



Neutral Citation Number: [2024] EWHC 1924 (Admin)

Case No: CO/2760/2023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2024

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JAY

Between:

MARIAN GURĂU

Appellant

- and -

SUCEAVA DISTRICT COURT, ROMANIA

Respondent

Mark Summers KC and Hannah Hinton (instructed by **Coomber Rich Ltd**) for the
Appellant
Joel Smith KC and David Ball (instructed by **Crown Prosecution Service, Extradition Unit**)
for the **Respondent**

Hearing date: 17 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE JAY

MR JUSTICE JAY:

1. Mr Marian Gurău (“the appellant”) is sought by the Suceava District Court in Romania (“the respondent”) pursuant to a European Arrest Warrant (“EAW”) to serve a total of 3 years 5 months’ imprisonment. On 6 May 2021 District Judge (Magistrates’ Court) Clews (“the DJ”) held that the appellant’s extradition was barred by specialty and his discharge was ordered. That decision was successfully appealed to this Court by the respondent (Holroyde LJ and Jay J, [2023] EWHC 439 (Admin); [2023] 1 WLR 2813) (“the first *Gurau* decision”) and on 2 March 2023 the matter was remitted to the DJ pursuant to section 29(5)(b) of the Extradition Act 2003 (“the Act”) with a direction given pursuant to section 29(5)(c) that he proceed as he would have been required to do had he decided the question under section 11(1)(f) (viz., specialty) differently at the extradition hearing.
2. The remittal hearing took place before the DJ on 28 June 2023 and he handed down his judgment on 21 July 2023. The DJ found against the appellant on specialty and article 8, held that he had no jurisdiction to determine the appellant’s case under article 3, and ordered his extradition to Romania pursuant to section 21(3) of the Act. The appellant now appeals to this Court with the permission of Cavanagh J.
3. Three issues arise for consideration: first, whether the DJ correctly declined jurisdiction to determine the appellant’s article 3 case; secondly, but only if he did not, the nature of the consequences that flow from the DJ’s error; and thirdly, whether the appellant’s extradition to Romania would violate his article 3 rights.
4. I am grateful to all counsel – Mr Mark Summers KC and Ms Hannah Hinton for the appellant, and Mr Joel Smith KC and Mr David Ball for the respondent – for their written and oral submissions.
5. Given that the background to this case is fully set out in the judgment of this Court in the first *Gurau* decision, I am able to proceed directly to a consideration of the three issues.

The First Issue: Jurisdiction

6. Article 3 was first raised as an issue at the initial hearing before District Judge Tempia on 15 January 2020. On the following day, District Judge Ikram directed that the respondent serve an article 3 assurance within 8 weeks, and that occurred. On 27 May 2020, at a case management hearing before District Judge Zani, the appellant confirmed that article 3 remained an issue in the case, and in a skeleton argument filed and served on 15 September 2020 the respondent was put to proof that the assurance complied with the requirements of article 3. The respondent’s opening note dated 6 November 2020 acknowledged that article 3 was one of the issues in the case. That remained the position in other written pleadings, and it was only at the hearing before the DJ on 31 March that counsel (neither Mr Summers nor Ms Hinton) conceded that the article 3 challenge could not succeed.
7. Paragraph 8 of the DJ’s judgment given on 6 May 2021 therefore correctly identified one of the issues raised by the appellant as “section 21/article 3 (prison conditions)”. Under the later section of his judgment dealing with “discussion of issues raised/challenges to extradition” (paragraph 33), the DJ said this:

“Article 3: This issue was conceded and was not argued. In the light of the fact there is a prison assurance and in the light of the recent decision in **Adamescu**, such a concession seems to me to be realistic.”

8. When the case was argued before the DJ at the remittal hearing on 28 June 2023, on the question of whether the 2022 CPT report and expert evidence then relied on amounted to decisive and admissible fresh evidence the respondent took no jurisdictional point. The DJ heard evidence and submissions on the article 3 issue. After the hearing had been concluded, the DJ reminded himself, as he put it, that “article 3 had not actually been argued either on paper or in court at the hearing on 31 March 2021”. The DJ invited written submissions from the parties on the jurisdictional issue, and the respondent, through Mr Ball, adhered to his position that article 3 had been raised at the first extradition hearing. Mr Summers reminded the DJ of the relevant chronology. The DJ, however, came to a different conclusion.
9. The DJ’s analysis was that the article 3 issue had not been argued or resolved at the extradition hearing itself, and that “the mere mention of a potential bar to extradition without any written or oral argument was insufficient to preserve a requested person’s right to argue the point in remittal proceedings”. Further:

“In my judgement, the raising of article 3 as an issue was limited to a request to be provided with the necessary prison assurance. It is of note that there was never, on paper or in court, a word of argument about potential non-compliance with article 3.

When the assurance was provided article 3 was abandoned as an issue. Whilst this may not have been until the start of the extradition hearing, it is clear from the absence of any written submissions that it was never intended to be argued.

