Neutral Citation Number: [2022] EWHC 3368 (Admin)

Case No: CO/2559/2021

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/12/2022

**Before**:

**LORD JUSTICE BEAN**
**MR JUSTICE JAY**

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**Between:**

**VASILE STANCIU** **Appellant**

**- and –**

**PROCURATOR GENERAL'S OFFICE OF THE REPUBLIC OF ARMENIA** **Respondent**

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**Graeme L Hall** (instructed by **Lawrence & Co Solicitors LLP**) for the **Appellant**
**Adam Payter** (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 20th December 2022

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# Approved Judgment

This judgment was handed down remotely at 10.30am on 23 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**MR JUSTICE JAY:**

1. This is the judgment of the Court.

2. On 15th May 2020 the Procurator General's Office of the Republic of Armenia ("the Respondent") issued a request for the extradition to Armenia of Mr Vasile Stanciu ("the Appellant") for the purpose of his prosecution for four offences of theft, attempted theft, the manufacture and sale of forged payment documents, and attempt to commit crimes. Part 2 of the Extradition Act 2003 ("the 2003 Act") applies to these proceedings. Although Armenia is not on the designated list for the purposes of Part 1, it is a member of the Council of Europe.

3. Following the certification of the request by the Secretary of State, the Appellant was arrested on 16th July 2020 pursuant to a warrant issued by Westminster Magistrates' Court. The Appellant was remanded in custody where he has remained throughout these proceedings.

4. After a two-day hearing on 13th and 14th May 2021, on 27th May District Judge Michael Snow ("the Judge") rejected the Appellant's various arguments that he should not be extradited. The case was then sent to the Secretary of State who on 1st June 2021 ordered his extradition to Armenia.

5. The Appellant now appeals to this Court with the leave of Fordham J limited to one issue: namely, whether the Judge was wrong to conclude that the Appellant's extradition did not expose him to a real risk of detention in inhuman or degrading prison conditions, contrary to Article 3 of the ECHR. Fordham J gave detailed reasons ([2022] EWHC 1529 (Admin)) for granting permission on this ground, for which we are grateful.

6. After the hearing before the Judge, and indeed after the hearing before Fordham J, further evidence from the Appellant and further information and assurances from the Respondent have been provided. The parties are not in agreement as to the extent to which this further material is admissible on an appeal to this Court under section 103 of the 2003 Act. But before that dispute is considered, we must address the course of the litigation before the Judge.

THE PROCEEDINGS BEFORE THE JUDGE

*The Evidence*

7. The Judge received oral evidence from Mr Arshak Gasparyan who was put forward by the Appellant as an expert in prison conditions in Armenia. However the Judge, applying the decision of Collins J in *Brazuks v Latvia* [2014] EWHC 1021 (Admin), concluded that Mr Gasparyan was not an expert for the purpose of assessing the Article 3 risks in relation to the prison at issue. He had done no more than produce open source material in his two reports, and his visits to a number of prisons in Armenia took place some time ago. Fordham J ruled that the Judge's conclusion was not arguably wrong on this topic.

8. For the avoidance of doubt, we consider that had Mr Gasparyan visited the relevant prison, Armavir, in the recent past, his evidence of what he observed would have been

admissible as evidence of fact. That he was not an expert would have gone to its weight and not to admissibility.

9. The open source material before the Judge comprised a 2016 report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), US State Department reports from 2019 and 2020, the Public Monitoring Group's ("PMG") reports from 2018 and 2019, and an Ombudsman's report from 2019.

10. The CPT had visited a number of prisons in Armenia in October 2015. The report itself was published in March 2016 and the Government of Armenia responded to it in October that year. Given that, save in one respect, the Appellant did not contend before the Judge that there was a systemic problem in Armenia's prisons, we may properly focus on the CPT's findings in relation to Armavir prison which was where the Judge found that the Appellant would if extradited be held on remand. We will be addressing in due course the submission of Mr Graeme Hall for the Appellant that the ambit of our inquiry should be broader.

11. The 2016 CPT report was critical of that prison in terms of the lack of any proper ventilation system (described as a "serious problem inside the cells, the sanitary areas and the kitchen"), signs of significant wear and tear (somewhat surprising, given that the establishment had only opened in early 2015), and the size of the exercise yards. Further, prisoners were locked up in their cells for 21-23 hours a day.

12. The systemic issue which formed part of the Appellant's Article 3 case and was remarked on by the CPT concerned the existence of an informal criminal hierarchy and consequent corruption, violence and intimidation. The 2016 CPT report characterised the problem in these terms:

> "No allegations of ill-treatment by staff were received by any of the penitentiary establishments visited, and staff-prisoner relations appeared generally free of visible tension. However, the delegation once again observed that there was a general tendency for the management to partially delegate authority to a select number of inmates (the so-called 'watchers') who were at the top of the informal prison hierarchy and use them to keep control over the inmate population. The CPT called upon the Armenian authorities to take resolute steps to put an end to this practice.
>
> …
>
> The management at Noubarashen and Armavir prisons openly stated that the very low staff complement rendered this policy almost unavoidable. …
>
> The CPT must reiterate its view that such an approach constitutes not only a potential threat to good order within prisons but also a high-risk situation in terms of inter-prisoner intimidation, and leads to a culture of inequality of treatment between inmates. It is noteworthy that the delegation saw in the relevant documentation that requests for voluntary isolation were quite

> frequent in the prisons visited; at least some of the requests were expressly motivated by the prisoners' fear of their fellow inmates (and of the prisoner hierarchy) and staff acknowledged the existence of the problem."

13. In sum:

> "The CPT calls upon the Armenian authorities to take resolute steps to address the above-mentioned phenomena. It wishes to be informed of the concrete steps that will be taken to bring an end to these practices and of the timeframe within which they will be implemented."

14. The Government of Armenia's response to the 2016 CPT report contained the following assertion:

> "All the cells, sanitary annexes and the kitchen at Armavir Penitentiary Establishment are provided with proper ventilation (natural ventilation). The storage facilities are fully provided with ventilation systems as well …"

It was not being said that the cells etc. possessed a ventilation system, nor was it explained how "natural ventilation" might be effective during periods of hot weather in the south of the country.

15. As for the prevalence of inter-prisoner violence, the Government of Armenia declared:

> "In all cases when persons try to intentionally violate the requirements of the internal regulations of penitentiary institutions, try to establish hierarchy amongst convicts, as well as wish to circumvent the legitimate demands of penitentiary officers in any way, various legitimate means – ranging from subjecting to disciplinary liability to sending to penitentiary institutions with a higher level of security – are unavoidably applied. For example, during 2015-6 'transfer to punishment cell' disciplinary penalty has been imposed 1,649 times on persons attempting to establish hierarchical positions among convicts, as well on those ignoring legitimate demands of the penitentiary officers.
>
> The Penitentiary service is in complete control of the operational situation at penitentiary institutions and – if necessary – undertakes respective actions to prevent cases of unofficial hierarchy."

16. The US State Department reports provide useful summaries of the reports from others. Its report from 2020 noted that "Armavir penitentiary… did not have an air ventilation or cooling system, which allowed recorded cell temperatures [to be] as high as 113 degrees Fahrenheit in past summers". The Ombudsman had referred to summer highs of 45 degrees Centigrade, effectively the same figure. In both 2019 and 2020 the US

State Department described Armenian prison conditions as marked by "predation by hierarchical criminal structures ('thieves-in-law')".

17. The 2018 PMG report provided little information about Armavir prison although it was noted that there was no ventilation system, which was said to be a systemic problem. This report identified what it called the "criminal subculture and hierarchical relations" as "the reason for the majority of problems in the penitentiary institutions". Its conclusion was as follows:

> "During the second half of 2018, after the political changes in the country, the RA Ministry of Justice expressed readiness and willingness to fight against the criminal sub-subcultures [sic], hierarchic relations and corruption existing [in] the penitentiary institutions. However, the members of the Monitoring Group did not record any positive change in this regard in the outcomes of its constant visits to the penitentiary institutions. The Monitoring Group is hopeful, the policy adopted by the RA Ministry of Justice will become an effective fight through presenting changes in practice."

