



Neutral Citation Number: [2019] EWHC 1998 (Admin)

Case No: CO/2696/2018

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30/07/2019

Before :

**LORD JUSTICE FLAUX**  
**SIR KENNETH PARKER**  
**Sitting as a Judge of the High Court**

Between :

**JOAO ANTONIO DELGARDO HENRIQUES** **Appellant**  
- and -  
**JUDICIAL AUTHORITY OF PORTUGAL** **Respondent**

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**MR STEVEN POWLES QC & MR JAMES STANSFELD** (instructed by **Bindmans LLP**)  
for the **Appellant**  
**MR MARK SUMMERS QC & MR JONATHAN SWAIN** (instructed by **Crown**  
**Prosecution Service**) for the **Respondent**

Hearing dates: Thursday 11 July 2019

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**Approved Judgment**

**Sir Kenneth Parker :**

**A. Introduction**

1. This is an appeal by Joao Henriques against two orders for extradition made by DJ Crane on 4 July 2018.
2. The Appellant's extradition to Portugal is sought by two Judicial Authorities pursuant to two European Arrest Warrants. The first warrant is an allegation warrant issued by the Judicial Authority, Comarca de Leiria, Juizo Central Criminal De Leiria, Segunda Secção, Portugal, on 3 January 2017. It alleges that between September 2002 and 17 March 2004 the Appellant conspired with others to import about 32 kg of hashish from Spain to Portugal. The offence carries a minimum sentence of 5 years' imprisonment, and a maximum of 15 years' imprisonment. The second warrant is a conviction warrant issued by the Tribunal de Execução das Penas de Lisboa, Juiz 3, Portugal on 25 July 2017. The Appellant was convicted of conspiracy to supply heroin between 1993 and March 1995. A sentence of 13 years, 6 months was imposed on 13 August 1998. The Appellant did not return to custody after the grant of 4 days' leave on 26 August 2003. There is a balance of 5 years, 5 months, and 5 days to serve.
3. Portugal has been designated a Category 1 territory pursuant to section 1 of the Extradition Act 2003 ("the Act"). Thus, Part 1 of the Act applies.
4. The Appellant was arrested on the first warrant on 24 April 2017 and on the second warrant on 14 August 2017. He has been on conditional bail throughout and has complied with all conditions.
5. The Appellant resisted extradition essentially on the basis that prison conditions in Portugal were such that, especially in light of the Appellant's state of health, his extradition would be incompatible with Article 3 of the European Convention on Human Rights ("ECHR"); and that extradition would be oppressive on account of his health under s. 25 of the Act.
6. His extradition was ordered on both warrants following a contested hearing before DJ Crane on 11 June 2018. A written judgment was handed down on 4 July 2018.
7. Permission to appeal was granted on 4 October 2018.

**The Grounds of Appeal**

8. Permission to appeal was granted on the following two grounds. Firstly, DJ Crane erred in concluding that extradition was compatible with the Appellant's rights under Article 3 of the ECHR. Secondly, DJ Crane erred in concluding that extradition was not unjust and /or oppressive, under s. 25 of the Act.

**The Appellant**

9. The Appellant is now 66 years of age and has lived in the United Kingdom ("UK") since 2004. On his arrival in the UK he worked in a factory for 3 ½ years. He then worked for about 4 years maintaining factory machines. He stopped working on the

advice of his doctor. It appears that he has travelled back to Portugal on several occasions, the last time being in August 2014.

