Neutral Citation Number: [2022] EWHC 2317 (Admin)

Case No: CO/4264/2020, 4507/2020 & 4353/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2022

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE SAINI

- -

Between:

(1) DAN MARINESCU
(2)FLORIN RUSU
(3) IULIAN VARLAN **Appellants**

- and –

(1) JUDECATORIA NEAMT, ROMANIA
(2) JUDECATORIA IASI, ROMANIA
IASI CITY COURT OF LAW, ROMANIA **Respondents**

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Ben Cooper KC and Alex Tinsley instructed by **Shaw Graham Kersh** for the appellant **Dan Marinescu**
Ben Cooper KC and Ben Joyes instructed by **Taylor Rose MW** for the appellant **Florin Rusu**
Ben Cooper KC and Jonathan Swain (instructed by **Taylor Rose MW**) for the appellant **Iulian Varlan**
John Hardy KC and David Ball (instructed by **CPS Extradition Unit**) for the **Respondents**

Hearing date: 29 March 2022

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Approved Judgment

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This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 11:00 on 12 September 2022.

Lord Justice Holroyde and Mr Justice Saini:

1. Each of the three appellants appeals against the decision of a District Judge (Magistrates' Courts) ("DJ") ordering that he be returned to Romania pursuant to a European Arrest Warrant ("EAW"). This is the judgment of the court.

2. The appellants are in materially similar circumstances, and raise similar grounds of appeal. No distinction need be drawn between them. Each contends that, if returned, there are strong grounds for believing that he faces a real risk of being detained in conditions which will violate his rights under article 3 ("art. 3") of the European Convention on Human Rights ("the Convention"). Each contends that the risk arises because he will face a combination of limited personal space and other inappropriate prison conditions.

3. It is unnecessary to give more than a bare outline of the appellants' respective cases. For convenience only, and intending no disrespect, we shall for the most part refer to the appellants by their surnames, and to the respondent judicial authorities collectively as "the respondents".

The extradition hearings:

4. Dan Marinescu, now aged 55, was convicted by the Targu Neamt Law Court of an offence in June 2016 of failing to provide biological samples following his arrest for drink driving, and was subsequently sentenced to 12 months' custody, all of which remains to be served. An EAW was issued on 21 August 2019 and certified in this country by the National Crime Agency on 9 May 2020. On 13 November 2020 DJ Hamilton ordered his extradition to Romania.

5. Extradition had been challenged before the DJ on a number of grounds, including "the wholly unsatisfactory state of some of the detention facilities in Romania". It was probable that, after the initial quarantine period at the Bucharest Rahova Penitentiary ("Rahova"), Marinescu would serve his sentence at the Iasi penitentiary ("Iasi"). The Romanian authorities had provided an assurance on 19 May 2020, specific to Marinescu, which gave details as to the conditions and regime at Iasi and provided an undertaking to Marinescu of a personal space of 3m² throughout his sentence; but it was submitted on his behalf that the DJ should find that Romania was failing to comply with such assurances. The DJ rejected the evidence which was relied on as showing such a failure. He concluded that he was bound by case law, in particular *Scerbatchi v First District Court of Bucharest,* Romania [2018] EWHC 3612 (Admin) and *Gheorge v Giurgiu District Court, Romania* [2020] EWHC 722 (Admin), to apply the presumption that an EU state such as Romania will comply with any diplomatic assurance it has given in the course of extradition proceedings.

6. Florin Rusu, now aged 29, was convicted by the Iasi City Court of Law of offences of aggravated theft committed in 2013 and 2014, and was subsequently sentenced to 2 years 8 months' custody, all which remains to be served. The EAW in his case was issued on 24 March 2020 and certified three days later. On 27 November 2020 DJ Zani ordered his extradition to Romania.

7. Rusu had challenged his extradition on a number of grounds. In relation to art. 3, the Romanian authorities had provided Further Information dated 22 April 2020 which

indicated that it was highly probable that Rusu would serve at least part of his sentence at the Botosani penitentiary ("Botosani") and part at Iasi. Details were provided of the accommodation, conditions and regime in both those prisons. The Further Information included an undertaking to provide a minimum individual space of 3m² for the duration of Rusu's sentence. Rusu contended before the DJ that the undertaking was not reliable and that the guarantees concerning other material conditions in prison were inadequate.

8. In rejecting the art. 3 grounds of challenge, the DJ noted that a Divisional Court had accepted assurances, comparable to those offered to Rusu, in *Adamescu v Romania* [2020] EWHC 2709 (Admin). He did not accept a submission that the Romanian authorities should provide detailed and specific Further Information in relation to each requested person.

