



Neutral Citation Number: [2022] EWHC 908 (Admin)

Case No: CO/1141/2019

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 13/04/2022

**Before :**

**LORD JUSTICE COULSON**  
**MR JUSTICE HOLGATE**

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**Between :**

<b>The Queen on the Application of Mihaylov</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Regional Prosecutions Office in Burgas (Bulgaria)</b>	<b><u>Defendant</u></b>
<b>- and -</b>	
<b>National Crime Agency</b>	<b><u>Interested</u></b>
	<b><u>Party</u></b>

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**Tim Owen QC and Florence Iveson** (instructed by **Tuckers Solicitors LLP**) for the  
**Appellant**  
**James Hines QC and Stuart Allen** (instructed by **Crown Prosecution Services**) for the  
**Respondent**

Hearing Date: 7 April 2022  
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**Approved Judgment**

## **LORD JUSTICE COULSON :**

### **1.Introduction**

- 1 The appellant is the subject of a European Arrest Warrant (“EAW”) to which Part 1 of the Extradition Act 2003 (“the Act”) applies. Following a hearing before District Judge (MC) Ezzat (“the judge”), his extradition was ordered in March 2021. His application for permission to appeal against that decision was refused on the papers by Johnson J. Following an oral application (at which the respondent was not present), leave to appeal was granted by May J on 26 January 2022. As part of her order, a template set of questions ‘borrowed’ from another case involving extradition to Bulgaria, was put to the Bulgarian authorities.
- 2 There are two Grounds of Appeal. The first is that the Bulgarian authorities do not have effective specialty arrangements in place, contrary to s.17 of the Act. The second is that extradition presents a real risk to the appellant of a breach of Article 3 due to the conditions in Bulgarian prisons, the failure of the Bulgarian authorities to comply with assurances in other cases, and the alleged inadequacy of the assurances in the present case.

### **2.The Background Facts**

- 3 The appellant was convicted of a driving offence contrary to Article 343c(2) of the Bulgarian criminal code. The date of the criminal conduct was 22 January 2017 and the location was Murgash Street in the city of Burgas. The offence was the equivalent in domestic law of driving without a licence. The appellant was sentenced to one year and six months.
- 4 The original conviction following trial is 57/16.03.2017 on GC498/2017 of the District Court in Burgas. The appellant was present for that trial, at which he was convicted and sentenced. He appealed, and also attended the appeal hearing, but he left Bulgaria – without informing the Bulgarian authorities - for the UK before the decision of the appellate court was handed down. The decision, which confirmed the decision of the District Court, is 160/17.07.2017 on AGCC 6194/2017 of the Provincial Court in Burgas. It took effect on 17 July 2017.
- 5 The appellant has not been convicted of any offence in the UK. He has, however, committed criminal offences in Bulgaria and has previously spent ten years in Burgas prison.
- 6 The EAW was issued on 23 October 2017 and certified on 27 October 2017 by the National Crime Agency as a warrant to which Part 1 of the Act applies. The appellant was arrested in Skegness on 25 April 2020.
- 7 The initial hearing took place at Westminster Magistrates Court on 27 April 2020. Consent was put and refused so the extradition hearing was opened and adjourned. The appellant’s case was subsequently joined with three others involving Bulgarian nationals so that the s.17 and Article 3 issues could be considered together. The substantive hearing took place over two days, on 9 November 2020 and 20 January 2021. Judgment was handed down by the judge on 20 March 2021. Thereafter, as I

have said, an application for permission to appeal was refused on papers but allowed following an oral hearing.

- 8 There have been a number of assurances provided by the Bulgarian authorities in this case. The assurance before the judge was dated 26 May 2020. The most recent is dated 22 March 2022, and it addresses the questions that were asked as part of May J’s order granting permission to appeal. The assurance of 22 March 2022 is examined in greater detail below.

### **3.The Judge’s Judgment**

- 9 The judge identified the evidence called at the hearing. This included oral evidence from the appellant. The judge found at [13] that the appellant was a fugitive. The judge also received written and oral evidence from Mrs Mandzhukova-Stoyanova, a practising lawyer in Bulgaria (“the expert”). There was other evidence relating to other individuals as well, which I address in greater detail below.
- 10 In his judgment, the judge dealt with the arrangements in Bulgaria as to specialty at [17]-[24]. He summarised the relevant evidence, including the evidence of the expert, and concluded that the principle of specialty existed in Bulgaria and that, although some lawyers and officials are unaware of its proper use and application, once the matter had been raised, it was generally dealt with appropriately. Accordingly the judge found that the challenge on the ground of specialty failed.
- 11 As to Article 3, the judge addressed that challenge at [25]-[27]. He referred to the assurance of 26 May 2020 which had been provided by the respondent, which set out the conditions in which the appellant would be detained. The judge found that the assurance specifically addressed Article 3 compliance and that, on the basis of the assurance offered, the appellant would be detained in Article 3 compliant conditions. He concluded that the assurances could be relied on and that, in those circumstances, the Article 3 claim failed.
- 12 There were a number of other issues which the judge had to address but which do not arise on this appeal.

### **4.Statutory Framework**

- 13 Section 17 of the Act deals with specialty<sup>1</sup>. It provides:

#### **“17 Speciality**

(1)A person’s extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory.

(2)There are speciality arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—

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<sup>1</sup> The section is headed ‘Speciality’ but lawyers have habitually used the term ‘Specialty’: see [45] of *Hilali*, cited at paragraph 18 c) below.

- (a) the offence is one falling within subsection (3), or
  - (b) the condition in subsection (4) is satisfied.
- (3) The offences are—
- (a) the offence in respect of which the person is extradited;
  - (b) an extradition offence disclosed by the same facts as that offence;
  - (c) an extradition offence in respect of which the appropriate judge gives his consent under section 55 to the person being dealt with;
  - (d) an offence which is not punishable with imprisonment or another form of detention;
  - (e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;
  - (f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.
- (4) The condition is that the person is given an opportunity to leave the category 1 territory and—
- (a) he does not do so before the end of the permitted period, or
  - (b) if he does so before the end of the permitted period, he returns there.
- (5) The permitted period is 45 days starting with the day on which the person arrives in the category 1 territory...”