18. The 2018 PMG report also stated that the Armenian Ministry of Justice, although affording the monitoring group unrestricted access to the prisons, was not facilitating unrestricted visits to prisoners. Accordingly:

> "Taking into consideration the above mentioned, the members of the Monitoring Group strictly condemn such conduct against hindrance of the Group's activities and consider the restriction of the implementation of the Group's activities as an attempt to conceal the facts of subjecting the prisoners or the convicts to alleged torture, since the restriction of the Monitoring Group's activities is illegal and has an individual nature."

19. The 2019 PMG report recorded that the Minister of Justice had announced that a ventilation system would be installed in Armavir prison. It confirmed that the criminal culture, hierarchy and corruption issues endured despite the reduction in the number of inmates. Prisoners bribed staff in order to gain access to better conditions, healthcare and contraband. Despite changes in 2018 and a stated willingness on behalf of the Ministry of Justice in Armenia to fight criminal sub-cultures, the hierarchy and the corruption, the 2019 PMG report "did not record any positive change in this regard in the outcomes of its constant visits to the penitentiary".

*The "Assurances"/Information from the Respondent*

20. Three documents from the Government of Armenia were before the Judge, dated, respectively, 22nd January, 5th March and 16th March 2021. The Judge described these variously as "information" and "assurances". The point that he was making – correctly in our view – was that these documents were hybrid in nature. They contained a mixture of information or evidence about prison conditions as well as assurances or guarantees from the relevant authority as to where the Appellant would be detained and how specifically he would be treated.

21. The first document (Further Information No. 3) provided quite general information about Armenian prison conditions which did not materially advance the Respondent's case. The Government of Armenia also guaranteed that the Appellant's personal space would comply with Chapter 15 of the Penitentiary Code (i.e. by Article 73, at least 4m² per prisoner) and he would be provided with all necessary healthcare.

22. The second document (Further Information No. 4) addressed the issue of inter-prisoner violence at Armavir and Noubarashen prisons. It was said that both institutions have "the necessary video recording equipments" (which we understand to be a reference to CCTV), that 20 cases were prepared for criminal prosecution in 2020 (albeit "it was decided to reject the initiation of criminal prosecution" in accordance with the relevant article of the criminal code), that prison staff are constantly present during outdoor exercise, and that there is a system for investigating prisoner complaints.

23. It was also said in relation to Armavir prison that significant building works had been undertaken, including the reconstruction and decoration of 48 cells for 192 detainees (each cell houses four prisoners) in what was described as "the 2nd precinct of the institution". We accept the submission of Mr Adam Payter for the Respondent that this is a reference to the whole of "Wing 2", and that there are in all six wings, blocks or precincts at Armavir prison.

24. Additionally, the Respondent expressly guaranteed that the Appellant would be detained at all times at Armavir "and won't be transferred to another penitentiary unless there are exceptional reasons provided by law".

25. The third document (Further Information No. 5), which on this aspect included a letter from the Head of Penitentiary Service of the Ministry of Justice dated 19th January 2021, stated that the cells in Armavir prison are provided with ventilation and natural light. Read in the context of the Government of Armenia's response to the CPT report from 2015, referring as it did to *natural* ventilation, the third document added nothing. On the other hand, we consider that it was apt to mislead, and that a reader failing to conduct this cross-referencing exercise would be forgiven for thinking that what was being contended for was some form of ventilation system.

*The Judge's Ruling*

26. The Judge conducted a thorough, and in our view accurate, review of the well-known jurisprudence relevant to prison conditions and Article 3.

27. The Judge also carried out a comprehensive review of the open source material which had been identified for him by Mr Gasparyan. We have already set out most of the essential points, but we add the following. First, the "Velvet Revolution" in Armenia in 2018 led to an amnesty and a substantial reduction in the prison population. Overcrowding is no longer a systemic problem and prisoners have at least 4m² of personal space. Secondly, although there was a theoretical possibility that the Appellant would be detained at Noubarashen prison, there was in excess of a 90% chance (as Mr Gasparyan put it in oral evidence) that he would be held at Armavir prison. Although the remand block was overcrowded, the main prison was not. Even in the remand block, each prisoner had at least 4m² of personal space.

28. It may be seen that both in relation to detention at Armavir rather than anywhere else and the lack of overcrowding in the main prison, the Judge – having ruled that Mr Gasparyan's evidence was inadmissible save as to open source material – then relied on it.

29. The Judge concluded that the Article 3 threshold had not been met in relation to Armavir prison. His reasons for so concluding were as follows.

30. First, there is no pilot judgment against Armenia and no evidence to indicate that there was a systemic failure in the Armenian prison estate that would provide substantial grounds for the conclusion that there was a real risk of an Article 3 violation.

31. Secondly, there have been substantial improvements in the prison estate following the "Velvet Revolution". In particular, the Judge was satisfied that things had changed significantly since 2018 and that the reports relied on by the Appellant did not reflect the current position. The Judge did accept that the 2016 CPT report demonstrated that, in 2015 at least, prisons represented a "high risk situation of inter-prisoner intimidation".

32. Thirdly, neither the CPT nor the PMG reports provided any quantitative evidence as to the level of inter-prisoner violence. Furthermore, in the light of the information given on 5th March 2021, the Judge was satisfied that appropriate preventative measures were in place.

33. Fourthly, the Judge was satisfied on the basis of the letter dated 19th January 2021 that prisoners at Armavir prison are provided with ventilation. Again, having rejected Mr Gasparyan's oral evidence as inadmissible, the Judge then deployed it as confirmation that funds had been allocated to improve the ventilation system. The Judge may have interpreted the letter dated 19th January as suggesting that there was such a system already in situ. Our reading of Mr Gasparyan's evidence was that there was no such system at all.

34. Fifthly, and overall:

> "119. There is no basis to doubt the up to date information provided by 3 separate Government ministers is not accurate, honest and reliable.
>
> 120. I am satisfied that things have changed significantly since the Velvet Revolution and that the reports relied on [by] the Defendant do not reflect the current position.
>
> 121. The Defendant has not provided objective, reliable, specific and updated evidence to establish that there is a real risk of his Article 3 rights being breached if he is extradited. Although the Government has provided specific assurances it is not necessary to consider them as the presumption remains in place."

35. We make two brief observations at this juncture. First, it may be inferred from para 120, read in conjunction with paras 115-6, that had it not been for the changes since 2018 the Judge would likely have concluded that the Article 3 threshold had been met

in the context of inter-prisoner violence. Secondly, the reference to "specific assurances" in the final sentence of para 121 above must be to the express guarantees given within the documents we have referred to, rather than to all the information they contain. The Judge did expressly consider what he called the up-to-date information from the Government of Armenia and described this as "accurate, honest and reliable". As we have said, it was on that footing that he felt able to conclude that things had improved since 2018. It was also on that premise that the Judge did not believe it was necessary to go on to consider the status of the additional guarantees that had been given.

THE GROUNDS OF APPEAL

36. The Appellant's Grounds of Appeal dated 26th August 2021 assail the Judge's decision on the basis of the material that was before him and also seek to rely on fresh evidence.

37. In the first instance we will focus on the Appellant's challenge to the Judge's decision on its own terms.

38. First, it is contended that the Judge ought not to have concluded that incarceration in Noubarashen prison was only a theoretical possibility. There was a real risk that the Appellant might be imprisoned there, and it was common ground that conditions at Noubarashen prison were significantly worse than at Armavir. Further, even if the Appellant would not go to this particularly notorious prison, and we note that the Armenians are planning to close it by the end of 2022, conditions elsewhere were also poor.

