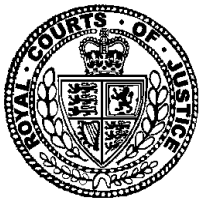

Neutral Citation Number: [2019] EWHC 890 (Admin)

Case No: CO/3623/2018 and CO/2784/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/04/2019

Before:

LORD JUSTICE IRWIN
MR JUSTICE STUART-SMITH

- -

Between:

THE BAIA MARE COURT, ROMANIA	**1st Appellant**
- and -	
STEFAN-GEZA VARGA	**1st Respondent**
And	
DUMITRU TURCANU	**2nd Appellant**
-and-	
THE TÂRGU JIU COURT OF LAW, ROMANIA	**2nd Respondent**

- -
- -

Mark Summers QC and Daniel Sternberg (instructed by **The Crown Prosecution Service**) for the **1st Appellant and 2nd Respondent**
Edward Fitzgerald QC and David Williams (instructed by **Jung & Co Solicitors**) for the **1st Respondent**
Edward Fitzgerald QC and Émilie Pottle (instructed by **Kaim Todner Solicitors Ltd**) for the **2nd Appellant**

Hearing dates: 27 March 2019

- -

Approved Judgment

Lord Justice Irwin:

Introduction

1. In these conjoined appeals the Court is concerned with the potential infringement of Article 3 ECHR represented by Romanian prison conditions. The cases in some ways represent two sides of the same coin. The original assurances as to personal space and conditions given to each potential extraditee are in identical language in the original Romanian, although there are some variations in the English translations which have been furnished. If extradited, each man is likely to begin with an initial period of 21 days in Bucharest Rahova Penitentiary. No complaint is now made of conditions there. After that period, Varga will probably be transferred to Baia Mare Prison to serve the remainder of his sentence in the "semi-open" and then the "open" regime. Following the initial three weeks, Turcanu will probably be transferred to Târgu Jiu Prison, again to serve the remainder of his sentence in the "semi-open" and "open" regimes.

2. On 11 July 2018, Stefan-Geza Varga was discharged by District Judge Crane on Article 3 grounds. The Baia Mare Court, Romania appeals that decision. On 11 September 2018, Dumitru Turcanu's extradition was ordered, the judgment being given by District Judge Goozée. The Târgu Jiu Court, Romania resists that appeal. For clarity, I will refer to "Varga", "Turcanu" and "Romania" throughout.

3. A central consideration in each case has been the adequacy of the assurance offered as to a minimum 3m² of personal space, so as to ensure compliance with the standard laid down by the ECtHR in *Muršić v Croatia* (2017) 65 EHRR 1 as confirmed by the Divisional Court in *Grecu v Cornetu Court (Romania)* [2017] 4 WLR 139. As will become clear, matters developed further in the case of Turcanu.

4. The Appellant Turcanu seeks leave to introduce fresh evidence in the form of expert reports from a Romanian lawyer and academic Dr Radu Chiriţă as to the conditions in Târgu Jiu Penitentiary. That application is resisted by Romania.

Turcanu: Notice of Appeal

5. The Appellant Turcanu failed to serve his notice of appeal on the Crown Prosecution Service in time. It is accepted that his solicitors chose not to use the standard secure email, mistyped the CPS email address, and failed to follow-up. However, since the Administrative Court Office notified the CPS of the appeal, Romania takes no issue on jurisdiction and makes no objection to Turcanu's application for relief from sanctions.

6. Romania took this approach on the following basis. Noting that Turcanu had failed to serve his Notice on time and thus to comply with Section 26(4) of the 2003 Act, and noting that there had been technical errors in his solicitor's attempted service, Romania further noted that an appellant cannot rely on the errors of his own lawyer to found an application to extend time, see *Szegfu v Court of Pecs, Hungary* [2016] 1 WLR 322. However, Romania took account of the fact that the Administrative Court staff (following their usual practice) notified the CPS of the existence of the appeal within the requisite period. Romania has taken the view, in the light of the "generous view" to be afforded to the meaning of "notice of appeal" as expressed by Lord Mance in *Pomiechowski v District Court of Legnica, Poland* [2012] 1 WLR 1604, at paragraphs

18-20, that they will accept this Notice, in this case. Hence, they waive any point on Notice.

7. In written submissions, Turcanu has argued that following this concession "the key test from now [on] is whether the Appellant or his lawyers lodge an application within time with the Court". This is clearly a misconceived submission. No concession of this kind as to Notice can be the basis of such a change. Nor is it proper that a significant alteration of the law should be said to derive from a concession, in the absence of argument on the point. Practitioners should clearly understand that the obligation to serve a Notice of Appeal on a respondent subsists. Informing the Court office cannot be treated generally as a substitute form of Notice. Nor can this Respondent's concession be taken in some fashion to have undermined or varied the decision of the Divisional Court in *Szegfu*.

Facts and Procedural Background

8. In both cases, assurances have been given both before and after the decision below. In each case, therefore, it is helpful to follow the development of the case from the beginning up to the hearing before us.

Varga

9. The European Arrest Warrant ["EAW"] was issued in this case on 7 February 2018 and certified by the National Crime Agency ["NCA"] on 26 February 2018. Varga was arrested in May 2018, appearing before the Westminster Magistrates on 14 May 2018. The EAW relates to two offences, both offences of drink driving. The first occurred in February 2012 and the second on 29 September 2015. The Respondent Varga was present at his trial and was sentenced to one year eight months imprisonment, all of which remains outstanding.