14 Article 27 of the Council Framework Decision of 13 June 2002 provides that:

“1 Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.  
2 Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.”

15 Article 3 of the ECHR provides that no-one should be subjected to torture or inhumane or degrading treatment or punishment.

16 As to the scope of any appeal from the judge’s judgment, that is set out in Section 27 of the Act as follows:

**“27 Court’s powers on appeal under section 26**

- (1) On an appeal under section 26 the High Court may—
- (a) allow the appeal;
  - (b) dismiss the appeal.

(2)The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3)The conditions are that—

(a)the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b)if he had decided the question in the way he ought to have done, he would have been required to order the person’s discharge.

(4)The conditions are that—

(a)an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b)the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

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

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

(a)order the person’s discharge;

(b)quash the order for his extradition.”

## **5. Ground 1: Specialty**

### *Applicable Principles*

17 Specialty, as set out in Article 27 of the Framework Decision, is the rule whereby a person surrendered under an EAW may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender, other than that for which he or she was surrendered. Specialty can be infringed in two ways: where the individual is extradited and then subjected to unrelated charges or proceedings; or where the individual is prosecuted for enhanced charges based upon the conduct which gave rise to the EAW in the first place. It appears that it is the first possibility to which Ground 1 goes; there is no suggestion that the appellant in the present case faces enhanced charges arising out of his driving offence.

18 There are a number of well-established principles:

a) There is a strong presumption that EU Members States will respect specialty rights in accordance with their international obligations: see the judgment of Dyson LJ (as he then was) at [67]-[68] in *Ruiz and others v Central Court of Criminal Proceedings No5 of the National Court of Madrid* [2008] 1 W.L.R. 2798 and *Brodziak* (citation below) at [46].

b) Accordingly, this court will presume that the State in question will act in compliance with those obligations unless there is compelling evidence to the contrary: see *Arronategui v 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Sections of the National High Court of Madrid, Spain and others* [2012] EWHC 1170 (Admin) at [47].

c) The court must be satisfied that there are practical and effective arrangements in the requesting territory to ensure that specialty will not be infringed: see *Farid Hilali v*

*Central Court of Criminal Proceedings No.5 Madrid* [2006] EWHC 1239 (Admin) at [46].

d) This primarily goes to the substantive law operating in the requesting territory. As Scott Baker LJ pointed out at [49] of *Hilali*, the basic question was whether the rule of specialty was catered for in the law of the requesting territory. The same emphasis was provided by Dyson LJ in *Ruiz* at [67]-[68]. He said that what was important was that Spain (the State in question in that case) had incorporated the specialty rule into their law; that there was no compelling evidence that the Spanish authorities would act in breach of the rule; and that the requested person had a remedy in domestic law.

e) The burden is therefore on the requested person to show that the presumption has been rebutted in the particular case and that appropriate speciality arrangements were not in place: *Brodziak and others v Circuit Court in Warsaw, Poland* [2013] EWHC 3394 at [42].

### *The Position in Bulgaria*

19 It is common ground that, in Bulgaria, Articles 61 and 62 of the *Act on the Extradition and the European Arrest Warrant* state expressly that an individual, surrendered on the grounds of an EAW, cannot be prosecuted, tried or detained in the Republic of Bulgaria for crime committed before his/her surrender, other than the crime referred to in the EAW. In addition, the expert confirmed in her evidence that:

a) The principle of speciality was provided for in Bulgarian law, although there were no other legal procedural rules or protocols ensuring the observance of the speciality principle.

b) Her review of the case law revealed 5 cases between 2013 and 2020 in which there had been an initial breach of speciality. In each case, once the issue had been raised, the breach was corrected.

### *The Appellant's Case on Ground 1: General Observations*

20 Accordingly, before looking at the detail of the appellant's case on Ground 1, it must be observed that the appellant's room for manoeuvre is severely limited. It cannot be said that Bulgaria does not have a system that recognises specialty in principle: it plainly does. It cannot be said that it does not have a system that recognises specialty in practice: the evidence is that, generally, if the rule is missed first time round, the situation is resolved subsequently. The highest the appellant can put it is that, by reference to other cases, specialty arrangements in Bulgaria have not operated successfully in every instance. There are a number of general points to be made about that.

21 First, it seems to me that such an approach is some way removed from the provisions of s.17 of the 2003 Act or Article 27 of the Framework Decision. Since the requesting territory in this case recognises specialty, it would only be if there was some compelling evidence that the requesting authorities were likely to use the EAW and the extradition in this case to charge this appellant with another offence or offences on his return that s.17 comes into play. There is no such evidence here.

