Neutral Citation Number: [2022] EWHC 13 (Admin)

Case No: CO/1759/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/01/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

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

- -
- -

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

Hearing date: 5 October 2021

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Approved Judgment

Mr Justice Chamberlain

Introduction

1 This judgment follows a second hearing in this appeal. The first hearing took place on 15 April 2021. I handed down my first judgment on 28 April 2021: [2021] EWHC 1096 (Admin).

The first hearing and judgment

2 At the first hearing, three grounds were advanced by the appellant by way of appeal pursuant to s. 103 of the Extradition Act 2003 (the 2003 Act) against a decision of 16 March 2020 by District Judge Goldspring to send the appellant's case to the Secretary of State.

3 I dismissed Grounds 1 and 2 for the reasons set out at [49]-[63] and [64]-[66] respectively. The issues the subject of the second hearing arise from Ground 3 in this way:

(a) Under s. 85 of the 2003 Act, the judge is required to ask (i) "whether the person was convicted in his presence" (s. 85(1)); (ii) if not, "whether the person deliberately absented himself from his trial" (s. 85(3)); and (iii) if not, "whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial" (s. 85(5)). This latter question can only be answered in the affirmative if the person would have "(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required" and "(b) the right to examine or have examined witnesses against him and to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him" (s. 85(8)). This reflects the language of Article 6(3)(c) and (d) of the European Convention on Human Rights (ECHR).

(b) In each case, it is for the requesting state to prove to the criminal standard that the answer is "Yes". If it cannot prove that the answer to at least one of these questions is "Yes", the judge must order the person's discharge: s. 85(7): see [68] of my judgment.

(c) The judge dealt with those questions briefly, holding at [223] of his judgment that the appellant "was present at some hearings but when he was not it was [because] he chose to deliberately absent himself". This was wrong for the reasons I set out at [70] of my judgment: it could not account for what happened on 29 February 2008. On that day, two hearings took place, in different locations. At one of these, the appellant was produced from custody. At the other, the main prosecution witness gave evidence, confirming the contents of her written statement. Neither the appellant, nor his lawyer, attended that hearing.

(d) At [74], I held that, on the material then before me, it was not possible to say that the appellant would be entitled to a retrial and therefore not possible to answer any of the questions in s. 85(5) in the affirmative.

(e) In those circumstances, I held at [76] that the appropriate course was to adopt the procedure used in *Grecu v Cornetu Court (Romania)* [2017] EWHC 1427 (Admin), [49]-[51] and *Zelenko v Latvia* [2019] EWHC 3840 (Admin), [25]-[26]. I granted permission to appeal on Ground 3 and adjourned the appeal without making a final order, so as to allow a final opportunity to the Turkish authorities to: (i) supply an undertaking that the appellant will be offered a retrial; and (ii) identify the domestic legal provisions under which this undertaking will be given effect.

Events since the first hearing

4 Since my first judgment was handed down, the respondent has provided a judgment from Presiding Judge Mustafa Paksoy, sitting with other two members of the 1st High Criminal Court of Gebze, dated 5 May 2021, along with a covering letter dated 18 May 2021. The respondent says the judgment contains a guarantee that the appellant will be entitled to a retrial, which satisfies the requirement in s. 85(5) of the 2003 Act. The material part of the judgment reads as follows:

> "Nesin Kaderli, son of Cemal and Nediye, born on 05/01/1976 in Haskova whose TR ID No is 23102274674, who was convicted to an imprisonment of 6 years and 8 months with the decision Docket Numbered 2007/145 and Decision Numbered 2008/417 of our Court, SHALL BE ENTITLED TO THE RIGHT TO A RETRIAL pursuant to 'Article 3 of 2nd Additional Protocol to European Convention on Extradition' in the event that he was extradited to our country for his imprisonment of 6 years and 8 months for the offence of sexual abuse of children with the writ dated 25/12/2008 and Docket Numbered 2007/145 and Decision Numbered 2008/417 of our Court."

5 This was supplemented by further information dated 18 May 2021 from Judge Abdullah Aydin on behalf of the Minister Deputy Director General of the Ministry of Foreign Affairs, which included this:

> "1) Concerning the fulfilment of the retrial guarantee;
>
> The right to retrial is set out in par. I of Art. 3 of the Second Additional Protocol to the European Convention on Extradition, to which our country and the UK are parties. The approval of the Second Additional Protocol to the European Convention on Extradition, was ratified by Law No. 3732 of 08/05/1991 and the text of the Convention was published in the Official Gazette No. 21002, dated 25/09/199l.
>
> Article 3 of Ratification Law No. 3 732 regulates how the guarantee for retrial is to be provided and what actions are to be taken in case the person is extradited:

If a person - about whom there is a judgment in absentia given by a Turkish court - is found in one of the countries which are party to the Convention and if the said country requests a guarantee for the person - requested to be extradited - about the right of re-trial in accordance with the first sub-paragraph of the Article 3 of the Protocol, without taking into consideration whether the decision is final or not, the competent court shall render a decision on re-trial of the person in question, and after the person is extradited, s/he shall be subject to this decision. Following the extradition, the judgment in absentia shall be served to the extradited person and if s/he does not object to this decision within seven (7) days since the date of service, the judgment in absentia shall be executed without retrying.

If the person is extradited in accordance with the aforementioned regulations, the execution of the proceedings regarding the retrial is exclusively within the jurisdiction of the court and these transactions are carried out in accordance with the general provisions of the Criminal Procedure Code, Law No. 5271, at the discretion of the court.

2) Concerning the representation of the person by a legal counsel:

In the trial process, conducted under Art. 150 of the Code of Criminal Procedure, the accused person is required to appoint a legal counsel for himself. If the suspect or the accused declares that he cannot afford an attorney, one will be is appointed for him upon his request.