39. Secondly, it is argued that the Judge was wrong to conclude that there had been a substantial improvement in prison conditions since 2018. In relation to the issue of inter-prisoner violence, that conclusion was based on a combination of impermissible speculation and assurances which were too generic and stereotypical to provide proper grounds for the conclusion that adequate preventative measures were in place.

40. Thirdly, it is said that the Judge failed to address the lack of adequate ventilation at Armavir prison. There was no ventilation system and natural ventilation is not likely to be efficacious in high summer heat.

41. Additionally, the Appellant contends that post-decision evidence in the form of a 2021 report of the CPT "demolishes the Judge's conclusions".

EVIDENCE, INFORMATION AND ASSURANCES POST-DATING THE JUDGE'S DECISION

42. It is necessary to summarise these in chronological order. No objection is taken to the admissibility of the CPT report of 2021 and the Government of Armenia's response. However, the Appellant contends that parts of later information and assurances from the Government of Armenia are inadmissible. At this stage, therefore, this later material will be considered *de bene esse*.

*The CPT report of 2021*

43. On 26th May 2021, that is to say the day before the Judge handed down his decision in this case, a further CPT report was published together with the Government of Armenia's response. The 2021 CPT report followed an inspection of a number of penal establishments, including Armavir and Noubarashen, in December 2019. The CPT presented its preliminary observations to the Government of Armenia on 20th December 2019 and the latter responded on 20th February 2020. The report of the visit to Armenia was then adopted by the CPT at its 102nd meeting, held from 29th June to 3rd July 2020, and was transmitted to the Government of Armenia on 24th July. The latter formally responded on 16th April 2021 and the 2021 CPT report was published on 26th May.

44. The Executive Summary of the 2021 CPT report stated:

> "By contrast [to the lack of evidence of physical ill-treatment by staff], inter-prisoner violence, intimidation and extortion remained a problem in most of the establishments visited and it was clearly related to the persistent influence of the informal prisoner hierarchy. The Committee calls upon the Armenian authorities to step up their efforts to combat inter-prisoner violence and intimidation. Resolute steps must be taken to put an end to the existence of the informal prisoner hierarchy."

45. In the main body of the 2021 CPT report, it was stated that inter-prisoner violence remained a problem at most of the establishments visited, in particular Armavir and Sevan prisons. This phenomenon was acknowledged by the directors of these prisons and was "partially confirmed" by medical evidence "as well as the injuries directly observed by the delegation's forensic specialists".

46. Further:

> "Some of the senior staff in the establishments visited expressed the view (also confirmed by the delegation's own observations) that inter-prisoner violence was clearly related to the persistent influence of the informal prisoner hierarchy. The aforementioned phenomenon was also demonstrated by the continuing - despite assurances given to the delegation by senior officials from the Ministry of Justice and the penitentiary service at the outset of the visit - existence of strikingly better (sometimes even bordering on the "luxurious") prisoner accommodation in some of the establishments (e.g. at Armavir and Sevan prisons …) and the presence of large amounts of prohibited items ...
>
> …
>
> As already stressed by the CPT in the past, it is essential and urgent that the prison administration and prison Directors strive to prevent situations in which certain prisoners exploit their wealth and influence within the informal prison hierarchy, and thus undermine the management's efforts to keep firm control of the establishments.

> **The Committee calls upon the Armenian authorities to step up efforts to combat inter-prisoner violence and intimidation. Prison staff must be especially alert to signs of trouble, pay particular attention to the treatment of vulnerable inmates by other prisoners, and be both resolved and properly trained to intervene where necessary. Resolute steps must be taken to put an end to the existence of the informal prisoner hierarchy.**
>
> It is evident that the Armenian authorities will not manage to succeed in their struggle against inter-prisoner violence (and the power of informal prisoner hierarchy) without making a major investment in prison staff - not only as regards the staff complements and staff presence inside prison accommodation areas, but also in terms of staff salaries (so as to eliminate the temptation of corruption) and staff training. …" [emphasis as in original]

47. In addition, criticisms were made of the staffing levels at various establishments, in particular at Armavir prison. This institution had a total capacity of 1,200, and at the time of the visit there were 734 male prisoners, including 375 remand prisoners. These statistics represented a major decrease in the prison population since the 2015 visit, being a consequence of the amnesty following the "Velvet Revolution". However, there remained little, if any, purposeful out of cell activity and prisoners were locked up for 21-23 hours.

48. The 2021 CPT report noted an increase in prison staff, but numbers of custodial staff working in prisoner accommodation areas continued to be generally low, with Armavir one of the worst. According to footnote 125, this prison had 21 custodial staff per shift, sometimes with one "controller" supervising a wing of approximately 160 inmates. In all, there were 152 custodial staff members with 28 vacancies. The criticised practice of 24-hour shifts continued from the previous visit. The CPT called upon the Armenian authorities to continue their efforts to increase custodial staffing levels and presence in the accommodation areas.

49. The CPT report 2021 also noted that the Government of Armenia was drafting legislation which would criminalise the existence of these hierarchies.

50. As for the physical conditions at Armavir prison, the CPT report 2021 was concerned at the "increasing deterioration of material conditions", in particular in the admission or quarantine wing where conditions were "unacceptable". The "Kartzer" or segregation cells were extremely dilapidated and required urgent refurbishment. Moreover:

> "… despite the earlier assurances by the Armenian authorities, the problem of the lack of any effective ventilation system had not been solved and some parts of the prison (especially wings 1 and 2) were extremely filthy and infested with vermin."

51. A positive development since the last visit was that foreign prisoners (as well as Armenian nationals whose families lived abroad or otherwise far away) could use Voice over Internet Protocol (VoIP) free of charge to get in touch with their relatives.

*The Government of Armenia's Response*

52. The Government of Armenia's response to the CPT report 2021 noted that on 22nd February 2020 laws criminalising the existence of criminal hierarchies, and "founding or leading a group bearing criminal subculture", were drafted. It appears from later evidence that these laws came into force on 5th May 2021. A "comprehensive action plan" was drafted outlining "the preliminary action plan for fight against criminal subculture". The authors of the response remarked that "interesting developments" have taken place in prisons, in particular:

> "the so-called 'thieves in law' and 'prison bosses' have abandoned their overt propaganda of traditions of the criminal subculture among a special contingent, maintain *prima facie* neutrality, spread the word among convicts and detained persons that they need not address them for criminal clarifications and for normalisation of interpersonal relations, as they are in the centre of attention of the law enforcement bodies and cannot interfere as before. The so-called 'alpha dogs' also maintain neutrality … many so-called 'alpha dogs' have openly given up that status …"

Mr Hall comments that it seems implausible that these dramatic changes should have occurred in response to the mere drafting of a law which, as at the date of the Government of Armenia's response, had not as yet come into force.

53. The Government of Armenia's response detailed the works of reconstruction and refurbishment carried out at Armavir prison in 2020. We have already identified some of these but do not overlook the further works listed under para 35 of Mr Payter's skeleton argument. A request had been submitted for funding a heating, ventilation and air-conditioning system. As at the date of the response, it does not appear that any works had been carried out to the admission or quarantine wing, or to the "Kartzer" cells.

*Further Information 7 dated 29th September 2021*

54. This information was provided by the First Deputy Minister of Justice of the Republic of Armenia to the Respondent, for onward transmission to the competent authorities in the United Kingdom.

55. By way of summary:

(1) Save in exceptional circumstances (e.g. illness, reasons of personal security, and "the reorganisation or liquidation" of the prison), the Appellant would remain in Armavir prison and in any event would not be sent to Noubarashen.

(2) Various measures were being taken to eliminate the criminal subculture, including the establishment of "an operative control centre" which would provide online

supervision, as well as amongst other things additional exercise periods and reduced quarantine periods.

(3) 22 employees are involved in each shift at Armavir (i.e. an increase of one staff member).

(4) Detainees are held in the admission or quarantine wing for up to seven days. Part of the purpose of this exercise is to identify at-risk groups.

