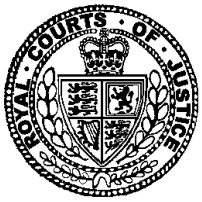

Neutral Citation Number: [2021] EWHC 1693 (Admin)

Case No: CO/3984/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2021

Before :

MR JUSTICE JOHNSON

- -

Between :

PAUL CRETU **Appellant**

- and -

IASI TRIBUNAL, ROMANIA **Respondent**

- -
- -

Graeme Hall (instructed by Taylor Rose MW) for the Appellant
Daniel Sternberg (instructed by CPS Extradition Unit) for the Respondent

Hearing date: 15 June 2021

- -

Approved Judgment

Mr Justice Johnson:

1. The Respondent seeks the Appellant's extradition to serve a sentence of 14 years and 10 months imposed for sex offences against children. The Appellant opposes extradition because he says:

   (1) he has been convicted in his absence and has no right to a re-trial, so he should have been discharged under section 20 Extradition Act 2003;

   (2) extradition is incompatible with Article 3 of the European Convention on Human Rights ("ECHR"), having regard to the poor conditions at Rahova prison in Bucharest where the Appellant will spend 21 days in quarantine at the start of his sentence, before being transferred to another prison.

2. On 26 October 2020 District Judge Baraitser rejected each of these grounds of opposition and ordered the Appellant's extradition. The Appellant appeals against that order and contends that the District Judge should have upheld each of his two grounds for resisting extradition.

The European Arrest Warrant and Respondent's Further Information

European Arrest Warrant

3. The Appellant's extradition is sought pursuant to a European Arrest Warrant which was issued on 14 October 2016. The Warrant states that the Appellant was convicted on 29 January 2016 and that an appeal was dismissed on 3 October 2016.

4. Box d) on the warrant states "Indicate if the person appeared in person at the trial resulting in the decision." Underneath that box the following completed checkbox form appears:

> "1. [X] Yes, the person appeared in person at the trial resulting in the decision.
>
> 2. [ ] No, the person did not appear in person at the trial resulting in the decision.
>
> 3. If you have ticked the box under point 2, please confirm the existence of one of the following:
>
> …
>
> 3.2 [X] being aware of the scheduled trial, the person had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by the counsellor at the trial;
>
> …
>
> 3.4 [X] the person was not personally served with the decision, but:

> - the person will be personally served with this decision without delay after the surrender; and
>
> - when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and
>
> - the person will be informed of the time frame within which he or she has to request a retrial or appeal, according to Article 467 of the new Code of Criminal Procedure which will be 1 (one) month."

Information as to trial

5. Further information was provided by the Respondent in December 2019, in response to questions asked by the CPS. This stated that the Appellant had not been present at his trial, that he had been legally represented by two lawyers of his own choice, and that he had been aware of the representatives acting on his behalf. It also stated that he had been duly summoned throughout the entire criminal trial, and that receipt of the summons was signed by one of the Appellant's relatives. It stated that the Appellant "may demand a re-trial following his surrender."

6. The Appellant served an expert report from a Dr Radu Chiriţă which suggests that any request for a re-trial will be refused. In the light of this evidence the Respondent was asked to provide further information. In response, the Respondent stated that the Appellant would be able to file a motion for a retrial under Article 466 of Romania's Criminal Procedure Code and this would then be considered by the court.

Assurances as to prison conditions

7. A letter was sent from the Respondent to answer questions raised about the conditions in which the Appellant will be detained. In respect of the first 21 days of detention it said the Appellant will be placed in Rahova Prison in Bucharest in a room that provides the Appellant with a minimum personal space of 3 square metres. This was, and is, treated by all parties as a formal assurance ("the first assurance").

8. On 14 October 2020 the following additional information was provided:

> "The quarantine and observation period covers … a period of 21 days in a room which shall ensure a minimum individual space of 3 square meters… According with the applicable legislation, each sentenced person has the right to walk every day in the open, at least one hour a day, plus, as case might be, the time dedicated to the performance of educational activities.
>
> In this period detainees exercise all the rights provided for by the legislation on the execution of penalties and undergo the program for preparation for the deprivation of liberty. Convicted persons are accommodated in separate rooms, depending on

> gender and age, as well as on other legal requirements, internal rules or safety regulations.
>
> In the quarantine and observation period various activities in the field of initial assessment and intervention are conducted, medical checks are performed and information and research measures are ordered…
>
> Furthermore, activities are conducted which are meant to help inmates get familiar with the regulations concerning order. discipline, behaviour, interaction with other persons, involving individual or collective activities performed by the prison administration.
>
> …
>
> …the National Administration of Penitenciaries can safeguard a minimum individual space of 3 square meters for the entire duration of the penalty enforcement, including the bed and furniture belonging to it, not including however the lavatory."

9. Again, this information was and is treated by all parties as a formal assurance ("the second assurance").

The hearing in the Westminster Magistrates' Court

10. The Appellant was arrested on 10 August 2019, and the initial hearing took place on the same day. The District Judge sets out in her judgment what she describes as the "unfortunate history" of the proceedings. There were numerous hearings, including the case being listed for a final hearing on 5 occasions before the hearing was effective.

11. On 26 May 2020 the substantive hearing commenced. On that day no submissions were made about Article 3 ECHR and the hearing was adjourned part heard. Shortly before the hearing, the District Judge was provided with a copy of the decision in *Gheorghe v Romania* [2020] EWHC 722 (Admin) (see paragraphs 58 - 60 below). Following the hearing on 26 May 2020, and after considering *Gheorghe*, the District Judge took the view (which she communicated to the parties) that it was necessary to seek further information about Rahova prison. She informed the parties of her wish that the Respondent be asked:

> "Please provide the court with information regarding the existing conditions and the prison regime at Rahova Penitentiary, in particular, regarding the availability of time a prisoner can spend outside their cell, the ventilation, natural light and air, adequacy of heating arrangements, the use of private toilet facilities and compliance with basic sanitary and hygiene requirements at the prison."