3) Concerning the issue of the accused posing questions to the witness:

According to Art. 36 of the Constitution, 'Everyone has the right to claim and defend as a complainant or an accused and to a fair trial before the judicial authorities by employing legal remedies'.

According to Art. 147 of the Code of Criminal Procedure, during the questioning, the accused is reminded that he may want to collect concrete evidence in order to disperse the suspicions, and he is given the opportunity to eliminate the reasons of suspicion against him and to put forward points in his favor.

According to Art. 201 of the Code of Criminal Procedure, the public prosecutor, attorney or the legal counsel, attending the hearing, may pose directly questions to the accused, the participant, witnesses, experts and other persons, invited to the hearing in accordance with the discipline of the hearing. The accused and the participant can also ask questions through the president of the court or the judge. When the question is challenged, the presiding judge decides whether the question should be sustained or not."

6 The respondent filed written submissions inviting the court to dismiss the appeal on the basis that a sufficient assurance had now been given to allow the court to answer the question posed by s. 85(5) in the affirmative. The appellant responded and applied for permission to adduce fresh evidence, namely: (i) the expert report of Ms Saniye Karakas, dated 20 June 2021; (ii) a European Parliament Resolution of 19 May 2021; and (iii) Transparency International's *Corruption Perception Index 2020*. There were then further written submissions from the respondent and appellant.

7 On 27 July 2021, I ordered that a further oral hearing be listed and permitted the respondent to file evidence responding to the evidence of Ms Karakas and to the appellant's written submissions. The appellant was also entitled to file evidence in reply.

8 On 9 August 2021, the CPS served a request for further information. The respondent provided a response on 27 August 2021.

9 On 30 September 2021, the appellant made an application seeking the permission of the court to adduce as further fresh evidence on this appeal the report of Ms Begüm Gedik, a Turkish attorney-at-law, dated 24 September 2021.

10 On 5 October 2021, at the hearing, the appellant sought permission to adduce further fresh evidence, namely a trial observation report concerning the trial of Adnan Oktar, drafted by Lionel Blackman and Sarah Heritage from the Solicitors' International Human Rights Group ("SIHRG") dated 29 September 2021. Given the lateness of this application, I directed that the parties file written submissions on the point. For the appellant, these were filed on 11 October 2021; for the respondent, they were filed on 18 October 2021.

The law

The Second Additional Protocol to the European Convention on Extradition

11 Article 3 of the Second Additional Protocol to the European Convention on Extradition (2AP) deals with judgments *in absentia*. It provides in material part as follows:

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

Case law

12 Section 85(5) requires the judge to be sure that the appellant would be entitled to a retrial. The authorities make clear that this means the retrial must be available as of right. It is not enough to point to the existence of provisions of local law under which a retrial *may* be held: the right must be *guaranteed* (the term used in Article 3 of 2AP), though this does not preclude the imposition by local law of domestic procedural preconditions: *Kotsev v Bulgaria* [2018] EWHC 3087 (Admin), [2019] 1 WLR 2353, [53].

13 If there are substantial grounds for believing that there is a real risk of treatment contrary to the ECHR following extradition, the requesting state may show that the requested person will not be exposed to such a risk by providing an appropriate assurance. The principles for assessing an assurance were set out by the European Court of Human Rights (the Strasbourg Court) in *Othman v UK* (2012) EHRR 1 at [188] and [189]. In *Kotsev,* at [51], Julian Knowles J summarised the relevant principles in the context of s. 20(8) of the 2003 Act (which deals with category 1 territories in terms materially similar to s. 85(8)):

> "a clear statement from the issuing judicial authority that a defendant convicted in his absence will receive a retrial/review and will have the rights specified in section 20(8) should be accepted and should not be impugned by defence expert evidence save where bad faith etc is alleged. Also, where such a statement is made, then the judge can have recourse to the relevant provisions of foreign law in English in order to understand the assurance given by the issuing judicial authority."

14 At [52], Julian Knowles J said that district judges should not attempt to decide questions of foreign law for themselves, unaided by assistance from the issuing judicial authority, which can be taken to be expert evidence in the law of the requesting State. This was especially so when the foreign law is not written in English.

15 In *Giese v United States of America* [2018] EWHC 1480 (Admin), [2018] 4 WLR 103, Lord Burnett of Maldon CJ said this at [38]:

> "The principles relating to the assessment of assurances were summarised by the European Court of Human Rights in *Othman v UK* (2012) EHRR 1 at [188] and [189]. The overarching question is whether the assurance is such as to mitigate the relevant risks sufficiently. That requires an assessment of the practical as well as the legal effect of the assurance in the context of the nature and reliability of the officials and country giving it. Whilst there may be states whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them, that is not appropriate when dealing with friendly foreign governments of states governed by the rule of law where the expectation is that promises given will be kept. The principles identified in *Othman*, which are not a check list, have been applied to assurances in extradition cases in this jurisdiction. A court is ordinarily entitled to assume that the state concerned is acting in good faith in providing an assurance and that the relevant authorities

> will make every effort to comply with the undertakings, see *Dean (Zain Taj) v Lord Advocate* [2017] UKSC 44; [2017] 1 WLR 2721 at [36]."

16 As noted in *Giese*, and reflected in Article 3 of 2AP, the overarching question is whether an assurance is sufficient to mitigate the relevant risks. That question has to be answered on the facts of each case. *Kotsev* suggests that, once the court is satisfied that a clear statement has been made that the person will have the rights specified in s85(8) – an exercise which may involve looking at the relevant provisions of foreign law to understand the import of the assurances – the court will not look behind that absent bad faith or impropriety.