It follows that I did not hear any argument on article 3, nor did I rule on it. Obviously, in any case involving Romania a judge must assess the prison assurance and decide if it is article 3 compliant. If the parties agree it is compliant (or if neither party contends that it is not) then it cannot, in my view, realistically, be treated as a matter in issue at the extradition hearing. On that basis, I conclude that article 3 was not raised at the extradition hearing.”

10. Before us both parties submitted that the DJ was wrong to decide that the article 3 issue had not been raised at the extradition hearing.
11. In my judgment, the agreed position of the parties is correct and the DJ should not have departed from it. The point is a straightforward one and is covered by paragraphs 58-60 of the first *Gurau* decision, per my Lord, Lord Justice Holroyde:

“58. Mr Summers KC raised concerns as to the consequences of the decision in *Dempsey v USA* ([2020] 1 WLR 3103) in cases in which a requested person wishes to raise, at the hearing following remittal, either fresh evidence on issues decided

against him at the original hearing, or a completely fresh bar to his extradition.

59. As to the first of those situations, *Dempsey v USA* does not in my view prohibit a DJ, at the hearing following remittal, from receiving fresh evidence relevant to an issue argued at the extradition hearing if it is appropriate to do so in accordance with usual principles. As I have noted, the court in *Dempsey v USA* was considering an attempt to raise, at the hearing following remittal, an issue which had not been raised at all in the extradition hearing. In the passage which I have quoted at [36] above, the court distinguished between bars to extradition which had not been raised at the extradition hearing, and the matters in issue which it expected would be resolved at the appeal. It is in my view permissible in principle for a requested person, at the hearing following remittal, to apply to the DJ to adduce fresh evidence on an issue which had previously been argued but in relation to which it could be said that fresh evidence, which might be decisive on that issue, had become available since the extradition hearing. Cases in which such an application will succeed may well be few in practice.

60. In the second situation, the defendant (as I have said at [55] above) will have following the remittal hearing a right of appeal pursuant to s26 of the Act. As part of that appeal, he will be able to raise an entirely new issue where it is appropriate to do so in accordance with well-established principles. By s27(2) of the Act, the court hearing that appeal will have the power to allow his appeal if he can satisfy the criteria in s27(4), namely that –

"(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

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

Such cases may well be infrequent, but when they arise the requested person will not be without remedy."

12. The article 3 issue *was* raised at the extradition hearing before the DJ although little was made of it by the appellant in the light of the respondent's assurance. My review of the chronology and the DJ's summary of the issues clearly confirms this. A ruling by the DJ was still required, and he gave it. In my view, it is an artificially narrow approach – and one that entails a misreading of the first *Gurau* decision - to hold that, because there was no oral argument on the point during the course of the hearing itself, the point had not in fact been raised. Further, I incline to think that the DJ's approach

is capable of generating undesirable practical problems. Had the concession been made after the DJ had heard some submissions about it, because counsel appreciated the weakness of his case, there could have been no doubt that the article 3 issue would have been raised at the extradition hearing. However, if it were necessary to pinpoint exactly when the hearing started in the context of the timing of any concession, there may well be situations in which no clear demarcation line is apparent.

13. In my judgment, a broader approach is the correct one, and the focus should not be limited to what happened during the hearing itself. The appellant had made it clear that an issue arose under article 3 and the court was invited to rule on it.
14. Mr Summers is also correct in submitting that a restrictive interpretation of the first *Gurau* decision is undesirable as a matter of legal policy. If the second situation identified in the first *Gurau* decision were unnecessarily expanded, that would have the undesirable effect of placing the primary fact-finding function on this Court in circumstances where the DJ is far better placed to exercise it. It would also deprive an appellant of the dual level of decision-making to which he is entitled under the Act: see *Norris v USA* [2007] UKHL 4; [2008] 1 AC 920, at paragraph 110.
15. Thus, the correct approach is to hold in these circumstances that article 3 had been raised as an issue in the extradition proceedings, and that the instant case falls to be contrasted with the type of case, described as in the first *Gurau* decision as “the second situation”, where the issue should be treated as entirely new.
16. It follows that the DJ wrongly declined jurisdiction in this appeal, and that consideration must now be given to the second issue.

The second issue: how should this Court proceed?

17. This Court’s powers on an appeal brought under section 26 of the Act are set out in section 27:

“27 Court’s powers on appeal under section 26

(1) On an appeal under section 26 the High Court may —

(a) allow the appeal;

(b) dismiss the appeal.

(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.

(3) The conditions are that—

(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person’s discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

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

(5) If the court allows the appeal it must—

(a) order the person's discharge;

(b) quash the order for his extradition."