(5) In the first nine months of 2021, various works were carried out at Armavir including the repair and redecoration of quarantine accommodation "number 4" (subsequently, the Respondent made it clear that this means four quarantine cells), the renovation of 12 bathrooms, and additional steps "towards doing research as well as ensuring the funding" for the combined central heating and ventilation system. Funding for this system would be secured in 2022 and the works would then start.

(6) Each cell houses four inmates and "the [Appellant] will be kept in a cell that meets all the requirements of the law".

(7) Security Division staff "will take all measures determined by all legal acts regulating the penitentiary section to ensure [the Appellant's] safety … in particular … his criminal inclination will be a subject of examination, so as to make it possible to place him in an appropriate cell".

56. On 7th September 2021 the Respondent was invited by the CPS to provide "an updated diplomatic assurance" in relation to four specific matters, including that the requested person be housed within one of the 48 recently refurbished cells and that all reasonable measures be taken to protect him from violence perpetrated by other prisoners. In his letter of 29th September the First Deputy Minister of Justice stated that the conditions of detention at Armavir were the same for each detainee, and that all the measures required "by all legal acts" would be taken to ensure the Appellant's safety. Our interpretation of these statements is that the First Deputy Minister was not prepared to go further than what the "relevant legal normative acts" governing Armenian prisons already required.

*Further Information 8 dated 12th October 2021*

57. This information was provided by the Respondent to the competent authorities of the United Kingdom.

58. Pending the installation of the air conditioning system, the Appellant would be permitted a portable air conditioning unit in his cell provided that no more than 5 kW/hour of electricity was used. In oral argument Mr Hall made the valid point that the Respondent was not undertaking to provide any portable air conditioning unit, and that the Appellant would have to make the necessary arrangements himself. However, given the up-to-date position we do not consider that anything turns on this aspect.

*Further Information 10 dated 23rd May 2022*

59. This has been transmitted via a letter from the CPS to the Appellant's solicitors after seeking an update from Armenia.

60. In short, "the ventilation and air conditioning system will be installed in the nearest future, to ensure proper conditions for detention in seasons with hot temperature as well". The communication from the "Penitentiary Service", apparently dated 23rd May 2022, stated that the construction work will be carried out under a contract made between that entity and "Grigoryan Shin LLC", and was due to be completed on 25th December 2022.

*Further Information 11 dated 2nd December 2022*

61. This information was provided by the Respondent to the competent authorities of the United Kingdom in answer to a series of questions posed by the CPS on 2 November. In the main, these questions sought an update on various topics, but question (g) asked the Armenian authorities, not for the first time, to specify the particular measures that would be taken to safeguard the Appellant from the risk of inter-prisoner violence.

62. Further Information No. 11 was provided to the Appellant's solicitors on 5th December, that is to say just over two weeks before the hearing of the appeal.

63. By way of summary:

(1) As at 31st October 2022, there were something in excess of 800 inmates at Armavir prison – the precise figure is difficult to work out from the table provided, but was still well under total capacity.

(2) In 2021 there had been 14 incidents of inter-prisoner violence at Armavir prison with no details given.

(3) Between 8th January and 2nd December 2022, there had been 17 recorded incidents of inter-prisoner violence at Armavir prison with full details given. In several instances, however, "initiation of a criminal case was refused on the ground of lack of elements of crime" although in two cases a criminal investigation was set in train. In order to prevent incidents of inter-prisoner violence, "in-depth" studies are carried out at the preliminary mental status examinations.

(4) 404 cameras are installed throughout the prison and three officers conduct surveillance 24/7.

(5) Out of the total staff complement of 368, there were 42 vacancies as at 10th November 2022. In relation to the "Security Support Division" there were 172 staff positions and 19 vacancies. Each guard duty comprises 37 officers in all. This appears to be a significant increase over since September 2021, assuming a comparison of like with like.

(6) The ventilation, heating and air conditioning system would be completed on 20th December.

(7) In 2022, various works of renovation and improvement were undertaken, although no details were given.

(8) Under Article 31 of the Law "[o]n custody of arrested and detained persons", foreign persons would be held separately.

64. The Respondent had been asked by the CPS to provide examples of the exceptional circumstances in which prisoners might be transferred from one prison to another. In our view the information furnished does no more than restate what had been previously explained.

THE DECISION OF DEPUTY CHIEF MAGISTRATE IKRAM IN *ARMENIA v ROCA*

65. On 24th March 2022 Deputy Chief Magistrate Tanweer Ikram handed down his judgment in the case of *Government of Armenia v Roca*. He discharged the extradition request on *inter alia* Article 3 grounds. Judge Ikram took into account the terms of the 2021 CPT report and heard evidence from three witnesses: (1) Mr Harmik Petrosyan, an Armenian lawyer, (2) Dr Marzena Ksel, the head of the CPT delegation that undertook the prison visits in 2019, and (3) Mr Ara Ghazaryab, a legal expert and national consultant of the Council of Europe.

66. Dr Ksel's written evidence was that the major failures described in the CPT reports had not changed. She had conducted a further visit to Armavir prison in September 2021. The problems with ventilation remained, and Dr Ksel observed for herself that it was over 30 degrees within cells and hard to breathe. As for the hierarchy:

> "… save [for] the absence of physical signs on cell doors [previously, the 'thieves in law' had eight-pointed stars on their doors], 'nothing had changed'. She had interviewed people and the prison population was organised according to power and the informal hierarchies were still there will LGBT prisoners at the bottom. A rules system controlled by strong prisoners and the use of intimidation … she did, however, say, she did not observe risk of increased violence whereas, previously, they were subjected to violence if they did not follow 'the rules' of the hierarchy although she had only spoken to three prisoners."

67. Dr Ksel agreed in cross-examination that things were on an "upward trajectory" with gradually improving conditions in some respects "but .. some CPT recommendations had not been implemented". She adhered to her evidence that informal hierarchies remained a constant problem. Furthermore:

> "The director of the prison she spoke to stated that there was violence on a daily basis. She was not presented with any arguments on what they had done to stop it. That is why she thought it was still an issue.
>
> There had been no change on prisoner staff ratio since 2019. On her September 2019 visit [we think that this must be a reference to the September 2021 visit] she had spoken to a foreign prisoner and a LGBT prisoner and 10 prison staff. Water was being cut

> off to cells was an issue during the daytime. The place where they place foreign prisoners, the cells were in poor condition."

This last sentence was not further explored. It is not clear, for example, whether foreign prisoners are physically segregated from the others.

68. Mr Ghazaryab's evidence was that the improvements at Armavir prison were "cosmetic" and that Mr Roca would be at constant danger throughout his sentence owing to his sexuality. It was an important feature of Mr Roca's case that as an LGBT prisoner he would find himself at the lowest level in the informal hierarchy within Armavir prison.

69. By letter dated 21st May 2021the Ministry of Justice advanced a detailed rebuttal of Mr Roca's evidence.

70. Judge's Ikram's conclusion was that Mr Roca's witnesses "had a very high level of direct experience within the prison system" and that much of the Government of Armenia's response was aspirational. His conclusion was that Mr Roca faced a real risk of being subjected to inhumane and degrading treatment. This was based on a combination of the discriminatory treatment of LGBT inmates and physical conditions within Armavir prison.

71. Mr Payter submitted in writing that the expert evidence given in *Roca* is inadmissible before us, although he modified that submission slightly in oral argument. He relied on the decision of this Court (Simon LJ and Flaux J, as he then was) in *Jankowski v District Court, Wroclaw* [2016] EWHC 3792 (Admin) where an attempt was made by the Respondent to adduce evidence from another case to rectify an ambiguity in an EAW. Simon LJ giving the judgment of the Court ruled such evidence to be inadmissible:

> "22. While I can see why the district judge relied on the evidence given in Grabowski to fill in the gaps in the EAW in this case, I am quite clear that it was impermissible to do so. As the district judge observed, the matter could have been made clear by a simple statement from the Judicial Authority as to the meaning of the figures in the EAW. In my view, the matter not only could have been made clear by evidence, it should have been made clear by evidence from the Judicial Authority. The Judicial Authority was given the opportunity to clarify the significance of the figures in the EAW and failed to do so.
>
> 23. In the absence of such clarifying evidence, I do not accept that findings of fact in one case can legitimately be read across to another case as was done here. On the contrary, there is high judicial authority that the circumstance that a fact has been proved in one case does not enable the court to take judicial notice of it in another case; see Phipson on Evidence 18th Edition 3-20 and the speech of Lord Wright, with which all other members of the House of Lords agreed, in Lazard Brothers & Co v Midland Bank [1933] AC 289 at 297-298. The strictness of this rule is reflected in the criminal context in Archbold 2016 edition at 10-61.

