Neutral Citation Number: **[2018] EWHC 1885 (Admin)**

Case Nos. CO/4291/2017, CO/5227/2017

IN THE HIGH COURT OF JUSTICEQUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

Royal Courts of Justice

Date: Monday, 16 July 2018

Before:

LORD JUSTICE SINGH

MRS JUSTICE CARR

B E T W E E N :

- - - - - - - - - - - - - - - -

(1) ATTILA FUZESI

(2) LASZLO BALASZ

Appellants

- and -

(1) BUDAPEST-CAPITAL REGIONAL COURT, HUNGARY

(2) MISKOLC REGIONAL COURT, HUNGARY

Respondents

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A P P E A R A N C E S

MR M SUMMERS QC and MS N DRAYCOTT (instructed by Lawrence & Co) appeared on behalf of the First Appellant.

MR M SUMMERS QC and MR J SWAIN (instructed by Oracle Solicitors) appeared on behalf of the Second Appellant.

MR J HINES QC and MS A BOSTOCK (instructed by the Crown Prosecution Service) appeared on behalf of the Respondents.

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LORD JUSTICE SINGH:

Introduction

1 This is the judgment of the court to which both of its members have contributed. We have been assisted by both written and oral submissions from Mr Mark Summers QC (leading Ms Natasha Draycott for the first appellant, and Mr John Swain for the second appellant) and from Mr James Hines QC (leading Ms Amanda Bostock) for the respondents. We are grateful to them all.

2 There are before the court two appeals against extradition which was ordered by the magistrates' court. Initially, both cases concerned a single common issue, namely whether prison conditions in Hungary are such that there would be a real risk of a breach of Article 3 of the European Convention on Human Rights ("ECHR") on the basis of overcrowding should the appellants be extradited to Hungary. However, as will become apparent, that issue has fallen away in the case of the second appellant. In his case, there have been recent developments which led to an application to adjourn final consideration of his appeal and/or an application for permission to amend his grounds of appeal. We will return later to those applications.

3 The first appellant's extradition was ordered by District Judge Lucie on 15 September 2017. The second appellant's extradition was ordered by District Judge Ashworth on 6 November 2017. On 21 December 2017, Ouseley J granted permission to appeal on the Article 3 ground alone. On 15 May 2018, the respondents conceded that there was a real risk of an Article 3 breach. On 16 May 2018, Sharp LJ adjourned the hearing which was then due to take place on 24 May.

4 Further assurances have now been given by the respondents. The first assurance, dated 23 May 2018, so far as material reads:

> "The Ministry of Justice of Hungary and the National Headquarters of the Hungarian Prison Service, which has jurisdiction in Hungary to provide this binding assurance, guarantees that [the first appellant] will [...] during any period of detention for the offences specified in the European arrest warrant, be detained in conditions that guarantee at least 3 square metres of personal space. [The first appellant] will at all times

be accommodated in a cell in which he will personally be provided with a guaranteed personal space.

As of 1 January 2015, Hungary has signed, ratified and implemented the Optional Protocol to the UN Convention against Torture (OPCAT) and has set up The General Ombudsman as its National Preventative Mechanism. Accordingly, the General Ombudsman will monitor compliance with this assurance."

5 The second of the assurances was dated 28 May 2018 and related to the second appellant. It is unnecessary for present purposes to recite it in any detail. The reason why there had to be more than one recent assurance given is that the first assurance of 28 May only dealt with the European arrest warrant which bore the reference Szv.2301/2012. The second assurance, to which I will return in a moment, dated 14 June 2018, dealt with both the European arrest warrant with the reference Szv.2301/2012 (the 14-count theft-, fraud- and bankruptcy-related one, which, as we shall see in a moment, is said to be limitation barred) and the one that bore the reference Szv.1231/2015 (the 26-count burglary-related one).