9. Iulian Varlan, now aged 40, was convicted by the Iasi City Court of Law of an offence of assault committed in 2014, and was subsequently sentenced to 2 years 6 months' custody, all which remains to be served. The EAW in his case was issued on 14 May 2019 and certified on 11 June 2020. On 18 November 2020 DJ Griffiths ordered his extradition to Romania.

10. Varlan's grounds of challenge before the DJ had included an art. 3 issue as to prison conditions in Romania. An assurance, specific to him, had been provided by the judicial authority in Further Information dated 10 July 2020. It guaranteed a minimum cell space of 3m² both at Rahova during the quarantine period and at the Vaslui penitentiary ("Vaslui"). The Further Information included "a lot of detail" about the conditions at Vaslui. The DJ accepted that there were general concerns about the prison estate in Romania and that assurances were therefore required, but accepted the assurance offered to Varlan as clear and specific, and sufficient to exclude any real risk that Varlan would face treatment which violated his art. 3 rights. She rejected as insufficient the evidence relied on by Varlan in seeking to rebut the strong presumption that Romania was willing and able to fulfil its assurances.

The grounds of appeal:

11. Each of the appellants contends that the DJ who ordered his extradition was wrong to reject his art. 3 ground of challenge.

12. The appellants have applied for permission to rely on fresh evidence concerning prison conditions and the personal space available to prisoners in Romania. If permission is granted, the respondents have applied to rely on fresh evidence in response. Some of the material which is the subject of these applications was before the court at the hearing of the appeals. At the conclusion of the hearing, judgment was reserved. Further material has been provided by the parties subsequently, together with accompanying written submissions. It has not been necessary for a further hearing to be convened. The court has considered all the material *de bene esse*.

The assurances provided by the respondents:

13. It is common ground that, if returned to Romania, each appellant will be held in the quarantine and observation section at Rahova for an initial period of 21 days.

Thereafter, each will be allocated by the National Administration of Penitentiaries ("NPA") to a prison of the appropriate regime, taking into account proximity to his place of residence. It is probable that Marinescu will serve his sentence in open conditions at Iasi; Rusu will serve part of his sentence in semi-open conditions at Botosani, from where he is likely to be transferred at a later stage to open conditions at Iasi; and Varlan will serve part of his sentence in semi-open conditions at Vaslui, from where he too is likely to be transferred to open conditions at Iasi.

14. As has been indicated, each of the DJs accepted that adequate assurances had been provided by the respondents. Those assurances were given in letters from Prison Police Commissioner Fabry, Director of the Directorate for Prison Safety and Execution Regimes, to Dr Onaca, Director of the Directorate for International Law and Judicial Cooperation in the Romanian Ministry of Justice.

15. By the time of the hearing of the appeals, those assurances had been supplemented in each case by a letter dated 4 March 2022 written by Chief Commissioner of Correctional Police Paun, Director of the Directorate for Detention Security and Prison Regime, and addressed to Dr Onaca in the Romanian Ministry of Justice. Each of the letters is in similar terms. They state that during the quarantine and observation period at Rahova, each appellant "will benefit from at least 3m² of personal space", will have the right to walk for 2 hours daily and will have access to a number of other activities outside the detention room. Details are given of the shared detention rooms at Rahova, including the size of the rooms, the lighting and heating, the toilet rooms, the furniture and the availability of drinking water. Each letter included an assurance expressed in the following terms:

> "In consideration of the perspective of implementing the measures from the "Action Plan for the period 2020-2025, drafted in order to execute the pilot judgment Rezmives and others against Romania, as well as the judgments delivered in the group of cases Bragadireanu against Romania", as well as the number of detainees currently guarded by the National Administration of Penitentiaries, following the criminal policies adopted by the Romanian state, the National Administration of Penitentiaries guarantees the provision of a **minimum personal space of 3m²** while serving the punishment, **including the quarantine and observation period**, which includes bed and afferent furniture, without including the space for the toilet room." [emphasis as written]

16. The respondents rely in addition on a letter, also dated 4 March 2022 and bearing the same reference number as Chief Commissioner Paun's letters, from Dr Halchin, Commissioner of Correctional Police and General Director of the NPA, to Dr Onaca in the Ministry of Justice. Dr Halchin's letter provides further information about the conditions in the quarantine and observation section at Rahova and includes the following assurance:

> "In consideration of the perspective of implementing the measures from the "Action Plan for the period 2020-2025, drafted in order to execute the pilot judgment Rezmives and others against Romania, as well as the judgments delivered in

> the group of cases Bragadireanu against Romania", as well as the number of detainees currently guarded, **the National Administration of Penitentiaries guarantees that the prison punishment, including the quarantine and observation period, will be served in decent conditions which respect human dignity.**" [emphasis as written]

17. The appellants contend that the assurances, even as supplemented on 4 March 2022, are inadequate to exclude the real risk that their art. 3 rights will be infringed by the conditions of their detention.