> 24. This is not a case in which evidence was unnecessary; on the contrary, evidence was necessary and could not be found by referring to another case or cases where the facts had been proved. To this extent, I disagree with the approach of Sir Stephen Silber in Jaroszynski v Polish Judicial Authority [2015] EWHC 335 (Admin) at paragraph 33."

We would add that *Jaroszynski* was a case whose facts were very similar to *Jankowski*.

72. We have no doubt that *Jankowski* was correctly decided on its particular facts. The question was whether the EAW disclosed an extradition offence. On its face, the EAW possessed a lacuna in relation to blood alcohol levels, and this Court held that the gap could not properly be filled by referring to technical evidence called in another case. In such a situation, the strict rules of evidence applicable to criminal proceedings are pertinent.

73. But the present case raises an issue under the ECHR, and in that regard it is established practice in extradition cases that the courts will allow a relaxation of the ordinary rules of evidence. A broad approach is taken to the nature and basis of the expert evidence that may be admitted: see *R (B) v Westminster Magistrates' Court* [2014] UKSC 59; [2015] AC 1195, per Lord Mance JSC at paras 6, 21 and 23, and Lord Hughes JSC at para 70. See also *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14; [2021] 1 WLR 2569, per Lord Lloyd-Jones JSC at para 43.

74. In the present situation, where Judge Ikram received evidence from highly authoritative witnesses in relation to the identical prison and very similar issues, we are not required to impose an exclusionary rule of evidence effectively compelling us to ignore both the evidence and the judicial findings based upon it. Indeed, it would be odd if we should not be taking into account to this Appellant's advantage the fact that Judge Ikram's assessment of the three witnesses he saw and heard was favourable. That judicial evaluation, given the expertise and experience of Dr Ksel in particular, may not have been altogether surprising. We recognise, of course, that matters may have moved on in certain respects since the date of *Roca* and that his personal circumstances were in any event different from those of the Appellant. These are factors which go to weight and not to admissibility.

ADMISSIBILITY OF FURTHER INFORMATION 7, 8, 10 AND 11

75. Mr Hall for the Appellant submitted that parts at least of all four sets of further information are inadmissible in this appeal, although he naturally placed greater emphasis on Further Information No. 11 which was provided to the Appellant so recently, following a conference between the CPS and the Respondent on 25th November to discuss the 2021 CPT report "specifically in relation to the works on Armavir prison and the efforts to address concerns of inter-prison violence". Mr Hall reminded us of the chronology, in particular that the Respondent was aware of the 2021 CPT report as long ago as 24th July 2020 and it was served in these proceedings in May 2021. It is submitted that no explanation has been given for the lateness of this further information and that the Appellant is now irremediably prejudiced because he has not been able to obtain expert evidence in rebuttal.

76. Mr Payter submitted that the further information amounts to no more than a series of updates in the context of an ongoing response by the Armenian authorities to the criticisms made in the 2021 CPT report. Furthermore, although Further Information No. 11 comes late in the day, the Appellant has not been prejudiced because in reality he is in no position to obtain expert evidence to rebut or contradict it.

77. We have already adverted to the distinction between further information and evidence on the one hand, and assurances on the other, although the line of demarcation between the two may not always be that bright. As this Court (Lord Burnett CJ and Holroyde LJ) explained in *Government of the United States of America v Assange* [2021] EWHC 3313 (Admin); [2022] 4 WLR 11, at para 39, an assurance is in the nature of being a statement about the intentions of a requesting state as to its future conduct. In *Marinescu v Romania* [2022] EWHC 2317 (Admin), this Court (Holroyde LJ and Saini J) characterised an assurance as being in the nature of a "solemn promise, binding as between the states concerned". In our experience, such promises are typically, but by no means always, given when those advising the requesting state assess that the Court might otherwise refuse extradition. Moreover, on our reading of *Assange*, the Court always has a discretion to refuse to admit late assurances but will bear in mind the particular context, namely that extradition proceedings are "a process through which solemn treaty obligations are satisfied in the context of a framework which ensures that a request person is provided with proper safeguards" (see para 45, read in conjunction with para 43).

78. In *Greece v Hysa* [2022] EWHC 2050 (Admin), this Court (Popplewell LJ and Cavanagh J) emphasised that the reasons why assurances have been offered at a late stage must be examined, as well as the practicability or otherwise of the requesting state having put them forward earlier. It was also necessary to consider whether the latter had delayed the offer of assurances for tactical reasons or has acted in bad faith. If the requested assurance has not been provided within a reasonable time, or was supplied outside any time limit that had been laid down, that may be a reason for refusing to admit it on appeal.

79. Mr Hall also drew to our attention to various dicta in the cases of *DPP v Petrie* [2015] EWHC 48 (Admin), *Antonov and Baranauskas v Lithuania* [2015] EWHC 1243 (Admin), *M and B v Italy* [2018] EWHC 1808 (Admin) and *India v Dhir and Raijada* [2020] EWHC 200 (Admin). Save in the last of these cases, we think that the dicta he relied on were all taken out of context. In *Dhir*, this Court (Dingemans J and Spencer J) did not intervene on appeal in circumstances where the District Judge excluded reliance on an assurance given by the requesting state at the very last moment. In observing that the requesting state "should have sought directions providing a timetable for the service of an assurance for the service of an assurance, and served an assurance in accordance with that timetable", we have no doubt that this Court was not intending to outline the preconditions for admissibility in all cases.

80. In our judgment, the statements by the Government of Armenia that the Appellant would be held in Armavir prison subject to exceptional circumstances, would in no circumstances be transferred to Noubarashen prison, and that pending the installation of the ventilation system could have a portable air conditioning unit in this cell are in the nature of being assurances. These statements do not appear for the first time in Further Information No. 11 and applying the principles we have outlined there is no

reason why we should not admit them, not least because the Appellant has had sufficient time in which to adduce a contrary evidential case.

81. The remainder of what is set out in the various sets of Further Information seems to us to be in the nature of evidence. It follows that the whole of Further Information No. 11 contains evidence or information, and not assurances. The relevant principles in relation to respondent evidence of this type have been set forth by this Court (Hickinbottom LJ and Green J, as he then was) in *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin), at paras 38-51. These principles may be summarised as follows:

(1) Neither the approach in *Ladd v Marshall* or *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin) applies, although "availability" of evidence at first instance is still a relevant factor.

(2) There is no restriction on the inherent jurisdiction of this Court on an appeal to admit further evidence from a respondent to an extradition appeal, although in having regard to the overall interests of justice we should bear in mind the probability that the discharge of a warrant on the basis of some defect would likely lead to its reissue (with the defect now addressed), that an appellant should be given the opportunity to address the further evidence, if he can, and that questions of prejudice will always be relevant.

(3) The Court should also bear in mind its ability to seek further information from the requesting state at any stage.

(4) "where the new evidence sought to be admitted merely confirms a factual finding made by the district judge, or clarifies an issue of fact or law that might otherwise be ambiguous or unclear, it may be straightforward to persuade the court that it is in the interests of justice to admit it." (para 40).

82. It may well be that the principles governing the admission of post-decision respondent evidence do not differ materially from those governing the admission of assurances. If anything, it seems to us that the Court should adopt a more stringent approach to late evidence than to late assurances; but on any view it should not adopt a more relaxed approach.