6 The assurance of 14 June 2018 is in material terms identical to the one we have already recited in the case of the first appellant, save that it specifies that the second appellant "will be detained in the Szombathely National Prison where the detention conditions are CPT compliant". That acronym appears to be a reference to the Committee for the Prevention of Torture, a European body under the auspices of the Council of Europe which is charged with responsibility for (amongst other things) inspecting premises to ensure compliance with the prohibition on torture and inhuman and degrading treatment.

7 In the case of the second appellant, as we have seen, the assurance makes it clear that, if extradited, he would be detained at Szombathely, which it is accepted is one of two prisons in Hungary which can reliably guarantee compliance with Article 3 standards. The Article 3 objection to his extradition has therefore fallen away.

8 However, the first appellant submits that the assurance in his case still does not adequately meet the systemic risk in Hungary because it does not specify the prison at which he will be detained if extradited. Mr Summers submits that there are only two prisons which reliably guarantee compliance with Article 3 (Szombathely and Tiszalök), but there is no assurance that the first appellant will be held in either of those two prisons. The respondents on the other hand submit that the assurances which have now been given are in precisely the terms which were approved by the Divisional Court in *GS & Ors v Central District of Pest, Hungary & Ors* [2016] EWHC 64 (Admin); [2016] 4 WLR 33, and that this court did not then consider it necessary for the assurances to be specific to a particular prison. The respondents also submit that the criteria in the European Court of Human Rights decision in *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1 are satisfied in these appeals.

Factual background in the individual cases

9 The first appellant was born in Hungary on 20 September 1982. He was arrested in this country on 24 July 2017, and is now in custody at HMP Wandsworth. At the hearing before us, we were informed that in fact he is now on bail. A conviction European arrest warrant ("EAW") was issued on 21 April 2017 and certified by the National Crime Agency ("NCA") on 3 July 2017.

10 The first appellant faces two custodial sentences of 2 years and 9 months and 6 months respectively for two offences of illicit trafficking in narcotic drugs and psychotropic

substances. He fled Hungary after his conviction and sentence. The district judge stated that the first appellant accepts that he committed the offences, although he does not accept that this was as part of a criminal organisation dealing in drugs.

11 The second appellant was born in Hungary on 12 May 1982. He was arrested on 30 June 2017 and is in custody at HMP Wandsworth. There are two EAWs. The first EAW (2301/2012) was issued on 7 May 2013 and certified by the NCA on 9 January 2016. This relates to various offences of burglary, forgery and other offences. He faces a total sentence of 3 years and 4 months' custody, with 2 months and 18 days having been served. He was found by the district judge to be an unreliable witness and to have absconded while he was on bail knowing that he was due to serve a sentence. The second EAW (1231/2015) was issued on 4 August 2016 and certified by the NCA on 9 August 2017. This relates to 25 burglaries committed in August and September 2010 and one drugs offence. The second appellant should serve a sentence of 4 years and 2 months' custody, of which 3 years, 9 months and 22 days still remain to be served.

Application to adjourn/amend on behalf of the second appellant

12 As we have indicated, it is now accepted that in the light of the assurance of 14 June 2018 the second appellant can now be extradited to Hungary, at least on the second EAW. The sole remaining issue on the second appellant's appeal relates to a limitation issue in respect of the first EAW, which has the reference number 2301/2012.

13 The first EAW stated on its face that: "The custodial sentences concerned shall lapse on 6 May 2018." The appellant's first written submissions of 10 May 2018 concluded as follows:

> "Finally, it appears that the limitation has very recently expired in respect of the second appellant's first EAW [...] Should it be necessary to do so, the second appellant will apply to amend his grounds of appeal to add an Article 5 ECHR/section 82 ground insofar as that EAW is concerned."

Reference was made to certain authorities in support of the submission that expiry of limitation ought to result in discharge pursuant to Article 5 of the ECHR (the right to personal liberty) and/or section 82 of the 2003 Act.