The legal framework:

18. In a case falling within Part 1 of the Extradition Act 2003 ("the Act"), the extradition judge must decide whether the extradition of the requested person would be compatible with his Convention rights. If it would not, the requested person must be discharged: see sections 21 and 21A of the Act.

19. Art. 3 of the Convention provides that –

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

20. In its judgment of 20 October 2016 in *Mursic v Croatia* (Application no. 7334/13) the Grand Chamber of the European Court of Human Rights ("ECtHR"), having reviewed its previous case law, said at [137-139]:

> "137. When the personal space available to a detainee falls below 3 sq m of floor space in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space. …
>
> 138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:
>
> (1) the reductions in the required minimum personal space of 3 sq m are short, occasional and minor …;
>
> (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities…;
>
> (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention…. .

> 139. In cases where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements."

21. We can briefly summarise some of the principles established by case law including *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, *Dorobantu v Romania* (case C-128/18) EU:C:2019:334, [202] 1 WLR 2485 ("*Dorobantu"*), *ML* [2018] EUECJ C-220/18PPU, [2019] 1 WLR 1052 and *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14, [2021] 1 WLR 2569 (*"Zabolotnyi"*). Extradition will be refused if there are substantial grounds for believing that the requested person, if returned to the requesting state, faces a real risk that he will be subjected to inhuman or degrading treatment in prison such as to infringe his art. 3 rights. However, if the requesting state is a signatory to the Convention and a member of the Council of Europe, there is a strong presumption that it will comply with its obligations under art. 3. That presumption may be rebutted by clear, cogent and compelling evidence, amounting to something approaching an international consensus, for example in a pilot judgment of the European Court of Human Rights ("ECtHR") which identifies structural or systemic failings. If the benefit of the presumption is lost as a result of such internationally authoritative evidence, the requesting state must show by cogent evidence that there will be no real risk of a contravention of art. 3 in relation to the particular requested person in the prisons in which he is likely to be detained. An assurance as to the circumstances in which the requested person will be held may be sufficient to exclude any such risk. Where an assurance is given or endorsed by the requesting judicial authority, it must be relied on by the executing judicial authority unless there are specific indications that the detention conditions in a particular prison in which the requested person is likely to be held will infringe art. 3. Where (as in this case) the assurance is provided by a non-judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority. There is no rule requiring evidence of any particular type or quality, or setting out any hierarchy of the factors listed in *Othman v UK* (2012) 55 EHRR 1, in carrying out such an assessment.

22. As a result of the pilot judgment of the ECtHR in *Rezmives and others v Romania* (Applications nos 61467/12 etc), the presumption, that states which are members of the European Union and the Council of Europe will abide by their obligations under the Convention, has been rebutted in relation to prison overcrowding and conditions in Romania: see *Grecu v Cornetu Court, Romania* [2017] EWHC 1427 (Admin) at [48].

23. In *Adamescu v Romania* [2020] EWHC 2709 (Admin), at [165], the court accepted a submission that the presumption had been rebutted –

> "… not only in relation to issues of personal space in shared prison accommodation but also in relation to material conditions in that accommodation and the availability of adequate medical treatment."

The respondents have not sought to argue against that decision. The result, in practical terms, is that it is for the respondents to dispel the concerns as to the risk of a breach of art. 3.

24. One way in which the concerns may be dispelled is by a requesting state giving assurances as to the conditions in which a requested person will be held if returned. Whether a particular assurance is sufficient to do so will depend upon the facts and circumstances of the case. The important question, as expressed by the High Court (Lloyd-Jones LJ and Lewis J, as they then were) in *Kirchanov v Bulgaria* [2017] EWHC 827 (Admin) at [23], is

> "… whether the assurances will, in their practical application, provide a sufficient guarantee that the person concerned will be protected against ill-treatment."