10. As stated in a letter from Dr Potts at the Taunton Road Medical Centre in Somerset, he suffers from various conditions, which include Type 2 diabetes, fatty liver disease; morbid obesity; and poliomyelitis, mainly affecting the right leg.
11. The Appellant has been assessed by medical practitioners on a number of occasions. DJ Crane accepted the medical evidence, as follows.
12. Ms Julie Sheard (Occupational Therapist) assessed the Appellant on 6 December 2017. He could walk only a limited distance, had limited standing tolerance and struggled to negotiate stairs. He requires assistance with bathing and on occasions required assistance with dressing. His functional ability was unlikely to improve but was likely to be further reduced by his continuing post-polio syndrome and diabetes.
13. Dr Jason Payne-James assessed the Appellant on 20 December 2017. He undertook a frailty test and the Appellant was ranked as “*Moderately frail*”. “*Moderately frail*” is defined as “*people needing help with all outside activities and with keeping house. Inside, they often have problems with stairs and need help with bathing and might need minimal assistance (cuing, standby) with dressing*”. The Appellant would require prostate surgery once his prostate medication ceased to be effective. He would suffer increased disability as a consequence of his post-polio syndrome and in the absence of any substantial lifestyle change was likely to be wheelchair bound by the age of 70.
14. Dr Payne-James provided a further medical report on 15 March 2019. The Appellant was found in addition now to suffer from swelling to the right of his neck and weakness to the right side of his face, which was diagnosed as Grade 2 Bell’s palsy. After further assessment and a review of the medical records, Dr Payne-James concluded as follows. On the Clinical Frailty scale, the Appellant rated physically as between 6 and 7, Moderately to Severely frail encompassing those who are “*Completely dependent for personal care from whatever cause (physical or cognitive). Even so, they seem stable and not at high risk of dying (within up to 6 months)*”. The Appellant had chronic pain in both knees and hips and now has right groin pain, which may reflect increasing arthritis in the right hip, which would further limit his mobility. The Appellant has a shortened, visibly atrophic wasted right leg with reduced muscle power in all groups. The Appellant has reduced mobility and can now walk about 10 meters and then needs to rest. Absent the level of support provided by his children, who undertake many of the activities of daily living on his behalf, he would struggle and his degree of frailty would increase. He would require a similar level of support from prison personnel in his day-to-day activities and the need would increase in the future. There has been an increase in his nocturia (night time urination) which coupled with his poor mobility would increase his likelihood of falling at night. His post-polio syndrome would continue increasingly to disable him and limit his mobility and Dr Payne-James anticipates that he could be wheelchair bound by 70, if not sooner.
15. Taking into account what he believed were the prison conditions in Portugal, Dr Payne-James concluded that there was a risk of acquiring infections, his personal hygiene would deteriorate as he would struggle to access shower facilities and his

diabetes and hypertension would become more poorly controlled in the event of less rigorous monitoring and possibly inconsistent medication administration.

16. The Appellant has two adult children in the UK, Claudia Henriques and Felipe Henriques. The Appellant relies heavily on his children to assist him with his most basic day-to-day living needs. They assist with bathing and the preparation of meals. He has to use a stick to help him get out of bed and move around the house. He cannot walk for more than 20 metres before requiring a break and fears falling if he were to walk unaided.
17. Until recently he has been assisted by Felipe who lives five minutes away. However, at the end of April 2019 Felipe was hospitalised and diagnosed with stage 4 lymphoma and liver failure. The initial diagnosis is that the cancer is aggressive. Felipe is no longer able to care for the Appellant.
18. Claudia works shifts as a chef in a pub. She has a daughter, Raquel, who was born in 2002. They came to the UK in 2011 and live less than a five minute drive from the Appellant. When she is not at work she goes to the Appellant's house to care for him, which includes assisting him washing, cleaning and cooking. In the winter months, when it is colder, they must assist the Appellant in getting out of bed. She is now caring for both the Appellant and her brother, Felipe.

## **B. Applicable law on prison conditions for the purposes of Article 3 ECHR**

19. It is unlawful for the UK to extradite an individual to a country where he is at a real risk of being treated in a manner prohibited by Article 3: *R (Ullah) v Special Immigration Adjudicator* [2004] 2 AC 323, §24. The legal burden is on the requested person to establish by evidence “*substantial grounds for believing that he or she would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country*” (*Saadi v Italy* (2009) 49 EHRR 30, GC, at §140; *Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin) at §49). Clear and cogent evidence is required to discharge this burden (ibid at §§49-50).
20. There is a strong but rebuttable presumption that EU member states will comply with their Convention commitments due to the concept of mutual trust: *Krolik v Poland* [2013] 1 WLR 490. To rebut the presumption “*something approaching an international consensus*” is required to be shown (§§4 and 7).
21. Ill-treatment must attain a minimum level of severity in order to offend Article 3. The threshold for this minimum level is relative (*Saadi* (supra) at §134). Ill-treatment will offend Article 3 ECHR if the suffering or humiliation involved goes beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

22. The general applicable substantive requirements of Article 3 ECHR in the prison context were recently restated by the Grand Chamber in *Mursic v Croatia* (2017) 65 EHRR 1 at §§96-141.
23. In the EU context, Article 3 ECHR is mirrored by Article 4 of the Charter of Fundamental Rights, as to which the CJEU held in *Proceedings Against Aranyosi and Caldara* [2016] QB 921 that:
  - (1) Where an “*executing Member State is in possession of evidence of a real risk of inhuman and degrading treatment*” for those returned to a requesting state, an assessment of the risk must be made such that return does not result in inhuman and degrading treatment (§88);
  - (2) The executing Member State must initially “*rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention*” (§89);
  - (3) However a finding that there is a real risk of a breach of Article 4 in a requesting state as a result of the general conditions of detention “*cannot lead, in itself, to the refusal to execute a European arrest warrant*” (§91);
  - (4) The key issue is whether there are substantial grounds to believe in the case of the specific person before the Court that there is a real risk of an Article 4 breach (§94);
  - (5) Should such substantial grounds exist, the requested state “*must, pursuant to art.15(2) of the Framework Decision*” urgently request supplementary information as to the conditions the requested person will be detained in upon return (§95);
  - (6) The request for information may include inquiries regarding national or international procedures in existence for monitoring detention conditions which make it possible for them to be assessed (§96);
  - (7) If in light of the information provided it is still found that there is a real risk of inhuman treatment, then the extradition request must be postponed but it cannot be abandoned (§98);
  - (8) Instead “*the executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end*” (§104).
24. The position of the prison system in Portugal has been examined recently by this Court. In *Mohammed v Comarca De Lisboa Oeste* [2017] EWHC 3237 (Admin) (“Mohammed No. 1”), having regard to CPT reports from 2012 (periodic visit of February 2012) and 2013 (ad-hoc visit of May 2013), along with the government’s