18. Unlike an appeal against an order for discharge made at an extradition hearing which is governed by section 28, there is no power in the present circumstances to remit the case to the DJ with a direction to proceed as he would have been required to do had he decided the relevant question differently. Given that the first *Gurau* decision was dealing with an appeal brought by the respondent in exactly those circumstances, this Court exercised a power to remit under section 29(5)(b).
19. Accordingly, this Court has no option but to decide the third issue for itself, applying the well-established principles set out in *The Szombathely City Court and others v Fenyvesi and another* [2009] EWHC 231 (Admin); [2009] 4 All ER 324. This outcome works no real injustice to the appellant, for a number of reasons. First, had the DJ ruled that he did have jurisdiction these same principles would have applied below, albeit on different evidence. Secondly, and contrary to Mr Summers' argument that the respondent now finds itself in a better position regarding the weight that may be given to a recent assurance, this Court would have been required to request further information from Romania pursuant to the procedure laid down by the Grand Chamber of the ECtHR in *Criminal Proceedings Against Aranyosi and Caldaru* [2016] QB 921, and the upshot would have been the same. Thirdly, although there is some force in the argument that the appellant has been deprived of the second bite of the metaphorical cherry (see *Norris*), ultimately this Court is as well placed as would have been the DJ to determine the article 3 question.
20. Mr Summers submitted that in light of the events that have occurred he is now required to seek this Court's permission to raise a new issue pursuant to section 27(4) of the Act. Given that the DJ ought to have found that article 3 did not amount to a new issue, the correct analysis may well be that permission is not formally required. However, the point does not require formal resolution and, with my Lord's agreement, out of an abundance of caution the Court grants permission under section 27(4).

The third issue: Article 3

Governing legal principles

21. Given that there is no dispute between the parties about these, I can be quite brief.
22. In *Muršić v Croatia* [2017] 65 EHHR 1 the Grand Chamber of the European Court of Human Rights (“the ECtHR”), at paragraphs 137-139, expounded principles of general application in article 3 prison cases. The test is whether there are substantial grounds for believing that there is a real risk of the appellant being exposed to conditions which would violate article 3. In relation to living space, where the personal space of a detainee falls below 3 square metres in a multi-occupancy room that factor alone gives rise to a strong presumption of an article 3 breach, capable of being rebutted by demonstrating the presence of compensating factors. Where the personal space lies within the range of 3-4 square metres, this remains a “weighty factor” in assessing the adequacy of conditions of detention and a violation of article 3 will be found if such living space is coupled with other inappropriate conditions.
23. In *Marinescu and others v Romania* [2022] EWHC 2317 (Admin) this Court (Holroyde LJ and Saini J) addressed the issue of Romanian prison conditions and the status of an assurance given by the Romanian prison authorities. At paragraphs 18-28 of the judgment, the position was summarised as follows:
 - (1) As a result of the pilot judgment of the ECtHR in *Rezmiveş and others v Romania* (applications nos. 61467/12 etc., 25 July 2017), the presumption that Romania, as a member of the EU and the Council of Europe, will abide by its obligations under the Convention has been rebutted in relation to prison overcrowding and conditions. I would add that the pilot judgment catalogued generic or systemic findings.
 - (2) Romania must therefore show that there is no real risk of a contravention of article 3 in the case under consideration. I interpolate that in *Saadi v Italy* [2009] EHHR 30, the ECtHR made it clear that the burden was on the State in question “to dispel any doubts about it”.
 - (3) The presumption may be rebutted by the provision of assurances. In *Adamescu v Bucharest Appeal Court Criminal Division, Romania* [2020] EWHC 2709 (Admin), this Court (Holroyde LJ and Garnham J) held, in circumstances where there was no evidence that prison conditions in Romania had improved since *Rezmiveş*, there would be real risk of a violation of article 3 in the absence of “sufficient and reliable assurances” (at paragraph 165).
 - (4) Whether an assurance is sufficient will depend on the facts and circumstances of the case in hand. The important question is whether the assurance would, in its practical application, provide a sufficient guarantee that the person concerned will be protected against ill-treatment.
 - (5) A non-exhaustive list of facts that may be used to measure the effectiveness of assurances was set out by the ECtHR in *Othman v UK* [2012] 55 EHRR 1. There is no hierarchy to these factors.

Summary of the evidence before this court

24. The respondent has confirmed that, if extradited, the appellant will most likely be detained in (1) Rahova prison (for 21 days’ quarantine and assessment), then (2) Mărgineni prison (for at least one-fifth of his sentence, in closed conditions), and then

(3) Tulcea prison (for the balance of his sentence, approximately 30 months, in semi-open or open conditions).

25. I propose to examine the conditions in each of these institutions separately.

Rahova prison

26. In *Cretu v Iasi Tribunal, Romania* [2021] EWHC 1693 (Admin), Johnson J examined relevant authority and, at paragraph 75, held that if no assurances had been provided by Romania in relation to Rahova prison, extradition would have been incompatible with article 3. The principal concern was overcrowding. On the basis of the assurances that were provided in that case, Johnson J concluded that these were sufficiently robust to amount to a guarantee that Mr Cretu would not face article 3 ill-treatment.
27. At paragraph 78 of his judgment, Johnson J rejected a submission that the assurances given were “generic” and “stereotypical”. Paragraph 79 of Johnson J’s judgment is also material:

“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 3m² 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 3m²–4m² 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.”

