Neutral Citation Number: [2016] EWHC 1801 (Admin)

Case Nos: CO/5174/2015
CO/6572/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2016

Before :

LORD JUSTICE BURNETT
- and –
MR JUSTICE MITTING

- -

Between :

GJIN MARKU	**Appellant**
- and -	
THE NAFPLION COURT OF APPEAL, GREECE	**Respondent**
- and –	
JOHN MURPHY	**Appellant**
- and –	
THE PUBLIC PROSECUTOR'S OFFICE TO THE ATHENS COURT OF APPEAL, GREECE	**Respondent**

- -
- -

CO/5174/2015
MR EDWARD FITZGERALD QC AND MR DANIEL JONES (instructed by **Sonn MacMillan Walker**) for the **Appellant**
MR JAMES STANSFELD (instructed by **the Crown Prosecution Service**) for the **Respondent**
CO/6572/2015
MR EDWARD FITZGERALD QC AND MR BENJAMIN SEIFERT (instructed by **Edward Hayes LLP**) for the **Appellant**
MR JAMES STANSFELD (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing date: 28 June 2016

- -

Approved Judgment

LORD JUSTICE BURNETT AND MR JUSTICE MITTING :

1. By an accusation European Arrest Warrant ("EAW") issued on 28 May 2014 by the Deputy District Attorney of the Court of Appeal in Nafplio, Greece the extradition of Gjin Marku, an Albanian citizen, is sought for the purpose of prosecuting him for the attempted murder of Marklj Petrit on 18 November 2005 in Velo of Corinth. The EAW was certified by the National Crime Agency ("NCA") on 12 September 2014. Marku was arrested on 28 September 2014. Following a contested extradition hearing his extradition was ordered by District Judge Bayne on 20 October 2015.

2. By a conviction EAW issued on 13 March 2013 by the Public Prosecutor of the Athens Court of Appeal the extradition of John Murphy, a British citizen, is sought to serve 9 years 11 months and 10 days of a sentence of 10 years imprisonment imposed by the Court of Appeal for Felonies, Athens for possession and importation of 11.2 grams of cocaine at Athens International Airport on 23 May 2007 following his conviction in his absence by the same court on 10 April 2012. The EAW was certified by the NCA on 6 May 2015. Murphy was arrested on 3 July 2015. Following a contested hearing his extradition was ordered by District Judge Nina Tempia on 21 December 2015.

3. Both Marku and Murphy challenged extradition on manifold grounds. They appeal to this court with permission granted by Laws LJ and Flaux J on 7 April 2016 on limited grounds: in the case of both appellants, that conditions in the prisons in which they would be likely to be held (in Marku's case, on remand and if convicted) would infringe their rights not to be subjected to inhuman or degrading treatment under Article 3 European Convention on Human Rights ("ECHR") and Article 4 Charter of Fundamental Rights of the European Union ("the Charter"); and in Marku's case only, that he would be at risk of torture or inhuman or degrading treatment at the hands of Greek police, contrary to the same Articles.

4. The District Judges made uncontroversial findings that Marku would probably be detained at Nafplio Prison on remand and if convicted and that Murphy would be detained at Korydallos Men's Prison.

<u>The law</u>

5. The law is not in doubt. If there are substantial grounds for believing that there is a real risk that if extradited a person will be subjected to torture, inhuman or degrading treatment in breach of Article 3 ECHR his extradition must be refused and an order made for his discharge under s21 Extradition Act 2003. In the case of a request by a judicial authority of a member state of the Council of Europe which is also a member state of the European Union, there is a strong, but rebuttable, presumption that it will comply with its obligations under Article 3 ECHR. If cogent evidence is adduced that there is a real risk that it will not, ordinarily in the context of something approaching an international consensus to that effect, extradition must be refused unless the requesting judicial authority can give, and if necessary secure from the relevant authority of its state, an assurance sufficient to dispel that real risk: see the summary of UK and Strasbourg cases in *Krolik v Poland* [2012] EWHC 2357 (Admin) at paragraphs 4 - 7 and in *Elashmawy v Italy* [2015] EWHC 28 (Admin) at paragraph 50; and as to assurances see *Othman v UK* [2012] 55 EHRR 1 paragraphs 187 – 189.