response to each report, and other materials, this Court held (§49) that conditions in certain basement cells in Lisbon Central Prison do not comply with the standards set down in *Mursic*. The “*Aranyosi procedure*” was thus engaged in respect of that prison and information was requested from Portugal (§54).

25. In *Mohammed v Comarca De Lisboa Oeste* [2018] EWHC 225 (Admin) (“*Mohammed No. 2*”), the Portuguese authority provided a response to the questions raised (§13), as well as a response to a far earlier request for further information (§§16-17). The Court found that neither document provided adequately specific assurance to meet the risks it had identified (§§16-20), and refused further time for the Judicial Authority to put anything further before the court (§§24-26).

26. Following the discharge of Mr Mohammed, the Portuguese authorities provided, in all cases, a general assurance entitled the ‘*Declaration of Commitment*’. That provides that:

*“a. Inmates shall be detained in cells that provide at least 3sqm of personal space.*

*b. Inmates shall be detained in cells that contain a self-contained sanitary facility (and which is separated from the remainder of the cell).*

*c. Inmates shall not be detained in the basement areas of wings B, C, D and E of the Lisbon Prison or any room which lacks artificial light.*

*d. The commitment herein shall be recorded in the inmates personal penitentiary files.*

*e. Should any temporary reduction in minimum personal space become necessary, as a result the prisoners own conduct, or in order to protect the health and safety of the prison population, the principles set out in *Mursic v Croatia* (7334/13, Grand Chamber judgment of 20 October 2016) will be applied to ensure that conditions remain compatible with Article 3 ECHR.*

*f. During the short periods of time that the inmates remain to the custody of others entities (e.g. on Court or Police cells), the DGRSP will transmit them the Recommendations and principles set out in *Mursic v Croatia* to ensure those conditions remain compatible with Article 3 ECHR. In particular:*

*(i) any such reduction in personal space will be short, occasional and minor;*

*(ii) any such reduction will be accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities;*

*(iii) for the duration of such reduction the extradited person will be confined in an appropriate detention facility with no other aggravating aspects of the conditions of his or her detention...”*

27. The capacity of the Declaration to meet the risks identified in *Mohammed* was then considered by this Court in *Duarte v The Comarca De Lisboa* [2018] EWHC 2995 (Admin). This Court considered that a further CPT report published since *Mohammed*

No. 2 “provides objective, reliable and specific evidence that in autumn 2016 there were deficiencies affecting a number of prisons in Portugal, in particular because of a continuing serious problem of overcrowding and unacceptable living conditions in parts of some prisons”. Having considered all the relevant material, Holroyde LJ concluded: [para 43]

*“It is however clear from the case law to which I have referred that a general assurance applicable to all potential places of detention may suffice to exclude a real risk of inhuman or degrading treatment, and in my view the Declaration of Commitment does so in this case. It is applicable to all prisons in Portugal, and in my view it is sufficient to meet the Othman criteria. It is accepted on behalf of the Appellant that the Declaration was given in good faith. That concession, properly made, is in my view important. Given that there is no evidence of a systemic problem affecting all parts of all Portuguese prisons, it is clearly possible for the Portuguese authorities to detain the appellant in a prison, or part of a prison, which does not risk breaching his rights; and the principle of mutual trust requires this court to assume that the Portuguese authorities will do so. There is in my view nothing in the evidence and submissions before this Court which displaces that assumption. I accept that it is likely that the appellant will initially be detained for a short period at Lisbon Central Prison. I further accept that if a real risk of a breach of Article 3 is shown, the fact that it will only exist during a short period would not assist the Portuguese judicial authority. There is however no ground for saying that there is a real risk that the appellant would be detained in a part of Lisbon Central Prison which has been condemned by the CPT, and other parts of that prison have not been said to carry a real risk of breach of Article 3. There is clear evidence of actual improvement, in particular in the reduction of the level of overcrowding and a clear statement of intent – which must be respected – to achieve further improvements at that prison and elsewhere in the prison estate; and there is a clear assurance that any prison to which the appellant is allocated will house him in conditions which comply with the Mursic principles and meet the minimum standards set out in the Declaration of Commitment.”*