28. It is unnecessary to examine the terms of the first assurance given in this case which was on 9 March 2020: it has been superseded by events. On 27 September 2022 Prison Chief Superintendent Gabriel Păun, Director of the Department for Prison Safety and Prison Treatments, gave an assurance on behalf of the National Administration of Penitentiaries:

“... that a minimum individual space of 3 sq. m., including the bed and related pieces of furniture, without including the area reserved for the sanitary facilities, is to be provided throughout the execution of the entire custodial sentence.”

Further:

“The National Administration of Prisons issues an assurance that the execution of the sentence in custody shall be provided throughout its length, including during the quarantine and monitoring period, in decent conditions, which comply with human dignity.”

29. In the letter accompanying this formal assurance, it was explained that the appellant would have the right to a daily walk for two hours, and further information was provided in relation to the 3 square metre figure. At the beginning of the letter, where Rahova was addressed specifically, this figure was not qualified in the manner underlined in the assurance itself. Further information was provided as to where the appellant would be held (viz. in E2 detention wing, where there are 20 detention rooms varying in surface area), and as to matters such as heating. For example, when the temperature falls below -5 degrees centigrade, the heating is on for 12 hours a day.
30. The appellant relies on expert reports by Dr Radu Chiriță dated 23 June 2023 and 5 July 2024. In his first report Dr Chiriță, who does not appear to have visited any relevant prison, doubted whether Romania could guarantee the minimum surface area figure and pointed out that under domestic law there was a requirement to provide at least 4 square metres. Further, he drew to the court’s attention that the prison authorities have not specified how many inmates would be held in the cells of different dimensions (varying from 19.3 square metres to 24.59 square metres), and that the occupancy rate of the quarantine rooms was over 100%. The position had not materially changed by July 2024.
31. Dr Chiriță also referred to reports by the domestic Ombudsman on Rahova prison. There were significant staff shortages, in particular medical staff; some detainees did not receive a mattress, pillow etc.; and the budget for each prisoner’s daily food – 9.97 lei, which is less than £2 – makes it “impossible to ensure decent food conditions”.

Mărgineni prison

32. Between 10 and 21 May 2021 the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (“CPT”) carried out an ad hoc visit to Romania. One of the prisons the CPT inspected was Mărgineni. The CPT reported on 14 April 2022, which was after the first extradition hearing before the DJ. It is clear from that report that the appellant under the closed regime would be detained in that establishment in either Pavilion 1 or Pavilion 2. The former was described by CPT in the following terms:

“The most problematic conditions of detention were found in Pavilion 1, the oldest building of the prison, where cells were humid, often dilapidated, including a regular presence of mould, and were allegedly very cold in the winter. The vast majority of persons were held in very cramped conditions: for example, 32 persons held in a cell of 44m² (offering only 1.35m² living space per person), 13 persons held in a cell of 23m²; or 18 persons held in a cell of 30m². The atmosphere in these cells was oppressive.

The cells used for double- (almost 9m²) and quadruple occupancy (12m²) were dilapidated but not overcrowded.”

As for Pavilion 2:

“... cells had good lighting, were sufficiently ventilated and were relatively clean. However, the cells were crowded with, for example, 18 persons accommodated in some 60m².”

33. The appellant relies on the following additional features of the CPT report:

- (1) At the time of the visit, the prison was 51% overcrowded. It should be noted that this figure is based on a requirement of Romanian domestic law that 4 square metres of personal space be provided. On the basis of 3 square metres, the level of overcrowding would, of course, be lower.
- (2) Material conditions were generally poor, with for example mattresses and bedding being worn out and infested with bed bugs and cockroaches. Sanitary conditions were often in a poor state of repair; hot water was available for a maximum of 90 minutes a day; the collective shower room of E4 section (relevant to those areas within Pavilion 1 which did not have a shower facility within the cells) consisted of a dirty and dark room with a rusty pipe below the ceiling distributing water; the only access to the exercise yard was through the shower room, making it totally unhygienic; the supply of personal hygienic products was insufficient.
- (3) There was a lack of purposeful activities for prisoners.
- (4) Healthcare provision was inadequate and under-resourced, with mental health care and dental care particularly so.
- (5) In the four prisons inspected, the CPT delegation received a significant number of allegations of ill-treatment of detained persons by prison staff, including by members of the masked intervention groups. The vast majority of prisoners who alleged ill-treatment stated that their injuries were not recorded by the healthcare service. However, in relation to Mărgineni prison only four inmates made these allegations, there had been an improvement since 2018, and persons of Roma origin and sex offenders appeared to be particularly at risk (and the appellant does not fall into either of these categories). As at the date of Romania’s response to the CPT report (i.e. April 2022), one of the allegations had been rejected and the remaining three were under investigation by the prosecutor’s office.
- (6) There were numerous allegations of verbal abuse by custodial staff.
- (7) In the four prisons inspected, the overcrowding, lack of activities and limited access to hot water and showers at times spilled over into inter-prisoner violence, particularly in the cells. Even so, in relation to Mărgineni prison there was just one instance of inter-prisoner violence, and that took place in April 2021 when an inmate was attacked by two others with a chair. Staff rapidly intervened and the victim was placed in another cell.