17 In his written submissions, the appellant suggested that *Kotsev* can be distinguished on the basis that Bulgaria is a member state of the EU, whereas Turkey is not, and that the judgment was said to be based on earlier authority dealing with category 1 territories and EAWs. The appellant also submitted that the reference in *Giese* to "friendly foreign governments of states governed by the rule of law" does not apply to Turkey, given the recent deterioration in respect for the rule of law documented in the expert reports and other materials.

18 A further point to be determined in this appeal is whether a state can show compliance with s. 85(5) and (8) of the 2003 Act by proving simply that there will be a retrial in which the appellant will have the rights specified in s. 85(8) or whether the state must also prove that the retrial will conform with Article 6 ECHR (or at least will not involve any flagrant breach of the standards that would apply under that Article). If so, the requesting state must prove these things to the criminal standard. If not, the appellant will bear the burden of showing that any retrial will involve a real risk of a flagrant breach of Article 6 standards: see *Soering v United Kingdom* (1989) 1 EHRR 439, [113]. This has been described as an "exacting test": *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [24]. See also *L & P* (Cases C-354/20 PPU and C-412/20 PPU), ECLI:EU:C:2020:1033; *Turkey v Tanis* [2021] EWHC 1675 (Admin), [49].

The parties' submissions

Submissions for the appellant on the substance

19 Hugh Southey QC, for the appellant, submitted that the assurance given by the Turkish government in this case fails to satisfy the requirements of s. 85(8) of the 2003 Act. Therefore, the Court cannot answer the question posed in s. 85(5) in the affirmative, with the result that the appellant falls to be discharged.

20 In oral submissions, Mr Southey made clear that he was not saying the assurance was given in bad faith. In his submission, it was not necessary to do so. It was sufficient that a retrial would be unfair for reasons not addressed (or not addressed sufficiently) in the assurance. It was necessary to examine the assurance against the backdrop of the expert evidence, both specifically in relation to the retrial guarantee and more generally as to the Turkish judicial system. In practice, he submitted, there were substantial uncertainties as to the

respondent's ability to satisfy the court that s. 85(8) and Article 6 standards were complied with; and the test in *Kotsev* (to the extent it applies here) is therefore not satisfied.

21 It was inherent in Mr Southey's argument that s. 85(8) required that the court be satisfied to the criminal standard, not only that the appellant would be entitled to a retrial, but also that the retrial would adhere to Article 6 standards (or at least that it would not be flagrantly unfair by reference to those standards).

22 Mr Southey divided his submissions into two distinct, albeit related grounds. First, he argued that the assurance itself fails to satisfy the requirements of s. 85(8). The provisions of Turkish law relied on confer judicial discretions rather than guarantees of retrial. Second, and more generally, he argued that corruption in the Turkish judicial system, and its impact on judicial independence, creates a real risk that any retrial would be flagrantly unfair and therefore that extradition would be contrary to the appellant's rights under Article 6 ECHR.

23 Mr Southey relied on the expert reports of Ms Karakas and Mr Gedik, as well as the SIHRG Report to argue that Turkish law conferred a discretion in relation to the attendance of witnesses and the right to cross-examine them (and, relatedly, the status of the original judgment in the retrial). He noted that the assurance was explicit that:

> "the execution of the proceedings regarding the retrial is exclusively within the jurisdiction of the court and these transactions are carried out in accordance with the general provisions of the Criminal Procedure Code, Law No. 5271, at the discretion of the court."

24 This was consistent with the relevant provisions of Turkish law relied on. In particular:

(a) Under Article 147, "during the questioning, the accused is reminded that he may want to collect concrete evidence in order to disperse the suspicions, and he is given the opportunity to eliminate the reasons of suspicion against him and to put forward points in his favour".

(b) Under Article 177, "in cases where the accused requests to summon the witness or expert to appear in the main trial, or requests defense evidence to be collected, he shall submit his petition thereof, indicating the events they are related to, at least five days prior to the day of the main hearing, with the chief judge of the court, or the trial judge. The ruling thereof shall be notified to him immediately".

(c) Article 191 provides for the main trial; Article 192 provides that the chief judge or trial judge has conduct of the main hearing, including the interrogation of the accused and the presentation of evidence.

(d) Under Article 201, "the public prosecutor, attorney or the legal counsel, attending the hearing, may pose directly questions to the accused, the participant, witnesses, experts and other persons, invited to the hearing in accordance with the discipline of the hearing. The accused and the participant can also ask questions through the

> president of the court or the judge. When the question is challenged, the presiding judge decides whether the question should be sustained or not".

25 Mr Gedik opines "that there is a distinction between a right of a defendant at trial, or re-trial to request the collection of exculpatory evidence and to call witnesses and the right to have that evidence collected or those witnesses to court". The collection of exculpatory evidence "is not a right for that evidence to be collected or to call witnesses, which is again a matter of judicial discretion". Similarly, "a defendant can challenge the evidence of these witnesses but the question whether they are summoned to the trial or not is decided by a judge". Mr Gedik concludes that:

> "the CPC sets out matters of right and matters of judicial discretion. If a defendant exercises their right to request the collection of exculpatory evidence and/or witnesses, including for or against him, it is up to the judge holding the trial to agree to that request or reject it and for the judge to decide whether the witness should be summoned to trial or not."
>
> It is not a right to have that evidence gathered or witnesses called as the judge can refuse or accept that request, in part or in total. A defendant may appeal that judge's decision."

26 Ms Karakas says that, under Turkish law, the complainant would be a compellable witness in any retrial: "if the complainant is summoned and notified that she will be brought by force, and despite this she fails to come to the court she could be compelled to attend the hearing and provide her statement". She further confirms that the evidence given on 28 February 2008 would remain as evidence and that "it is likely that the Gebze Court would not change its previous assessment of evidence provided by the complainant".