28. The *Declaration* relied upon decisively in *Duarte* is applicable to, and has been served in, the present case.

**Ground 1, and the first relevant issue, namely, prison conditions combined with the Appellant’s state of health**

29. Mr Steven Powles QC, on behalf of the Appellant, submits that both Lisbon Central Prison and Leiria Prison remain overcrowded. Furthermore he contends that, on the basis of an expert report of Ms Vania Costa Ramos dated 22 February 2019, neither Lisbon Central Prison nor Leiria Prison would be equipped to provide the care that the Appellant reasonably requires, in particular with respect to daily assistance in washing, using the lavatory, and moving within the prison, given his present restricted mobility (which is in the event likely to deteriorate). The Appellant will not be able to stand and shower; he will struggle with stairs.
30. Mr Powles also drew attention to evidence that the continuing threat of industrial action by prison personnel in Portugal would make delivery of treatment which was compliant with Article 3 ECHR even more precarious than might otherwise have been

the case. Finally, Mr Powles drew attention to the likely difficulty that the Appellant might face in communicating his reasonable needs to those responsible for his care in prison.

31. For the proceedings before DJ Crane, Portugal provided certain assurances to the court, namely:

(1) Letters dated 22 January and 8 February 2018 from the Portuguese Ministry of Justice (Mr Manata, deputy director general of prisons) stating that the Appellant (and indeed all persons extradited to Portugal) will be sent initially to the prison in Lisbon attached to the police station (as opposed to Lisbon Central Prison, whose basement cells were the subject of this Court’s judgments in *Mohammed*).

(2) Letter dated 22 January 2018 stating that the Appellant may then “...*be assigned to any Prison Establishment with General and Family Medicine assistance, what is happen [sic] in all Portuguese Prisons Establishments... The mentioned medication [currently prescribed to the Appellant in the UK], or equivalent, is available in any Prison Establishments. There are sanitary/bathing facilities suitable for the state of health of the patient in most of the Prisons Establishments. The particular needs of the patient can be satisfied in the generality of the Prisons Establishments, always being safeguarded the possibility of adjusting the medical care to the clinical evolution [sic] of the patient (prisoner), in particular and if justified, medical assistance at the Prison Hospital the Sao Joao de Deus or in Unit of the National Health System...*”

32. Taking account of all relevant material, including the assurances set out above, DJ Crane reached the following material conclusions:

*“44. The RP [The Appellant] will have the same right of access to the national health service as the general population. The RP will be provided with medicines and access to health care professionals at the prison hospital. So the RP will receive adequate medical treatment. He can be provided with a special diet for his diabetes.*

*45. The RP has additional care needs but these are limited to assistance putting on socks and shoes and some assistance in bathing and occasional needs getting out of bed. The RP will be assessed upon his arrival in prison, including by healthcare professionals, which will ensure that his particular requirements are known to the authorities and provided for. Whilst there are concerns over staffing levels and the conditions of the building, they are not such as to indicate that the treatment of the RP will create a real risk of breach of his Article 3 rights.*

*46. If the RP’s needs reach a certain level there are alternatives to the RP serving his sentence in a prison, such as the prison hospital, which has a new residential unit, or in hospital or at home.”*

33. Having considered the assurances that were before the court, DJ Crane stated her final conclusion, as follows:

“49. In *Othman (Abu Qatada) v UK* [2012] ECtHR 56, the court set out the criteria to be applied when considering assurances:

a) *Portugal is a member of the European Union and a signatory to the European Convention on Human Rights. Therefore, an assurance from Portugal can be accepted.*

b) *In assessing the quality of the two assurances, I consider:*

i) *The terms of the two assurances have been disclosed to the court.*

ii) *Both assurances provide specific details about the minimum conditions the RP will be held in and the medical care that will be provided.*

*The assurances detail the medical assistance that will be available, the sanitary/bathing facilities, the assessment of the RP’s individual needs, the availability [sic] of the Prison Hospital and units of the National Health Service, a minimum personal space of 3sqm, the closure of the relevant basement areas in Lisbon Central Prison and the provision of artificial lighting. The assurance details that the Director General is aware of the obligations in Mursic and will comply with them.*

iii) *The assurances have been given by the Director General for Reinsertion and Prison Services of the Portuguese Ministry of Justice and can bind the state. Vania Costa Ramos agreed that he had the authority to give an assurance and that there was no reason to suppose that it would not be upheld.*

iv) *The director General has detailed that the commitments shall be recorded on each inmate’s personal file. He is [in] charge of the prison system and there is no reason to suppose that the individual prisons will not abide by his guarantees.*

v) *Portugal has ratified the Optional Protocol to the United Nations Convention Against Torture in December 2012. It was ratified domestically in January 2013. On 09.05.13, the Portuguese government adopted a resolution designating the Provedoria de Justica as the national Preventative Mechanism.*

vi) *Portugal has a Prison Ombudsman, has cooperated with CPT visits and cooperated with the CPS in providing assurances. This indicates that they have systems for monitoring prison conditions. It also indicates that they will cooperate with monitoring of the assurances.*