25. Similarly, in *GS and others v Hungary* [2016] EWHC 64 (Admin), at [20], the High Court (Burnett LJ, as he then was, and Ouseley J) said –

> "In all cases involving assurances the inquiry touches their 'practical application'. The question involves consideration of what is promised, by whom it is promised and whether, having regard to all the circumstances on the ground in the state in question, there is confidence that the promise will be honoured."

26. In *Othman*, the ECtHR observed, at [187], that assurances provided by a requesting state will always be a relevant factor in deciding whether a requested person faces a real risk of ill-treatment, but that assurances are not in themselves sufficient to ensure adequate protection against that risk:

> "There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving state depends, in each case, on the circumstances prevailing at the material time."

27. The court went on, at [189], to list a number of factors to which (amongst others) the court will have regard when assessing the quality of the assurances and whether they can be relied upon:

> "(1) whether the terms of the assurances have been disclosed to the Court;
>
> (2) whether the assurances are specific or are general and vague;

> (3) who has given the assurances and whether that person can bind the receiving state;
>
> (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
>
> (5) whether the assurances concern treatment which is legal or illegal in the receiving state;
>
> (6) whether they have been given by a Contracting State;
>
> (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
>
> (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;
>
> (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs) and whether it is willing to investigate allegations of torture and to punish those responsible;
>
> (10) whether the applicant has previously been ill-treated in the
>
> receiving state; and
>
> (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State"

28. The passages which we have cited from *Othman* have been endorsed in numerous decisions, amongst which the appellants particularly mention *Shumba v France* [2018] EWHC 1762 (Admin) and *Case C-128/18 Dorobantu.* They have recently been considered by the Supreme Court in *Zabolotnyi*. Lord Lloyd-Jones (with whom the other Justices agreed) stated that the principle of mutual trust between member states applied to assurances given as to the prison conditions in which a requested person would be held. He continued, at [34] –

> "In *ML* [2019] 1 WLR 1052, the CJEU referred (at para 110 and following) to the fact that the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing member state. It explained (at para 111) that an assurance provided by the competent authorities of the

> issuing member state that the person concerned, irrespective of the prison in which he is detained, will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention is a factor which the executing judicial authority cannot disregard. A failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing member state. The CJEU continued:
>
> '112. When that assurance has been given, or at least endorsed, by the issuing judicial authority, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing member state, as referred to in article 7 of the Framework Decision, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 4 of the Charter' (See also *Dorobantu* at para 68)
>
> In that case, however, as in the present case, the assurance given by the Hungarian Ministry of Justice was neither provided nor endorsed by the issuing judicial authority. The CJEU accordingly stated:
>
> '114. As the guarantee that such an assurance represents is not given by a judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority' "

29. We turn to consider the submissions in these appeals, and the fresh evidence on which the parties seek to rely.

The submissions: (1) the appellants:

30. The appellants submit that there is clear evidence that they face a real risk of a violation of their art. 3 rights through a combination of limited personal space and other inappropriate conditions in prison. They contend that they must therefore be protected by what are referred to as "suitable undertakings, in the proper sense of the word". The letters provided by the NPA, it is submitted, provide a guarantee of a minimum of 3m² of personal space, but provide no more than minimal information about prison conditions. That information, moreover, is said to conflict with the picture which emerges from the ECtHR decisions and other material which the court is invited to receive as fresh evidence. The appellants accept that the respondents have recently provided an undertaking as to material conditions in the quarantine and observation section of Rahova; but, they submit, it is inadequate even in respect of that discrete aspect of prison conditions, and it says nothing about the penitentiaries in which they will be held for most of their sentences.

31. Developing those core submissions, the appellants point to the numerous past violations of art. 3 rights, resulting from overcrowding and recurrent deficiencies in the material conditions of detention, which were referred to in the pilot judgment in *Rezmives*. They submit that subsequent cases show that similar problems continue. They rely in particular on the many recent "multi-applicant" cases relating to prison conditions in Romania, in which the ECtHR has given a short judgment to which is annexed a table listing features of each individual applicant's case: for convenience, we shall refer to all these cases collectively as "the ECtHR judgments". The appellants accept that they have each been given a sufficient undertaking or guarantee as to the provision of a minimum personal space of 3m². They submit however that prison overcrowding is a continuing problem, and remains a relevant consideration in these appeals because each appellant is in "the range of 3 to 4 sq m of personal space per inmate" referred to in *Mursic* (see para 20 above).