6. The approach to Article 4 of the Charter is in essence the same:

> "Where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing member state that demonstrates that there are deficiencies, which may be specific or generalised…the executing authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned will be exposed…to a real risk of inhuman or degrading treatment within the meaning of Article 4."

If, after requesting and receiving supplementary information from the requesting judicial authority, it cannot discount the existence of such a risk it "must decide whether the surrender procedure should be brought to a close": *Pal Aranyosi and Robert Caldararu* C-404/15 and C-659/15 PPU paragraph 104.

7. Mr Fitzgerald QC submitted that there may be a difference between the approach of domestic courts and that of the Luxembourg Court, in that the latter does not expressly recognise a strong presumption in favour of the requesting state. We do not accept that proposition. The requirements of the Luxembourg Court for "objective, reliable, specific and properly updated evidence…" presupposes the existence of a presumption that the requesting state will comply with its obligations under Articles 3 ECHR and 4 of the Charter.

Articles 3 and 4 – Prison conditions

8. For many years prison conditions in Greece have given rise to adverse comments by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"). On 15 March 2011 it deployed its weapon of last resort: a public statement, in which it observed,

> "9…The CPT has observed a steady deterioration in the living conditions and treatment of prisoners over the past decade. The Committee has identified a number of fundamental structural issues which serve to undermine attempts to remedy this state of affairs. They include the lack of a strategic plan to manage prisons, which are complex institutions, the absence of an effective system of reporting and supervision, and inadequate management of staff. The CPT has highlighted in its reports the unsuitable material conditions, the absence of an appropriate regime and the poor provision of healthcare. It has found that due to the totally inadequate staffing levels, effective control within the accommodation areas of some of the prisons visited has progressively been ceded to groups of strong prisoners. All these issues are compounded by the severe overcrowding within most Greek prisons.
>
> 10. The Greek authorities have yet to recognise that the prison system as it is currently operating is not able to provide safe and secure custody for inmates. Discussions with the prison

> administration in Athens indicated a lack of appreciation on their part of the actual situation in the country's prison establishments.
>
> 11. The findings of the 2011 visit confirmed that a regulated prison system, as aspired to in law, has given way to the practice of warehousing prisoners. No action has been taken to implement the CPT's repeated recommendations to improve the situation in establishments visited as regards living conditions, staffing levels, purposeful activities and aspects of healthcare, not to mention inter-prisoner violence. Conditions are especially worrying at…Korydallos Men's and Women's Prisons…."

9. The CPT made two further visits to Greece – from 4 to 16 April 2013 and from 14 to 23 April 2015. On each occasion, they visited Korydallos Men's Prison. On the second occasion only, they visited Nafplio Prison. Stringent criticisms were made of the regime and conditions at Korydallos Men's Prison in both reports and of Nafplio Prison in the 2015 report.

10. The 2015 report of 15 July 2015 was published on 1 March 2016. Its tone is set by preliminary remarks in paragraphs 61 and 63:

> "61. The CPT is concerned that the Greek prison system is reaching breaking point and yet, despite the numerous warnings, the authorities have not taken up the fundamental structural issues raised in the Committee's previous reports with the necessary urgency. They include the lack of a strategic plan to manage prisons, which are complex institutions, the absence of an effective system of reporting and supervision, and inadequate management of staff.
>
> The findings from the 2015 highlight that the main problems of overcrowding and chronic shortage of staff persist in the Greek prison system. These two overarching problems compound the many additional serious shortcomings in the prisons visited, including very poor material conditions, lack of hygiene, the absence of an appropriate regime and high levels of inter-prisoner violence and intimidation. Further, the insufficient provision and inadequate medical care in prisons is particularly worrying.
>
> The situation has now deteriorated to the point where over and above the serious ill-treatment concerns under Article 3 of the European Convention on Human Rights (ECHR), there are very real right to life issues under Article 2 ECHR, in as much as vulnerable prisoners are not being cared for and, in some cases, are being allowed to die…
>
> 63. The challenges facing the prison system in Greece are not new and the CPT has been consistently pointing out the