50. *The assurances provide sufficient guarantees to ensure that the risk of breach of the RP’s Article 3 rights, as identified above, is discounted.*

51. *If I am wrong that the particular health and care needs of the RP within the Portuguese prison system do not reach a level such as to amount to a real risk of breach of his Article 3 rights, the assurances provided are sufficient to*

*guaranteed that his needs are met such that there would no longer be a real risk of breach of his rights.”*

34. After the decision of DJ Crane, and following the launch of this appeal, Portugal provided further material in the form of, first, a letter from the Portuguese Ministry of Justice (Mr Manata, deputy director general of prisons) dated 10 September 2018 reiterating the content of his previous assurance; and secondly, a letter from the Portuguese Court with conduct of the trial following any extradition assuring that that Court will also address the prison services to “*ensure that the defendant...will have access to home-suitable for people with reduced mobility, and ask for the help of a third person to assist him in his personal hygiene...all the medicines available in the market may be released to [the Appellant] when detained’ and, like all prisoners in Portugal, he has ‘the right to medical and nursing conditions, and when their medical condition is justified by medical indication, they may be admitted to a prison hospital’*”.
35. In the light of Ms Ramos’s report of 22 February 2019, and Dr Payne-James’ report of 15 March 2019, the Portuguese authorities were asked to provide further specific assurances. The newly appointed Portuguese Director General of Prisons then provided a further and comprehensive assurance. I set out below the assurance requested, and, in italics, the assurance given.

- 1) Reconfirm the commitment set out in i) the documents you have previously provided specifically in respect of Mr Delgado Henriques that is, your letters of 23 January 2018 (enclosing a letter from 22 January 2018), 10 September 2018, and 11 September 2018; and ii) in the general document named as the Declaration of Commitment dated 6 April 2018 signed by Celso Manata;

*The commitments previously made remain in effect;*

- 2) That Mr Delgado Henriques will be placed in a cell which is on the same floor as a shower room and dining hall, or with access via a lift given he cannot walk up or down any steps;

*The Appellant will be received in the prison hospital in Sao Joao de Deus in Caxias for observation and then transferred to a prison that affords “easy access” to facilities (showers, refectory, exercise yard, visiting rooms and medical services) without barriers such as stairs;*

- 3) That there will be an immediate medical assessment of Mr Delgado Henriques’ needs following his surrender, with a view to establishing a suitable and medically safe regime for him upon admission to prison;

*He will be assessed immediately in order to determine his needs. That must occur within 24 hours of his admission;*

- 4) That sufficient staff will be provided in order to assist Mr Delgado Henriques with his mobility needs, including assisting with access to the visitation area;

*He will receive medical attention according to his needs;*

- 5) That Mr Delgado Henriques will be housed, at all times, in accommodation with at least one other individual, to ensure that he is not left alone at any time and/or he will be placed in a cell with a working call bell – potentially within wing F of Lisbon Central Prison where it is understood they are currently in working order – or provided with a personal alarm. This is because his mobility problems result in a high risk of him falling;

*He will be housed in a cell with a call bell, and possibly with another detainee [to ensure his own safety];*

- 6) Confirmation that his current medication, or any such other medication as recommended by doctors in Portugal, will be provided. His current medication is as follows:
- a. Amlodipine 10mg daily;
  - b. Indapamide 2.5mg daily;
  - c. Metformin 1000mg twice daily;
  - d. Ramipril 10 mg daily;
  - e. Simvador 20mg daily;
  - f. Tabphyn 400mg daily;
  - g. Finasteride 5mg daily.

*His medication or equivalent is available at any prison and will be provided under the guidance of doctors;*

- 7) Confirmation that Mr Delgado Henriques will be provided with access to a diet specific to his needs as a Type 2 diabetic;

*His dietary needs will be met;*

- 8) That Mr Delgado Henriques will be provided with access to in-prison healthcare emergency equipment, should it become necessary, including ECG, defibrillator, oxygen, and nebuliser;

*He will be provided with the necessary medical equipment, including ECG, defibrillator, oxygen and nebuliser;*

- 9) That Mr Delgado Henriques will be provided with access to external hospital healthcare where appropriate;

*If his particular needs cannot be [met] in the prison, he will receive treatment at the prison hospital or an external National Health Service facility;*

- 10) Confirmation that Mr Delgado Henriques has the possibility of serving any sentence in hospital or under ‘home arrest’, in the event that doctors in Portugal recommend it;

*A physician will be able to decide whether he can serve some of his sentence in hospital, and a Court may consider the possibility of doing so under house arrest;*