27 The appellant points to the SIHRG Report as containing an example of an unfair trial, in which none of the defendants was permitted by the judge to call any defence witnesses and no reason was given for these refusals. The defendants were also barred from attending court, or being represented in court, when prosecution witnesses gave evidence. This, the appellant submits, is consistent with the position both that Article 177 does not guarantee a right to call witnesses and that a trial (or retrial) may be compliant with Turkish Criminal Procedure laws and nevertheless unfair (and indeed flagrantly unfair) by Article 6 standards.

28 Mr Southey submitted that this shows that Turkish criminal procedure does not *guarantee* the rights of the accused, but leaves relevant matters to the discretion of the court. This falls short of what is required by s. 85(8) and Article 6. Mr Southey focussed in particular on the status of the original judgment in any retrial. Section 85 of the 2003 Act must be read in its proper context. It seeks to remedy the defects found to have occurred in the first trial. If it cannot be guaranteed that evidence will be considered afresh on a retrial (and the appellant given the right to challenge it), or the tribunal simply relies on the original judgment in any retrial, then any retrial would not remedy the original defects. If there were no guarantee that the original defects will be remedied, the assurance would not be sufficient.

29 A further factor which aggravates these concerns, Mr Southey suggests, is the novelty of the retrial guarantee in Turkey. Turkey has been a party of 2AP since 1987. That instrument has had domestic effect in Turkey since 18 May 1991, but it is difficult to find examples of its application. Ms Karakas noted that "in the sole example that I have been able to find, the re-trial, such as it was, simply endorsed the original trial decision". Reliance is placed on the recent decision of Fordham J in *Koc v Turkey* [2021] EWHC 1234 (Admin) (12 May 2021), in which an appeal was allowed under s. 85 of the 2003 Act because the court was unable to decide whether the appellant was entitled to a retrial.

30 Under his ground 2, Mr Southey argued that the evidence indicates a level of structural corruption or judicial partiality within the Turkish judicial system which creates a real risk that any retrial in Turkey would be flagrantly unfair.

31 Mr Southey did not shy away from the submission that, on the evidence, *any* trial in Turkey would be procedurally unfair. But, in his submission, it was not necessary to go this far. It was sufficient if, where the relevant rights were not guaranteed by law but subject to the discretion of the court, the danger of corruption meant that the retrial guarantee could not be relied upon.

32 Mr Southey relied in particular on:

(a) the evidence of Prof. Bowring (accepted by District Judge Goldspring) that "Turkey has been found on a number of occasions to be in breach of Article 6 of the European Convention over and over again", the rule of law in 2008 was "pretty bad", but the impact since the failed *coup d'état* of 2016 "has been disastrous";

(b) the latest Transparency International Index, for 2020, which lists Turkey at 86th out of 179 countries (falling from 64th in 2007), below all EU member states;

(c) the European Parliament Resolution condemning Turkey's "inability to adhere to the rule of law and failure to uphold basic comity between nations," its "unprecedented illegal behaviour" against EU member states and the "dire human rights situation in Turkey and the continued erosion of democracy and the rule of law, in violation of the Copenhagen criteria". The Resolution also expresses concerns regarding the "dismissal, large-scale transfer and forced removal of approximately 30% of Turkish judges and prosecutors, which is causing a worrying level of intimidation, self-censorship and a decline in the overall quality of judicial decisions…" Finally, the Resolution notes that retrials – even where these have taken place following an adverse ruling by the Strasbourg Court – "often fail to meet internationally recognised standards for a fair trial"; and

(d) Ms Karakas' evidence concerned significantly increased executive interference with the judiciary, including the mass dismissal of judges and prosecutors. She notes that lower courts often ignore decisions of the Constitutional Court, encouraged by public statements from the President and other senior government officials. She concludes

that the courts "are open to external pressures, they are not impartial and independent".

33 Mr Southey submitted that the position is akin to that in *Bulla v Albania* [2010] EWHC 3506 (Admin), where the court held that the fact that Albania is a state party to the ECHR was no answer to the doubts about whether that appellant would be granted a re-trial.

Submissions for the respondent on the substance

34 Mr dos Santos, for the respondent, invited me to draw a sharp distinction between the requirements of s. 85(5) and (8) of the 2003 Act on the one hand and those of Article 6 ECHR on the other. Section 85(8) asks simple, discrete questions as to whether a retrial is guaranteed and as to two particular aspects of any such retrial. If the court is satisfied to the criminal standard that those aspects are present, the relevance of s. 85(8) is exhausted and the respondent's burden discharged. The appellant still enjoys the benefit of the protections of Article 6 ECHR if he can show that any retrial would be flagrantly unfair, but on this the appellant bears the burden of proof.

35 Mr dos Santos contended that the principles in *Kotsev* apply. The Government of the Republic of Turkish has issued a retrial guarantee, which should not be questioned absent evidence of bad faith or impropriety. The appellant does not allege bad faith or impropriety and the assurance therefore provides a complete answer to the questions posed by s. 85(8) of the 2003 Act.

36 Mr dos Santos submitted that the appellant's concerns as to the role of judicial discretion under Turkish law are at best inflated and at worst unfounded:

(a) The assurance confirms that the retrial is guaranteed in accordance with Article 3 of 2AP and the response to the CPS's request for further information that the guarantee would be executed according to the general provisions of the criminal procedure code (i.e. the same procedural rules as the original trial, with no separate rules for retrials). Read as a whole, the responses from the Turkish government show that the re-trial will be conducted in the same way as any other trial.

(b) If the appellant were correct that the role of judicial discretion within the Turkish judicial system undermined the ability to guarantee a fair trial, then it would be difficult to see how extradition could ever take place to the Republic of Turkey or to any other requesting state which operates a similar civil law system. That would be an extreme and surprising conclusion.

(c) The notion of judicial discretion over the admission or exclusion of evidence is familiar to English courts. To set out accurately the way in which this fact-sensitive discretion would be applied would require an unrealistic treatise of great detail and length. The existence of procedural discretion does not undermine the fairness of proceedings. The evidence of Mr Gedik does not therefore take this point any further.