12. In the event, counsel for the Respondent was then able to provide the District Judge with the information covering these matters that had been provided to the court in *Gheorghe* ("the *Gheorghe* material") (see paragraph 59 below). The substantive hearing

resumed on 12 June 2020. There is no transcript of that hearing or any ruling given at that hearing, and there is not complete agreement between counsel as to what was said. It is, however, clear that the District Judge considered it necessary to "make a formal request in identical terms to those in the *Gheorghe* case." On the Appellant's case this was because the District Judge did not consider that the *Gheorghe* material could automatically be "read over" to the present case (absent agreement from the Appellant, which was not forthcoming). This is consistent with the District Judge treating the *Gheorghe* material as amounting to an assurance, and taking the view that it could not therefore be treated as if it were evidence in the present case (see *United States of America v Giese* [2015] EWHC 3658 (Admin) [2016] 4 WLR 10 *per* Sir Richard Aikens at [14] and *Government of India v Chawla* [2018] EWHC 1050 (Admin) *per* Dingemans J at [31]). That explains why the District Judge considered it necessary to make the identical request to that made in *Gheorghe*, even though the court was in possession of the *Gheorge* material. The District Judge set directions for that further request to be sent, with the reply to be provided by 10 July 2020 and any rebuttal evidence to be provided by 14 August 2020.

13. A response to the District Judge's request for further information was eventually provided on 14 October 2020 (see paragraph 8 above). That response is in quite different terms from the *Gheorghe* material. It does not cover all of the issues that had been raised by Steyn J in *Gheorghe*, or by the District Judge in the present case. It deals with the time that a prisoner can spend outside their cell, but not with "ventilation, natural light and air, adequacy of heating arrangements, the use of private toilet facilities and compliance with basic sanitary and hygiene requirements at the prison."

14. The adjourned hearing resumed on 20 October 2020 and the hearing was completed on the same day.

15. The Appellant did not give evidence. His mother did. In her written statement she said that she had hired a lawyer, Mr Juravle, to act on behalf of the Appellant, that she had attended the court proceedings, but that she did not tell the Appellant what was happening because she wanted to shield him from it and she told him that she would deal with it. In her oral evidence she said that she told the Appellant that he was wanted for rape, that they had discussed the circumstances of the alleged rape, that he had told her that he had met the complainants in September 2014 but that he had only seen them once, and that he had witnesses. She said that Mr Juravle had not wanted to speak to the Appellant, and that the Appellant did not make any enquiries about the proceedings.

16. Mr Juravle provided a written statement in which he said that he had been instructed to defend the Appellant by his mother. He took his instructions from her and did not have direct contact with the Appellant. The Appellant would be able to seek a retrial but the request would not be granted: the application would be considered on the basis that Mr Jurvale had been instructed directly by the Appellant, even though, in fact, he was instructed by the Appellant's mother. The District Judge considered it necessary that Mr Juravle should give oral evidence. She made directions accordingly. In the event, Mr Juravle did not attend to give oral evidence. The court was told that he could not be traced.

17. The Appellant's expert, Dr Chiriță, gave evidence. He said that a "retrial would be inadmissible" on the basis that Mr Cretu had been legally summoned to his trial and had a chosen lawyer to represent him. He explained that the criminal law in Romania

does not differentiate between a lawyer hired directly by the accused and a lawyer hired by another person.

The District Judge's decision

Section 20

18. District Judge Baraitser proceeded on the basis that the burden was on the Respondent to establish the matters that arise under section 20 to the criminal standard. She noted that it was common ground that the Appellant was not personally present at the trial.

19. The District Judge analysed the further information provided by the Respondent (see paragraph 5 above). She accorded this information considerable weight, but did not suggest that it was irrebuttable. As against the further information provided by the Respondent, the Appellant had chosen not to give evidence and Mr Juravle had not given oral evidence.

20. The District Judge carefully considered the evidence that had been given by the Appellant's mother. She gave detailed reasons for her assessment that this evidence did not throw doubt on the content of the further information provided by the Romanian authorities. She considered that aspects of Mrs Cretu's evidence lacked credibility (including her assertion that Mr Juravle had not wanted to speak to the Appellant – the person whose interests he was representing, and her assertion that the Appellant did not make any enquiries about the proceedings). She also considered that there were inconsistencies between Mrs Cretu's oral evidence and her statement, and that she was motivated by a desire to secure her son's discharge.

21. Having undertaken a detailed assessment of the evidence, the District Judge accepted the information provided by the Respondent that the Appellant had been aware of the proceedings and had given a mandate to a lawyer to defend him at his trial. The District Judge referred to the decision in *Cretu v Romania* [2016] EWHC 354 (Admin) in which, at [34iii], Burnett LJ said that an accused who has instructed a lawyer to represent him at trial is not, for the purpose of section 20, absent from his trial (see paragraph 27 below). She therefore found that the Appellant was "not absent from his trial" and the Respondent had satisfied the criteria in section 20.

22. In the alternative, if the Appellant had not been present at the trial, and if his absence had not been deliberate, the District Judge found that the Appellant would have a right to a retrial or appeal. In that respect, she relied on the decision in *BP v High Court of Marmures Romania* [2015] EWHC 3417 (Admin). There, Cranston J, giving the judgment of the Divisional Court, found that Article 466 of the Romanian Criminal Procedure Code provides a right to a retrial in a way which satisfies section 20 of the 2003 Act.

Article 3 ECHR

23. The District Judge made reference to the pilot judgment of the European Court of Human Rights in *Rezmives v Romania Rezmiveş and others v Romania* (Application Nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017). She observed that the consequence of that decision is that the Respondent cannot rely on a presumption that prison conditions in Romania are compatible with Article 3 ECHR. It is therefore

necessary for an appropriate assurance to be provided as to the conditions in which the Appellant will be imprisoned.

24. The District Judge found that on the evidence the Appellant will be held for 21 days at Rahova prison before then being transferred to Tulcea prison. The Romanian authorities had provided a detailed assurance in respect of Tulcea prison, and this was sufficient to ensure that there would be no violation of Article 3 ECHR during his incarceration there. That left the 21-day period that the Appellant would spend at Rahova prison. There was an assurance that he would be provided with a minimum of 3 square metres of space, excluding sanitary facilities, that he would have the right to walk in the open for at least an hour each day, and that he would be able to spend time outside his cell for educational activities. In addition, he would be given "all of the rights provided for by the legislation on the execution of penalties". In the light of these assurances the District Judge found that the Appellant's extradition is compatible with Article 3 ECHR.