34. Overall:

“For a number of persons held in each of the four prisons visited, the cumulative effect of being accommodated in overcrowded cells with poor material conditions, combined with a regime offering extremely limited time out of cell could amount to inhuman or degrading treatment.”

35. The CPT made a number of specific recommendations in relation to Mărgineni prison, in particular:
- (1) Steps should be taken rapidly to reduce the severe levels of overcrowding.
 - (2) All cells should be appropriately equipped with tables, chairs and personal storage space.
 - (3) Measures should be taken to tackle the infestations of bed bugs and cockroaches, and to replace worn mattresses.
 - (4) Steps should be taken to renovate the sanitary facilities and replace the shower room in section E4. In addition, inmates should be supplied with appropriate quantities of detergent and hygiene products, and have regular access to hot water.
 - (5) The CCTV system should be rendered fully functional.
36. Romania’s response to the CPT report addressed some, but by no means all, of these criticisms.
37. The assurance dated 27 September 2022 covers Mărgineni prison. In addition to the promise to provide at least 3 square metres of personal space, excluding sanitary facilities, and “decent conditions”, the following matters may be drawn from this document:
- (1) Each inmate is provided with an individual bed, mattress and the required bedding; the rooms provide proper ventilation and natural light; heating is provided “so that an optimal temperature can be reached”.
 - (2) The daily schedule of inmates in the closed prison regime includes work, educational, cultural and sports activities, as well as psychological counselling and social assistance. Inmates who do not work and who do not participate in these activities are entitled to at least three hours of exercise; those who work or do participate are entitled to at least one hour’s exercise.
38. Although not part of the formal assurance, my approach to this further information is that it should be accorded the weight that flows from the general mutual obligations of respect and confidence that apply to Part 1 extradition cases.
39. Mr Summers took the Court to a number of ECtHR decisions given in 2023 which found violations of article 3 in relation to, amongst others, Mărgineni prison. It appears from the application numbers of the various cases that the claims were filed at the ECtHR in the period 2017-2020. This Court in *Marinescu* was provided with similar information.

40. Dr Radu Chiriță's report dated 23 June 2023 includes the following arithmetical calculation:

“49. When asked about the occupancy rate of detention rooms, the answer is that it fluctuates according to the dynamics of the number of detainees, resulting in an average of about 3 square metres per detainee. Beyond the evasiveness of the answer, it can be seen that it is false anyway, a fact that can be proved by some mathematical calculations. According to the same response from Mărgineni prison, the number of people serving a prison sentence in closed regime on 16 June 2023 is 375 inmates. I have shown above that the total surface area of each detention room in closed regime as indicated in the response is 1,000.6 square metres. Dividing this area by the number of inmates serving a prison sentence in closed regime on 16 June 2023 means that each of them has a maximum of 2.67 square metres available. Moreover, this area also includes the space occupied by beds and other furniture in the room.”

Although Dr Chiriță's precise workings are not available, it appears that he has aggregated the surface areas of all of the cells within the closed wings or Pavilions in order to arrive at his figure of 1,000.6 square metres.

41. On 22 May 2024 the Chief Prison Police Commissioner, Marian Ilie, Director of the Department for Prison Safety and Enforcement Regime, provided further information on behalf of the National Administration of Penitentiaries. The following matters may be drawn from this document:

- (1) Prison numbers at Mărgineni spiked in 2022 and measures have been taken to reduce the occupancy rate, which has fallen from 156% in early 2022 to 120% in 2024 (these figures based, as before, on 4 and not 3 square metres per inmate).
- (2) By the end of 2023, the accommodation was expanded to enable the addition of 37 new beds. This has enabled the third level of the bunk beds to be removed from most of the cells.
- (3) In Pavilion 1, maintenance works have been carried out in 48 cells in 2022 and a further 40 cells in 2023. These include painting, plastering or infilling, insulation and replacement of sanitary units.
- (4) Daily bathing is possible in each cell, except in section E4 where showering is carried out on a rota in a new shower room called “E4.52”.
- (5) In 2022 the prison bought 201 fire-proof mattresses, 1,430 bed sheets and 750 pillow cases.
- (6) Cells are now equipped with storage spaces for personal belongings such as shelves, a table, a TV table, and metal benches.
- (7) The heating is in “optimal condition”. I should add that in 2021, according to the response to the CPT report, improvements were made to the heating system by

buying new heat boilers, replacing damaged installations and supplying or improving other equipment for providing domestic hot water.