- 22 Secondly, it seems to me that combing through other cases in the past, where there may or may not have been an initial breach of the specialty arrangements in Bulgaria, in order to say that these cases show that Bulgaria is unlikely to comply with Article 27 of the Framework Decision, is an inherently unsatisfactory line of attack. No legal system is ever perfect, and it is quite wrong to apply s.17 on the basis that the Bulgarian legal system may not be.
- 23 As a matter of principle, therefore, it goes much too far to suggest that, because a) there is evidence that others, following their extradition to Bulgaria, have had to point out to their lawyers or the authorities that they cannot be charged for offences other than those for which they have been extradited; and b) some instances where the specialty principle may have been breached, there is likely to be a breach of s.17 in this case. In all States which recognise specialty, there will be glitches: cases which fall through the system. Indeed, I note that there is at least one case in this jurisdiction where that happened: see *R v Jack Shepherd* [2019] EWCA Crim 1062.
- 24 Thirdly, the highest that the expert was able to put it in her report was that, during the period 2013-2020 (7 years), she found in the caselaw a total of five judicial acts where there was a possible breach of the specialty rule. Her suggestion (in para. 6.4(a)) that the number of violations might be much higher, was a matter of speculation, to which no significant weight could be attached in any event. It cannot be said that less than one possible breach annually of the rule means that this court should find a likely breach of s.17. That is emphatically not what Scott Baker LJ in *Hilali* or Dyson LJ in *Ruiz* had in mind. The same is also true of the criticism that the Bulgarian system is inadequate because there are instances where the breach of the speciality rule was only remedied on appeal. Dyson LJ in *Ruiz* was emphatic that the fact that there was a remedy in the event of a breach was an important element of the system.
- 25 Finally, and perhaps most important of all, there is an underlying sense of unreality about the appellant's specialty argument on the facts of this case. If extradited, the appellant will not face a trial: he will simply serve the sentence lawfully imposed some years ago. There is no suggestion of anything which could be aggregated or of any allegations which might give rise to a separate prosecution. Neither the appellant nor the respondent have even hinted that there could be.
- 26 This is a fundamental weakness in the appellant's case on specialty. As Mr Owen fairly accepted, there were no authorities that anyone could find where a requested person had avoided extradition on the basis of a hypothetical breach of the speciality rule. The closest the authorities come is *Brodziak*, where there was an issue about aggregation. It was not a theoretical issue at all, but a point which arose on the particular facts of that case. In any event, extradition was ordered in that case, partly because specialty was part of the Polish legal system.
- 27 In one way, this chimes with Mr Hines' submission that, by reference to the judgment of Hughes LJ (as he then was) in *R v Seddon* [2009] EWCA Crim 483; [2009] 1W.L.R.2342, the rationale for specialty "may owe something to the protection of the individual, but it plainly lies principally in the international obligation between states." It is unnecessary for the purposes of this judgment to decide the precise scope of the individual's rights: what matters is that both *Seddon* and *Brodziak* show that, for extradition to be even arguably unlawful because of a potential breach of the specialty rule, facts specific to the individual case will be of critical importance. In

their absence, the argument simply becomes an impermissible referendum on another country's legal system.

- 28 Accordingly, I consider that these general reasons are enough to reject Ground 1 of the appeal. However, for completeness, I turn to deal with the appellant's individual complaints about the judge's judgment.

*The Appellant's Case on Ground 1: Individual Complaints*

- 29 The first is that the judge carried out no proper assessment of whether the evidence provided by the expert demonstrated that, on the balance of probabilities, appropriate speciality arrangements were in place. It seems to me that that submission fails at every level. For the reasons that I have indicated, the expert's evidence showed that, not only were speciality arrangements in place as a matter of law, as the judge found, but they were in place as a matter of practice, albeit that, in a small number of cases, the point had to be raised by the individual, having not been spotted by the relevant lawyer or court. On every occasion identified by the expert, the initial breach was corrected.
- 30 The judge regarded the evidence as demonstrating that effective speciality arrangements were in place in Bulgaria. I agree with that conclusion. That is unaffected by the fact that, in some countries (such as the UK) there is separate guidance for prosecutors as to speciality. I repeat the point made above, that legal systems vary from country to country and it is not appropriate to judge the practice and procedure in one by reference to the practice and procedure in another.
- 31 The second complaint is that the judge did not address the specific breaches of speciality which were identified in the evidence relating to three UK extraditees to Bulgaria: Messrs Petrov, Zdravkov and Ivanov. Although the judge referred at [18] to this evidence in general terms, he went on to say that, once proper procedures were in place, the principle of speciality was applied. That appears to be a summary of the expert's evidence, but it did not address the separate evidence about these three specific cases.
- 32 This was not a matter that was dealt with by Mr Owen orally. However, it does feature quite significantly in his skeleton argument. I accept the submission made there that the judge ought to have expressly dealt with the evidence relating to these three extraditees. It appears that in each case other charges were brought which predated the extradition and which led, in the case of Petrov, to an extended period on the equivalent of bail, and in the cases of Zdrovkov and Ivanov, additional sentences of 18 months and 6 months respectively.
- 33 This evidence therefore supports the appellant's general case that speciality arrangements in Bulgaria do not always work in practice. However, it is to be noted that the relevant events in those three cases are now 3-5 years old. This evidence, therefore, even taken at its highest and considered along with that of the expert, does not lead to the conclusion that there is likely to be a breach of the speciality rule in this case.
- 34 The third complaint is that the judge did not engage with the evidence from the respondent. It is certainly right that he did not refer to the respondent's letters on this



topic of 2 or 10 November 2020. But in my view, he had no need to. He had concluded, on the appellant's evidence and particularly that of his expert, that the specialty complaint had not been made out. The evidence relating to the three UK extraditees made no material difference to that outcome. That was therefore the end of the matter.

- 35 Furthermore I regard the express and implied criticisms of the respondent's letters (at paragraphs 40-44 of the appellants skeleton argument) as misplaced. It is not for the appellant to criticise the tone of the letters or to suggest that, in some way, there was an obligation on the respondent to answer every point set out in the expert's report. I do not accept the appellant's suggestion that the letters show that the Bulgarian authorities do not understand the specialty rule.
- 36 Finally, the judge is criticised for concluding that the appellant's own knowledge of specialty would mean that the appellant could enforce his rights should the situation arise. I reject that. The judge was entitled to reach that conclusion because the expert's evidence was to the effect that, if there had been a problem with specialty, the matter had been raised by the requested person and then dealt with appropriately. I profoundly disagree with the suggestion that, because the evidence shows that it is sometimes the requested person who raises the point in the first place, that must mean that there is not a proper system of specialty in place. That is contrary to what Dyson LJ said in *Ruiz*, where he attached importance to the remedy available to the requested person in such a situation.
- 37 Accordingly, for all these reasons, I would dismiss Ground 1 of the appeal.