Ground 1: Section 20 Extradition Act 2013

The legal framework

25. Section 20 of the 2003 Act states:

> "**20 Case where person has been convicted**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge.
>
> (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—

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

26. For the reasons given by Burnett LJ in *Cretu* at [14]-[19], section 20 must be interpreted consistently with Article 4a of EU Council Framework Decision 2002/584/JHA ("the Framework Decision") (as amended). That provision sets out the circumstances in which a judicial authority may refuse to execute a EAW where the person did not appear in person at trial:

> "**Decisions rendered following a trial at which the person did not appear in person**
>
> 1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
>
> …
>
> (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;
>
> or…
>
> (d) was not personally served with the decision but:
>
> (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;
>
> and
>
> (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant."

27. Burnett LJ explained in *Cretu* at [34] that, in the light of article 4a, section 20 should be interpreted as follows:

> "…
>
> (iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.
>
> (iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5), is to be determined by reference to article 4a(1)(d).
>
> (v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW."

28. At [35], Burnett LJ explained the relevance of article 4a to the importance that should be attached to statements made in the EAW:

> "It will not be appropriate for requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process. The issue at the extradition hearing will be whether the EAW contains the necessary statement. Article 4a is drafted to require surrender if the European arrest warrant states that the person, in accordance with the procedural law of the issuing Member State, falls within one of the four exceptions. It does not contemplate that the executing state will conduct an independent investigation into those matters. That is not surprising. The EAW system is based on mutual trust and confidence. Article 1 of the 2009 Framework Decision identifies improvement in mutual recognition of judicial decisions as one of its aims. It also contemplates surrender occurring very shortly after an EAW is issued and certified. To explore all the underlying facts would generate extensive satellite litigation and be inconsistent with the scheme of the Framework Decision. Article 4a provides additional procedural safeguards for a requested person beyond the provision it replaced in the original version of the Framework Decision, but it does not call for one Member State in any given case to explore the minutiae of what has occurred in the requesting Member State or to receive evidence about whether the statement in the EAW is accurate. That is a process which might well entail a detailed examination of the conduct of the proceedings in that other state with a view to passing judgment

> on whether the foreign court had abided by its own domestic law, EU law and the ECHR. It might require the court in one state to rule on the meaning of the law in the other state. It would entail an examination of factual matters in this jurisdiction, on which the foreign court had already come to conclusions, but on partial or different evidence. None of that is consistent with article 4a of the Framework Decision."

Submissions

29. Mr Hall, on behalf of the Appellant, submits that there is an inconsistency in the District Judge's judgment. On the one hand she found that he was not absent from his trial. On the other hand, she found that he was not present at his trial. He therefore submits that the District Judge's conclusion is, as he puts it, "vitiated by confusion and contradiction". He also submits that the District Judge reversed the burden of proof in that she had held it against the Applicant that he had not given evidence. He also challenges the District Judge's reliance on the decision in *BP*. He argues that *BP* was wrongly decided because article 466 does not grant an automatic right to a re-trial - it only grants a right to seek a re-trial and the evidence shows that an application for a re-trial will be refused. Mr Hall submits that the court in *BP* wrongly characterised the question of whether the court would grant an application for a re-trial as a mere "procedural" issue. In any event, he says, *BP* should be distinguished because, in this case, and in the light of Dr Chiriță's evidence, it is extremely unlikely that a re-trial will be granted.

30. Mr Sternberg (who did not appear below), on behalf of the Respondent, resists the appeal and seeks to uphold the reasoning and finding of the District Judge. He says that she reached factual conclusions which were open to her on the evidence, and the Appellant has not identified any flaw in her reasoning or conclusions.

Discussion

31. Permission to appeal was granted by Morris J. In granting permission, Morris J acknowledged the suggested inconsistency identified by the Appellant (between the District Judge finding that the Appellant was both not absent from the trial and not present at the trial), and concluded that the Appellant's case was arguable. He added: "It may well be that in fact the issue was presence under s.20(1) and that the Judge's underlying analysis supports a finding that the Appellant was convicted in his presence. In that event, Ground 1 as a whole, will fail."

32. Read in context, the District Judge's finding that the Appellant was "not absent" from his trial is clearly not a finding that the Appellant was personally and physically present in the courtroom. Rather it is a finding that he was represented at the trial (and, in that sense, was "not absent" from the trial) by lawyers he had instructed. This is clear from the closely reasoned judgment:

    (1) At [44] the District Judge cites *Cretu* (see paragraph 27 above), including, in particular, [34(iii)]: "An accused who has… mandated… a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it."

(2) At [46] the District Judge accurately records that it is common ground that the Appellant was "personally absent from court."

(3) At [47] the District Judge correctly records Mr Hall's submission that the Appellant was not "deliberately absent."

(4) At [49] the District Judge makes a finding that the Appellant had mandated a lawyer to represent him in the trial.

(5) Immediately after that finding, the District Judge says "He was therefore not absent from his trial."

33. The District Judge's finding that the Appellant had "mandated a lawyer" ((4) above) uses the language of *Cretu* at [34iii] (which in turn uses the language of the Framework Decision) which she had cited ((1) above). Her conclusion that the Applicant was "not absent" is a clear, faithful and correct application of that paragraph of the judgment of Burnett LJ in *Cretu*. It is, when properly understood, completely consistent with her finding that he was not personally present at the trial.

34. I do not, therefore, consider that there is any internal contradiction or confusion in the judgment. On the contrary, the District Judge carefully analysed the evidence and reached clear, consistent and well-reasoned conclusions.

35. The District Judge's underlying analysis which resulted in her finding that the Appellant had mandated a lawyer to represent him at the trial does not contain any error. The EAW says that, in terms, at paragraph 3.2. Mr Hall rightly makes the point that there is in oddity in the content of the EAW in that it implies that the paragraph 3 of the form should only be completed if the paragraph 2 box has been marked, and yet paragraph 3 of the form was completed even though the paragraph 2 box was not marked (see paragraph 4 above). It follows that, in the absence of further information, it may not have been safe, on the basis of the EAW alone, to make a finding that the Appellant had been present at his trial within the meaning of section 20 – see *Iftimie v Romania* [2016] EWHC 1370 (Admin) *per* Collins J at [13] – [21].