14 In their written response of 15 May 2018, the respondents stated that this was an entirely new issue of which no prior notice had been given and upon which permission had not been granted. Reference was made to the fact that the EAW stated elsewhere (albeit in the same box of the EAW) that an EAW issued after the domestic arrest warrant would interrupt the term of limitation. Thus it did not appear that the limitation period had expired. There had been little time to seek instructions. An adjournment generally was sought on Article 3, but also to allow time for this point to be properly explored. As indicated above, the matter was adjourned by the court on 16 May 2018. In the event, for reasons which are unexplained, it appears that the parties did not pursue the issue of limitation further at all prior to the hearing before us on 13 July 2018. No application to amend was issued on behalf of the second appellant and no further material was produced by the respondents. During the course of the hearing, however, the respondents produced further material which suggested that the decision of the district judge had suspended the running of time.

15 Foreign law is a matter for the court to determine as a question of fact based on the evidence before it. Mr Summers sought an adjournment to explore the position and to adduce further evidence if appropriate. He also offered to lodge a formal application to amend the grounds

of appeal. We decline to adjourn the hearing for the point to be considered further or to allow the objection to extradition on limitation grounds to be advanced. The matter could and should have been pursued in good time for this hearing, including by a formal application to amend. The evidence before us suggests that the point is at the very least not an obviously good one. Moreover, on any view, as is now common ground, the second appellant must be extradited on the second EAW, since the Article 3 objection has fallen away in his case. As we observed during the course of the hearing, there is no reason to suppose that the Hungarian authorities will act on a sentence that has lapsed, or that the second appellant will not be able to raise any valid objection that he has on limitation grounds.

General context

16 Hungary is a category 1 territory for the purposes of the Extradition Act 2003 ("the 2003 Act"). Therefore, Part 1 of the Act applies. On 10 March 2015, the European Court of Human Rights gave judgment in a "pilot" case against Hungary relating to prison conditions: see *Varga v Hungary* (2015) 61 EHRR 30. Hungary then conceded that there was a real risk of an Article 3 breach on the basis of overcrowding. It provided assurances to the UK which were found to be acceptable by the Divisional Court in *GS*, to which we will return. Since then, Hungary has made improvements and also has introduced remedial legislation in October 2016 which, as we understand it, came into force on 1 January 2017. This introduced a scheme for detainees to request a transfer, a scheme for compensation and preventative measures such as release from detention on tagging. In the light of those developments, on 18 November 2016 the European Court of Human Rights suspended its examination of all of the *Varga* applications until 31 August 2017.

17 On 2 May 2017, the Hungarian Ministry of Justice wrote to the NCA to summarise the developments which had taken place, including the suspension of proceedings by the European Court of Human Rights, and also to outline the terms of the legislation which had been in effect since 1 January 2017. On 10 May 2017 there was a similar letter written by the Hungarian authorities, again to the NCA. In the light of those developments, the Hungarian Ministry of Justice expressed the view that:

> "... on the basis of mutual recognition and mutual trust, there are no substantial grounds for requesting prison assurance and hereby the Article 15(2) of the Council Framework Decision Nr 2002/584/JHA is not applicable if the necessary supplementary information concerning detention conditions ..."

Although the translation may not be entirely accurate, it is tolerably clear that what the Hungarian Ministry was saying was that it considered that in the light of developments, including legislation and the action taken by the European Court of Human Rights, it was no longer necessary to give assurances. However, it is important to note that on 15 May 2017 the Hungarian Ministry of Justice again wrote to the NCA on the subject of assurances, and in particular made it clear that all previous assurances were still valid and would be honoured.

18 On 6 June 2017, the matter was considered by the Committee of Ministers of the Council of Europe, which is the body charged under the ECHR with supervising compliance with judgments of the European Court of Human Rights. In that meeting, the Committee of Ministers considered both the individual measures which had been required by the Court of Human Rights in *Varga* and general measures. At paragraph 1 of its decision, the

Committee welcomed the authorities' commitment to resolve the problem of prison overcrowding in Hungary, and noted with interest that the substantive measures taken appeared to be showing their first concrete results, in particular a decrease in the rate of overcrowding and a drop in the shortage of prison places.