## **Ground 2: Article 3 (Prison Conditions)**

### *Article 3: Principles*

- 38 The following principles are applicable:
- a) A judge must order a person's discharge if their extradition would not be compatible with their ECHR right: see s.21(2) of the Act.
  - b) The burden is on the individual to demonstrate that there are strong or substantial grounds for believing that there is a real risk that he or she will be subjected to inhuman and degrading treatment: see *R(oao Ullah) v Special Adjudicator 2* A.C. 323; [2004] 3WLR 23 at [24], and *R(oao Harkins) v Secretary of State for the Home Department and Anr* [2014] EWHC 3609 (Admin); [2015] 1 W.L.R. 2975, at [34].
  - c) In order to establish a real risk it is necessary to show that the risk is "well founded": see *R(oao Bagdanavicius) v Secretary of State for the Home Department* [2003] EWCA Civ 1605.
  - d) All such Article 3 applications must be considered in the context of the importance of the principle of mutual trust between States, which principle applies equally to assurances given as to the conditions in which a returned person will be held: see *Zabolotnyi v Mareszalka District Court, Hungary* [2021] UKSC 14; [2021] 1 W.L.R. 2569 at [31]-[34].

- 39 Overcrowding is one of the common complaints in these cases. The relevant principles were explained in *Mursic v Croatia* [2017] 65 EHHR1. There is a presumption that, where personal space accorded to inmates falls below 3 square metres, there will be a breach of Article 3 unless there are ameliorating factors. Where the space is between 3 and 4 square metres, the court must examine the adequacy of other aspects of the conditions.
- 40 Another common area of concern can be sanitary facilities. In *Neshkov and others v Bulgaria* [2015] ECHR 77, this point is dealt with at [231] and [240]-[243]. Issues such as a lack of privacy when using the toilet, and infestation with bed bugs and the like, are potentially relevant matters which may cumulatively give rise to a breach of Article 3. With the exception of the space issue, none of the other concerns identified in the *Neshkov* judgment are necessarily decisive on their own: what matters is their nature and scope in any given case, and their cumulative effect.
- 41 Where the requesting territory has made it plain that the individual will be detained at a particular prison, it is the conditions in that prison that matters: see *Case C-220/18 PPU ML v Generalstaatsanwaltschaft Bremen*. At [87] the CJEU said unequivocally that the court is “solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended the person concerned will be detained.” This is a part of the court’s obligation, in the words of the CJEU, “to determine, specifically and precisely, whether, in the particular circumstances of the case,” substantial grounds exist to deny extradition.

#### *Prison Conditions in Bulgaria*

- 42 Bulgarian prisons were the subject of adverse comment and findings in other cases, beginning with the adverse pilot judgment of the Strasbourg court in *Neshkov*. In domestic law, this has meant that assurances are required in every case in which extradition is sought to Bulgaria. In the first such case, *Vasilev v Regional Prosecutor’s Office, Silistra, Bulgaria* [2016] EWHC 1405 (Admin), Burnett LJ (as he then was) made clear that there was a real risk of breach in the absence of the assurance sought and provided. That has remained the position for all Bulgarian extradition applications in the UK. I think that Mr Owen is therefore right to say that, in consequence, the case falls to be decided under the third of the three stages identified in *Aranyosi* (EU:C:2016:140, [2016] QB 921).
- 43 There is a presumption that an assurance given by a Council of Europe State will be complied with unless there is cogent evidence to the contrary: *Ilia v Greece* [2015] EWHC 547 (Admin) at [40], affirmed by the Supreme Court in *Zabolotnyi* at [44]. Because the assurances here were provided by the Bulgarian Ministry of Justice, not a judicial authority, they are not the subject of that presumption, but are instead to be evaluated as part of the court’s overall assessment (*Zabolotnyi* at [34] and [42]). However, as Mr Hines noted, no point is taken by the appellant in this case as to the proper authority of the Bulgarian Ministry of Justice to provide these assurances.
- 44 Breaches of past assurances will be relevant to an assessment of reliability: *Duarte v Portugal* [20189] EWHC 2995 (Admin) at [44]; *Georgiev v Bulgaria* [2108] EWHC 359 (Admin) at [61]; and the Supreme Court in *Zabolotnyi* at [46]. In that paragraph, the Supreme Court made plain that the weight to be attached to a previous breach of assurance would be likely to vary from case to case.

- 45 There have been a number of cases in which assurances from Bulgarian authorities have been provided and accepted, and other cases where assurances have been considered inadequate but where, ultimately, the extradition has been permitted to continue. These include *Kirchanov v Bulgaria* [2017] EWHC 827 (Admin) (“*Kirchanov 1*”) and *Kirchanov v Bulgaria* [2017] EWHC 1285 (Admin) (“*Kirchanov 2*”), where the original assurances were inadequate but where, after a second attempt, they were accepted and the appeals against extradition were dismissed: see *Kirchanov v Bulgaria* [2017] EWHC (Admin) 2048 (“*Kirchanov 3*”).
- 46 It is worth pausing there just to note the nature of the original inadequacies of the assurances given in that case. Amongst other things, it was not disputed that the requested person would be held in a prison where there was no access to toilets between 8pm and 6am, and where the space was no more than 2 square metres per prisoner. It was therefore unsurprising that the court originally refused to order extradition.
- 47 In *Georgiev*, this court embarked on an analysis of the historic events surrounding four different extraditees to Bulgaria, unconnected to the case before the court, but which it was said were relevant to the reliability of the assurances in that case. It was said that there was at least one and sometimes multiple breaches of assurance in each case. On analysis, this court found that, in three of the four cases, there was no breach at all and in the fourth there was a single breach. None of that came close to preventing the extradition of the appellants in that case. Furthermore, whilst of course Hickinbottom LJ was addressing the submissions that had been made about those four individuals in *Georgiev*, speaking for myself, I rather doubt the utility of the exercise he undertook. That is a point to which I return below.
- 48 The importance of focussing on the conditions in the particular prison was demonstrated in the recent case in this court of *R v Chechev and Vangelov* [2021] EWHC 427 (Admin) (“*Chechev 2*”). That case not only noted the generally improving conditions in Bulgarian prisons but carefully differentiated the prisons in which each man was to be held. Thus the appeal in Chechev’s case was dismissed because he was due to be incarcerated at Pazardzhik and there was no evidence of substandard conditions at that prison. Vangelov, however, was to be detained in Bobov Dol prison where there was written and oral evidence which made plain that, particularly in respect of the 3 square metre rule, part of that prison did not comply with Article 3. What is more, that prison had been the subject of a recent adverse inspection, evidence of which was before the court. In what were described by Singh LJ at [42] as “those very particular circumstances”, Vangelov’s appeal was allowed.