36. However, the Respondent was asked for further information on this point. The further information which was then provided puts the matter beyond any doubt (see paragraph 5 above). The Appellant did not give evidence to dispute the content of the further information. Mr Juravle did not give oral evidence. The District Judge was entitled to regard Mrs Cretu's evidence as unreliable for the reasons she gave (see paragraph 20 above). She was, in particular, entitled to regard Mrs Cretu's oral evidence as inconsistent with her witness statement. The District Judge's conclusion that Mrs Cretu's oral evidence suggested the Appellant "had significantly more information about the proceedings than [she] initially implied" was justified.

37. I also reject the submission that the District Judge wrongly applied the burden of proof. She explicitly and correctly identified both the burden and standard of proof. Her ultimate finding was expressed by reference to the correct burden and standard of proof. Her finding was not simply based on an absence of evidence. Nor was it solely (or predominantly) dependent on the fact that the Appellant did not give evidence. She undertook a conspicuously careful fact finding exercise and reached a cogently reasoned conclusion which does not contain any error.

38. It was suggested that it was not open to the District Judge to reject Mrs Cretu's evidence, because neither the CPS nor the District Judge had put it to her that she was not telling the truth. Reliance was placed, in that respect, on the well-known remarks of Lord Herschell LC in *Browne v Dunn* (1894) 5 R 67 at 70: "if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him." The District Judge records in her judgment a summary of the questions that Mrs Cretu was asked by counsel for the Respondent and by the District Judge. This summary shows that Mrs Cretu's evidence that her son was unaware of the detail of the proceedings was thoroughly explored, with entirely appropriate questions, both by counsel for the Respondent and by the District Judge. True it is that it was not put to Mrs Cretu that she was lying, or that her evidence was unworthy of any credit. That was not, however, necessary, and in the case of the District Judge would have resulted in her inappropriately entering the adversarial arena. The important point is that the witness' evidence was appropriately tested and she was given every opportunity fully to explain what she said happened. The District Judge's finding that the witness' account was, in parts, not plausible was both fair and reasonable.

39. It follows, as Morris J foreshadowed when granting permission, that the District Judge found that the Appellant was present under section 20(1), that her underlying analysis supports that finding, and that ground 1 therefore fails.

40. It is therefore not necessary to address Mr Hall's challenge to the District Judge's reliance on the decision in *BP*. It would be artificial to do so because it would involve considering the arguments on a version of the facts that differs from that found by the District Judge which I have upheld. Any challenge to the correctness of the decision in *BP* is, I consider, better addressed in a case where the challenge is material to the outcome.

41. For all these reasons ground 1 is dismissed.

Ground 2: Article 3 ECHR

Submissions

42. Mr Hall does not suggest that there is a real risk of a violation of Article 3 in respect of the conditions in which the Appellant will be detained after the initial 21-day quarantine period at Rahova prison. His submission is that there is a real risk that the Appellant will be exposed to inhuman and degrading treatment during the 21 days that he will spend at Rahova prison. He recognises that the assurances suggest the Appellant will have the bare minimum of space which is required, but he points out that the authorities show that the bare minimum may be insufficient depending on the general material conditions of the prison. The District Judge specifically asked for assurances on this issue and there was no substantive response. Mr Hall argues that an assurance is inadequate if it is silent as to the general material conditions. In that respect, he strongly relies on *Gheorghe v Romania* [2020] EWHC 722 (Admin) *per* Steyn J at [42] - [49] and *Romania v Iancu* [2021] EWHC 1107 (Admin) *per* Chamberlain J at [33] - [35]. Further, he argues that assurances drafted in "stereotypical" terms will not be sufficient adequately to safeguard against poor general material conditions - *Bivolaru and Moldovan v France* (Applications nos. 40324/16 and 12623/17) at [10] and [122] - [126]. Here, he says, the assurances are in "stereotypical" terms.

43. Mr Hall says that reliance should not be placed on the *Gheorghe* material because that was an assurance that had been specific to that case and could not be treated as evidence of the conditions that will be applied to this Appellant. Moreover, the District Judge did not rely on that material and it would be wrong for this court to attribute weight to it. The Appellant had relied on the District Judge's indication, at the hearing on 12 June 2020, that she did not consider that the *Gheorghe* material could be read across to the present case, there was no challenge by the Respondent to that finding, and the Appellant had therefore unfairly lost an opportunity to introduce evidence in rebuttal.

44. Mr Sternberg argues that the *Gheorghe* material was not an assurance that was particular to that individual case, but was rather further information which amounted to generic evidence as to the conditions at Rahova prison and which he was entitled to deploy in the present proceedings. He contends that in the light of all of the evidence it has been demonstrated that there is no real risk of the Appellant being exposed to inhuman or degrading treatment.

Discussion

The test for compatibility with Article 3 ECHR

45. It is common ground that the District Judge should have discharged the Appellant if there is a real risk that he will be exposed to inhuman or degrading treatment owing to the conditions in which he will be detained at Rahova prison – section 21 Extradition Act 2003 read with *Soering v United Kingdom* (1989) 11 EHRR 439 at [91].

46. As Mr Hall correctly emphasised, there is an absolute prohibition on treatment that infringes Article 3 ECHR. If there is a real risk that the Appellant will be exposed to such treatment then the District Judge should have discharged him. It is no answer that the duration of the potential exposure to such treatment is limited to 21 days.

47. However, a minimum threshold of severity must be met before treatment can be regarded as "inhuman or degrading" within the meaning of Article 3. It usually involves bodily injury or intense physical or mental suffering, although treatment may also be degrading contrary to Article 3 ECHR if it "humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking [his] moral and physical resistance" – *Muršić v Croatia* (2017) 65 EHRR 1 at [98].

48. Whether that minimum threshold is met in a particular case is highly fact sensitive. The duration of the treatment is relevant. So too, in principle, is the age, state of health and any vulnerability on the part of the requested person, as well as the likely physical or mental effect of the treatment. These types of factor can "play an important part" in determining whether the minimum threshold is met (see, in the context of prison conditions, *Muršić* at [103] and [122]).

49. Thus, in the context of prison conditions, an environment which is tolerable for a short period of time may become inhuman or degrading if it is to be endured for months or years. An environment which may be tolerable for a young fit adult may be inhuman or degrading for a vulnerable prisoner who has particular needs which cannot be accommodated. And vice versa.