(d) There is no evidence to suggest that the Republic of Turkey would not honour its guarantees – or fail to comply with its obligations under Article 6 ECHR.

37 Mr dos Santos invited caution with respect to Ms Karakas' report, the conclusions of which he suggested are speculative. In particular, and as confirmed by the Turkish authorities, the single case of retrial Ms Karakas refers to could not be identified and should not be assigned any precedential value. It does not therefore speak to any broader practice of retrials within the Republic of Turkey. Mr dos Santos concludes that Ms Karakas' evidence is not sufficiently probative to undermine the clear retrial guarantee provided in the assurance. The decision in *Koc v Turkey* also does not lend support to this position, as in that case the court had accepted that there would be no re-trial. Here, the position is different: a retrial has been guaranteed.

38 Mr dos Santos noted that the European Parliament Report deals with general matters, none of which is capable of leading to the conclusion that there is a real risk that this appellant will have a flagrantly unfair (re)trial. That is particularly so given that the appellant is not being tried for any political or otherwise sensitive offence. If it is admitted at all, no reliance should be placed on the SIHRG's report. It relates to two cases, 13 years apart, and cannot therefore be said to reflect any wider practice. It is in any event incomplete and of questionable reliability in circumstances where the authors attended only limited parts of the relevant trials, in a foreign language, noted that there were difficulties hearing and relied on unidentified third-party sources. In any event, the relevant trials occurred before different courts in Turkey, were of a political nature and related to different matters. There is no evidence of a complaint or appeal in relation to fair trial rights, or otherwise.

39 Finally, Mr dos Santos submitted that – to the extent I accept the appellant's submissions as to judicial partiality and corruption within the Turkish judicial system – other courts have warned of the limits of any such conclusions. Even a finding that judicial independence was to some extent impaired would not entail that there was a real risk of a flagrantly unfair outcome in every case (see, by analogy, *L&P*). The court in *Turkey v Tanis* upheld the findings of the District Judge who had "explicitly rejected the suggestion that nobody in Turkey could receive a fair trial".

40 These factors should be viewed against the backdrop that, as a matter of principle, an assurance from a requesting state should ordinarily be accepted at face value and such assurances have become an increasing and essential part of effective extradition proceedings: *Shankaran v India* [2014] EWHC 957 (Admin), [59].

41 For those reasons, Mr dos Santos invited me to accept the assurance as satisfying s. 85(8), to find that there was no real risk of a flagrantly unfair procedure and to dismiss the appeal.

Submissions on the admissibility of fresh evidence

42 The appellant seeks, by an application dated 22 June 2021, to admit fresh evidence, in particular: (i) expert report of Ms Saniye Karakas, dated 20 June 2021; (ii) the European Parliament Resolution of 19 May 2021 on the 2019-2020 Commission Reports on Turkey (2019/2176(INI)); and (iii) Transparency International, Corruption Perception Index 2020. Further applications dated 30 September 2021 and 5 October 2021 relate to the report of Mr Gedik and the SIHRG Report, respectively.

43 The appellant submits that all of this evidence post-dates the conclusion of the first hearing or has arisen in response to the material adduced by the respondent on this appeal and is capable of being decisive.

44 Section 104(4) of the 2003 Act provides for the admission of fresh evidence if the following conditions are satisfied:

> "(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

45 The test was considered in *Hungary v Fenyvesi* [2009] EWHC 231 (Admin), [2009] 4 All ER 324 in relation to the analogous provisions in Part 1 of the 2003 Act. At [32], the Divisional Court said that: "evidence that was 'not available at the time of the extradition hearing' meant evidence that either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available". The court had to determine whether, if the evidence has been adduced, the result would have been different.

46 The respondent resists the admission of fresh evidence, primarily on the basis that at least some of the evidence was available to the appellant and, for the reasons set out in the substantive submissions, none of the evidence would have resulted in the judge deciding the question differently.

Disclosure of questions

47 A further point of dispute between the parties concerns the disclosure of the questions which elicited the response from the Turkish government, referred to in the further information.

48 The appellant submits that, whereas there is a clear duty of disclosure of questions asked in order to elicit a response in extradition proceedings between the CPS and a requesting state, it is less clear that there is such a duty between the organs of the requesting state. However, the volume of the correspondence, and the fact that it is cited in evidence upon which the respondent seeks to rely suggests it ought to be disclosed: see *Kirsanov v Estonia* [2017] EWHC 2593 (Admin), [36]; *Puceviciene and Another v Lithuanian JA and Another* [2016] EWHC 1862 (Admin), [2016] 1 WLR 4937, [23].

49 The respondent confirmed that confidential and legally privileged advice was provided to the Government of the Republic of Turkey; the communication was not a general request for further information and the CPS was not merely "acting as a conduit on behalf of the court in transmitting questions"*: Puceviciene,* [21] and [22]. The respondent further

confirmed that the correspondence noted in the further information is correspondence internal to the Government of the Republic of Turkey, not correspondence between the CPS and the requesting State. The respondent confirms it has discharged its duty of candour and claims there is nothing which requires disclosure in this case.

Application to certify a point of law of general importance

50 On 12 June 2021, the Divisional Court (Holroyde LJ and Jay J) in *Popoviciu v Romania* [2021] EWHC 1584 (Admin) considered the test to be applied when considering an alleged past breach of fair trial standards. It concluded that the "real risk" test applied as much to alleged past breaches as to the prospect of future breaches. At [176], the Divisional Court noted that this was contrary to the view I had reached in my first judgment in this case, that the concept of "real risk" was inherently forward-looking and that, where the breach relied on was in the past, it was necessary for the appellant to establish that the facts giving rise to the breach had actually occurred.