32. In this regard, the proposed fresh evidence about prison populations which was before the court at the time of the appeal hearing showed that on 1 March 2022 the total number of inmates held in the 35 penitentiaries in Romania was 21,730, whereas the capacity of the estate on the basis of 4m² per inmate was 16,773. In relation to the specific prisons in which the appellants are likely to be detained, the populations (and capacity at 4m² per inmate) were:

    i) Rahova: 1,356 (1,093)

    ii) Botosani: 745 (502)

    iii) Iasi: 746 (450)

    iv) Vaslui: 657 (406).

33. It may be noted that the total population of those four prisons was higher than it had been in corresponding figures for 15 June 2021.

34. In further proposed fresh evidence submitted after the hearing, the corresponding populations for three of the prisons as at 7 June 2022 were:

    i) Rahova: 1,350 (1,093)

    ii) Botosani: 785 (502)

    iii) Iasi: 764 (733).

35. As to other conditions of detention, the appellants criticise earlier decisions of the High Court for failing to consider, sufficiently or at all, a distinction between mere information on the one hand, and undertakings, guarantees or assurances on the other hand. It is submitted that in both *Gheorge v Giurgiu District Court, Romania* [2020] EWHC 722 (Admin) and *Cretu v Iasi Tribunal, Romania* [[2021] EWHC 1693 (Admin) the court (Steyn J and Johnson J respectively) erred in accepting, as assurances, documents relating to conditions at Rahova which were akin to the letters of 4 March 2022 in these appeals: those documents, it is submitted, should have been characterised as "information".

36. It is accepted that descriptive information might in some cases be sufficient to set aside a real risk of a violation of art. 3 rights; but it is submitted that the contents of the standard-form letters of 4 March 2022 are inadequate, incomplete and misleading, and that a much clearer undertaking is required. Even in relation to Rahova, the letters provide an undertaking only in respect of the minimum personal space: the information about other conditions is detailed but, it is submitted, is no more than a description. As to the other prisons, it is submitted, the letters merely indicate the type of regime and give information as to matters such as disinfestation measures: they contain no explicit assurance or undertaking to any of the appellants as an individual.

37. The appellants point to the ECtHR judgments as showing that the letters provided to these appellants are an unreliable guide to the prison conditions which the appellants will face. The annexes list the personal space afforded to each applicant and other "specific grievances" such as matters relating to hygiene and infestations. In many of the cases, these specific grievances have not been disputed by Romania, and indeed many of the applicants had been compensated for inadequate conditions under domestic remedies. It is therefore submitted that the generalised descriptions given in the letters provided to these appellants should not be relied on as showing there is no real risk of violation of their art. 3 rights.

38. The appellants, relying on the decision of the ECtHR in *Case of Bivolaru and Moldovan v France* (applications nos 40324/16 and 12623/17), submit that the ECtHR judgments should be received by this court as evidence of the presence of the "specific grievances" listed in the annexes, contrary to the picture painted by the information provided by the NPA.

39. The following submissions are made in relation to the particular prisons with which the court is concerned:

    i) Rahova remains overcrowded, with personal space towards the lower end of the 3-4m² range. Specific grievances in relation to conditions there have been admitted (or at any rate, not contested) by Romania in some of the ECtHR judgments: they contradict what is asserted in the letters of 4 March 2022. Although the NPA has guaranteed that the prison sentences "will be served in decent conditions which respect human dignity", that is a vague assertion and has not been given or endorsed by the relevant judicial authority.

    ii) Botosani is the subject of a report by the Ombudsman, who visited on 23 June 2021, noted a shortage of prison and medical staff, and recorded complaints by prisoners about matters such as overcrowding, the presence of harmful insects, inadequate meals and poor conditions. By the time of this hearing, the level of overcrowding had increased (the population in June 2021 was 611, against a capacity at 4m² per inmate of 478). The information provided by the NPA in these appeals therefore gives an inadequate description of conditions at Botosani.

    iii) Iasi is also the subject of a report by the Ombudsman, who visited on 30 March 2021 and found a level of overcrowding which could result in serious problems in relation to treatment, health, safety and rehabilitation; a shortage of prison and medical staff; and unsatisfactory accommodation, with harmful

insects present. The prison was more overcrowded by the time of this appeal hearing than it was in March 2021 (when the population was 683, against a capacity at 4m² per inmate of 426). It too has been the subject of admitted specific grievances which provide evidence of unsatisfactory conditions in the prison, undermining the NPA's information.

iv) Vaslui also remains overcrowded.

