Mrs Dana Roman, director of the international law and judicial cooperation section of the Romanian Ministry of Justice. It refers specifically to the appellant and describes the material conditions in Rahova where he will serve the so-called quarantine and observation period of up to 21 days. It guarantees that the appellant's prison period, including the quarantine period, will be served in decent conditions observing human dignity i.e., it contains the wording in Dr Halchin's assurance. It then goes on to describe the material conditions the appellant will experience when he is moved into the prison estate, either the Slobozia or Constanța-Poarta Albă prisons.

Application of Dr Halchin's assurance

25. The law about assurances is well-established. The factors to which the court will have regard in assessing the quality of assurances and whether they can be relied upon was identified in *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1, [189].
26. Mr Swain accepted that if the October 2022 assurance is admitted then that is the end of the appellant's appeal since it applies to him and contains the requisite guarantees as regards material conditions and human dignity in both Rahova and the prisons where he will serve his sentence.
27. The issue of application only arises in relation to Dr Halchin's assurance. In that regard Mr Swain submitted that Dr Halchin's letter does not apply in this appellant's case absent clear evidence from an identified individual or office, with the authority to bind the prison service, that it was intended to apply to all extraditees, including this appellant.
28. In response, the Judicial Authority now applies to adduce communications served in another case (*Gheorghita*). Albeit privileged these, in Mr Ball's submission, constitute clear instructions from the judicial authority that Dr Halchin's letter is binding for all extradited individuals.
29. Mr Swain's response is that it is unclear that the communications are from the judicial authority, even less clear that they are from the court which issued the warrant; the CPS are refusing to disclose the instructions, even in extract; the procedural path for the admission of this material is uncertain; and the fact that the CPS now intends to adduce further information is precisely because the current position is insufficient.
30. In my view there is no need to enter *Gheorghita* territory. That is because the issue of the application of Dr Halchin's assurance has been authoritatively decided by the Divisional Court in *Marinescu*. As Fordham J said in refusing permission, this case falls squarely within the terms of that judgment. There is no need to reinvent the wheel.
31. It is important to recall that *Marinescu* was a lead case, decided by a Divisional Court of Holroyde LJ (Vice-president of the Court of Appeal Criminal Division) and Saini J. Many Romanian extradition cases were stayed awaiting judgement in that case. At the time it was decided, Holroyde LJ had recently ceased being the judge responsible for extradition matters in the Court of Appeal.
32. The court in *Marinescu* dismissed the appellant's article 3 challenges. The Divisional Court placed reliance on Dr Halchin's assurance. First, it not only described the conditions and regimes at the prisons concerned but guaranteed that each appellant would be detained throughout in decent conditions which respect human dignity. Consequently, the court rejected the submission that it was not an undertaking in the proper sense of the word: [55].
33. Secondly, although noting that it was not given by the judicial authorities concerned, the Divisional Court held that the authors and addressees of the various assurances, including Dr Halchin, were 'plainly in positions of high authority in the Romanian

prison system, and well-placed to know about, and direct, prison conditions. It is not suggested that they are not acting in good faith’: [56].

34. Thirdly, it did not matter that Dr Halchin's letter was not specific: it did not refer to any of the appellants by name or by any description although it formed part of correspondence about them, and clearly applied to them. It could be said to be generalised in its terms, said the court, but it was necessary to focus on substance rather than form: [56]. The court then said:

‘[58] We are unable to accept the appellants' submission that the guarantee given in Dr Halchin's letter is “vague”. On the contrary, it is in our view clear. The guarantee given by Dr Halchin is therefore, in our view, an assurance that the conditions of the appellants' detention will not violate their art. 3 rights...The assurance applies to the prisons, and the regimes and accommodation, described in the other letters, and it is not necessary for the Respondents to provide further detail. The assurance is plainly intended to be, and is, binding as between the UK and Romania; and any breach of it could be expected to have significant consequences for relations between the two countries in relation to extradition matters.’

35. Just as in *Marinescu* Dr Halchin’s letter did not refer to the appellants there, it does not refer to the appellant in this case. In *Marinescu* it formed part of the correspondence relating to the appellants there; in this case the respondent has lodged it with the intention that it should apply in this case as well. As the Divisional Court held in *Marinescu* it may be generalised in its terms, but it is an assurance which can apply to any requested person, namely, that their detention will not violate their article 3 rights. In other words, its language is such that it can constitute an assurance which can be relied upon to dispel the risk of breach in any case where the Romanian authorities proffer it. As the court explained in *Marinescu*, in such cases it is plainly intended to be, and is, binding as between the UK and Romania and any breach could be expected to have significant consequences for the UK’s relations with Romania in relation to extradition matters.