51 There being a divergence between the Divisional Court and my earlier judgment, Mr Southey submitted that I should certify the following question for determination by the Supreme Court:

> "Where a requested person challenges the request for their extradition on the basis of Article 5 of the Convention, where a sentence of imprisonment has been imposed following a trial conducted in flagrant breach of their right to a fair trial contrary to Article 6, must the person prove that their trial was in fact flagrantly unfair; or rather, is it sufficient to demonstrate substantial grounds to believe there is a real risk the conduct of the trial was so unfair?"

52 Mr dos Santos invited me to dismiss the application, which he submitted is academic in the light of the findings in my earlier judgment, and would, if granted, lead to unjustifiable delay.

Discussion

Disclosure

53 In my judgment, there is no proper basis on which to doubt that the respondent has complied with its duty of candour in this case. The CPS is entitled to provide confidential advice to the authorities of the requesting state. The authorities of that state are entitled to correspond confidentially between themselves. The matters on which I invited the provision of further information were set out clearly in my first judgment. What the material provided shows is a matter for submission. I therefore dismiss the appellant's application for disclosure.

Admission of fresh evidence

54 The conditions for the admission of fresh evidence on appeal are set out in s. 104(4) of the 2003 Act. They are that: (a) evidence is available that was not available at the extradition hearing; (b) the evidence would have resulted in the judge deciding a question before him

at the extradition hearing differently; (c) if he had decided the question in that way, he would have been required to order the person's discharge.

55 Although Ms Karakas' evidence about retrials could in principle have been adduced before the judge below, it would in my judgment be wrong to exclude it for that reason. The evidence was responsive to assurances which I had invited the Turkish authorities to give. I would admit Ms Karakas' evidence as to the way in which retrials are conducted if it satisfied conditions (b) and (c) in s. 104(4) of the 2003 Act. Whether it does or not depends on an analysis of that evidence.

56 As to Ms Karakas' evidence on corruption in the Turkish judicial system generally, it is true that there was some evidence on the topic before District Judge Goldspring. However, given his finding that the appellant had voluntarily absented himself from the hearing at which his accuser gave evidence, he did not have to reach any concluded view about the fairness of the contemporary Turkish judicial system. He was dealing with a conviction warrant seeking the appellant's surrender to serve a sentence imposed following a hearing in 2008. He therefore naturally concentrated on the specific allegation that the conviction in question had been tainted by corruption and (to some extent) the evidence of systemic corruption at that time.

57 In the light of the findings in my first judgment, if the appellant is extradited, he will now face a retrial. That means that the ability of the Turkish judicial system to provide a fair trial *now* is, for the first time, squarely in issue. In those circumstances, I have considered all the evidence relied upon by the appellant, including that which post-dates the hearing before District Judge Goldspring. I have done so applying the test which applies to "foreign cases" under Article 6 ECHR: has the appellant shown substantial grounds for believing that, if extradited, he would be exposed to a real risk of being subjected to a flagrant denial of justice?

The proper approach to the assessment of the fairness of a retrial

58 In general, an appellant who claims to face the risk of an unfair trial in the requesting state must satisfy what has been referred to as an "exacting test": *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, [24] (Lord Bingham). It is "for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting state, he would be exposed to a real risk of being subjected to a flagrant denial of justice": *Othman,* [261], cited in [58] of my first judgment. As with other human rights-based objections to extradition, the onus is on the appellant to establish to the relevant evidential standard that extradition would give rise to a breach of his ECHR rights.

59 Against this background, s. 85 identifies one particular aspect of fair trial rights – the right to be present at one's trial – and requires the judge to answer a series of structured questions about it: see para. 3(a) above. Read with s. 206 of the 2003 Act, s. 85 means that the requesting state bears the burden of proving to the criminal standard that (i) the appellant was present at his trial, failing which (ii) he deliberately absented himself, failing which (iii) he would be entitled to a retrial or (on appeal) to a review amounting to a retrial. As noted above, by virtue of s. 85(8), this latter requirement entails (a) the right to defend

himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required and (b) the right to examine or have examined witnesses against him and to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him.

60 Parliament could have identified other aspects of the right to a fair trial as matters which the requesting state was required to establish to the criminal standard. It did not. In my judgment, the consequence is that the requesting state is not required to establish that all other such aspects will be present at any retrial. If it were, it would be markedly easier to impugn the fairness of a retrial in a conviction case than to impugn the fairness of a first trial in an accusation case. There is no case law, and no reason of principle, which supports such a distinction.

61 It follows that the proper approach to s. 85 is to ask whether the requesting state has proved to the criminal standard that the appellant is entitled to a retrial conferring the particular procedural rights identified in s. 85(8). If the answer is "Yes", the requirements of s. 85 are satisfied. This does not preclude an objection that the retrial will involve a breach of fair trial rights, but the objection must be made out by the appellant to the "exacting standards" set by the Strasbourg Court in this context, i.e. by showing "substantial grounds for believing that he would be exposed to a real risk of being subjected to a flagrant denial of justice". Only if those exacting standards are met will the objection succeed.

Has the respondent proved the s. 85(5) and (8) matters to the criminal standard?

62 The words used by Presiding Judge Paksoy, as set out in [4] above, were "entitled to the right to a retrial". If the assurance is read at face value, these words leave no room for doubt that the retrial is a matter of entitlement, not discretion. The reference to Article 3 of 2AP shows that the Turkish authorities themselves intend the assurance to satisfy that provision. In context, it can be inferred that the Turkish authorities consider the assurance they have given "sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence the background". The view of the Turkish authorities is not, of course, determinative, but it is a useful starting point for construing the assurance.