#### *General Reliability of Bulgarian Assurances*

- 49 *Chechev 2* is also important because it contains the most up-to-date examination of the general reliability of Bulgarian assurances in these circumstances. It was argued on behalf of the appellants in that case that whatever assurances were given by the Bulgarian authorities, they could not be relied on. Singh LJ rejected that submission. He said:

“47. In essence Mr Tam submits that, whatever assurances are given by the Bulgarian authorities cannot be relied upon by this Court in view of the history of breaches of assurances in other cases in the past. Mr Tam submits

that there has been such a persistent pattern of breaches that the time has come for this Court to say "enough is enough". He submits that the position might be different if the Bulgarian authorities had taken the opportunity, as recommended by Hickinbottom LJ in the postscript to his judgment in *Georgiev*, and had explained in detail the reasons why breaches had taken place in the past and set out the steps which had been taken to ensure that breaches do not take place again in the future.

48. Powerfully though the submissions were made, I am unable to accept them. First, Mr Tam accepted at the hearing before us that he does not submit that it is no longer possible for anyone to be extradited to Bulgaria in any case in which extradition is contested. But it seems to me that would be the practical effect if his broad submission were accepted. This is because his submission amounts to the proposition that, whatever assurances are given in a specific case, they cannot be relied upon.

49. Secondly, it is clear that the Bulgarian authorities have sought to answer requests for information which have been made. In the present case Ms Malcolm informed us that there have been 14 requests that have been answered and a fifteenth request has been made, to which a response is awaited. This Court did not refer to the past breaches or ask for an explanation about them when it set out its detailed questions in the Annex to its judgment of 5 November 2020. In those circumstances, I do not consider that it would be right for this Court now to criticise the Bulgarian authorities for not addressing those matters.

50. Thirdly, the evidence before the Court is clear that conditions in Bulgarian prisons have improved and are improving. That is borne out by the evidence of Mr Petrov of the BHC: as I have noted earlier, his evidence was objective and accurate in its tone and content.

51. Fourthly, there is evidence before the Court that there are quarterly reports produced in relation to people who have been extradited to Bulgaria on the basis of assurances.

52. Fifthly, there is evidence before the Court that there are independent mechanisms in Bulgaria for monitoring compliance with assurances and more generally for monitoring prison conditions. These include the national ombudsman and the BHC, which is an independent NGO. Mr Petrov confirmed in his evidence to the District Judge that the BHC has no difficulty gaining access to prisons and other facilities.

53. Finally in this context, the law in Bulgaria has itself changed in recent years, not least to comply with the pilot judgment in *Neshkov*. Article 3 is taken seriously both as a matter of law and as a matter of practice.”

#### *The Specific Evidence Relevant to This Appeal*

50 The original assurance in this case, and the one that was before the judge, was provided on 20 May 2020. It was in these terms:

“With regard to the EAW, issued by the Bulgarian judicial authorities for the surrender of Bilyan Sashev Mihaylov and with reference to your questions of 2.05.2020, we provide the relevant information on the conditions of detention of the above mentioned person, as follows:

Concerning questions (i): Taking into account our national legislation and the statutory requirement to keep the inmates in a prison near to their place of permanent residence, upon his arrival and taking into account his permanent address, Bilyan Sashev Mihaylov will be placed in Burgas Prison, including during the adaptation period.

Concerning questions (ii): As of 19.5.2020 the occupancy rate in Burgas Prison is as follows: 792 inmates with a capacity of 1020 inmates at 4 sq.m per person.

All dormitories are equipped with self-contained sanitary facilities and running water.

Concerning question (iii): In the event of transfer to another prison Bilyan Sashev Mihaylov will still be kept in conditions compliant with Article 3 ECHR and the minimum European standards.

On question (2): As it was already stated in (ii) the current occupancy rates in Burgas Prison provide for compliance with the requirement for 4 sq.m living area for the inmate.

Furthermore I would like to draw your attention to the fact that in the event the extradition is ordered, the rights and interests of Bilyan Sashev Mihaylov will be further safeguarded by the provisions of Article 276-283 of the Implementation of Penal Sanctions and Detention in Custody Act – PART Six: Protection against Torture, Cruel, Inhuman or Degrading Treatment (enclosed).

In order to guarantee compliance with the assurances that the Bulgarian state provides in regards to the prison conditions, on the 06.10.2017 the Deputy Minister of Justice issued a special order. It provides that the Directorate General “Execution of Sentences” reports on quarterly basis to the Deputy Minister of Justice the custodial conditions of any person deprived of liberty who are subject to EAW, extradition and prisoner transfer procedure, and the compliance of these conditions with the requirements of the ECHR.

As an additional guarantee for the rights of the inmates, the National Ombudsman, through “National Prevention Mechanism” Directorate part of the administration, has access to the places of deprivation of liberty in Bulgaria and may interview sentenced persons privately and to monitor the material conditions on the inmates. The Ombudsman has the power to make recommendations to the prison authorities, which are always taken into consideration.

The control over the implementation of panel sanctions is exercised by state bodies, organisations and not-for-profit legal entities registered for pursuit of public benefit activities.

The Bulgarian Public Prosecutor's Office exercises supervision as to compliance with legality upon implementation of penal sanctions according to the Judiciary System Act.