> structural deficiencies for many years. Indeed the CPT's public statement of March 2011 was an alarm call for the Greek authorities to act to put in place a prison system that can provide safe and secure custody for inmates. Regrettably, the concerns raised by the CPT were not fully acknowledged by the previous governmental authorities and, as observed during the 2015 visit, the situation has further deteriorated to the point where lives are being lost. There is now an even greater need to recognise the systemic shortcomings and to devise a strategic plan for the recovery of the prison system with clear, short, medium and long-term goals. Currently, many prisons in Greece are merely acting as warehouses in which to hold people until they are eligible to be released back into the community. It is high time to change the way prisons function in Greece."

11. Korydallos Men's Prison and Nafplio Prison were the subject of specific criticisms under three headings:

i) Ill-treatment

Korydallos Prison

There was serious understaffing: wings of 350 – 400 prisoners were supervised by one or two prison officers who acted, effectively, as "turnkeys". In consequence, inter-prisoner violence and intimidation were rife. Prison staff told the CPT that they had no idea what was going on in the wings. There had been three incidents of very serious violence in 2 ½ years, the last of which resulted in the death of two prisoners and the hospitalisation of 21. In paragraph 67 the CPT said of the situation generally:

> "The CPT is seriously concerned that despite the gravity of the situation little or no action appears to have been taken to investigate the underlying causes of the violence or to put in place a strategy to prevent similar episodes of violence breaking out. On the contrary, the policy of simply warehousing various groups of inmates continues, the effect of which can be likened to a boiling cauldron left to simmer away with violent eruptions every few months."

Nafplio Prison

There was severe understaffing: 11 officers on day duties for (then) 510 – 600 prisoners. The nurse and deputy director had never been inside the accommodation areas because they were advised that it was unsafe. There was a hierarchy of prisoners, with intimidation and beatings, for those who did not follow it. Fighting led to stab wounds for three prisoners in one incident in February 2015. A culture of impunity existed.

ii) Conditions of detention

> "71. Once again, the CPT's delegation found that the living conditions in the prisons visited were generally very poor. The provisions of the 1999 Greek Prison Law are simply no longer adhered to with regard to standards of accommodation and norms for a safe environment, including healthcare and hygiene, to be provided to each prisoner. Some of the conditions encountered notably at Korydallos Prison hospital and at Nafplio Prison, can easily be considered as amounting to inhuman and degrading treatment."

Korydallos Prison

1,979 inmates were detained in a prison with an official capacity of 800. Cells of 9.5m² designed for single occupancy were occupied by three or even four inmates.

Nafplio Prison

509 inmates were housed in a prison with an official capacity of 314. The normal occupancy of 600 had been reduced by 70 just before the CPT visit, to remove known trouble-makers. At times of high numbers, 14m² cells were occupied by seven prisoners. Dormitories of 57m² capable of accommodating 14 prisoners adequately, contained 30 (46 before the CPT visit). Vulnerable prisoners were placed in bunks in a filthy and barely ventilated corridor. (This use ceased in June 2015 following the CPT visit).

iii) Healthcare services

There were severe staff shortages. There had been no improvement since 2011/2013.

Korydallos Prison

"The situation…remained dire". Three trainee doctors attended five times a month. 12 visited twice a week. There were three full-time nurses. "This is totally insufficient".

Nafplio Prison

"One highly committed full-time nurse…placed in an untenable position, professionally isolated and overwhelmed".

The CPT stated that four full-time general practitioner equivalents and six full-time nurses were required for Korydallos Prison and one full-time general practitioner and three nurses for Nafplio Prison, by the end of January 2016.