63 The further information from Judge Abdullah shows how Article 3 of 2AP was given effect in Turkish law and what the implementing provisions require. It explains the procedure, which involves the Turkish court issuing a judgment on retrial (in this case, the judgment of Judge Paksoy). It confirms that the effect of the implementing law is that the requested person is "subject to this decision". Once the requested person is extradited, the judgment *in absentia* is served on him and he has 7 days in which to object. This is all consistent with an entitlement to retrial, albeit one which must be positively claimed, as opposed to a discretion whether to offer a retrial or not.

64 The statement that the retrial proceedings are "exclusively within the jurisdiction of the court and these transactions are carried out in accordance with the general provisions of the Criminal Procedure Code, Law No. 5271, at the discretion of the court" is general, rather than specific. In that context, the reference to "discretion" is one that would not be out of place in a description of English criminal proceedings. It means no more than that the conduct of the trial in this particular case is, as would be expected, exclusively a matter

for the court, rather than something which can be the subject of express assurances by the executive. No doubt, the decisions taken by the court will involve the exercise of judgment or discretion on a variety of different points, but subject always to the general law.

65 The content of the relevant general law is set out in Judge Abdullah's further information. This confirms at §2 that, at his retrial, the appellant will have the right, pursuant to Article 150 of the Code of Criminal Procedure, to nominate an attorney and, if he cannot afford one, the right to an attorney appointed by the state. This satisfies s. 85(8)(a) of the 2003 Act.

66 The further information sets out at §3 the provisions of Turkish law governing the right to have witnesses examined. Article 201 provides that an accused person's attorney can ask questions to those witnesses who are "invited to the hearing in accordance with the discipline of the hearing". It is not surprising, and not objectionable, that Turkish law allows the court to decide which witnesses are summoned to appear at the hearing. Nor can there be any objection to the ability of the presiding judge to determine if a question can properly be asked: judges in this jurisdiction also determine whether a particular question can properly be asked and will refuse to permit questions which are irrelevant or (in sexual assault cases) improper questions relating to a complainant's previous sexual history.

67 Read in context, the assurance based on this provision is sufficient to prove to the criminal standard that the appellant will have "the right to examine or have examined witnesses against him and to obtain the examination of witnesses on his behalf under the same conditions as witnesses against him", so that s. 85(8)(b) is satisfied.

68 *Dean (Zain Taj) v Lord Advocate* (cited by the Divisional Court in *Giese*: see [15] above) shows that the presumption that assurances are given in good faith applies not only in EAW cases (where the requesting state is a party to the Framework Decision), but in all cases where the UK has entered into extradition arrangements with "friendly foreign states or territories giving rise to mutual obligations in international law": see at [36]. See further *Gomes v Government of Trinidad and Tobago* [2009] 1 WLR 1038, [36].

69 The extract from *Giese* set out at [15] above recognises that there may be states "whose assurances should be viewed through the lens of a technical analysis of the words used and suspicion that they will do everything possible to wriggle out of them". That might be the case if there were evidence that a state had previously breached an assurance or interpreted it in a narrow or technical way. But there is no suggestion of that in this case.

70 The appellant's argument depends on the submission, said to be supported by Ms Karakas' evidence, that the retrial would merely be confirmatory of the decision taken in 2008. In my judgment, however, the Turkish government's assurance is to contrary effect. It makes plain that the retrial will be conducted according to the general provisions of the Code of Criminal Procedure – and sets out some of the relevant provisions. On any fair reading of the assurance, the Turkish government is saying that the same procedure as would have been applicable at the first trial will be employed at the retrial. If it were otherwise, the references to the right to obtain evidence and question witnesses would be otiose and misleading.

71 In my judgment, very little can be drawn from Ms Karakas' evidence on this point. She was able to find only one example of a decision under Law No. 3732 (which implements 2AP), a decision of the Court of Cassation in 2013. There is an obvious difficulty in drawing conclusions from a single appellate decision, particular where – as here – the respondent has been unable to locate details of the case concerned. It is unclear from what Ms Karakas says precisely what submissions had been made to the trial court in the case concerned and what the grounds of appeal were. In those circumstances, I do not accept that there is a proper basis for Ms Karakas' conclusion that "any review of [the appellant's] original trial would be highly likely simply to endorse the original decision". As I have said, that conclusion is contrary to any fair reading of the assurance given and I accordingly reject it.

72 In these circumstances, there is no reason not to apply the presumption that the assurances provided by the Turkish government within the framework of 2AP have been given in good faith. Since there is nothing to displace that presumption here, the respondent has discharged the burden of showing that the appellant will be entitled to a retrial in which he will have the rights identified in s. 85(8) of the 2003 Act.

Has the appellant shown substantial grounds for believing that, if extradited, he would be exposed to a real risk of being subjected to a flagrant denial of justice?

73 Although at the original hearing the appellant advanced a case that he had been asked for a bribe in 2008, I rejected that case. The defect which I identified in the procedure in 2008 was not such as to cast doubt on the operation of the system as a whole. It is not said that the offence in respect of which the appellant is entitled to a retrial is one which engages political or social sensitivity in Turkey. Nor is it said that his guilt or innocence is an issue on which the Government of the Republic of Turkey would be likely, or perceived, to have any view.

74 Nor, in my judgment, can the retrial be regarded as especially likely to be affected by corruption or partiality because it involves the exercise of judicial discretion. Every trial, whether in this jurisdiction or any other, involves the exercise of such discretion. The assurance and further information supplied by the Turkish authorities show that the legal framework governing the retrial will be the same as that governing a first instance trial. Thus, if there is a real risk of flagrant unfairness in this case, it must be for reasons which would apply equally to any Turkish criminal case.

75 There is no doubt that systemic corruption in the judicial system of a state can, in principle, lead to the conclusion that there is a real risk of flagrant unfairness in *any* trial under that system: *Kapri v Lord Advocate* [2013] UKSC 48, [2013] 1 WLR 2324, [28]-[33]. But, to reach such a conclusion, there would have to be evidence which established substantial grounds for believing that there is a real risk of flagrant unfairness even in a non-politically or socially sensitive case.