40. In material submitted after the hearing, the appellants have invited the court's attention to further "multi-applicant" judgments of the ECtHR, which they submit provide further evidence contradicting the picture of prison conditions painted by the respondents in these appeals. In particular, they rely on a number of the individual cases as showing that in respect of the very prisons in which these appellants are likely to be held, at about the same time as the respondents were providing further information in these appeals, Romania was effectively conceding complaints of overcrowding and poor material conditions. In four of the cases, the amount of personal space afforded to the claimant was 2.85m²: the appellants submit that the outcome of those cases could not sensibly have been different if an extra 0.15m² had been provided. This, they submit, confirms that material conditions have been an important factor in the ECtHR judgments, which cannot be said to be focused on personal space.

41. On the basis of those ECtHR judgments, it is submitted that the information provided by the respondents in these appeals, even if it could properly be viewed as "assurances", is general and vague, or "stereotypical", and does not suffice to show that there is no real risk of a violation of art.3 rights. The appellants therefore submit that extradition would be incompatible with their art. 3 rights, unless the respondents provide clearer and more specific assurances.

The submissions: (2) the respondents:

42. The respondents submit that there is no real risk of any violation based on a combination of personal space and other prison conditions, having regard to the assurances in the letters of 4 March 2022 and the evidence that, since *Rezmives* Romania has made considerable efforts to reduce the prison population and to improve conditions. They submit that the assurances which have been provided are sufficient, and that there is no purpose in seeking to draw a distinction between an assurance and information.

43. The respondents go on to argue that the appellants' criticisms of the assurances are unrealistic. They submit that considerable detail has been provided about conditions at Rahova, and point out that the same material was accepted in *Gheorge* as a valid and sufficient assurance. They submit that a requesting state cannot reasonably be expected to provide a guarantee that there will never be any problem with infestation of insects, or that the food or bedding will always be of a certain quality; or to provide a running commentary on the success of the measures taken to improve prison conditions.

44. It is submitted that there can clearly be no challenge to extradition based on conditions at Rahova. In relation to the other relevant prisons, it is submitted that the appellants' reliance on the ECtHR judgments is misplaced: in virtually all of those

cases, the applicant had been afforded less than 3m² of personal space, and it is therefore unsurprising that a violation of art. 3 was found. The respondents rely on the decision of Johnson J in *Cretu*, and in particular on his conclusion at [69] in relation to the "multi-applicant" decisions cited to him in that case:

> "However, the focus of the court's judgment in each of those cases appears to have been on over-crowding and consequential lack of personal space – there does not appear to be any clear finding that other factors aside from the lack of space amount, in themselves, to inhuman or degrading treatment."

45. The respondents further rely on the existence of Romania's 2020-2025 Action Plan. They submit that, since the decision in *Rezmives*, Romanian extradition requests have repeatedly been upheld in cases where art. 3 has been in issue.

46. In material submitted after the hearing, the respondents invite the court to consider two documents published on 14 April 2022: the Report of visits to Romanian prisons, in May 2021, by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") ("the Report"); and the Response to that Report by the Romanian Government ("the Response"). The four prisons which were visited by the CPT did not include any of those at which the appellants are likely to be held. The Report (as the appellants point out) refers to overcrowding and generally poor conditions in the prisons visited; but the respondents submit that the Response (which is comprehensive) provides important evidence as to the steps being taken by the Romanian authorities. The Response acknowledges the continuing problems and reiterates the commitment of the authorities to ensure that prisoners are detained in conditions which fully respect their Convention rights. It refers to a decision taken by the NPA in 2022 to improve detention conditions and explains the way in which the NPA provides funds for "revamping" of detention rooms and sanitary areas. It also explains the centralised arrangements for the supply of bedding; the periodic pest control measures; the rules for cleaning, sanitising and disinfection which have been intensified since the onset of Covid; and the establishment of "caloric values" for inmates' food.

47. Assessing the risk on the basis that the respondents are acting in good faith, and on the basis of the current information, it is submitted that there is no ground for finding that any of the appellants faces a real risk of violation of his art. 3 rights if returned. If, however, this court were to take a different view, the respondents submit that, in accordance with the process established by the CJEU in *Criminal proceedings against Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU), they should be invited to provide further information.

48. We are grateful to all counsel and solicitors for their preparation of the appeals and for their submissions.

Analysis:

49. In *Rezmives* at [106] the ECtHR noted that findings of a violation of art. 3 because of inadequate conditions of detention in certain Romanian prisons began in 2007, and the number of such findings had increased since that time. Most of the cases -

> "… concerned overcrowding and various other recurrent aspects linked to material conditions of detention (lack of hygiene, insufficient ventilation and lighting, sanitary facilities not in working order, insufficient or inadequate food, restricted access to showers, presence of rats cockroaches and lice, and so on)."