19 In paragraph 2, under the rubric of individual measures, the Committee noted that a number of applicants were still detained in conditions not meeting the minimum standards for personal living space, and reminded the authorities of their obligation to rectify the situation by ensuring that all applicants' conditions of detention were in line with the ECHR. It invited them to provide the outstanding information, in particular on other relevant aspects of the material conditions of detention where the available living space is between 3 and 4 square metres per inmate.

20 At paragraph 3, the Committee turned its attention to the general measures required by the court and noted with interest the further extension of the application of "reintegration custody", the facilitation of and increase in the use of house arrest, and the slight decrease in the number of defendants placed in pre-trial detention. The Committee strongly encouraged the authorities further to pursue their efforts in this regard and to find all possible means to encourage prosecutors and judges to use as widely as possible alternatives to detention and redirect their criminal policy towards reduced use of imprisonment.

21 At paragraph 4, the Committee welcomed the fact that in response to *Varga* the authorities had introduced both a preventative and a compensatory remedy aimed at guaranteeing genuinely effective redress for Convention violations arising from poor material conditions of detention, which took effect on 1 January 2017. That said, as Mr Summers reminded this court, at page 3 of 8 of the attached document the Committee also noted that of the remaining applicants before the Court of Human Rights 15 were still detained in multiple occupancy cells with a living space of less than 3 square metres per inmate.

22 On 14 November 2017, the European Court of Human Rights again had to consider matters in a case called *Domján v Hungary* (application no. 5433/17). On this occasion, the Court of Human Rights held to be inadmissible under the ECHR a complaint under Article 3 of the ECHR in respect of prison conditions in Hungary. The reason for that decision was that the applicant had failed to exhaust all local remedies, as is a procedural requirement of the Convention system. That was so because of the recent legislation which had come into force in Hungary.

23 On 13 to 15 March 2018, the matter again came before the Committee of Ministers of the Council of Europe. The Committee again addressed both the individual measures and the general measures which were being implemented in response to the judgment in *Varga*. It again welcomed the authorities' continuing commitment to resolving the problem of prison overcrowding and noticed with interest the continuation of the positive trend identified at the last examination of this group of cases, which was reflected by the further increase in the use of alternative sanctions and the slight further decrease in the prison overcrowding rate in 2017. That said, again it is important to recall that in the accompanying document at page 3 of 6 the Committee observed that 12 of the relevant applicants were still being detained in multiple occupancy cells with a living space of less than 3 square metres per inmate.

24 On 19 March 2018 there was produced a report headed "Expert Report" in the present appeals by a Hungarian NGO known as the Hungarian Helsinki Committee ("HHC"), which, as we understand it, at least until last autumn, amongst other things visited prisons to inspect their conditions in Hungary. There are three passages in particular to which we

should go at this stage. The first appears at paragraphs 161 to 165. It is unnecessary to recite that in full, but we do note at paragraph 161 it was said:

> "Most recently, on 14 March 2018 the expert personally met her defendant of British nationality in Szeged High and Medium Security Penitentiary who claimed that despite the assurances given by the Hungarian Authorities he is held in a cell of approximately 21 m^2 with ten other detainees."

25 The other passage to which we should specifically draw attention appears at paragraphs 227 to 228, in which the report considered the office of the NPM, which is the Hungarian Ombudsman for present purposes. In that passage, the Committee commented that the resources available to the NPM were relatively small; that he had a large number of facilities that he had to inspect under his mandate; and that he could only in fact inspect a small number of those in each year. It also observed that the publication of the Ombudsman's reports were slow.