To summarize, we express our willingness to resolve all the issues with commitment to the best interests of both parties and fruitful cooperation in the area of mutual cooperation in criminal matters and the EAW specifically, with the full respect of the rights of sentenced persons ”

51 It was suggested that, by granting permission to appeal and requiring answers to the template questions, May J was impliedly finding that the May 2020 assurance was inadequate. I do not accept that. She could make no such finding (express or implied) because the respondent was not represented before her. She was persuaded to grant permission to appeal and, very sensibly, she concluded that this court would benefit from up-to-date information (particularly given that the assurance of May 2020 was by then over 18 months old). It was a convenient mechanism to obtain that information by asking the questions that had been asked in *Chechev 2*. I do not read anything more into her order than that.

52 In the light of the points made by Mr Owen about the questions and their answers, it is appropriate to set out the questions in full. They read:

“a. Please list all detention facilities, including closed prison hostels and open prison hostels which Bilyan Sashev Mihaylov may be detained in for the duration of his sentence.

b. Please provide the occupation levels at each possible detention facility.

c. In which part of each facility will Bilyan Sashev Mihaylov be detained for the duration of the sentence? Please provide cell dimensions.

d. Will Bilyan Mihaylov be accommodated in a cell which:

i. provides him with 4 square metres of space at all times throughout; and

ii. contains a self-contained sanitary facility?

e. What mechanisms exist, or will be provided, to monitor the conditions in which Bilyan Mihaylov is detained throughout his detention?

f. Evidence of the measures being taken in the relevant section of each prison by the appropriate authority to limit or restrict the spread of Covid-19, in particular:

i. the amount of time out of the cell each prisoner at the relevant prison is permitted;

ii. How much access each prisoner at the relevant prison is permitted to:

- (a) the open air;
- (b) exercise;
- (c) education/training activities;
- (d) medical treatment;
- (e) communication with the family and/or friends outside of the prison.

g. Whether the Covid-19 restrictions have adversely affected the monitoring visits/system and, if so how much and to what extent.

h. The court seeks specific assurances:

A. That Bilyan Mihaylov will be held at the identified section of the identified prison in a cell which complies with the minimum international standards as to:

- i. space;
- ii. sanitary facilities; and
- iii. an effective system of monitoring

so as to ensure that the rights of the appellant pursuant to article 3 ECHR are not breached.

B. That Bilyan Mihaylov will not be transferred to a different prison where these minimum standards are not met.”

53 The subsequent assurance from the respondent is dated 22 March 2022. It provides as follows:

“With regard to the EAW, issued by the Bulgarian judicial authorities for the surrender of Bilyan Sashev Mihaylov and with reference to your questions, dated 25.02.2022, please find the answers to your questions as follows:

Bilyan Sashev Mihaylov will be held in the Burgas prison (total capacity of the main buildings 1020 prisoners with 708 currently accommodated). Depending on the type of regime of serving the imposed sentence, Bilyan Sashev Mihaylov could be accommodated in the main building of the prison (total capacity 300 prisoners with 209 currently accommodated), in the closed type prison dormitory “Debelt” (total capacity 276 prisoners with 273 currently accommodated), or in the open-type prison dormitories “Zhitarovo”, “Debelt 1” and “Razdelna” (total capacity 220 with 226 currently accommodated). The capacity of the prison divisions are based on 4 sq.m. space per prisoner.

Considering the current occupation and the living conditions available in the prison and the prison dormitories, we shall make the necessary efforts to place Bilyan Sashev Mihaylov in a dormitory conformant with the

requirements of the Implementation of Penal Sanctions and Detention in Custody Act (see Art. 43, para 4 in Annex 1) and the minimum European standards. Bilyan Sashev Mihaylov will be kept in a cell, which provides him with four square meters of space, not including the sanitary facilities at all times throughout his detention.

In case a transfer to another prison is required the inmate will enjoy the rights and living conditions as foreseen by the national law and the minimum European standards (see Art. 63, para 1, item 5 of the Act in Annex 1).

The premises in the prison in Burgas are as standard equipped with a sink, bathrooms with constantly flowing hot and cold water, sufficient daylight and the possibility of fresh air. All persons are provided with daily outdoor stays in specially designated areas. According to schedules approved by the head of the prison, prisoners can use the common areas - gym, library, chapel, etc., and each of the events has a different duration, according to the daily regime in the prison.

To ensure their established and social status, various activities are carried out to implement communication and social skills, to change attitudes and ways of thinking, to build up work habits, and to acquire a profession, aimed at protecting their physical and mental health, contributing to their future reintegration into society.

Prisoners can meet with lawyers in private and correspond without restriction..."

The letter then goes on to deal with the detailed arrangements for meeting lawyers in private without restriction, healthcare and other matters.

- 54 The court also has specific evidence about Burgas prison, where the appellant will be held. The report of the Council of Europe dated 4 May 2018 (CPT/IMF(2018)15) not only sets out the improvements in the Bulgarian prison estate generally, but at Burgas prison in particular. The report referred to the refurbished areas of Burgas prison offering "good material conditions" which are then set out. The report at [73] indicated that the prison would be completely refurbished by the end of 2017. The Bulgarian Government response to the report suggests that that has now happened. There is certainly no evidence to indicate that it has not.
- 55 The evidence relied on by the appellant in respect of Ground 2 did not come from him. Instead, it concerned two individuals, Mr Zdravkov and Mr Kolev, where it is said that assurances were provided and subsequently breached. The evidence in respect of Mr Zdravkov dealt with his assurance and his incarceration in Varna, Belene and Sofia prisons. The period covered was 2017 to early 2019. In summary, it is said on behalf of the appellant that there were breaches of the assurances in Mr Zdravkov's case.
- 56 I have some reservations about this evidence because it did not come from Mr Zdravkov himself (so it was arguably hearsay). More significantly, the same evidence regarding Mr Zdravkov was before this court in *Chechov 2*, where the suggestion that it showed that the assurances in those cases were unreliable was rejected at [45]. Most



important of all, at no time was Mr Zdravkov detained at Burgas prison, so his evidence could not go to the reliability of the assurance in the present case, which is solely concerned with that prison.