50. Following the pilot judgment in that case, Romania has clearly made efforts to tackle the systemic problems to which the ECtHR had referred; but it is apparent that there is still significant overcrowding (on the basis of 4m² per inmate) and there are continuing complaints about material conditions.

51. Each of the appellants has a guarantee that throughout his detention, he will be afforded at least 3m² of personal space per inmate in shared accommodation. Those guarantees are accepted by the appellants to be sufficient and reliable, such that the court can be confident that the minimum requirement of personal space will be met. However, there is no evidence that personal space in excess of 4m² will be provided, either generally or in particular prisons; and the Respondents have not challenged the appellants' submission that they will during their detention only be afforded personal space in the range 3m² - 4m². In accordance with *Mursic* at [139] (see para 19 above), that limited personal space is a weighty factor to be considered in conjunction with any evidence of other inappropriate physical conditions of detention.

52. Romania has lost the benefit of the presumption that it will comply with its art. 3 obligations in relation to personal space and material conditions in shared prison accommodation. That does not mean there is any presumption that Romania will not comply with its obligations; but a number of High Court decisions since *Rezmives* have found that there is a real risk of violation of art. 3, such that extradition should be refused unless sufficient assurances have been provided. Our focus must therefore be on the assurances provided in the letters, including those from Commissioner Fabry, Chief Commissioner Paun and Dr Halchin, to which we have referred in paras 14 -16 above.

53. The appellants by their grounds of appeal contend that the only undertakings which have been given by the Respondents relate to minimum personal space. So far as prison conditions are concerned, they contend that nothing more than a general description of the characteristics of prison regimes and conditions has been given, with no explicit assurance that appropriate measures will in fact be taken to ensure adequate conditions. Their submissions raise two issues:

    i) Do those letters contain "undertakings, in the proper sense of the word", or are they merely descriptive or informative as to general conditions in the prisons concerned?

    ii) If they do contain undertakings, do they provide a sufficient guarantee, which this court can be confident will be honoured, that each appellant will be protected against the risk of ill-treatment which violates his art. 3 rights?

54. In relation to the first of those issues, the focus must be on substance rather than form: the court must consider what (if anything) has been promised, and by whom it has been promised. It is obviously very important that the relevant promise should be

expressed in a way which unequivocally identifies it as a solemn promise, binding as between the states concerned; but to label the relevant document as a "guarantee" or "assurance" is, of itself, neither necessary nor sufficient.

55. In the present appeals, the various letters from Commissioner Fabry which were before the DJs must now be read in conjunction with the subsequent letters of Chief Commissioner Paun and Dr Halchin. We reject the submission that, individually and collectively, these amount to no more than information or description. In our view they not only describe the conditions and regimes at the prisons concerned, but also guarantee (in Dr Halchin's letter) that each appellant will be detained throughout "in decent conditions which respect human dignity". We therefore reject the submission that the Respondents have given no "undertakings, in the proper sense of the word".

56. In relation to the second issue, it is common ground between the parties that the undertakings have not been given by the judicial authorities concerned. However, the authors and addressees of the various letters are plainly in positions of high authority in the Romanian prison system, and well-placed to know about, and direct, prison conditions. It is not suggested that they are not acting in good faith. We accept that Dr Halchin's letter is not "specific", both in the sense that it does not refer to any of the appellants by name or by any description (though it forms part of correspondence about them, and clearly applies to them), and in the sense that it does not go into detail about the promised decent conditions. It can therefore be said to be generalised in its terms, which may be what the ECtHR meant, at [124] of its judgment in *Bivolaru*, when it referred to the assurances given by Romania in that case as being "described in a stereotypical way". However, we agree with Johnson J (in his judgment in *Cretu*, at [64]) that the ECtHR's conclusion in *Bivolaru* –

> "… does not mean that an assurance must be disregarded if it is in 'stereotypical' form. The court cannot have intended that the acceptability of an assurance should depend on whether it is stereotypical or idiosyncratic."

Again, therefore, it is necessary to focus on substance rather than form (see also *Popoviciu v Curtea de Apel Bucaresti, Romania* [2021] EWHC 1584 (Admin) at [174]).

57. We have reflected on the appearance of a contrast between the explicit guarantee given by the Respondents in relation to minimum personal space, and the absence from the letters considered by the DJs of a similarly explicit guarantee about other material conditions. As we have said, however, the individual assurances considered by the DJs are now supplemented by the letters of 4 March 2022.