- (8) A dentist was employed in November 2021.
 - (9) The prison has launched a recruitment exercise for a psychiatrist. In the meantime, immediate needs are met by the local county hospital.
 - (10) Aggressive inmates are monitored and included in activities aimed at addressing and reducing aggression.
42. Dr Radu Chiriță's report dated 5 July 2024 provided an update on the issue of personal space. The information supplied to him by the prison was somewhat confusing although it appeared to be saying that in late June 2024 the number of inmates in closed conditions had fallen to 278, yielding a figure of 3.28 square metres per prisoner, including the space occupied by beds and other furniture. Dr Chiriță's did not accept, however, that the situation had really improved – "we are simply in a period where there are fewer people incarcerated than usual".

Tulcea prison

43. The appellant has advanced a limited series of written objections to the regime at Tulcea. It is said that this is another prison governed by the systemic risks identified in *Marinescu*, although it should be pointed out that Tulcea was not one of the establishments specifically considered by this Court in that case, nor has it been inspected by the CPT. The assurance dated 27 September 2022 deals in some detail with Tulcea. As the respondent rightly observes, the cells remain open during the day (in the semi-open regime) or permanently open (in the fully open regime). Inmates are able to walk unaccompanied inside the detention facility and have daily (semi-open) or unlimited (open) access to the exercise yards.
44. The appellant complains that the assurance fails to address a number of required issues, such as: sanitary facilities in working order; quality or quantity of food; medical facilities; bathing only three times a week. However, the context in which the assurance falls to be assessed by this Court is rather different from the case of Mărgineni prison where the appellant is entitled to rely on the terms of a critical CPT report.
45. Dr Chiriță has attempted to obtain information from the prison which would enable him to carry out the sort of arithmetical calculation he was able to perform for Mărgineni prison, but in the end he has been unable to do more than speculate.
46. In my view, the appellant has fallen well short of demonstrating a real risk of article 3 ill-treatment in the context of Tulcea prison, and Mr Summers did not press this aspect of his case in oral argument.

The appellant's submissions

47. The principal focus of Mr Summers' submissions was Mărgineni prison although he advanced a succinct argument about the adequacy of the assurance in respect of Rahova. As I have already said, Mr Summers detected a difference in substance between the wording of the second paragraph of the letter dated 27 September 2022 (the appellant

will be placed whilst in quarantine “in a room which will provide a minimum space of 3 sq. m.”) and the wording of the assurance which covers all the establishments in which he will be held (“a minimum individual space of 3 sq. m. ... without including the area reserved for the sanitary facilities”). Mr Summers’ submission was that the general wording of the assurance should succumb to the more specific wording of the statement of intent made in relation to Rahova. He also referred us to passages in *Marinescu* and in other materials to make good that point.

48. Mr Summers submitted that the key question in relation to Mărgineni prison is whether the assurance is robust enough. He argued that the assurance about decent conditions respecting human dignity is far too vague and general to provide much comfort, particularly in the context of the mass of criticisms set out in the CPT report which have not been adequately answered by Romania. Mr Summers submitted that both assurance letters have failed to acknowledge the catalogue of serious, generic failings that the CPT have identified, and that in such circumstances the assurances should be regarded as no more than descriptive, carrying little or no weight. Mr Summers relied on the decision of this Court (McCombe LJ and Hickinbottom J, the latter as he then was) in *Badre v Court of Florence, Italy* [2014] EWHC 614 (Admin) in support of that contention, contrasting *Marinescu* where the facts of the case were different.
49. In his reply, Mr Summers refined his submissions to highlight the two key factors which generated a real risk of article 3 ill-treatment: the pilot judgment in *Rezmiveş*, which has not been superseded, and the damning conclusions of the CPT report. The further information provided in September 2022 and May 2024 should fail to convince this Court that enough has been done to address the host of systemic problems that have been identified; and, furthermore, a number of core problems remain unresolved. These include: heating; hygiene; healthcare; and inter-prisoner and staff-inflicted violence.
50. Finally, Mr Summers submitted that if this Court should conclude that the article 3 threshold has been surpassed at *Aranyosi* stage 1, the Romanian authorities should not be given a yet further opportunity to fill in the gaps. He equated the present case with that of the decision of this Court (Beatson LJ and Sir Wyn Williams) in *Mohammed v Portugal* [2018] EWHC 225 (Admin).

The respondent’s submissions

51. It is unnecessary in all the circumstances to provide a matching summary of Mr Smith’s written and oral arguments. In short, he invited us to evaluate Romania’s assurances against the contextual backdrop of all the available evidence, and to conclude that the cumulative impact of what now remains of the appellant’s case does not meet the article 3 threshold, acknowledging as he does that the burden lies on him to dispel any doubts.