- 11) That all of the above matters will be available, notwithstanding any strike action ongoing in the establishment in which Mr Delgado Henriques is detained at the time;

*Regardless of any industrial action, minimally assured services include food, medication and healthcare;*

- 12) Consideration of any measures appropriate to carrying out the surrender of Mr Delgado Henriques to Portugal, bearing in mind the significant medical needs which he has and how the journey will impact on him;

*If the Appellant’s doctors certify it as essential, Portugal will also guarantee that the Appellant can be accompanied on the extradition flight by a doctor.*

## **Discussion**

36. The correct approach in principle to the issue before this court was set out by Knowles J in *Andrzej Magiera v District Court of Krakow, Poland* [2017] EWHC 2757 (Admin):

*“34 .... where a requesting state is asked to respond to concerns about the health of a person whose extradition from the UK they have requested, and to supply details of how they would propose to manage that person in a prison environment to assuage legitimate concerns about the person’s health were he to be extradited and incarcerated that are supported by detailed medical opinions, they must provide, so far as is reasonably practicable, a response which meets the concerns in respect of that specific individual. That is not to say that very lengthy documents or care plans need always be provided by way of reply. The starting point must be that in the case of an EU member state there is a rebuttable presumption that there will be medical facilities available of a type to be expected in a prison: *Kowalski v Regional Court in Bielsko-Biala, Poland* [2017] EWHC 1044, para 20. From that starting point it might not [be] necessary to say very much more. In the case of an insulin dependent diabetic prisoner, for example, it might merely be necessary for the requesting state to indicate that the management of diabetes is understood, that insulin is available, and that arrangements can be made for the defendant’s blood sugar to be appropriately monitored.*

*35. However, in other cases where the treatment or management of the illness or condition is more complex, more detail may be required before the court considering matters under Part 1 of the EA 2003 can be satisfied that concerns arising from the defendant’s medical condition have been met such that there are no bars to extradition. The reason is that it is self-evident that the range of*

*medical care that is provided in prisons is necessarily and inevitably more limited than that which is available in the outside world (as the Polish authorities in this case have expressly stated), and it is also obvious that the sort of medical care which can be provided in prisons is subject to constraints arising from security requirements and the like. Thus, in some cases it may be necessary for the requesting state to provide specific details of what concrete steps will be taken to address the specific issues arising from the defendant's illness to ensure that he does not suffer severe hardship or oppression by reason of his incarceration resultant on extradition. In such a case, broad generalised assertions to the effect that the prison has a clinic, or that prisoners are entitled to health care, or that (unspecified) medicines are available, may not be enough."*

37. Between 27 September and 7 October 2016 the European Committee for the Prevention of Torture ("the CPT") visited Portugal, investigated prison conditions at a number of prisons, and reported in detail its findings to the Portuguese Government in a Report that was published on 27 January 2018 ("the CPT Report"). Section 5 of the CPT Report specifically considered "Health care services". Paragraph 57 of the CPT report stated that "*health care facilities in the prisons were, on the whole, of a good standard*". The CPT Report enumerated the medical staff – doctors, nurses and specialists – at four prisons, noting at paragraph 57 that staffing levels were "*not always adequate*", impacting on access to care. At paragraph 58 the CPT made specific recommendations to reinforce the level of health-care staffing at the prisons in question. As regards medications, the CPT found that there was an adequate supply in the prisons visited, but made recommendations regarding stocking and delivery. The CPT criticised the adequacy of medical screening on admission and the recording of results, and made appropriate recommendations.
38. The Portuguese government responded to the CPT Report. In section 4 of the response, under 'Health Care Services', the government referred to a new inter-ministerial working group, created by the Minister of Health and Minister of Justice, whose mission was to improve the inmates' access, on an equal footing with other citizens, to the National Health Service. The government also stated that it had assumed direct responsibility for the recruitment of doctor and nurses, with private companies now used to complement the state's care responsibility. The government accepted the recommendations regarding staffing levels, and indicated in some detail how the recommendations would be implemented. The government also explained how it was implementing, or intending to implement, the recommendations in regard to distribution of medicines and medical screening on admission.
39. In summary, the CPT Report did not identify any fundamental failure in the provision of health care in the prisons that the CPT visited. The Report did indicate several areas where improvement was necessary, and made appropriate recommendations. The Portuguese government has plainly paid close attention to the CPT Report, has accepted the relevant recommendations, and has adopted measures, or was in the course of adopting measures, in order to address the areas of weakness identified by the CPT. In my view, in the light of this evidence as a whole, there are no sufficient grounds to justify displacing the threshold presumption (see paragraph 36 above) that the general standard of health care provided in Portuguese prisons is compliant with the requirements of Article 3 ECHR.