83. In our judgment, there is no proper basis for excluding any part of Further Information Nos. 7, 8 and 10. These are all responsive to the 2021 CPT report. The Appellant has had sufficient time to deal with what they contain, for example by calling evidence from Dr Ksel if so advised. There is no unfairness to him in our receiving this evidence. What weight we give to it raises a rather different issue.

84. Further Information No. 11 is more problematic. It certainly came very late and no proper explanation has been given for the delay. The conference between the CPS and the Armenian authorities could and should have been arranged much earlier than late November 2022. It has not been possible for the Appellant to obtain any evidence in rebuttal.

85. These considerations lead us to conclude that we must exclude Further Information No. 11 to the extent that it refers to foreign nationals being held separately. Potentially, this

is an important point, but there is absolutely no reason why the Respondent could not have raised it before. Mr Gasparyan had mentioned Article 31 of the relevant Code in his report, but the parties made nothing of this before the District Judge. Dr Ksel too had referred to "the place where they place foreign prisoners" but here again the ramifications of her evidence were not addressed. Article 31 of the Code could amount to a significant point in the Respondent's favour, but further investigation might demonstrate that to be incorrect. Overall, we consider that it would not be in the interests of justice to admit this evidence; and, given the lengthy history to this case, it would be wrong for the matter to be adjourned for the position to be clarified. The Appellant has already been in custody for nearly 30 months and the Respondent has had every opportunity to get its tackle in order. The instant case has a number of features in common with *Mohammed (No. 2) v Portugal* [2018] EWHC 225 (Admin) which was drawn to our attention by Mr Hall. Ultimately, however, cases raising this sort of issue turn on their own particular facts.

86. We take a different view in relation to staffing levels, the incidents of inter-prisoner violence in 2021 and 2022, and the installation of the heating and ventilation system. The situation in relation to the latter has been ongoing, and it is clearly desirable for us to be given an update following the securing of funding, the awarding of the contract, and the progression of the works. The same observation may be made in respect of current staffing levels and vacancies within the prison. We have no reason to doubt the truth of what the Respondent has said, although we bear in mind that the relevant sections of Further Information No. 11 are open to interpretation. As for the reported incidents of inter-prisoner violence, we have greater concerns which we will be setting out. However, those concerns are not such as to lead us to refuse to admit this late evidence.

87. There is also force in the Respondent's submission that the Appellant has not been prejudiced. We do not think that earlier provision of this information would have prompted the Appellant to obtain any useful evidence of his own on the matters we have identified.

GOVERNING LEGAL PRINCIPLES

88. It is unnecessary for us to restate all the principles of general application to alleged Article 3 violations in a prison context. The Judge has set these out accurately and fairly. We merely highlight a limited number of matters.

89. First, Article 3 of the Convention provides that "no one shall be subjected to torture of inhuman or degrading treatment or punishment". The prohibition in Article 3 is absolute. Lord Bingham of Cornhill set out the test to be applied at paragraph 24 of *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323:

> "it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment…"

90. Secondly, Article 3 of the ECHR bars extradition where there is a "real risk" of detention in inhuman or degrading prison conditions: see *Soering v UK* 1989 11 EHRR 439. As regards the test for a "real risk", "the burden of proof is less than proof 'on the

balance of probabilities', but the risk must be more than fanciful.": see *Badre v Court of Florence* [2014] EWHC 614 (Admin) at para 40.

91. Thirdly, there is no pilot judgment of the ECtHR against the Government of Armenia. It follows that, at least as the starting point, it benefits from the presumption that it will comply with the Convention, and "objective, reliable, specific and properly updated" information is required before that may be rebutted: see the decision of the CJEU in *The Case of Aranyosi* [2016] QB 921, more fully considered in *Yilmaz v Government of Turkey* [2019] EWHC 272 (Admin), at paras 13-19.

92. Fourthly, the most recent authority on Article 3 and prison conditions is the decision of Chamberlain J in *Rae v United States of America* [2022] EWHC 3095 (Admin). We think that paras 64 and 86 contain helpful encapsulations of the legal principles:

> "64. Thus, the position can be summarised as follows:
>
> (a) The prohibition of Article 3 ill-treatment is absolute. There is no distinction to be drawn between the minimum level of severity required to meet the Article 3 threshold in the domestic context and the minimum level required in the extra-territorial context. The extradition of a person by a contracting state will raise problems under Article 3 where there are serious grounds to believe that he would run a real risk of being subject to treatment contrary to Article 3 in the requesting state: see, most recently, *Sanchez-Sanchez*, at [99]. "Serious grounds" in this context means "strong grounds": *Ullah,* [24].
>
> (b) Article 3 is not "relativist" in the sense suggested by Lord Hoffmann in *Wellington*. In an individual case, the question whether treatment in the requesting state will reach the Article 3 level of severity does not admit of a balancing exercise between the treatment on the one hand and the seriousness of the offence for which extradition is sought or the importance of the public interests in favour of extradition: *Harkins & Edwards*, [124]-[128]; *Ahmad*, [172]-[175]; *Sanchez-Sanchez,* [99].
>
> (c) However, the question whether treatment reaches the minimum level of severity required to engage Article 3 is intensely fact-sensitive and contextual. In a domestic case, the court is looking backwards at a concrete factual situation. In an extra-territorial case, the court is looking forward and attempting to gauge whether there is a real risk of Article 3 ill-treatment. Given the highly contextual nature of the assessment required, this may make it more difficult to establish a real risk of a breach: *Harkins & Edwards*, [130]; *Ahmad*, [178].
>
> (d) This is particularly so where the requesting state is one with a long history of respect of democracy, human rights and the rule of law, such as the USA: *Harkins & Edwards*, [131]; *Ahmad*, [179].

> …
>
> 86. The question whether treatment reaches the high level of severity necessary to engage Article 3 depends on a holistic assessment of the conditions of detention. As to personal space, unusually, *Muršić* creates a bright line rule giving rise to a strong presumption of breach. As to other conditions of detention, it will be rare that one element taken on its own will be sufficient to trigger the application of Article 3 in the domestic context and, *a fortiori,* in an extradition case: see para. 64(c) and (d) above."

93. Fifthly, it is apparent that matters have moved on considerably since the date of the Judge's decision. We have referred to the 2021 CPT report, which the Appellant suggests represents a paradigm shift (as assessed against the Judge's sanguine evaluation) and on any view alters the evidential picture, and to the Respondent's subsequent responses. In these circumstances, it is appropriate to adopt the approach taken by this Court (Stuart-Smith LJ and Jay J) in *Modi v Government of India* [2022] EWHC 2829 (Admin), at paras 102-104, which is to concentrate more on the up-to-date position rather than on whether the Judge's decision is legally flawed and the further evidence is "decisive". The justice of this approach is readily apparent in a case where both parties are seeking to rely on post-decision evidence which we have ruled to be admissible.

94. Seventhly, a failure to protect a prisoner from violence may give rise to a real risk of inhuman or degrading treatment: see *Jane v Lithuania* [2018] EWHC 1122 (Admin), at para 16. The test when from the risk emanates from non-state actors (such as other prisoners) is whether the state is unable or unwilling to act to provide "reasonable protection" to the requested person: see *R (Bagdanavicius) v SSHD* [2005] UKHL 38; [2005] 2 AC 668. It is incumbent on the requested person to establish not merely that he faces a real risk of suffering serious harm from non-state agents but that the receiving country does not provide for those within its territory a reasonable level of protection. The burden of proof does not therefore shift to the requesting state once a real risk of harm is demonstrated.

95. The incidence of the burden of proof reflects the fundamental principle that co-signatories of the ECHR may be presumed to discharge their obligations under that international instrument.