Admission of Dr Halchin’s and the October assurances

36. The appellant objects to the admission of the October assurance and Dr Halchin’s assurance. In characteristically cogent submissions, Mr Swain submits that the respondent is seeking to remedy a matter raised from the time of the first instance proceedings. It was seeking to circumvent the procedures of the court by advancing these assurances so late in the day. It had failed to comply with the requirements of the Administrative Court that there needed to be an application notice to adduce Dr Halchin’s assurance for the renewal hearing. There ought to be some ramifications for the failure to comply with procedural obligations. The respondent’s stance was inconsistent in this and other cases. At one point it asserts that Dr Halchin’s assurance applies to all extradites, then it adduces assurances like the October assurance in this case.
37. The admissibility of late assurances was recently addressed by the Lord Chief Justice and Holroyd LJ in the leading case of *Government of United States of America v*

Assange [2021] EWHC 3313 (Admin), which rejected a submission that an assurance is fresh evidence falling under the well-known test for admissibility in *Municipal Court of Szombathely v Fenyvesi* [2009] 4 All ER 324. The court in *Assange* said at paragraph [39] that an assurance was not ‘evidence’ in the sense contemplated by section 106(5)(a) of the 2003 Act, the same wording as in s.28(4)(a), the provision relevant to this case but an ‘issue’ in the case as referred to in that section. Approving para 36 in *India v Dhir* [2020] EWHC 200 (Admin) the Divisional Court in *Assange* said that assurances can be admitted at various stages of the proceedings, including on appeal, and the court may consider a later assurance even if an earlier undertaking was held to be defective: [40]. In *Assange* the court added:

‘[42] In our view, a court hearing an extradition case, whether at first instance or on appeal, has the power to receive and consider assurances whenever they are offered by a requesting state. It is necessary to examine the reasons why the assurances have been offered at a late stage and to consider the practicability or otherwise of the requesting state having put them forward earlier. It is also necessary to consider whether the requesting state has delayed the offer of assurances for tactical reasons or has acted in bad faith: if it has, that may be a factor which affects the court's decision whether to receive the assurances. If, however, a court were to refuse to entertain an offer of assurances solely on the ground that the assurances had been offered at a late stage, the result might be a windfall to an alleged or convicted criminal, which would defeat the public interest in extradition.’

38. The Divisional Court went on to make the point that a refusal to accept an assurance on the ground that they had been offered too late would be likely to lead only to delay and duplication of proceedings since if the appeal were dismissed on that basis a fresh request for extradition with the assurance proffered subject to properly available abuse arguments.
39. These passages were endorsed in *Sula v Greece* [2022] EWHC 230 (Admin) (William Davis LJ, Julian Knowles J), where the court admitted a late assurance from Greece: [40]. The court said, there is no question of Greece having acted in bad faith or having delayed serving the assurance for tactical reasons. Moreover, little would be gained by refusing to accept the assurance, since it would be open to the Greek authorities to begin fresh proceedings for the serious drugs offence with which the appellant was charged, with all of the delay and expense that would entail (and perhaps with the appellant again remanded in custody.) That, in the court's view, would not be in the interests of justice.
40. *Greece v Hysa* [2022] EWHC 2050 was what I regard as an exceptional case where the District Judge refused to wait for a late assurance in a much-delayed case. She seemed to be rightly concerned that the delay meant that the requested persons in that case were being held on remand, one for 15 months: see [60]. Cavanagh J (with whom Popplewell LJ agreed) took the same view. Mr Swain referred to Cavanagh J's helpful summary of the principles laid down in *Assange* and *Sula* on the late admission of assurances at paragraph [132]. As I pointed out in argument that had to be seen against the backdrop of the previous paragraph, paragraph [131] in Cavanagh J's

judgment, with its quotation of paragraph [42] of *Assange*, highlighting the public interest in extradition and, I would add, paragraph [40] of *Sula*, with its emphasis on the interests of justice.

41. In this case there is no bad faith on the part of the Romanian authorities or delay for tactical reasons. Dr Halchin's and the October assurances are late, but that was in response to points made by the appellant and other appellants in the many Romanian prison cases. I accept Mr Ball's submission that the respondent has throughout engaged constructively with the article 3 issue. That constructive approach was only marred by the breakdown in the CPS's arrangements for covering the responsible lawyer's work while on leave, resulting in the late filing of Dr Halchin's assurance.
42. There was the revised assurance, as far back as 11 March 2022, which responded to the questions raised in the District Judge's *Aranyosi* request. Then after *Marinescu*, when the wording about also guaranteeing conditions which respected human dignity was raised, Dr Halchin's assurance was filed, albeit not before the renewal hearing. This behaviour on the respondent's part is miles away from conduct which ought to result in the exclusion of Dr Halchin's assurance, or indeed the October 2022 assurance.
43. What the appellant characterises as inconsistencies in the Romanian approach in this and other cases I see as attempts to meet points raised by this and other appellants in Romanian prison cases. As I suggested in argument, given what Mr Ball described as the frequently mutating challenges being directed by appellants regarding Romanian prison conditions, my view was that the October assurance was very much 'belt and braces' as the respondent attempted to anticipate possible objections to Dr Halchin's assurance. There has been a changing landscape of challenges in this court based on Romanian prison conditions and the respondent has been playing catch-up.

Conclusion

44. For the reasons given the District Judge was not wrong to order the appellant's extradition. The appeal is dismissed.