50. Here, there is no complaint about the conditions in which the Appellant will be incarcerated once he leaves Rahova. The case is concerned only with the period of 21 days during which he will be at Rahova. That is relevant when seeking to apply findings made by the courts in other cases, where the impugned conditions were applied for a period of months or years. All cases are fact sensitive and here, as in other contexts, care should be taken before seeking to extract general principles from the fact sensitive determination of individual cases by the European Court of Human Rights. That said, in the context of prison over-crowding, a blurred line is drawn as to the minimum space requirement necessary in multi-occupancy prison accommodation to ensure that it is compatible with Article 3 ECHR.

Application of Article 3 ECHR to cases of prison overcrowding

51. There is a strong, but rebuttable, presumption that there is a violation of Article 3 if the space available to a detainee in such accommodation is less than 3 square metres – *Muršić* at [124]-[125]. Normally, the presumption will only be rebutted in cases of "short, occasional and minor reductions in the required personal space" - *Muršić* at [130]. One of the cases referenced in *Muršić* as an illustration of this principle is *Festiov v Russia* (application nos 343710/07 and others, 17 January 2012). In that case, one of the applicants (Mr Telyubayev) was held for 19 days in conditions where there was only 2 square metres of cell space available per inmate. This was not found to breach Article 3 ECHR (and it was not suggested that this was due to any compensating features of the prison regime – the key point was the duration) – see at [134]. Usually, however, the presumption will only be rebutted where, in addition to satisfaction of the "short/occasional/minor" test, there is "sufficient freedom of movement outside the cell, and adequate out-of-cell activities, and confinement in… an appropriate detention facility" - *Muršić* at [132] and [138]. In *Muršić* itself the applicant had (in the course of a longer sentence) been detained for a total of 50 days in cells with less than $3m^2$ of personal space, including 27 contiguous days in a cell with $2.62m^2$ of personal space. In respect of the shorter periods the Court found that the presumption of an Article 3 breach had been rebutted because (at [167]) they were "short and minor reductions in personal space, during which sufficient freedom of movement and out-of-cell activities were available to the applicant". In respect of the period of 27 days, the court made reference to *Belyayev v Russia* (Application no 9967/06, 17 October 2013). In that case the applicant was detained in a cell with $2.97m^2$ of personal space for 26 days. This was not found to amount to a breach of Article 3 ECHR. The Court recognised that this was "comparably similar" but nonetheless distinguished it on the grounds that the amount of space available to the applicant in *Muršić* was less ($2.62m^2$ rather than $2.97m^2$) and the period was longer (27 days rather than 26). It found that there was a breach of Article 3 ECHR.

52. Where the space available is more than $4m^2$ then no issue arises with regard to the adequacy of cell space, although other aspects of the regime may be capable of amounting to inhuman or degrading treatment - *Muršić* at [140].

53. Where the space available is in the range of 3-$4m^2$ then (*Muršić* at [139]):

> "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 art 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."

Application of Article 3 ECHR in the context of extradition under Part 1 of the 2003 Act: mutual trust and confidence

54. The Framework Decision is underpinned by a principle of mutual trust and confidence between EU Member States (including, for these purposes, the UK - see article 7(1) of the Agreement on the withdrawal of the United Kingdom from the European Union and Euratom). It follows that, in determining whether to extradite the Appellant, a court should, save in exceptional circumstances, proceed on the basis that the Respondent will act compatibly with EU law, including the prohibition on inhuman or degrading treatment (under Article 4 of the Charter of Fundamental Rights of the European Union, which corresponds to Article 3 ECHR) – see *Zabolotnyi v Mateszalka District Court, Hungary* [2021] UKSC 14 [2021] 1 WLR 2569 *per* Lord Lloyd-Jones at [31]-[33]. Similarly, a court should ordinarily proceed on the basis that the Respondent will act in accordance with any assurances that it has provided – see *Zabolotnyi* at [34].

Application of Article 3 ECHR to Romanian prison conditions

55. In *Rezmiveş* the court found that there was a structural or systemic problem with prison conditions in Romania such that it was appropriate to adopt the pilot-judgment procedure under rule 61 of its rules. The effect of this judgment is that the Respondent is unable to rely on the general presumption that would otherwise apply, namely that it will comply with its obligations under Article 4 of the EU Charter and Article 3 ECHR – *Grecu v Cornetu Court, Romania* [2017] EWHC 1427 (Admin) [2017] 4 WLR 139 *per* Irwin LJ at [48].

56. That does not, however, mean that there is a presumption of non-compliance. It remains the case that it is for the Appellant to establish a real risk that he will be subject to treatment contrary to Article 3 ECHR. Thus, if no material is put before the court on the issue, then the court may find that such a risk has not been established – *Bivolaru and Moldovan v France* (Applications 40324/16 and 12623/17, 25 March 2021) at [142] – [143]. However, a risk of inhuman or degrading treatment can, in principle, be established by reference to previous court judgments, subject to any evidence of an improvement in conditions –*Jane v Prosecutor General's Office, Lithuania* [2018] EWHC 1122 (Admin) *per* Dingemans J at [18]. In a number of cases since *Rezmiveş* the Divisional Court has found that the current line of authority in respect of Romanian prison conditions shows that extradition to Romania is incompatible with Article 3 ECHR unless sufficient assurances are in place.

57. In *Adamescu v Bucharest Appeal Court Criminal Division, Romania* [2020] EWHC 2709 (Admin) the appellant's extradition was sought to face trial for two offences of bribing judges. No evidence was adduced of any material improvement in prison conditions in Romania since *Rezmiveş*. The court considered that it followed that there was a real risk of a breach of Article 3 ECHR unless "sufficient and reliable assurances" were provided by the Respondent – see *per* Holroyde LJ and Garnham J at [165]. Assurances had been provided. These included that the appellant would be ensured a minimum space of $3m^2$, that he would have access to healthcare, and that for the initial

period of incarceration he would have 4.333m^2 of space, including bed and furniture (see at [80]). The Divisional Court was satisfied, in the light of these assurances, that there was no real risk of treatment which would violate the appellant's rights under Article 3 ECHR – see at [165] – [179].