26 At paragraph 27 of the same report, it was stated that out of these 32 penitentiary institutions in Hungary there are two which are at the moment relatively safeguarded against overcrowding. They are Szombathely and Tiszalök. These are the two penitentiaries which have been built and operated in public-private partnership and, according to the partnership agreement between the state and private investors, placement of inmates over the statutory limit is possible only at a high cost exceeding the available financial resources of the penitentiary administration.

27 On 25 April 2018 the Hungarian Ministry of Justice sent a letter to Interpol in Manchester at the NCA. In that letter, one of the individual detainees to whom reference was made, namely G Kapczár, it was noted was detained in the penitentiary of Szeged in a cell with eight people, leaving net space for one person of 2.8 square metres. Mr Kapczár was, as we understand it, one of the *Varga* applicants. It was in the light of that information in particular that the respondent authorities acknowledged in May of this year that there was a real risk of a violation of Article 3 because of prevailing conditions generally in Hungary. That is what prompted the giving of the assurances which have now been given in the present cases.

28 Very importantly, we must now turn to a document dated 6 May 2018, which was a letter from the Hungarian Ministry of Justice to the CPS in this country. In particular, we note section VI headed "Inmates placed with individual guarantee", which stated as follows:

> "According to the data available on 26 March 2018, in the detention facilities there are altogether 20 such persons whose surrender from the UK was preceded by a guarantee on the placement conditions. From among these persons 3 persons are in reintegration custody, whereas the execution of the sentence of 1 person was interrupted (the execution of a sentence can be interrupted, upon request or ex officio, for a justified reason, in particular due to the inmate's personal or family circumstances or health state), therefore in respect of these persons placement conditions in the penitentiary institutions cannot be examined.
> The remaining 16 persons are placed in the following penitentiary institutions:
> 1. Szombathely National Penitentiary Institution – 8 persons.

2. Tiszalök National Penitentiary Institution – 4 persons.
3. Állampuszta National Penitentiary Institution – 1 person.
4. Mid-Transdanubian National Penitentiary Institution – 1 person.
5. Pálhalma National Penitentiary Institution – 1 person.
6. Jász-Nagykun-Szolnok County Penitentiary Institution – 1 person.

Detention conditions in the Szombathely National Penitentiary Institution and the Tiszalök National Penitentiary Institution are described in detail in the written guarantee (previously sent to UK authorities). The inmates in the other four penitentiary institutions were placed in the given institution upon their express request, and 4 m^2 living space is continuously secured for them, in line with the relevant Hungarian laws. For the foregoing reasons it can be established that in the detention facilities the placement conditions of the pre-trial detainees and the sentenced persons affected by the guarantee continuously meet the undertakings made under the guarantee."

29 On 10 May 2018 there was a response to that document in an addendum to the expert report by the Hungarian Helsinki Committee, which continued to make the point that there was ineffectiveness in the system in practice in guaranteeing a reduction of overcrowding.

Relevant authorities

30 *Varga v Hungary* (2015) 61 EHRR 30 was, as we have said, a "pilot" judgment of the European Court of Human Rights. The court held that prison conditions in Hungary were such as to lead to a violation of Article 3 (see [79] to [92] of the judgment). After that judgment was given, the Hungarian authorities issued assurances as to the conditions in which a person extradited from the UK would be detained. The question of assurances was considered by the European Court of Human Rights in *Othman v United Kingdom* (2012) 55 EHRR 1. In considering an allegation under Article 3 (although not in the context of prison conditions) where a person was to be extradited to Jordan to face trial, the court said that assurances are a "relevant factor which the court will consider", but that they are "not in themselves sufficient to ensure adequate protection against the risk of ill-treatment" (see [187] of the judgment). At [189] the court said that it would usually:

> "... assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:
> (i) whether the terms of the assurances have been disclosed to the Court ...;
> (ii) whether the assurances are specific or are general and vague ...;
> (iii) who has given the assurances and whether that person can bind the receiving State...;
> (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them ...;
> (v) whether the assurances concerns treatment which is legal or illegal in the receiving State ...;
> (vi) whether they have been given by a Contracting State ...;
> (vii) the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances...;
> (viii) whether compliance with the assurances can be objectively verified

> through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers ...;
> (ix) whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible ...;
> (x) whether the applicant has previously been ill-treated in the receiving State ...; and
> (xi) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State..."