40. As to the health care of the Appellant, I note first that his medical conditions (see paragraphs 10-15 above), although relatively serious, are not of such complexity that they would require attention significantly beyond what could be reasonably expected in a prison hospital that met the standard required by Article 3.
41. Furthermore, the Portuguese Director General of Prisons has, in the latest assurance of 2 July 2019, specifically addressed each and every matter bearing on the care and treatment of the Appellant. He will be received in the prison hospital in Sao Joao De Deus in Caxias for observation. There is no assurance that he will remain in that prison, but, in my view, no such assurance was necessary because the assurances, read collectively, guarantee that he will be at all times in a prison capable of providing the care that he reasonably requires. The assurances deal with medication, dietary needs, and medical equipment. He will be kept in a cell with a call bell, and may, for his own safety, share a cell with another detainee. A doctor will determine whether he needs at any time to be moved to a prison hospital or an external NHS hospital. Even if there were industrial action, the Director General undertakes that the Appellant will continue to receive appropriate care and treatment.
42. Mr Powles QC pointed out that the assurances referred to above might be thought to be in relatively broad terms. For example, the precise prison where the Appellant might be held was not specified, so that it was not feasible to evaluate in advance conditions at a particular establishment against the assurances given. Nor is it stated in precise detail how his medical needs will be met. However, in my view, there would be potential and serious difficulties with the kind of granular, highly prescriptive approach that Mr Powles appeared to suggest. For example, it would not be likely to be conducive to operational efficiency, or even to be in the longer term interests of the Appellant, to limit the choice of prison in which he was to be kept, provided that his care and treatment were satisfactorily delivered in any prison where in fact he was kept. The same can be said about the nature of the care and treatment itself. Furthermore, an over prescriptive approach along the suggested lines would tend to encourage later allegations that a particular assurance had not been fully met, when examination showed that in fact some alternative, but perfectly adequate, measures had been adopted by the requesting state to achieve the relevant objective.
43. In short, taking due account of the threshold presumption (see paragraph 36 above), and also of the comprehensive assurance given by the Director General of Prisons, I am satisfied that Portugal will provide care and treatment to the Appellant which are in accord with the requirements of Article 3 ECHR.
44. It is only necessary to add that the carefully reasoned judgment of DJ Crane, dealing with the first relevant issue under Ground 1 of this appeal, was, in my opinion, wholly justified on the evidence before her, and disclosed no error of law.

**Ground 1, and the second relevant issue, namely, whether Portugal can be relied upon to comply with its assurances**

45. Mr Powles submitted that there was evidence to show that Portugal had not complied with the assurance in the form of the Declaration of Commitment (see paragraph 26 above). He relied upon the case of Mr Barry Candé, an individual who was extradited from the UK to Portugal in September 2018, on the basis of the Declaration of Commitment. Mr Candé made the following allegations.
46. He was detained immediately upon return to Portugal in Lisbon Prison, where he remained until his transfer to Linho Prison in January 2019. In his first cell he had a bed with a wooden frame and a thin sponge mattress, which had bed bugs. In the cell in wing B, the two beds in the cell were made out of cement and each bed had a thin mattress. There was no artificial light in either cell. Both cells had cockroaches. Neither cell had any 'call bell' and to contact a guard, one had to bang on the cell door. The toilet in the first cell was a "Turkish style" squat toilet and in both cells there was no wall separating the toilet from the rest of the cell, which he shared with one other. The shower was located on Level 0, which was accessible only by stairs. The food was poor. He witnessed guards assaulting prisoners, including when they have knocked on the cell door seeking the guards' attention. He witnessed an inmate suffer from a heart attack who had to be put on a stretcher by other inmates, with the guards showing no concern.
47. In response to Mr Candé's allegations, Portugal carried out an investigation. On the basis of that investigation, the following position emerged.
48. The relevant prison possesses no wooden frame beds; his mattresses were 10cm thick; the cells in which Mr Candé was held did not have "*Turkish style*" squat toilets; there was natural and artificial light (cells are inspected, and broken light bulbs are changed "*regularly*"); pest control is carried out by an external contractor; inmates are provided with cleaning products to maintain their cells; inmates have one shower per day with hot water; guards are "*permanently on duty*" to respond to banging on the cell door in lieu of call bells; Mr Candé "*did not register any complaint*" concerning violence; inmates have access to the gym, library, snack bar, board games etc; meals are provided by an external company and inspected daily. Food is also available for purchase from the snack bar; family members can send "*bags with various goods including up to 1kg of food*" and industrial action "*did not prevent the bags from being handed over*"; no records exist of any complaints of assaults on prisoners during the lock-in period; no-one suffered a heart attack.
49. The one allegation that is acknowledged by Portugal relates to provision of a partitioned toilet. The explanation was that Portugal intended and planned to send Mr Candé to the prison in Lisbon attached to the police station (as opposed to Lisbon Central Prison), where no possible suggestion of Article 3 violation could arise. That, however, did not occur. Mr Candé was taken instead to Lisbon Central Prison in error. Portugal are "*taking steps to address this*" and to ensure that it does not happen again. At the time, and because of the strikes and the attendant inability to transfer prisoners, Lisbon Central Prison was suffering "*an increase in occupancy*" which meant that detainees were sharing 9.2sqm cells designed for single occupancy. At all times, Mr Candé was afforded at least 4sqm (and he does not suggest otherwise). However, because they are single-occupancy cells, the in-cell toilets are not partitioned. Between 7 September and 14 December Mr Candé was (save for two days) sharing an unpartitioned toilet with one other inmate. To that extent, Portugal accepts that the *Declaration* was not complied with. The reason this was not discovered by the