- 57 Mr Kolev's statement was affirmed the day before the second day of the hearing before the judge (20 January 2021), although it had been available in unsigned form since the previous June. The evidence in the statement is equivocal. Mr Kolev was held in three different prisons, one being Burgas, and another being its dormitory satellite, Zhitarovo, between May 2018 and May 2019. He compares the conditions at Burgas favourably to the other two prisons, although he complains about the ex-Army beds and the proliferation of bed bugs. There was an assurance in his case (although he seemed unaware of its details) which appeared to relate primarily to space (the 3 square metres point). Perhaps the highpoint of his evidence for present purposes was what he said about Zhitarovo, where he also complained about bed bugs, and the sanitary facilities. The toilets were separated from the cell by partitions, but they were holes in the floor, not proper toilet pans. They were not individually isolated.

*The Appellant's Case on Ground 2: General Observations*

- 58 There is a suggestion in some of the material provided on behalf of the appellant that, because there is evidence that not every assurance in every case involving Bulgaria has been met, this court should not take the assurances at face value. Although he orally disavowed that intention, the undeniable thrust of Mr Owen's skeleton argument was that the assurances from the Ministry of Justice in Bulgaria should not be relied on by this court because they come from Bulgaria.
- 59 I reject that approach for three reasons. First, it seems to me to be contrary to the principle of mutual trust. The rule of law requires this court to accept such assurances unless there are strong grounds for concluding that the particular assurance in the particular case will not be met.
- 60 Secondly, the court has been presented with a good deal of evidence about conditions in other Bulgarian prisons, not Burgas, and possible breaches of assurances in other cases. Those are then relied on to suggest the likelihood of general breaches of Article 3 and/or general breaches of assurances by the Bulgarian authorities, leading on to the conclusion that the particular assurances in this case must therefore be unreliable. Those propositions do not follow. Each assurance must be considered on its own facts. The question is: Do the assurances in this case meet what would otherwise be a real risk of a breach of Article 3?
- 61 Thirdly, and most importantly for present purposes, I have concluded that this argument is not open to Mr Owen in any event, because of the detailed ruling by this court in *Chechev 2* (see paragraph 49 above). The submission as to the general unreliability of Bulgarian assurances was carefully considered and rejected by Singh LJ. The submission that every assurance should be treated as unreliable cannot now be resurrected every time there is a fresh assurance from the Bulgarian authorities. It must always depend on the particular facts of the case.
- 62 That therefore leaves the particular grounds of complaint raised by the appellant. The first two go to the judge's judgment; the third relates to the assurance of 22 March 2022.

*The Appellant's Case on Ground 2: Individual Grounds*

- 63 The first complaint is that the judge wrongly concluded that the decision of this court in *Chechev 2* was authority for the proposition that Bulgarian assurances could be relied upon. The complaint is that, because the assurance was not accepted in the case of Mr Vangelov, that was a misreading of this court's decision.
- 64 In my view this complaint impermissibly elides two different points. In *Chechev 2*, Singh LJ set out the appellant's submissions as to the inherent unreliability of Bulgarian assurances. He rejected them. The judge was therefore entitled to say that the present position in law is that assurances from the Bulgarian authorities can be regarded as reliable, unless an appellant can produce a cogent case to the contrary.
- 65 That leaves the result in the *Vangelov* part of that appeal. That was, as I have said, the result of specific findings in relation to a specific prison. It was a finding in respect of the inadequacy of a particular assurance (primarily relating to space): it was not a finding as to the reliability of Bulgarian assurances generally. For those reasons, I consider that this first criticism of the judge to be misplaced.
- 66 The second criticism is that the judge failed to make any findings of fact on the evidence before him. As developed in the skeleton argument between paragraphs 86 and 95, this appears to be a suggestion that the judge should have made findings of fact in relation to the cases of Mr Zdravkov and Mr Kolev.
- 67 I reject that submission. A judge dealing with the case of extraditee X is not required to make findings of fact in relation to the unrelated and historic cases of Y and Z, which have at best only a tangential bearing on the case before him. Such a requirement is neither proportionate nor in accordance with the overriding objective. *Georgiev* should not be regarded as laying down any rule to the contrary. It will depend on the issues in the individual case.
- 68 Here, there are also significant practical difficulties with such a suggestion. Take the evidence about Mr Zdravkov. Paragraphs 9-18 of Appendix 2 to the appellant's skeleton argument sets out a raft of factual material said to support the allegation that the assurance in his case was not met. The nine sub-paragraphs of paragraph 88 of the respondent's skeleton argument in response puts in issue a wide variety of those matters. The same difficulties arise in relation to Mr Kolev's statement. Paragraphs 1-9 of Appendix 2 of the appellant's skeleton argument set out various factual matters said to show that the assurance in his case was not honoured. Again, many of those are put in issue at paragraphs 89-92 of the respondent's skeleton argument in response. Further material was put in to address some of Mr Kolev's complaints on the morning of the appeal.
- 69 It would have been impossible for the judge to have undertaken a meaningful or detailed fact-finding exercise in relation to these matters. He did not have sufficient information, or sufficient time, to chase down all the loose ends, and he did not have any need to do so. Any findings he had been tempted to make – even if they had been practical or possible - would have been immaterial to the appellant's case.
- 70 In the case of Mr Zdravkov, since he was never detained at Burgas prison, the finding at its highest would have been that assurances in his individual case may have been

breached in 2017. The judge could not go further and say that this breach meant that the (different) assurances about the (different) prison in this case were unreliable: that was the very argument rejected by Singh LJ in *Chechev 2*.