76 The evidence adduced at the original hearing included evidence from Prof. Bowring, but this had understandably concentrated on the position in 2008. Prof. Bowring's statement in oral evidence that the failed *coup d'état* in 2016 had been "disastrous… for the rule of

law in Turkey" (see District Judge Goldspring's judgment at [172]) is not of sufficient particularity to assist materially in assessing the risk of corruption in non-political cases. It is also noteworthy that, on 5 October 2020, District Judge Zani rejected the submission, based on evidence initially given in that case by Prof. Bowring, that "nobody in Turkey could have a fair trial", while accepting that there was a real risk of a flagrantly unfair trial in the politically sensitive case before him: see Johnson J's judgment (with which Dingemans LJ agreed) in *Turkey v Tanis*, at [21] and [49].

77 The interim compliance report of the Group of States Against Corruption (GRECO), adopted on 22 March 2019 and published on 29 June 2019, was also before District Judge Goldspring. I referred to it in [27] of my first judgment. This report shows that several recommendations relevant to the independence of the judiciary had not been implemented. The Turkish authorities had informed GRECO that a code of judicial ethics for judges and prosecutors was currently under consideration, which would contain *(inter alia)* provisions on conflicts of interest, gifts, recusal and contacts with third parties. GRECO noted that "some progress had been made" albeit its key recommendations had not yet been implemented. This report certainly indicates that further work remains to be done in addressing structural independence and training for the judiciary, but it does not cast significant light on the extent to which corruption is endemic in the system in cases which are not politically or socially sensitive.

78 Also referred to in [27] of my first judgment was a report prepared by Kevin Dent QC on behalf of the Bar Council Human Rights Committee of England and Wales, published in May 2020 and updated in September 2020. That report concentrates on one trial of sixteen leading civil society activists whose arrest generated mass protests to which the Government reacted very strongly. It does not supply a basis for drawing conclusions as to the operation of the Turkish judicial system generally in cases which are not politically or socially sensitive.

79 The US State Department Report for 2019 contains examples of cases in which fair trial standards were breached, but the problems identified largely occurred in terrorism or national security cases. Transparency International's 2020 report suggests an increase in perceived levels of corruption in Turkey since 2008. It is true to say that Turkey ranked lower than all EU member states, but its position (86th equal) was the same as that of India and Trinidad and Tobago. The UK has active extradition arrangements with both. Turkey ranks considerably above many other states with which the UK maintains extradition arrangements. In any event, Transparency International's rankings relate to perceptions of corruption across all aspects of government and society, not just the judiciary.

80 The European Parliament Resolution of 19 May 2021 was produced as part of the ongoing process by which the EU institutions assess rule of law compliance (amongst other things) in states which are candidates to join the EU, as Turkey has been for many years. It is sharply critical of the state of the rule of law in Turkey. There is reference to "the deteriorating structural problems concerning the lack of institutional independence of the judiciary in favour of the executive" and "the chilling effect of the mass dismissals [of judges] carried out by the government in the past years". This is said to have undermined "the capacity of the judiciary as a whole to provide an effective remedy for human rights

violations, both with regard to measures taken under the state of emergency, and in general" (para. 17). The Resolution highlights some individual cases, all politically sensitive, and continues to note that the European Parliament is "deeply worried" about the disregard by the Turkish judiciary and by the Government of the Republic of Turkey of ECtHR rulings and the "increasing non-compliance of lower courts with the judgments of the Constitutional Court" and recognises that there have been instances where the Turkish judiciary has conducted retrials of prisoners following a decision by the ECtHR, which "often fail to meet internationally recognised standards for a fair trial" (para. 21).

81 Whilst the mass dismissal of judges is plainly a matter of significant concern, the European Parliament Resolution by its nature expressed conclusions rather than providing evidence from which an assessment can be made of the extent of corruption or partiality in the Turkish judiciary in general or in particular categories of case. The finding in relation to disregard by lower courts of decisions of the Strasbourg Court and of the Turkish Constitutional Court is also of concern, but it is difficult to draw clear conclusions from this without more detail, in particular as to the types of case in which these problems were identified and as to the willingness and ability of the appellate courts to correct them.

82 Ms Karakas' evidence on corruption in Turkey is itself based on the conclusions of the European Parliament, Transparency International, GRECO and reports by the Business Anti-Corruption Portal in 2018 (which appears mainly to relate to commercial law) and Freedom House in 2021. The excerpts from the latter report cited by Ms Karakas provide examples of investigations into corruption on the part of judges in criminal courts. The first bullet point dates from 2010. The second, third and fourth date from the period 2019-2021 and give four examples of cases in which Turkish prosecutors or judges were suspected of corruption. These examples also show, however, that the corruption suspected in these cases has been investigated and action taken to address it.

83 Finally, the SIHRG Report supplies no basis for drawing conclusions as to the extent of any risk of corruption or partiality in non-politically or socially sensitive cases, for the reasons given by Mr dos Santos and recorded at [38] above.

84 In my judgment, having considered all the evidence, the appellant has not shown substantial grounds for believing that there is a real risk that the retrial in his case will be flagrantly unfair.

85 The appeal will therefore be dismissed.

The application to certify a point of law of public importance arising from the first judgment

86 The point of law which Mr Southey invites me to certify (see [51] above) is one which I decided against the appellant in my first judgment. I also made clear at [57]-[62] of that judgment, however, that even if I had decided it in the appellant's favour, he would not have succeeded. In those circumstances, the point of law is not one which is "involved in the decision" for the purposes of s. 114(4) of the 2003 Act, because my conclusion on that point was not necessary to the decision. The application is therefore refused.