58. We are unable to accept the appellants' submission that the guarantee given in Dr Halchin's letter is "vague". On the contrary, it is in our view clear. It could no doubt have been made clearer still, by using the language of art.3, and/or by dealing with specific aspects of the accommodation in the prisons. However, if a prisoner is held in conditions which, through a combination of limited space and poor material conditions, violate his art. 3 rights, it could not be said that he was detained "in decent conditions which respect human dignity". Conversely, if he is held in "decent conditions which respect human dignity", it could not be said that he was "subjected to torture or to inhuman or degrading treatment". The guarantee given by Dr Halchin

is therefore, in our view, an assurance that the conditions of the appellants' detention will not violate their art. 3 rights. The assurance applies to the prisons, and the regimes and accommodation, described in the other letters, and it is not necessary for the Respondents to provide further detail. The assurance is plainly intended to be, and is, binding as between the UK and Romania; and any breach of it could be expected to have significant consequences for relations between the two countries in relation to extradition matters.

59. The appellants argue, however, that the assurance cannot be relied upon, because of the evidence contained in the ECtHR judgments and the Ombudsman's reports. Whilst there is no allegation that the Romanian authorities are acting in bad faith, it is submitted that the letters "involve a degree of wishful thinking".

60. In *Ilia v Appeal Court in Athens, Greece* [2015] EWHC 547 the High Court, in considering the factors set out in *Othman*, said at [40] –

> "… it is important also to recall that we are dealing with cases in which the assurance will have been given by the judicial authority or a responsible minister or responsible senior official of a government department of a Council of Europe or EU state. In our view there must be a presumption that an assurance given by a responsible minister or responsible senior official of a Council of Europe or EU state will be complied with unless there is cogent evidence to the contrary."

61. With that important point in mind, there are two principal reasons why we are unable to accept the appellants' submission that the assurances are unreliable.

62. First, it is a feature of almost every case in the ECtHR judgments relied on by the appellants (including those which are the subject of the fresh evidence applications) that the claimant concerned had been afforded less than 3m² of personal space. Although there is scope for argument about the precise figures, because the details provided in the annexes about some of the cases leave room for doubt, it is clear that there have been very few cases in which the minimum requirement of personal space was met, but the ECtHR found a violation on the basis of the other conditions of detention. We are unable to accept the appellants' submission that the ECtHR judgments provide "categorical evidence that conditions at the relevant prisons fall below irreducible standards". Even if the appellants are correct in their submissions as to the duration of the various specific grievances listed in the annexes, they can point to only a small number of cases in support of those submissions. In our view, that is an inadequate basis on which to reject as unreliable the assurance contained in Dr Halchin's letter.

63. Secondly, the appellants have not put before the court any case in which Romania has been found to have violated the art. 3 rights of a returned person to whom an assurance had been given. Mr Cooper KC submitted that the absence of any evidence of a breach of an assurance only served to highlight the importance and value of assurances. That submission depends, however, on his antecedent submission (which we have rejected) that the relevant letters in this case do not amount to any assurance. The absence of any evidence of breach therefore strengthens our view that the ECtHR judgments and Ombudsman reports, whatever

they may show about the conditions in which other prisoners have been held, do not provide a sufficient basis for treating the assurance given by Dr Halchin as unreliable, or for departing from the presumption that the respondents will honour their assurances.

Conclusion:

64. We do not find it necessary to seek any further information or assurances in accordance with the approach set out in *Aranyosi*. We conclude that the assurances which have been provided to the appellants satisfy the criteria encapsulated in the formulation adopted by the court in *Sunca v Iasi Court of Law* [2016] EWHC 2786 (Admin):

> "Without attempting to lay down rules which must apply in every case, we believe that four conditions must, in general, be satisfied:
>
> (i) the terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3;
>
> (ii) the assurances must be given in good faith;
>
> (iii) there must be a sound objective basis for believing that the assurances will be fulfilled;
>
> (iv) fulfilment of the assurances must be capable of being verified."

65. We are therefore satisfied that, in the words of *Othman* at [187] (see para 26 above), the respondents have given assurances which provide "a sufficient guarantee that the applicant will be protected against the risk of ill-treatment". It follows that the DJs were not wrong to accept the assurances as sufficient in each of the appellants' cases.

66. Having considered all the additional material *de bene esse* we are satisfied that, even taking it at its highest, it could not lead to a different conclusion. The proposed fresh evidence therefore could not satisfy the *Fenyvesi* test of decisiveness, and we accordingly decline to receive it.

67. The appeals must accordingly be dismissed.