31 In *GS*, the Divisional Court considered whether assurances given by the Hungarian authorities in the context of prison conditions following the decision in *Varga* had the effect of dispelling the doubts which would otherwise exist as to the risk of a violation of Article 3 if a person were extradited to Hungary. Burnett LJ (as he then was) gave the main judgment and Ouseley J agreed with him. Burnett LJ considered the decision of the European Court of Human Rights in *Varga* and its decision in *Othman*. He concluded that the assurances which were given by the Hungarian authorities did have the effect of dispelling the doubts which would otherwise exist (see [6] and [36]). At [31] he said:

> "The position with regard to these appellants, and any other requested persons sent with the benefit of this assurance, is that all will have a copy of the assurance in their possession. Most will have had lawyers acting for them in England and Wales to whom they could complain if the assurance is not honoured. All will have lawyers acting for them on their return to Hungary with whom, similarly, they could raise a lack of compliance with the assurance. The Ombudsman has an official role in monitoring prison conditions. He is mentioned in the assurance and would be another obvious point of complaint were something to go wrong. The information provided after the hearing shows that the assurance is recorded on a prisoner's file. That travels with him around the system. No complaints so far have been made to the Ministry or the prison authorities. All this suggests that any establishment dealing with a prisoner with the benefit of the assurance would be aware of it and that there are effective ways in which non-compliance could be raised. It also suggests, quite apart from positive information now available and set out in [17] above, that there is no reason to suppose that the assurance is not being honoured."

32 At [35] Burnett LJ described the assurance as "a solemn diplomatic undertaking by which the Hungarian authorities consider themselves bound". At [36] he concluded on this point:

> "In my judgment there is no basis for concluding that the assurance given by the Hungarian authorities relating to the treatment of these appellants (and all those on the list or who might be added to it) will not be honoured. The presumption that it will be has not been displaced. The recent evidence suggests that it has in fact been honoured. It follows that the grounds for believing that there is a real risk of treatment contrary to Article 3 of the Convention arising from the pilot judgment in *Varga* in the absence of the assurance, have effectively been met by the

assurance ..."

33 We should also refer to the recent decision of the Divisional Court in *Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 1122 (Admin), in which the main judgment was given by Dingemans J, with whom Hickinbottom LJ agreed in a concurring judgment. Hickinbottom LJ said at [52] that the burden lies on the requesting state to show that there will be no risk of a violation of Article 3 in circumstances where the presumption of compliance has been lost. At [53] he said that, when a state seeks to show that a past failure has been rectified and general prison conditions are now compliant with Article 3, it can do so in a number of ways. He said:

> "... A state can only discharge the burden on it in that way by adducing clear and cogent evidence."

However, he went on to say that the state may seek to discharge its burden by giving an assurance or assurances as to the circumstances of the detention of the requested person that satisfies the court that there will be no risk. At [54] Hickinbottom LJ said that the nature of such a straightforward assurance is very different from that of the general obligation that lies upon a state in relation to its prison conditions. At [55] he said:

> "In my view, in these circumstances, the starting point is that such a state is entitled to a presumption that it will comply with such a straightforward solemn assurance, even if it has lost the presumption in relation to its prison estate as a whole. Its general failures may, depending on the facts, bear upon its reliability in relation to an assurance; but that reliability will usually be tested in other ways, e.g. by its previous compliance (or non-compliance) with similar assurances. Where a state has made obvious substantial efforts to improve its prison conditions, even where it has as yet failed to raise them sufficiently to show that there will be no risk of treatment that does not comply with Article 3, that may be evidence of good faith and thus positive evidence of the state's reliability in ensuring that a specific assurance is met."