Discussion and conclusions

52. Mr Summers’ semantic point about the assurance given in relation to minimum personal space at Rahova prison is not compelling. In my opinion, the second paragraph of the letter dated 27 September 2022 was not intended to amount to a precise statement of Romania’s position in respect of that prison. Rather, it provided no more than a general description, the intention being to be more precise when it came to the wording of the assurance itself. The only fair reading of the letter, taken as a whole, is that the appellant would be provided with a minimum personal space in all three establishments

of 3 square metres, not including “the area reserved for the sanitary facilities”. It follows that the appellant’s article 3 complaint in relation to Rahova prison fails.

53. I agree with Mr Summers that the key question for determination in relation to Mărgineni prison is whether Romania’s assurances are robust enough in all the circumstances of this case. That question is predicated on Mr Smith’s acceptance that, without these assurances, there would be a violation of article 3 were the appellant extradited to Romania.

54. In *Badre* the assurance under consideration was limited to the following:

“Our Ministry assures you that should ... Abdi Badre be surrendered ... under the EAW, he will be kept in conditions complying with the provisions of article 3 of the ECHR ...”

55. That was in the context of (1) a pilot judgment of the ECtHR given in January 2013 which found a systemic problem in the Italian penitentiary system, and (2) the absence of any further information pertaining to the circumstances of Mr Abdi’s incarceration.

56. McCombe LJ’s judgment allowing Mr Abdi’s appeal was on the basis that, given that there were substantial grounds for believing that there was a real risk of ill-treatment contrary to article 3, the question at issue was whether Italy had provided sufficient material to dispel that belief (paragraph 52). As Italy had failed to supply at least some information as to the institution or the type of institution in which Mr Badre would be confined, as well as at least some information as to the prevalent conditions, the conclusion must be that the material provided was insufficient to dispel the belief (paragraphs 53 and 54).

57. At paragraph 66 of his judgment Hickinbottom J stated:

“Whilst of course every case will be fact specific, in my view, in the face of a pilot judgment identifying a system failure of a State’s prison system, a simple assurance from that state that the article 3 rights of an individual (who, if returned is at risk of being detained) will not be breached, will, without more, rarely if ever be sufficient to persuade a court that there is not a risk of such a breach.”

58. In *Marinescu* Romania had given two assurances in these terms:

“... 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.

... 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)

59. There is no material difference between the *Marinescu* assurances and those given in the present case.
60. The conclusions of this Court in *Marinescu* were as follows. First, since *Rezmiveş* in 2017, Romania had made efforts to tackle the systemic problems that had been identified although there remained significant overcrowding (on the basis of 4 square metres per inmate) and continuing complaints about material conditions (paragraph 50). Secondly, the Court endorsed Johnson J's approach in *Cretu* and rejected the submission that the assurances at issue were "merely descriptive or information as to general conditions in the prisons concerned" and, having regard to their substance rather than their form, held that they should be viewed as undertakings in the nature of solemn promises (paragraphs 54-55). Thirdly:

"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."

61. Fourthly, when the Court came to examine the contention that the assurances could not be relied on, it proceeded on the basis that, where assurances had been given by a responsible senior official of a Council of Europe or EU state, there must be a presumption that they will be honoured unless there is cogent evidence to the contrary (see *Ilia v Appeal Court in Athens, Greece* [2015] EWHC 547 Admin, paragraph 40). In *Marinescu*, the appellant had failed to put before the Court any case in which Romania had been found to have violated the article 3 rights of a returned person to whom an assurance had been given (paragraph 63). Further, there were very few cases where a breach of article 3 had been found in a situation where the minimum 3 square metre requirement *had* been met (paragraph 62).
62. Although *Badre* was not cited to the Court in *Marinescu*, I do not consider that there is any tension between these two decisions. In *Badre* the Italian authorities had given the barest of assurances without providing any further information about material conditions. Accordingly, the Court was unable to evaluate this assurance in any proper context. In *Marinescu*, on the other hand, the Court was considering two assurances

against the contextual backdrop of some information obtained from the Romanian authorities and elsewhere about prison numbers (paragraphs 32-34) and material conditions (paragraphs 45-46, in particular). In such circumstances, the Court could evaluate the assurances given against the available evidence rather than in a complete vacuum. It was in this context that the Court was able to conclude that the promise that Mr Marinescu would be held “in decent conditions which respect human dignity” was a significant additional factor which could be relied on.