12. In its published response of 1 March 2016, the Greek Government did not reply expressly to paragraph 61 of the CPT report. In response to the paragraphs dealing with ill-treatment (65 – 70) it acknowledged staff shortages and explained their cause: "since retirements are not replenished with equal recruitments, given the fiscal challenges facing our country". On overcrowding it stated that the situation at Korydallos Prison had improved and that the number of prisoners held at Nafplio

Prison had reduced to 444 by 1 October 2015. As already noted, the corridor for vulnerable prisoners had been closed. In response to the healthcare staffing recommendations, it stated that the process for the appointment of two physicians at Korydallos male prison "has already started" and that a law had provided for an increase of 20 nurses "and the process of filling these positions will begin". Nothing was said about Nafplio Prison. A general statement was made about prison medical and nursing staff: "A well-reasoned proposal for the emergency recruitment of a minimum number of 500 employees… is being devised in order to be forwarded for exceptional approval by the government".

13. On 22 June 2016, Eftychios Fytrakis, General Secretary of the General Directorate of Anti-Crime and Penitentiary Policy of the Ministry of Justice Transparency and Human Rights stated that as at 16 June 2016, the population of Korydallos Prison was 1,506 and of Nafplio Prison 389.

14. Only one conclusion can properly be drawn from this material: if the conditions in Korydallos Men's Prison and Nafplio Prison are anything like as bad as they were at the time of the CPT visit in April 2015, the appellants would establish that their extradition to Greece, if it would result in detention in either prison, would be impermissible by virtue of s21 of the 2003 Act. Neither District Judge can reasonably be criticised for reaching the opposite conclusion, because neither had the 2015 CPT report which belied their conclusions that matters had improved sufficiently since 2011 to permit extradition. Further, on 21 December 2015 this Court in *Balaei Haris v Greece* [2015] EWHC 3702 (Admin) withheld the Senior District Judge's decision to order the extradition of that appellant to Greece to serve a sentence at Korydallos Prison. However, as Laws LJ, who was a party to that decision, recognised when granting permission to appeal on prison conditions grounds, the 2015 CPT report requires the matter to be looked at again.

15. In measured, but forceful, submissions Mr Stansfeld, for the requesting judicial authority, submits that nothing has really changed, at least for the worse since the decision of this Court in *Balaei Haris*. It is true that, in its 2013 report, the CPT criticised clearly the poor material conditions in Korydallos Men's Prison (paragraph 101) and, in trenchant terms, the impossibility of fulfilling the minimum obligation of keeping prisoners and staff safe in circumstances in which there were usually only one or two officers in charge of a wing holding 400 prisoners (paragraph 98); and called for the appointment of the same number of medical and nursing staff as in 2015. In its response of 16 October 2014, the Greek Government rejected the "accusations" of lack of correctional staff or the ceding of control to prisoners and stated that they could not afford to recruit more staff, including medical and nursing staff. In the event, although the numbers detained at Korydallos Prison were reduced from 2,300 to 1,979 inmates, nothing was done between the two CPT visits to alter the staffing, medical and nursing arrangements. In those circumstances, it is hardly surprising that the CPT expressed itself in the strong language that it did, following its return visit to Korydallos Prison and its first visit to Nafplio Prison in 2015. Its report makes it clear, beyond question, that in both prisons the accommodation areas are run by groups of strong prisoners who use intimidation and violence to maintain their sway over weaker prisoners, with the predictable outcome of periodic eruptions of violence.

16. Mr Stansfeld submits that the root problem is overcrowding, which is being successfully addressed. We accept that the overcrowding at Nafplio is now only 25% of capacity, though at Korydallos Prison it remains nearly 200%, but that is not the only root problem. As the CPT expressly stated, the other one is understaffing. Until that is both addressed and surmounted, the ceding of control of the accommodation areas to groups of stronger prisoners and the risk that that poses to anyone not in that group cannot be overcome. It is the effective loss of control by the Greek prison authorities of the running of the prisons and management of the day to day lives of the prisoners which emerges as the most stark conclusion of the CPT 2015 report. Difficulties hinted at and expressed in relatively mute tones in the earlier report have come to the fore, and loudly so. We recognise that a number of the worst aspects of the immediate poor conditions in both establishments have received attention since the visit of the CPT and that the falling population in both will help. But we consider that to send individuals into a prison outside the effective control of the authorities which is run by prisoners and gangs in an atmosphere of violence, intimidation and constant threat exposes an individual to inhuman or degrading treatment. It is not a question simply of whether the person concerned will end up as a victim of violence but living in fear and under threat in a lawless prison that crosses the threshold.