The appellants' submissions

34 On behalf of the appellants, Mr Summers submits that the assurances which have now been given do not adequately meet the systemic risk which has been acknowledged to exist in Hungary. He submits that, although the assurances purport to guarantee a space of 3 square metres, they do not specify the prison in which that will be sought to be achieved. While he does not dispute the good faith with which the assurances have been offered, Mr Summers submits that the evidence in this case demonstrates that general assurances of this type offer inadequate protection in practice. He submits that the particular regard should be had to the following factors:

(i) The level of continued systemic overcrowding across the Hungarian prison estate;
(ii) The consequent continuing stream of compensation awarded to detainees subjected to such violations;
(iii) The evidence of what he submits are prior breaches of similar assurances;
(iv) The respondents' own evidence concerning the continued detention of *Varga* applicants in less than 3 square metres despite specific judgments from the European Court of Human Rights requiring an end to this. Mr Summers draws particular attention to the fact that at least one of the *Varga* detainees was still being held in a

space of less than 3 square metres as recently as April 2018;

(v) Hungary's lack of acceptance of the need for assurances;

(vi) The removal of effective monitoring mechanisms. In that regard, Mr Summers informs the court that since October 2017 the HHC has been preventing from monitoring prison institutions in Hungary;

(vii) Two decisions of the German Administrative Court in *Karlsruhe* in which assurances that were specific to a named prison have been required before a person would be extradited to Hungary;

(viii) The opinion of the Advocate General in a reference from a German court in Bremen in the *ML* case (C-220/18 PPU). We have been given an unofficial English translation of that opinion, the original being in Spanish, and have also been given a press release summarising its contents. Mr Summers draws attention in particular to [57] to [58] of the Advocate General's opinion. He submits that the approach of the German courts has been approved by the Advocate General, although he accepts that the opinion is not binding on this court because it is not a decision of the Court of Justice of the European Union. The court's judgment is still pending, but neither side before us invited this court to postpone its decision to await that judgment.

35 As we have mentioned, Mr Summers emphasises that he does not question the good faith or the desire of the Hungarian authorities to improve the state of prisons in Hungary, but he does question their ability in practice to give effect to the assurance that has been given in the case of the first appellant.

The respondents' submissions

36 On behalf of the respondents, Mr Hines submits that each of the factors mentioned in *Othman* is satisfied in the present case, (although it is unnecessary to go to it see paragraph 7 of the respondents' skeleton argument). Mr Hines also submits in response to Mr Summers that:

(i) The assurances are in the same terms as those given in *GS*. The evidence is that the general overcrowding situation in Hungary has improved since that time and continues to do so. Therefore, there is no logical reason to suppose that assurances which were effective at that time are no longer effective;

(ii) There have been legislative changes in Hungary which have been considered to be acceptable by the European Court of Human Rights in *Domján*, in which it was held that the failure to make use of the domestic legislation meant that the applicant had not exhausted local remedies and therefore the application in Strasbourg was inadmissible;

(iii) The suggestion that the Hungarian Ministry of Justice does not recognise the seriousness of the issues is contradicted by its actions. In particular, Mr Hines informs the court that the Ministry of Justice agreed to attend a meeting in The Hague to discuss cases in the UK and the evidence being presented in them. As a result of that meeting, further information and disclosure was made. Upon being advised of the legal position in the UK following *Jane*, the Ministry of Justice has agreed to revert to the previous position and to provide the same assurances as were given in *GS*. Mr Hines places reliance on what was said in *Jane* at [55] in particular, which we have quoted above;

(iv) Mr Hines submits that no weight should be given to allegations of breaches of assurances in other cases. This is because those allegations are too general, are based on hearsay, there is no corroborative or independent evidence to support them, and, in any event, it is far from clear that they specifically concern anyone extradited by the UK;