96. An example of a case where the presumption was rebutted is *Tabuncic and another v Government of Moldova* [2021] EWHC 1269 (Admin), where there was compelling evidence before this Court (Stuart-Smith LJ and Holgate J) in the form of a CPT report that the Moldovan authorities were unable to ensure a safe and secure environment for prisoners. This state of affairs resulted from a chronic shortage of custodial staff, the sort of informal hierarchies which appear to be replicated in the instant case, and the absence of a proper risk and needs assessment on admission. The assurances given by the Moldovan authorities were also considered to be unreliable because they failed to identify how the risk of inter-prison violence will be obviated in the first place (see para 42).

97. Eighthly, in evaluating evidence, information and assurances from the requesting state (and for these purposes it does not matter whether the taxonomy is of "assurances" in the strict sense, or of evidence in answer, for example, to a CPT report), regard must be had to the substance rather than the form. Assurances have been rejected in the past as vague, general or stereotypical (see, for example, *Bivolaru and Modovan v France* (App Nos 40324/16 and 12636/17)), which was a case with evidence of systemic Article 3 non-compliant prison conditions), but as this Court (Holroyde LJ and Jay J) explained in *Popoviciu v Romania* [2021] EWHC 1584 (Admin), at para 174:

> "In those circumstances, the decision in *Bivolaru and Moldovan* cannot affect my decision in respect of this ground of appeal, which I would dismiss. It is therefore unnecessary to consider whether *Moldovan* should prevail over the decisions of the Grand Chamber of the CJEU. That issue must await resolution if and when necessary in another case. I would however observe that in my view, the caution against "stereotypical assurances" should be regarded as an exhortation to focus on substance rather than form, and should not be taken as meaning that any use of a form of words which has also been used in another case must necessarily be regarded as inadequate to satisfy a court that art.3 obligations will be observed. There are, after all, only so many ways in which one can express an assurance that a particular prisoner will be guaranteed at least 3m² of personal space wherever he is detained."

98. Finally, in *Bartulis v Lithuania* [2019] EWHC 3504 (Admin), this Court (Irwin J and Supperstone J) wrote, at para 133:

> "We accept the broad points made by the Respondents as to the nature of the CPT system of inspection and response. We do not conclude that a Member State has an obligation to disclose a CPT report, or the state's response, in advance of the point when it would otherwise become available. To impose such an obligation would be likely to frustrate the CPT process. *However, the duty of candour must also mean that evidence or assertions should not be advanced which are inconsistent with the factual position known to the requesting state. That basic component of the duty of candour must arise in relation, for example, to concerns raised by a CPT inspection, not yet published as a report, which are either accepted or cannot be contradicted by the requesting state*. As often in such matters, there will frequently be room for argument as to what can and cannot properly be said. But in our view the principle is clear: a requesting state cannot in candour advance a position which the representatives of the state know to be false or misleading, on the basis of a CPT inspection or as yet unpublished report, or otherwise." [emphasis added]

## THE RIVAL CONTENTIONS

### *The Appellant's Submissions*

99. Mr Hall's first submission was that the Judge was wrong to conclude that the problem of inter-prisoner violence had been addressed by the 2018 amnesty and should not have placed reliance on the terms of the Ministry of Justice's letter dated 5th March 2021 in order to reach the conclusion that "watchers" were no longer necessary. He also erroneously concluded on the basis of the information he had been given that "prisoners at Armavir are provided with adequate ventilation".

100. Secondly, Mr Hall submitted that the "assurances" that were before the Judge were insufficient to meet the real risk of inhuman or degrading conditions. In relation to inter-prisoner violence, the information provided did "not provide grounds for assurance that the substantial and unacceptable risk of violence and intimidation would be obviated" (per Stuart-Smith LJ in *Tabuncic*) because they were purely reactive in nature and were couched in stereotypical and generic terms (per *Bivolaru and Moldovan*, at paras 124-126). Moreover, and this was a theme underlying many of Mr Hall's submissions, the Respondent has lacked candour and its evidence should be treated with considerable scepticism. The response to the 2016 CPT report was one of "complete denial", and the Respondent was aware of the stringent criticisms in the 2021 CPT report, including in particular the latter's condemnation of Armenia for failing to bring about real change, at the time of the hearing before the Judge.

101. Further, and in the context of transfer from Armavir in "exceptional circumstances", these were so broadly defined as to provide no assurance that the Appellant might not find himself elsewhere. It followed that the Judge should have assessed the conditions in all prisons in which the Appellant might be detained.

102. Mr Hall's third submission was that the 2021 CPT report demonstrated a real risk of inhuman and degrading treatment in Armenian prisons, including Armavir. The informal hierarchies remained; conditions had not materially improved; and in its response the Government of Armenia failed properly to engage with the report's conclusions. In this context, Mr Hall relied on the findings of the Deputy Chief Magistrate in *Roca*.

103. The highpoint of Mr Hall's fourth and fifth submissions was that the majority of the further information served by the Respondent was inadmissible. We have already ruled on that submission, but Mr Hall argued in the alternative that the further information was insufficient to safeguard against the Article 3 risk. Mr Hall focused primarily on the issue of inter-prisoner violence and contended that the information given was generic and aspirational. He also argued that the further information provided in relation to staffing levels was both unsatisfactory and unclear, and that it in any event did not provide the necessary degree of assurance.

### *The Respondent's Submissions*

104. Mr Payter introduced his submissions by pointing out that no issue is taken by the Appellant with the Judge's summary of the principles relevant to Article 3 and prison conditions. He emphasised that the evidential threshold for the Appellant is a high one, and submitted that the Judge was correct to conclude that it had not been surpassed.

105. Mr Payter addressed head-on our concern that the Respondent had lacked candour in connection with the 2021 CPT report. He submitted that the Respondent had been under no obligation to provide a copy of the report to the Appellant and the Judge before its publication, and that nothing that had been said by the Government of Armenia was inconsistent with its terms. Mr Payter focused on the issue of ventilation, and observed that it had never been said that Armavir prison had a ventilation system as opposed to natural ventilation. There had been no deliberate attempt to mislead.

106. Mr Payter also argued that the attitude of the Armenian authorities was not one of "complete denial", as Mr Hall had contended. In the context of inter-prisoner violence, they did not deny that there was a problem; instead, they were addressing it. Furthermore, the information given to the Judge was exactly the same as that set out in the Government's response to the 2021 CPT report.

107. Mr Payter submitted that *Roca* was distinguishable, having been decided on its own particular facts. It was highly significant in that case that the requested person would suffer discrimination as a bisexual man. Further, the assurances given by the Government of Armenia after Dr Ksel gave her evidence in that case brought the position up-to-date. Matters have moved on since September 2021 which was the date of Dr Ksel's last visit. Mr Payter also argued that this visit was not a CPT inspection and that no new report is currently in preparation.

108. Mr Payter invited us to conclude that the ventilation issue had now been addressed and that the increased staffing levels in 2022 meant that the problem of inter-prisoner violence was being resolved. That was borne out by the statistical information provided in Further Information No. 11.

109. Mr Payter advanced a series of detailed submissions to the effect that material conditions at Armavir had improved significantly with a range of remedial and renovation works in recent times. He accepted that there was no evidence that conditions in wing 1 had improved, but submitted that it was unlikely that the Appellant would be held there and in any event conditions were not so bad that his rights under Article 3 would be violated. In the context of the quarantine or admission cells, Mr Payter reminded us of the principles enunciated by the Grand Chamber in *Muršic v Croatia* [2017] 65 EHRR 1, in particular that short periods of incarceration would not be likely to amount to a violation of Article 3.

110. As for inter-prisoner violence, Mr Payter submitted that the Government of Armenia has a system in place to deal with this issue, and in any event has given an assurance that reasonable preventative measures will be taken in accordance with the law. Staffing levels have recently increased. Overall, the Appellant has failed to rebut the presumption that reasonable protection will be provided.

111. It is unnecessary to set out all the submissions advanced by both counsel with conspicuous care and attention to detail. We record our gratitude to both counsel for the overall excellence of their arguments both oral and in writing.