17. The appellants drew to our attention two recent cases of the German Courts. In PP and B the Oberlandsgerichten of Dusseldorf and Stuttgart respectively, on 14 December 2015 and 21 April 2016, refused to accept as sufficient to dispel the real risk of inhuman or degrading treatment of the requested persons by reason (only) of the conditions in which they would be detained in Greece, general assurances given by the Greek authorities. The underlying premise was stated by the Dusseldorf Court in Part III of its judgment: "the general desolate condition of the Greek prison system". Both decisions were based on the 2013 CPT report and information subsequently available. It is inconceivable that they would have been different if the 2015 report had been available to them, since the picture painted in many respects is worse. In *Balaei Haris* the Senior District Judge observed that there was an international consensus that prison conditions in Greece were "appalling", but not that they crossed the high Article 3 threshold. That case was argued on the basis of the 2013 CPT report, the Greek Government's response, other recent information and assurances from the Greek authorities. In our judgment, matters have moved on factually since the decision of this court in *Balaei Haris.*

18. Do the assurances given by the Greek authorities dispel the grounds for believing in the existence of a real risk of inhuman or degrading treatment? Four documents are relevant. On 12 February 2015 Nicolaos Paraskevopoulos, Minister of Justice, Transparency and Human Rights gave the following assurance in relation to *Balaei Haris, Marku and Others*:

> "On the subject matter the Ministry of Justice, Transparency and Human Rights confirms that the organisation and operation of Greek prisons is governed by the relevant international and European penitentiary rules and principles. In any case the Greek state shall ensure the protection of human rights, of all persons under detention in Greek prisons, in conformity with the international, European and national rules of law. The Ministry of Justice, Transparency and Human Rights through

> its competent agencies is consistently ensuring the adequate hygiene standards within the detention establishments and shall continuously provide the detainees with the necessary health and medical care, on a level equivalent to that enjoyed by the general population of the country.
>
> In this context, the Ministry of Justice, Transparency and Human Rights confirms that, in case of the EAW enforcement regarding the Iraqi citizen Mohamed Balaei Haris, the aforementioned assurances will be honoured and that the competent authorities will take care of resolving possibly special issues which may occur during his detention in Greek prisons.
>
> As regards the other cases of EAW execution mentioned in the document number T02070354908/06-02-2015 of Home Office we confirm that the same as the above-mentioned assurances will be honoured by the competent Greek authorities." (The other cases included that of Marku).

On 23 March 2015, in relation to the same requested persons, the Minister stated,

> "…We do certify that in addition to the assurances already given in these cases we state that each of the named requested persons will be accommodated in cells where they will have personal space in excess of 3 (three) m² not including space taken up by cell furniture. Further they will benefit from this assurance for the duration of their time of detention in Greece."

On 3 June 2016, Ioannis Stalikas, General Director of the General Directorate of Anti-Crime and Penitentiary Policy at the same ministry stated,

> "…You are advised that the guarantees given in our documents (the two referred to)…in relation with the detention conditions that would apply to the requested Albanian national Marku Gjin in the case of his extradition to Greece will also apply to requested UK national Murphy John."

On 22 June 2016 Eftychios Fytrakis provided the information about numbers at the two prisons and stated that the "decongestion of prison establishments is expected to continue", in the light of a 2015 law of urgent measures for the reduction of the prison population and a Bill currently before Parliament, expected to be voted on in the coming days. He also stated, however, in response to a CPS email of 15 June 2016 which has not been produced to us that "further assurances other than the above (i.e. the assurances cited above) cannot be provided".

It can be inferred that the Greek authorities have provided all of the information which they wish our courts to have to deal with the judicial authority's request for extradition of the appellants – the Greek Government's response to the 2015 CPT report and the assurances cited.