58. In *Gheorghe* the issue was, just as in the present case, whether a 21-day quarantine period at Rahova prison would violate Article 3. An assurance was provided in the same terms as the first assurance in the present case (see paragraph 7 above). The District Judge found that extradition was compatible with Article 3 ECHR. On appeal, it was contended that the assurance was deficient. Steyn J granted permission to appeal, stating that an appeal was reasonably arguable because the assurance did not address prison conditions such as access to one hour a day outside the cell, and access to outdoor exercise and natural light.

59. Following the grant of permission to appeal, the National Administration of Penitentiaries wrote a letter, which was provided to the appellant, in which details of the regime at Rahova were set out. These included details as to recreational activities (including access to walking courtyards), the size of windows, a minimum guaranteed temperature of 19°C in winter, private bathrooms in each type of cell, daily cleaning by prisoners and access to "walking courtyards" for 2 hours each day.

60. After taking account of the totality of the material (so including both the assurance that was before the District Judge, and the content of the letter), Steyn J found that there was no real risk of a violation of the appellant's rights under Article 3 ECHR. Steyn J did not need to (and did not) make a finding as to what the position would have been if the further information had not become available (save for the finding made when granting permission that an appeal was arguable). She did not therefore make a finding as to whether the District Judge was right to find, on the information that was available to the District Judge (so not including the subsequent letter) that extradition was compatible with Article 3. Thus, at [34] she referred to what the position would have been "if" she had found that the original assurance (that was before the District Judge) was inadequate and "if" no further assurance had been provided. As it was, she was satisfied that the deficiencies asserted by the appellant had been addressed by the subsequent letter from the National Administration of Penitentiaries. Accordingly, she dismissed the appeal. As Chamberlain J observed in *Bacau District Court Romania v Iancu* [2021] EWHC 1107 (Admin) at [35], the reasoning in *Gheorghe* shows that Steyn J did not reach a positive conclusion that the original assurance was sufficient. I would add that it also shows that Steyn J did not reach a positive conclusion that the original assurance was insufficient.

61. The decision in *Bivolaru and Moldovan v France* (Applications 40324/16 and 12623/17, 25 March 2021) is currently only available from the court in French. I was helpfully provided with the same certified English translation as was put before the court in *Popoviciu v Curtea de Apel Bucuresti (Romania)* [2021] EWHC 1584 (Admin) (see paragraph 68 below). In *Bivolaru and Moldovan* the applicants were sought on EAWs to serve sentences of 6 and 7½ years' imprisonment respectively. Mr Bivolaru had not adduced evidence as to the conditions in which he would be detained in Romania. The Court held that he had therefore not provided "sufficiently detailed or substantiated [evidence]" to raise a prima facie case that extradition would be incompatible with Article 3 (see at [144]). His application was therefore dismissed.

62. Mr Moldovan, on the other hand, did provide material to support his case that he would be subject to prison conditions that were not compatible with Article 3 ECHR, including previous court decisions to show overcrowding at the prison where he would be detained. In response, the Romanian authorities provided information that the applicant would be detained for 21 days at Rahova prison, with individual space of a "minimum of 2-3m^2". Thereafter, he would be moved to another prison where he would be provided with between 2 and 3m^2 of personal space ("including the bed and necessary furniture"). Given that the space that would be provided under these assurances fell below the 3m^2 *Muršić* minimum, and given that Mr Moldovan was facing a 7½ year sentence, it is hardly surprising that the Court did not consider that the assurance was sufficient. It said (at [123]):

> "The Court reiterates that, according to its case law, 3m^2 of floor surface per prisoner in a multi-occupancy cell was the minimum standard for the purposes of article 3 of the Convention… It considers, in view of all the evidence presented before it, in particular that provided by the Romanian authorities on its request that the executing court authority had information about the personal space which would be reserved for the applicant giving rise to a strong presumption of violation of article 3."

63. It also considered (at [124]) that when the extraditing court had assessed the risk, it had failed to include in its assessment the assurances provided by the Romanian authorities concerning other aspects of the conditions of detention at Gherla Prison:

> "the Court observes that the assurances provided by the Romanian authorities concerning other aspects of the conditions of detention in Gherla Prison, such as freedom to move around and activities outside the cell, which were allegedly capable of discounting the existence of a real risk of a breach of article 3 (idem, §§ 135 and 138), had been described in a stereotypical way ['étaient formulés de manière stéréotypée'] and had not been included in the executing court authority's assessment of the risk."

64. Mr Hall suggests that this shows that no reliance can be placed on any Romanian assurance which is "described in a stereotypical way" (whatever that means). I disagree. That reads far too much into the court's observation. The key (and obvious) point was that the assurance was inadequate by reference to the *Muršić* 3m^2 rule. A subsidiary point was that the court had not sufficiently assessed those parts of the assurance that were "allegedly capable" of rebutting the *Muršić* presumption. The practical reality, given the length of the sentence, is that the *Muršić* presumption was incapable of rebuttal. The fact that the court said the assurance "had been described in a stereotypical manner" is not the driver of the court's conclusion and 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.

65. Mr Hall further argues that in the light of *Bivolaru and Moldovan* the (earlier) case of *Gheorghe* was wrongly decided because the information provided in that case was also in "stereotypical" terms. Again, and for the same reason, I respectfully disagree.

66. In *Bacau District Court Romania v Iancu* [2021] EWHC 1107 (Admin) the respondent was facing a sentence in Romania of 2 years and 1 month. An assurance as to prison conditions was provided which the judge found to be inadequate. In doing so, he proceeded on the basis that Steyn J in *Gheorghe* had found the original assurance in that case to be inadequate. As a matter of case management (in the context of the judicial authority having had every opportunity to address the matter), he declined to adjourn the case to allow an adequate assurance to be provided. On appeal, Chamberlain J upheld the decision of the District Judge both in terms of the analysis of *Gheorghe* and also because *Bivolaru and Moldovan* "cautions against exclusive reliance on generic assurances by the Romanian authorities to address [concerns about prison conditions]."