63. In my judgment, the present case is *a fortiori Marinescu*. The further information provided by Romania, setting the scene for the assurances given, conscientiously addressed a number of concerns in some detail without perhaps anticipating all of them. Moreover, it is clear that since the date of the CPT inspection in May 2021 Romania has made considerable efforts to combat the specific problems in Mărgineni prison which were undoubtedly concerning. Whether Romania has done enough in the light of all the available evidence, and the assurance that the appellant would be held in decent conditions etc., is the question which I will now address.
64. That question cannot, of course, be considered without first deciding the personal space issue. Here, the position as at June 2024 is that the average personal space of inmates in closed conditions at Mărgineni prison is 3.28 square metres. Dr Chiriță does not believe that much, if any, comfort may be drawn from this statistic, but in my judgment it cannot be dismissed in this way. Furthermore, there is nothing to indicate that Romania would be unable to honour the undertaking it has given that the appellant would be provided with a minimum of 3 square metres personal space, ignoring for these purposes the surface area of the sanitary facilities. The position would be the same even if Dr Chiriță’s figure had been less than 3 square metres: the appellant’s additional space would on that premise be met to the detriment of non-extradited prisoners. In his reply, Mr Summers rightly conceded the personal space issue.
65. This conclusion materially avails the respondent in defending this appeal, but I am not overlooking the Grand Chamber’s conclusion in *Muršić* that where an inmate’s personal space lies within the range of 3-4 square metres, this remains a “weighty factor” in assessing the adequacy of conditions of detention, and a violation of article 3 will be found if such living space is coupled with other inappropriate conditions. As against that, paragraph 62 of *Marinescu* remains germane.
66. Turning now to material conditions at Mărgineni prison, the CPT report did not find unacceptable conditions in Pavilion 2. Mr Summers is correct to point out that the relevant assurance does not promise in terms that the appellant would be confined in that wing of the prison, but it is clear from all the available evidence that the prison authorities have done much to improve conditions in Pavilion 1 in response to the strong criticisms set out in the CPT report, and have provided a new shower room. In my judgment, the further information provided in May 2024 is sufficient to satisfy the Court that the appellant would be provided with article 3 compliant conditions in relation to hot water, cleaning facilities and heating in the colder months.
67. Furthermore, although the health and dental care provision at Mărgineni prison may be less than ideal given that this establishment houses over 700 inmates, I consider that the appellant has fallen well short of demonstrating even a potential breach of article 3 in this regard. It is also relevant, as Mr Smith points out, that the appellant has not

suggested that he suffers from mental health issues or any particular physical health problems.

68. This leaves the issue of inter-prisoner and prison staff-inflicted violence. In my judgment, the available evidence does not come close to showing a potential breach of article 3. In particular, the number of complaints in relation to Mărgineni prison, as opposed to other institutions within the Romanian prison estate, is relatively low; the Romanian authorities take complaints of staff-inflicted violence seriously; and the appellant does not fall within any high-risk group.
69. Overall, even taking the personal space issue as a “weighty factor” in the appellant’s favour, a fair evaluation of all the material conditions at Mărgineni prison on a cumulative basis, coupled with the assurance of decent conditions etc., must lead to the conclusion that the doubts generated by the pilot judgment in *Rezmiveş* and the CPT report have been dispelled. Given that the appellant’s case fails at *Aranyosi* stage 1, the issue of requesting further information from Romania does not arise.

Conclusion

70. If my Lord agrees, I would dismiss this appeal.

LORD JUSTICE HOLROYDE

71. I agree. For the reasons which my Lord, Mr Justice Jay, has given, I too would dismiss this appeal.
72. I wish only to add observations in relation to two matters raised by Mr Summers.
73. The first relates to my use of the words “raised” and “argued” in paragraphs 58-60 of my judgment in the first *Gurau* decision (quoted in paragraph 11 above). In the light of the DJ’s judgment, it is apparent that my use of those words was unfortunately capable of causing, and in this case did cause, a misunderstanding. I therefore confirm, for the avoidance of doubt, that Mr Summers was correct in his submission that the words were used interchangeably, and that “argued” was not intended to mean something more than “raised”. The question is whether a potential bar to extradition was raised in a meaningful way at the extradition hearing, and was before the court for the court’s decision, even if it was not developed in any detail and the court’s ruling upon it could therefore be expressed in very brief terms. That is to be contrasted with an attempt to raise on appeal an entirely new bar to extradition which was not raised at all at the extradition hearing, which was the position in *Dempsey v USA*.
74. It will be apparent that, in the event of a dispute, the court will have to decide whether in all the circumstances of the particular case an issue can properly be said to have been raised at the extradition hearing. For the reasons which Mr Justice Jay has explained, the article 3 issue was raised before the DJ at the extradition hearing in this case.
75. I would add that a token mention of a potential bar to extradition, expressed in formulaic terms purporting to keep all options open, is most unlikely to be regarded as a genuine raising of an issue.

76. The second matter relates to a submission by Mr Summers that the decision of this court in *Marinescu* has encouraged courts to give undue weight to an assurance (such as was given in that case) that a prisoner will be held “in decent conditions which respect human dignity”, or (such as was given in this case) that a prisoner will be held “in decent conditions which comply with the human dignity”.
77. I am unable to accept that submission. Where an assurance of that nature is given on behalf of a requesting state, by a person who is able properly to give it, it adds materially to an assurance as to the provision of a minimum amount of personal space; and it is an important consideration for a court when deciding whether the test in *Muršić* has been satisfied. Moreover, as was said in *Marinescu* at paragraph 58 –

“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.”