19. We do not doubt that the assurances were given in good faith and are binding on the relevant Greek authorities, in particular the Ministry of Justice, Transparency and Human Rights and the Directorate under it responsible for Greek prisons. The appellants did not dispute that the assurance regarding personal space should be taken at face value but submitted that those of a general character, in the context of the particular problems of loss of control of these two prisons, were of little value. We agree that these assurances cannot, at least for the time being, dispel the grounds for believing there exists at Korydallos and Nafplio Prisons a real risk that the appellants would be subjected to inhuman or degrading treatment of such severity as to engage and infringe Article 3 ECHR and Article 4 of the Charter. As the Greek Government acknowledged, in response to the 2013 and 2015 CPT reports, the underlying reason for understaffing and so lack of staff control over other prisoners and indeed poor material conditions at both prisons is a lack of physical resources, unlikely to be remedied soon. The reductions in numbers, small as a proportion at Korydallos Prison, but significant as a proportion at Nafplio Prison, are a step in the right direction, but no more than that. Unless and until more trained staff are recruited, the accommodation wings will be under the sway of lawless and intimidating groups of prisoners, unafraid to use violence when necessary. The fact that the single dedicated nurse and Deputy Governor at Nafplio Prison have not entered the accommodation areas because they have been advised that it is unsafe to do so starkly illustrates the point. To require any person to serve a significant prison sentence in such circumstances will inevitably put them in fear of the consequences, even if they do not materialise. There is no evidence that the Greek State has yet done anything effective to remove the circumstances which give rise to that fear. In consequence, there are substantial grounds for believing that, if extradited, either or both appellants would be subjected to inhuman or degrading treatment which would infringe their rights under Articles 3 and 4. Accordingly their extradition is prohibited by s21 of the 2003 Act and we uphold their appeal under s27(4) and order their discharge.

20. It is possible that, in the future, the Greek authorities will be able to persuade the CPT and the courts of other EU states that remedial measures not yet put in place will remove that risk, or reduce it to a level below the level of a real risk. If that were to happen, the extradition of either or both the appellants could lawfully be ordered. The mechanism for exploring the circumstances in a future case, or again in either of these cases, is fully explained in the judgment of the Luxembourg Court in *Aranyosi.* Our conclusions apply only to Korydallos and Naflio prisons. We recognise that the CPT has visited others but we heard no argument relating to them. Moreover, there are establishments within the Greek prison system which may well not suffer the deficiencies of these two. These appellants, and others sought for surrender to Greece, may yet be subject to assurances that will provide the necessary comfort that extraditees will be protected from the conditions that give rise to the material risk of a violation of Article 3 ECHR and Article 4 of the Charter.

21. In the light of our conclusion, remaining issues can be dealt with shortly. It is unnecessary to consider facts particular to Marku and Murphy, in particular about their mental state – in the case of both, moderate depression and of one post-traumatic stress disorder. Our decision is not based on any peculiar susceptibility of theirs or on shortcomings in the medical and nursing care which might be available to them in either prison. The criticisms of the medical care available in Korydallos and Nafplio are not such as would lead to a conclusion that the Greek authorities, on notice that

these appellants have been prescribed anti-depressants and may be in need of additional treatment, would not provide appropriate care. This was a subsidiary issue before the District Judge in the case of Marku. It is also unnecessary to determine Marku's additional ground that he may be ill-treated by police in the short periods in which he will be in their custody for transportation or in connection with a court appearance, because of his allegations of rape in police custody in 2005. We need say no more about that than that it seems to us to be dependent upon so many adverse contingencies occurring as to be fanciful.

22. We have also not addressed the reports of Professor Tsitselikis, who has visited neither prison (because Greek law does not allow him to). Nor have we considered additional reports from Dr Rod Morgan or Ms Papadopolou which the appellants sought to introduce. They fell outside the scope of material which could properly be admitted on appeal. Consistently with settled authority, we have looked principally at the objective reports of an independent international committee and at the information provided by the Greek authorities.