- 71 In the case of Mr Kolev, his evidence is very limited, paints Burgas prison in a relatively good light, and is in any event three to four years old. Furthermore, the assurance in Mr Kolev's case was less detailed than the assurances in the 22 March 2022 letter. So Mr Kolev's evidence, either considered on its own or together with all the other evidence, does not establish an arguable case that the assurances of 20 May 2020 and 22 March 2022 will not be met.
- 72 That deals with the criticisms of the judge. I should therefore say that, even if a contrary view is possible on some of the individual points raised under both Grounds 1 and 2, those were matters which were considered, if sometimes in brief terms, by the judge. What matters in this appeal is whether the judge was wrong; not whether he reached a conclusion which, although open to him, the appellant does not like. In my judgment, there is nothing in the judge's judgment which could be said to be wrong for the purposes of section 27 of the Act. For the reasons that I have set out, I consider that he was right but, allowing a proper margin for judges to take a different view of particular parts of the evidence, I consider that the judge's judgment was, at the very least, one that was open to him. There was manifestly no error of law.
- 73 The third complaint now raised is that the new information, that is to say the assurance of 22 March 2022 (when considered together with the assurance of 20 May 2020), was not sufficient to allay the concerns raised on behalf of the appellant. Before I deal with each alleged inadequacy in brief terms below, I should make one wider point about the process on which Mr Owen embarked.
- 74 At one point in his oral submissions, Mr Owen referred to the assurances of 20 May 2020 and 22 March 2022 and said that, if you were marking them as an exam paper, the Bulgarian authorities would not score highly. As I pointed out to him at the time, I considered that to be an apt analogy for the exercise on which he had embarked, but I am not persuaded that it is an appropriate approach. It is wrong to suggest that, even for a country such as Bulgaria, where assurances are required in every case, the court should examine every question and every answer and, unless the requesting territory passes each time with an A\*, extradition must be refused. What matters is the overall effect of the assurances and the court's evaluation of them.
- 75 The first alleged inadequacy is that, because the appellant might be moved to Zhitarovo prison dormitory instead of Burgas prison, there is evidence in Mr Kolev's statement that Zhitarovo is non-compliant. I disagree: the complaints that Mr Kolev makes about Zhitarovo do not themselves amount to clear evidence of a breach of Article 3. Much more importantly, they are in any event three or four years old. I return to the separate question about the sanitary facilities there at paragraphs 77 and 82 below.
- 76 The second alleged inadequacy is said to be that there is no answer to the question as to which part of each facility the appellant would be detained in if he was extradited. I disagree. The response makes plain that the appellant would be held in an identified section of the identified prison in a cell which complied with minimum international standards. I do not accept that that is a general and vague assurance: realistically, it is

the only assurance that could be given. There may be all sorts of immediate reasons why the appellant might be moved from one part of the facility to another. Those could never be anticipated in advance.

- 77 The third alleged inadequacy is a complaint that there is no specific answer to the question as to self-contained sanitary facilities. I disagree: there is a specific answer to that question in the May 2020 assurance (see paragraph 50 above). That has been added to by the reference in the March 2022 letter to the availability of hot and cold running water. In addition, I note that Mr Kolev does not say that Burgas prison did not have adequate sanitary facilities<sup>2</sup>. Thus the highest that it can be put is by reference to Mr Kolev's evidence, summarised above, about the toilet facilities in Zhitarovo, where it is possible that the appellant may be transferred.
- 78 The fourth complaint is about an absence of specific information as to monitoring. The arguments based on the absence of monitoring information were rejected by Singh LJ at [51]-[52] of *Chechev 2*. In my view, the same result must apply here. Further and in any event, a proper assurance as to monitoring was given in the 20 May 2020 assurance: see paragraph 50 above.
- 79 The fifth complaint is about the absence of any specific measures in relation to the spread of Covid 19. That question was again 'borrowed' from *Chechov 2*, at a time when the pandemic was a more significant problem. In any event, it was addressed in generic terms there, the nature of which did not trouble this court. In addition, in a subsequent document dated 2 March 2022 but only provided on the morning of the appeal, a detailed and full assurance was given by the Bulgarian Ministry of Justice in relation to Covid-19.
- 80 It should be added that there is nothing to suggest that Covid is not being dealt with adequately in Bulgarian prisons, and so this can be no basis for finding a likely breach of Article 3 and refusing extradition. There is nothing in the evidence provided by the appellant to suggest that this is a realistic, as opposed to a contrived, ground of complaint.
- 81 The sixth and final complaint is that only general information has been provided about access to open air, exercise, education and medical treatment. There was greater detail, it is said, in *Chechev 2*. Again, that is simply not a proper ground for complaint: in my view, the answers provided in the March 2020 assurance were sufficient. I would not expect more detailed information to be provided, so the fact that it was provided in another case is nothing to the point.
- 82 In summary, therefore, the only residual concern that I have arising out of the two sets of assurances relates to the possible state of the sanitary facilities in one of the possible prisons (Zhitarovo) in which the appellant might be held if he is moved from Burgas prison. That is, however, countered by the clear terms of the assurance of May

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<sup>2</sup> Neither does the appellant, who spent 10 years there, although I imagine much of what he might have said would have been out-of-date.

2020 (which refers to “dormitories”, which is the description used about the facility at Zhitarovo) and the fact that Mr Kolev’s evidence is 3-4 years old. Beyond that, there is no evidence from the appellant which contradicts or calls into question any of the assurances of 20 May 2020 and 22 March 2022. Nor is there any other up-to-date evidence about Burgas prison (or the possible alternatives) adduced on behalf of the appellant, which might have been of rather more relevance than the experiences of Mr Kolev three or four years ago. In the round, therefore, I have concluded that the appellant has not demonstrated that the assurances give rise to strong or substantial grounds of a real risk of a breach of Article 3.

83 For those reasons, therefore, I would also reject Ground 2 of this appeal. All that therefore means that, if my Lord agrees, this appeal will be dismissed.

**MR JUSTICE HOLGATE**

84 I agree.