67. Mr Sternberg argues that in *Iancu* ("at least at first instance") the *Gheorghe* material was wrongly treated as an "assurance". The true position, he says, is that it amounts to evidence (as opposed to an assurance) that the court in *Iancu* could and should have taken into account so as to find (like Steyn J in *Gheorghe*) that there was no risk of an article 3 violation. I do not consider that is realistic, not least because the *Gheorghe* material was described both by Steyn J in *Gheorghe* and by Chamberlain J in *Iancu* as amounting to an assurance (and see paragraphs 71 - 73 below in respect of Mr Sternberg's equivalent submission as to the approach that he says the District Judge in the present case should have taken). I do, however, accept that the decision in *Iancu* has limited application to the facts of the present case. Mr Iancu was facing incarceration for 2 years and 1 month in Romania. Mr Hall (who appeared for Mr Iancu) says that the case (like *Gheorghe* and like the present case) was concerned only with the first 21 days at Rahova prison. That may be so, but there was, on appeal, no distinct consideration of the limited period of time that the appellant would spend at Rahova. The appeal was essentially concerned with the case management decision taken by the District Judge not to accept a very late assurance that was proffered on the eve of hand-down of judgment. Moreover, the application of the observations in *Bivolaru and Moldovan* about stereotypical assurances has been subject to further analysis since *Iancu*. To the extent that it was found that the assurance in *Iancu* was insufficient, the assurance in any event fell significantly short of the totality of the two assurances that are provided in the present case.

68. The most recent domestic case to consider prison conditions in Romania is *Popoviciu v Curtea de Apel Bucuresti (Romania)* [2021] EWHC 1584 (Admin). In that case (as in this case) the appellant was likely to be detained at Rahova prison for an initial period of 21 days. There was, however, no challenge to the regime at Rahova – it was accepted that the terms of the assurance that had been provided showed "that Romania was only just able to comply". It was, however, suggested that if there was a transfer from Rahova to another prison then that might result in an Article 3 breach (see at [122]). Strong reliance was placed on *Bivolaru and Moldovan*. It was suggested that the assurances in *Popoviciu* were also in "stereotypical, if not boiler-plate, terms" such that no reliance could be placed on them. Holroyde LJ (with whom Jay J agreed) rejected that submission. He held that the District Judge was entitled to accept the assurances as "sufficient and satisfactory." Holroyde LJ said (at [173]) that *Bivolaru and Moldovan* could be distinguished because in that case the assurance had only guaranteed 2-3m^2 of space, whereas in *Popoviciu* a guarantee had been given of 3m^2 of space. He added (at [174]):

> "the caution against "stereotypical assurances" should be regarded as an exhortation to focus on substance rather than form, and should not be taken as meaning that any use of a form of words which has also been used in another case must necessarily be regarded as inadequate to satisfy a court that art.3 obligations will be observed. There are, after all, only so many ways in which one can express an assurance that a particular prisoner will be guaranteed at least 3m² of personal space wherever he is detained."

Conditions at Rahova prison

69. The Appellant primarily relied on authority to support his contention that the conditions at Rahova prison are incompatible with Article 3 ECHR. He relied on: *Jidovoiu and others v Romania* (No 40930/15), 5 November 2020, *Pavel and others v Romania* (No 11950/16), 10 December 2020, *Rusu and others v Romania* (No. 27929/16), 21 January 2021, *Neghina and others v Romania* (No 37620/15) 21 January 2021, *Duta and others v Romania* (5836/16), *Biban and others v Romania* (No 39129/16), 11 March 2021, *Văduva and others v Romania* (No 7344/15) 15 April 2021, *Dinu and others v Romania* (No 52160/15), *Vasile and others v Romania* (No 33213/15). In each of those cases at least one of the applicants had been detained in Rahova prison for at least part of their period of incarceration, and in each case a finding of breach of Article 3 ECHR had been made. This body of authority supports the conclusion that (absent the provision of a sufficient assurance, or evidence of improvement in the prison conditions) imprisonment at Rahova prison for any significant length of time involves a risk of a breach of Article 3 ECHR. 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.

70. Mr Hall relied on the decision of *Văduva* (application no 7344/15 and 9 others, 15 April 2021) to demonstrate that present-day conditions in Rahova prison are incompatible with Article 3 ECHR. In particular, he relies on the decision in that case in respect of the applicant Mr Diaconu. That applicant had spent 486 days in inadequate prison conditions between April 2013 and December 2019. He complained of "overcrowding, lack of fresh air, lack of or insufficient physical exercise in fresh air, …no or restricted access to warm water, lack of or poor quality of bedding and bed linen, infestation of cell with insects/rodents, poor quality of food, lack or inadequate furniture." For most of that period he had not been at Rahova prison. He had been detained in Rahova prison between 30 January 2020 and 26 March 2020 (a period of 1 month and 26 days) and then between 23 October 2020 and 17 November 2020 (a period of 26 days). He had $2m^2$ of personal space. It is therefore unsurprising that there was an Article 3 violation. He was awarded 1,000 euros for damages and costs. Leaving aside the complaint of over-crowding, the Court did not make any clear finding that Mr Diaconu's other complaints were each well-founded so far as Rahova prison (where he only spent a small part of his sentence) is concerned, or that (leaving aside the over-crowding) they would have amounted to a breach of Article 3 ECHR. Again, the primary focus of the judgment was on the amount of cell space available – see at [15]-[17].

Should the *Gheorghe* material be taken into account?

71. Mr Sternberg argues that the *Gheorghe* material should be taken into account when assessing whether there is a risk of a violation of Article 3 ECHR in this case. His argument was that that information amounts to evidence as to the conditions at Rahova prison and that it was properly put before the District Judge. Mr Hall argues that it would be quite wrong to place any weight on this evidence given the history of the case (see paragraphs 11 - 12 above).

72. I accept Mr Hall's submission. I do not consider that the *Gheorghe* material should be taken into account on this appeal. I accept that in one sense it does not amount to fresh evidence because it had been placed before the District Judge. However, the District Judge does not refer to it in her judgment. I think it very likely that she ruled on 12 June 2020 that it should not be admitted in evidence. That was, effectively, a case management decision which cannot now fairly be questioned. It would be unfair to the Appellant to place any weight on the material. He had proceeded on the basis that it would not be taken into account, and that if any further information were made available then he would be given an opportunity to adduce rebuttal evidence. If the *Gheorghe* material is now taken into account then the Appellant will have lost the opportunity to adduce rebuttal evidence. Further, the *Gheorghe* material had not formally been produced in this case by the Respondent as a promise (whether by way of assurance or further information) as to what the prison conditions would be in Rahova. Rather, it had been produced by counsel, and there is no suggestion that it was obtained directly from the Respondent, or that it was produced to the court with specific instructions from the Respondent. The Respondent had been explicitly asked to provide information about the conditions at Rahova in a context where it was clear that what was expected was that the *Gheorghe* material (or something similar) would be provided. The Respondent did not reply to the request within the time allowed. When its very late response was provided it did not include the *Gheorghe* material. Given that the second assurance materially differs from the *Gheorghe* material, I do not think it can safely be inferred that the *Gheorghe* material is an accurate reflection of the way in which the Appellant will be treated at Rahova prison.