monitoring arrangements was because the authorities were monitoring conditions at the prison in Lisbon attached to the police station (where they believed all extradition detainees were).

50. The Portuguese Director General of Prisons assured that what occurred “*does not have any other impact that may jeopardise the decisions...granting extraditions to Portugal*”.

## Discussion

51. Portugal’s assurances amount to a “*solemn diplomatic undertaking*” from the Portuguese government. They are to be approached on the assumptions that they have been given in good faith and that they will be honoured. Even where the general presumption of ECHR compliance has been displaced, there remains a presumption that EU/ ECHR states can and will abide by the assurances that they give (and that cogent evidence is required to displace that assumption once an assurance is given). In *Jane v Prosecutor General, Lithuania* [2018] EWHC 1122 (Admin), Hickinbottom LJ held that:

*“54. Even if a state’s prisons are such that, as a general proposition, compliance with Article 3 cannot be guaranteed – often despite the considerable efforts of that country to improve prison conditions and comply – although the presumption of compliance with the Article 3 obligations may be lost in that particular respect, that will not necessarily bear upon the reliability of that state in complying with a specific assurance it gives to this court as to (e.g.) where a prisoner will be detained. 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 in general. Similarly, the assessment of the risk of non-compliance will usually depend upon different factors.*

*55. 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...”*

52. The court’s preparedness to make findings in respect of Article 3 ECHR is frequently dependent upon receipt of an assurance from the requesting state (*Florea v Romania* [2014] EWHC 2528 (Admin) at §2; *USA v Giese* [2015] EWHC 2733 (Admin) at §§69-70, *Dzgoev v Russia* [2017] EWHC 735 (Admin) at §87. Assurances are part of the ongoing dialogue between the courts and the requesting authorities in extradition cases:

*“...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...”* (*Giese v Government of the United States of America (No 4)* [2018] 4 WLR 103 per Lord Burnett CJ at §38).

53. I have to be satisfied that “*the strong presumption that [in this case, Portugal] is willing and able to fulfil any assurances it gives in support of its obligations as a signatory and member state*” (*Georgiev v Regional Prosecutor’s Office, Shuman, Bulgaria* [2018] EWHC 359 [Admin] at 61-62) has been displaced. A similar question was recently raised, and answered negatively, by the Court in *Szalai v Hungary* [2019] EWHC 934 [Admin], in circumstances where Hungary had admitted some limited breaches of an assurance given to the UK.
54. I am not so satisfied. On the evidence there was one proven, and admitted, breach of the relevant assurance. That isolated breach occurred in exceptional and unusual circumstances. Portugal carried out a thorough investigation of Mr Candé’s allegations. It frankly acknowledged the breach that had occurred, and, most importantly, gave a firm assurance that appropriate measures were being taken to ensure that in the future the relevant assurance would be fulfilled without fail. It does not seem to me that remedial steps involve any particular difficulty, or that there is any reason to believe that Portugal is unlikely to take such steps.
55. It is also notable, first, that Mr Candé is the only person extradited to Portugal since *Mohammed* who has made allegations of non-compliance with the Declaration, strongly supporting the conclusion that there has been compliance in respect of others who have been extradited since that time. Secondly, I note that, as regards monitoring of assurances, in addition to the role of the Ombudsman, there is a system of prison inspection coordinated by a judge and there are then routes by which a prisoner can complain about the conditions of his detention. (see *Duarte*, §44).
56. In my view, the nature and extent of monitoring is plainly adequate in the circumstances of this case.

## **Ground 2 : Section 25 of the Act**

57. In his written submissions under section 25, Mr Powles QC rightly confined his challenge to the matters that he had specifically raised under Article 3 ECHR. The Appellant’s case under section 25 is accordingly focussed on the treatment that he will receive in prison in Portugal, taking proper account of his medical condition.
58. At the hearing before this court Mr Powles frankly conceded that Ground 2 had no independent life but depended on the outcome under Ground 1.

## **Conclusion**

59. For the above reasons, I reject both Grounds 1 and 2, and would dismiss this appeal.

LORD JUSTICE FLAUX:

60. I agree