DISCUSSION

112. The duty of candour on requesting states is the counterpart of the principle of mutual trust and confidence that is properly shown to them by executing states. One cannot subsist without the other.

113. When this case was before the Judge on 13th and 14th May 2021, the Respondent must have been aware that the 2021 CPT report was about to be published and known what it was going to say. We accept that the Respondent could not give disclosure in advance of the report, and we also accept that it might not have agreed with all the criticisms it made. However, it must (or at least should) have been obvious to the Respondent that the 2021 CPT report contained information and evidence highly material to the Appellant's case that could not simply be ignored or brushed aside. Consequently, we consider that the Respondent was under an obligation in these circumstances to appraise the CPS of the position, and warn them that highly material evidence from the CPT was about to be promulgated. The Judge would then have been asked either to adjourn the case or, at the very least, not to hand down his judgment pending the provision to him of evidence that he was told was pertinent to the case. Taking such steps would not have breached any confidentiality requirements imposed by the CPT, and would have ensured that the Court below had the full picture. Once the 2021 CPT report was published, the Judge would then have been in a position to evaluate how it should be addressed: for example, by written submissions alone, or by some other means. We do not think that the Judge, having read this report, would simply have handed down his ruling regardless.

114. We also consider that the letter from the Head of Penitentiary Service of the Ministry of Justice dated 19th January 2021, referring as it did to "ventilation" in unqualified terms, was unfortunately worded. It is true that it did not state in terms that there was a ventilation system at Armavir, and it is also correct that in its response to the 2016 CPT report the Respondent made no such claim. The Judge may have been wrong to reject or ignore all the evidence to the effect that there was no ventilation in the sense in which that term is generally understood in this context. However, he clearly placed heavy reliance on what he was being told by the Respondent and interpreted the letter to which we have referred as proclaiming the existence of a ventilation system. This misunderstanding would not have occurred had the matter been clearly and explicitly stated.

115. Consequently, the Judge's decision has been wholly superseded by events. It is unnecessary in these circumstances to dwell on his reasoning and conclusions. We begin afresh on the basis of all the evidence, information and assurances that we have admitted. In the light of the history we must examine with particular care, as well as a degree of caution, the information and assurances given by the Respondent since the beginning of these proceedings.

116. Central to this appeal is the issue of inter-prisoner violence. We accept Mr Payter's submission that the threshold for the Appellant to surmount is a high one, and that the nature of the population under consideration renders many prisons inherently dangerous places. It is incumbent on the Appellant to prove the existence not merely of a real risk of violence but also that the responsible authorities in Armenia will fail to provide reasonable protection. Mr Payter drew our attention to a number of cases, decided on their own facts, where that high threshold had not been attained.

117. As we have already said, the Judge did accept that the 2016 CPT report demonstrated that at that time Armenian prisons represented a "high risk situation of inter-prisoner intimidation". It is noteworthy that the Government of Armenia's response to that report included the blithe assertion that "the Penitentiary Service is in complete control of the operational system". The 2021 CPT report presents a completely different perspective. The Government of Armenia was urged to take control of an ongoing state of affairs that indicated a lack of control. That report is all of a piece with the other open source materials which we have summarised.

118. Furthermore, the *Roca* case shows that matters had not materially improved by September 2021. We consider that Judge Ikram was right to place very considerable weight on Dr Ksel's authoritative evidence, and he had the additional advantage of seeing and hearing her testify. Her evidence was that the phenomenon of inter-prisoner violence had not materially changed since the CPT delegation visited Armavir prison in December 2019. We reject Mr Payter's submission that Dr Ksel's evidence merits lesser weight because her September 2021 visit was not as part of a formal CPT delegation.

119. It is correct that Mr Roca was in a particularly disadvantageous position on account of his personal circumstances, but in our view that is only a matter of degree. It is also correct that an important aspect of Dr Ksel's evidence was that it was difficult to breathe in the cells in the absence of a ventilation system. We are able to accept the Respondent's evidence that a contract for a new system was awarded in May 2022 or thereabouts, and that the work has been, or is about to be, concluded. That, however, does not answer the gravamen of the Appellant's central case.

120. The question, then, is whether we may accept Mr Payter's submission that matters have sufficiently moved on since September 2021 to compel a different conclusion.

121. In this context, we agree with Mr Hall that much of the Respondent's evidence is generic, stereotypical and aspirational. Assurances to the effect that the relevant law will be applied carry very little weight, because that should always have been the case. These assurances must also be viewed in the context of their having been advanced for some years now, in the face of the CPT findings and the views expressed by other reputable groups and entities in the open source material. We also place little weight on the Respondent's contention that the mere drafting of new laws had an immediate impact on the behaviour of the "Alpha dogs".

122. The observations made by this court in *Tabuncic* are applicable here. Much of the Respondent's evidence fails to explain how the risk would be obviated at source rather than addressed after the event.

123. The statistical information set out in Further Information No. 11 is heavily relied on by Mr Payter. We do not doubt that the Respondent has provided quite detailed information regarding the cases of inter-prisoner violence that have been reported to the relevant authorities and have been documented by them. However, we are sceptical about the assertion that there were only 14 cases of inter-prisoner violence in 2021, with no details given. That is not consistent with Dr Ksel's evidence, which we regard as reliable, of violence on a daily basis. That information was given to her by the director of Armavir prison. We are equally sceptical about the limitations inherent in the 2022 data although we accept that it is far more detailed.

124. Conversely, there are three factors which weigh in the balance on the Respondent's side, at least to some extent. First, the legislative changes introduced in May 2021 may have had *some* effect. No analysis of this has been undertaken. Secondly, there is some evidence that the numbers of staff in the security division have increased (on one view, from 21 to 37 per shift), although we agree with Mr Hall that Further Information No. 11 is unclear and difficult to interpret. Thirdly, we also see some force in the point which appealed to the Judge, that inter-prisoner violence in Armavir and elsewhere has not been precisely quantified. We express the matter in these terms because violence of this sort will often go under the radar and quantification will always be difficult.

125. We are required to reach our own conclusion on all the available evidence: we reiterate that on Article 3 issues the Judge's decision has been wholly superseded. We recognise that the evidence does not point all one way. However, we place particular weight on the 2021 CPT report and the evidence of Dr Ksel that brings matters forward to September 2021. Had this appeal been decided shortly after that date, we would have had very little hesitation in holding that the Appellant faced a real risk of Article 3 harm in Armavir prison which the Armenian authorities have failed to take reasonable measures to prevent. The position is not quite so clear-cut some 15 months later, but overall we are satisfied that a real risk of a violation of Article 3 has been made out.

126. Thus far, we have not addressed Mr Hall's submission that the Appellant faces a real risk of Article 3 ill-treatment on the additional or alternative basis that he might be transferred from Armavir to another prison. We cannot accept that submission. On the evidence, we conclude that the Appellant would be held at Armavir were he to be extradited, and that he would only be moved from there should operational imperatives require it. That is an entirely reasonable and appropriate position for the Respondent to adopt.

127. Nor have we yet addressed Mr Hall's further arguments based on material conditions within Armavir. In the light of our conclusions on the main issue, it is unnecessary for us to say much about them. In our view, these arguments add very little to the Appellant's case. As Mr Payter points out, the Appellant would be provided with 4m² of personal space, which is at the upper end of the *Muršic* range. Conditions in wing 1 remain poor, but even if there is a real risk that the Appellant would be detained there (we assess that risk to be in the region of 1:6, which may be enough to amount to a real risk), we cannot conclude that they are so poor that the high threshold for proof of a violation of Article 3 is met. The Appellant would be held in the admission or quarantine wing for a matter of days, too short a period to engage Article 3, we note that four cells in that wing have been renovated, and we are not satisfied that he is at sufficient risk of being held in a "Kartzer" cell.

128. In the circumstances, it is unnecessary for us to address the remainder of Mr Hall's submissions.

DISPOSAL

129. This appeal must be allowed, the order for the Appellant's extradition must be quashed, and he must be discharged.