73. I therefore leave the *Gheorghe* material out of account (as the District Judge did) when considering whether the District Judge was wrong to find that extradition would be compatible with Article 3 ECHR.

Was the District Judge wrong to find that extradition would be compatible with Article 3 ECHR?

74. The Respondent is not entitled to rely on a presumption that the prison conditions at Rahova are compatible with Article 3 ECHR (see paragraph 55 above). The Appellant has placed material before the court to show that some prisoners at Rahova are still being provided with only $2m^2$ of space.

75. The Appellant will spend 21 days at Rahova prison. Notwithstanding the findings of no Article 3 breach in *Festiov* (19 days/$2m^2$) and *Belyayev* (26 days/$2.97m^2$), this length of time, with just $2m^2$ of space and, possibly, none of the features that are capable of rebutting the *Muršić* presumption, is such as to give rise to a risk of a violation of Article 3 ECHR. It follows that if no assurances had been provided extradition would be incompatible with Article 3 ECHR.

76. Two assurances have been provided. Each is a formal assurance given by the Romanian judicial authority to the Romanian Ministry of Justice in the knowledge that it will be provided to the Magistrates' court. Each specifically relates to the Appellant (and nobody else). No evidence was put before the District Judge, or me, to show the Romanian authorities have breached assurances of this type (albeit I note the minor, and acknowledged, breaches identified in *Ademescu* at [173] and in *Zagrean and another v The Court in Mures and others* [2016] EWHC 2786 (Admin) at [12] - [17] and [34]). Moreover, in none of the cases where Romanian prison conditions have been found to be incompatible with Article 3 ECHR had an assurance been given.

77. Applying the criteria in *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1 (at [187] – [189]) I am satisfied that reliance should be placed on the assurances for the same reasons as assurances as to Romanian prison conditions were accepted by the Divisional Court in *Sunca* (see at [51] – [61]). I note that since *Sunca* assurances as to Romanian prison conditions have continued to be accepted by the Divisional Court – see *Scerbatchi v First District Court of Bucharest, Romania* [2018] EWHC 3612 (Admin) (at [51] – [55]), *Baia Mare Court Romania v Varga* [2019] EWHC 890 (Admin) (at [34] – [48]), *Adamescu* (at [165]-179]) and *Popoviciu* (at [170] – [174]).

78. For the reasons given at paragraph 64 above (and applying the approach of Holroyde LJ in *Popoviciu* at [174] to focus on substance not form), I do not accept Mr Hall's submission that these assurances fall to be rejected on the grounds that they are "generic" or "stereotypical". Nor do I accept the submission that the systemic difficulties in relation to Romanian prison conditions that are identified in the authorities are such that the Respondent is unable to comply with the assurances it has offered: providing this one Appellant with just $3m^2$ of space, and daily outdoor exercise for at least an hour, and access to other activities, for the first 21 days of his sentence, is unlikely to cause insurmountable logistical or resourcing difficulties, even if it may impact on the regime that can be offered to other prisoners. It is not necessary to determine precisely how the Romanian authorities will ensure that compliance with the assurance is achieved (see *Sunca and others v Romania* [2016] EWHC 2786 (Admin) *per* Cranston J at [58]).

79. Mr Hall is correct that the assurances are limited in their coverage. They do not cover matters such as temperature, ventilation, infestation and hygiene. However, the principal concern that has been identified in the authorities in respect of Rahova prison is that of overcrowding. That is largely answered by the $3m^2$ guarantee. A significant residual issue in the overcrowding context is whether the regime requires the right to spend time each day outside. That is one of the main factors that has been consistently recognised as being relevant to the question of whether the *Muršić* presumption can be displaced (or whether personal space of $3m^2$– $4m^2$ is still insufficient) and was a significant factor in *Gheorghe*. The right to spend time outside each day is guaranteed by the second assurance. That second assurance also indicates the availability of educational activities and both individual and collective induction activities. It also makes clear that detainees are accorded all the rights provided for by the legislation on the execution of penalties (but without spelling out what those rights are). I was not shown any authority to suggest that conditions at Rahova prison, other than overcrowding, are such that they would amount to inhuman and degrading treatment over a 21-day period.

80. District Judge Baraitser's ultimate conclusion was:

> "…Mr Cretu will not be held in conditions which are overcrowded. Nor will he be deprived of exercise or fresh air. He will be allowed time away from his cell for at least an hour each day and if he attends educational activities, likely a longer period than this. On the evidence before the court he will be held at this prison for a period lasting no more than 21 days. He is guaranteed all rights provided for in legislation and the authorities guarantee that they are concerned to ensure an appropriate environment for the housing of prisoners. In light of these assurances I am satisfied that there are no reasonable grounds for believing that there is a real risk of a breach of Article 3 if Mr Cretu is extradited to Romania."

81. As with every other aspect of the District Judge's judgment which has been subject to challenge, the Appellant has not shown that she was wrong.

82. Ground 2 is therefore dismissed.

Application to amend

83. Following the distribution of a draft of this judgment, the Appellant made an application to amend his grounds of appeal to add a new ground of appeal to the effect that the Respondent is not a judicial authority for the purpose of section 2(3) Extradition Act 2003. The Appellant acknowledges that the application "arrives late" but maintains that he is "entitled" to raise the new ground and contends that it does not pose any prejudice. No reason was been given as to why the application was not made earlier, nor has any evidence been lodged in support of the application. Rather than summarily dismiss the application I will give the Appellant an opportunity to address these issues (and the Respondent an opportunity to respond) before then determining the application on the papers.

Outcome

84. The appeal on the grounds which were argued, and for which permission had been given, is dismissed. There is an outstanding application to amend the grounds of appeal which I will address separately.