(v) In relation to the *Varga* applicants, it could certainly be said that the evidence

demonstrates that an assurance from Hungary is still required, but, submits Mr Hines, it does not provide evidence that assurances given to the UK have been breached;

(vi) Insofar as Mr Summers relies on decisions of the German courts, Mr Hines submits that those are of limited assistance, particularly when only one example is given. In fairness, he says, the decisions of all Member States would need to be examined. That is neither practicable nor required;

(vii) Mr Hines submits that the opinion of the Advocate General in *ML* is of no material assistance in the present case;

(viii) In relation to monitoring mechanisms, Mr Hines points out that the Ombudsman remains available and was considered to be an effective independent mechanism in *GS*, so there is no reason to think that is no longer the case.

Our assessment

37 We accept the respondents' submissions. There can be no question that there is potent evidence before this court of general shortcomings in the Hungarian prison estate. The respondents do not deny that. Indeed, that is why, although at one time they discontinued the practice of giving assurances that had been given after *Varga*, it is accepted that such assurances should be given for the time being. However, the point here is the assurance given in the case of the first appellant. This is in the same terms as the assurances considered in *GS*. In our view, there has been no material factual change since then. We refer back to [52] and [55] of Hickinbottom LJ's judgment in *Jane*, which we have cited earlier. Here, the key question is the strength and scope of the assurance which has been given to the UK in respect of the first appellant. It constitutes a solemn undertaking to this court. What is crucial, in our view, is that there is no evidence that any assurance to the UK in respect of an individual has been breached: see section VI of the letter dated 6 May 2018 which we have already cited from the Hungarian Ministry. That evidence is unequivocal and specific. The evidence cited by Mr Summers on the other side of the balance, namely paragraphs 161 to 165 of the HHC report, is both indirect and anonymous. Mr Summers fairly accepts that it is of limited value. It does not appear, at least not clearly, in our view, to relate to any individual extradited from the UK, although it should be observed, as we have already said, that paragraph 161 does refer to a person "of British nationality".

38 In our view, the failure to identify a specific prison as has been done in other cases, for example that of the second appellant, does not make a material difference. We do not find anything of material assistance in the opinion of the Advocate General in the reference from the Bremen court in *ML*. The issue which is before this court (as to whether an assurance from Hungary must specify the particular prison where a requested person will be detained) did not arise in that case. As Mr Summers appeared to acknowledge at the hearing before us, the opinion of the Advocate General is "neutral" on the issue that divides the parties in the present case.

39 Nor do we consider that there is any force in Mr Summers' submission that if the respondents were correct it would never be open to courts in this jurisdiction to ask questions of a foreign state about which specific prison a requested person will be detained at. He gave as an example of that the decision that this court gave last week in *Shumba & Ors v France* [2018] EWHC 1762 (Admin). We disagree. That case was not one that concerned assurances at all. One of the issues was whether the appellants would be held at one of four named prisons in France, because it was only in relation to those prisons that the appellants contended that there was a real risk of a violation of Article 3. In those circumstances, it was entirely appropriate for this court to ask the French authorities whether

any of the appellants would in fact be detained at any of the four named prisons.

Conclusion

40 For the reasons we have given, both of these appeals are dismissed.

LORD JUSTICE SINGH: Yes, Mr Hines?

MR HINES: Thank you, my Lord. There are a number of cases pending at Westminster that would benefit from your Lordship's judgment. In the circumstances, I wonder whether you might expedite production of it?

LORD JUSTICE SINGH: Yes, we will direct that.

MR HINES: Thank you, my Lord.

LORD JUSTICE SINGH: Is there anything else?

MR HINES: No, thank you, my Lord.

LORD JUSTICE SINGH: Can I thank you all, and also through you thank those who have not been able to attend today's judgment.

MR HINES: My Lord, there is one detail on the date, but I will take it up with the shorthand writer.

LORD JUSTICE SINGH: Yes, of course. Thank you.