10. Varga came to the United Kingdom in May 2017. The District Judge found that he had been illegally at large since 29 May 2017. He was joined in the UK by a partner and their son later that year. He has since found work and has family members living in England. The Respondent Varga accepted before the Magistrates' Court that he was a fugitive. He sought to avoid extradition on two grounds, an Article 8 claim which was rejected, and an Article 3 claim based on prison conditions in Romania.

11. For a number of years, Romania has accepted that systemic problems of overcrowding in the Romanian prison estate meant that the courts of the United Kingdom have required assurances as to the personal space to be afforded to prisoners extradited to Romania, see the general judgment of the ECtHR in *Stanciu v Romania* (2012) (App. No. 5972/05) 24 July, *Florea v Romania (No 1)* [2015] 1 WLR 1953, and *Florea v Romania (No 2)* [2014] EWHC 4367 (Admin), *Blaj v Romania* [2015] EWHC 1710 (Admin), *Zagrean and Sunca v The Court in Mures and Others* [2016] EWHC 2786 (Admin).

12. In 2017, following the decision in Strasbourg of *Muršić*, the ECtHR gave a pilot judgment concerning Romanian prisons in *Rezmives v Romania* (App. No. 61467/12) 25 April 2017, noting the general difficulties of overcrowding and poor conditions in Romanian prisons and indicating that pending the success of the Romanian government's strategy to improve conditions, specific assurances would be necessary.

Finally, in the decision in *Grecu*, the Divisional Court ruled that assurances in respect of minimum personal space had to comply with the decision of Strasbourg in *Muršić*.

13. It was against that backdrop that the original assurance in the case was given. Since the assurance in relation to the quarantine and observation period is no longer in issue, I will omit any reference to that. In relation to the period thereafter, the assurance in the translation advanced in the Varga case was as set out below. The assurance came from Dr Viviana Onaca, the Director of the Directorate of International Law and Judicial Cooperation, Ministry of Justice. The critical passage read as follows:

> "*Given the perspective to implement the measures contained in the "Calendar of measures for 2018-2024 for solving prison overcrowding and detention conditions",* **the National Administration of Penitentiaries may guarantee, at present, a minimum individual space of 3 square meters throughout the execution of the penalty, including bed and furniture.**
>
> In the event the number of convicts registers significant increase, the National Administration of Penitentiaries will inform the Ministry of Justice about the change of the operative situation, with consequences on the guarantees provided."

14. In the course of her decision, DJ Crane rejected Varga's Article 8 claim, but as I have indicated upheld the claim on Article 3. Having properly directed herself as to the necessity of personal assurance, DJ Crane recited the parts of the assurance, including the passage I have quoted above. She noted that the submissions on behalf of Varga were that "the assurance is inadequate. The use of the words 'assume' and 'may' means that the assurance is not a clear statement of intent and provides no guarantees."

15. DJ Crane then properly directed herself as to the criteria for assessing assurances laid down in *Othman v UK* (2012) 55 EHHR 1 and concluded as follows:

> "17(e) The National Administration of Penitentiaries is unable to ensure that conditions will remain article 3 compliant through the duration of the RP's sentence. They say that they "may" guarantee and then have a mechanism for notifying the Ministry of Justice about any changes and the impact on the guarantees. However, this is insufficient to guarantee that the RP will be held with at least 3 sq.m. of personal space throughout his sentence.
>
> …
>
> 18. Whilst the details provided of the conditions during any quarantine period and the conditions in Baia Mare Penitentiary would provide 3sq.m of personal space. The assurance does not provide a guarantee that if the RP is held in other institutions that he will have 3 sq.m. of personal space. Therefore, the assurance is insufficient to ensure that there is not a real risk of breach of the RP's article 3 rights throughout the duration of the RP's sentence."

16. On 10 December 2018, Romania was given permission to appeal the decision of the District Judge by Sir Ross Cranston, both as to the reading of the assurance by the District Judge and as to the issue whether a further clarification should have been sought.

17. In a careful letter of request for further information sent on 21 February 2019, the CPS asked for clarification, in effect, of the consistency and enduring nature of the assurance given. It has been helpful to see the request when considering the response. The clarification takes the form of a letter dated 28 February 2019 from a prison Chief Superintendent to Dr Onaca at the Romanian Ministry of Justice. In its material parts this reads:

> "… the National Administration of Penitentiaries is in a position to issue an assurance that a minimum individual space of 3 sq.m., including the bed and related pieces of furniture, <u>without including the area reserved for the sanitary facilities</u>, is to be provided throughout the execution of the entire custodial sentence.
>
> Throughout the custodial sentence served within the prison system, the prisoners might be subpoenaed to judicial bodies which are situated in the area of responsibility of other prison units or the inmates must report to prosecution bodies as part of ongoing criminal investigations, and such situations cannot be foretold by the management of the detention units or by our institution; when such situations arise, they may call for the inmates to be transferred for strictly limited periods of time, and in such situations the inmates shall be provided with daily access to the outdoor walking yard.
>
> Should a successive number of subpoenas require the inmate to be transferred to a different unit than the one where such assurances had been issued for, then the management of the unit where the inmate is kept in custody <u>will take measures in order to comply with the assurances provided as stipulated in this document.</u>"

18. Romania makes four essential points in relation to this decision. Firstly, the implication that Romania was required to assure the Court about conditions in other institutions was an error of law; secondly, the District Judge erred in her assessment of the terms of the existing assurance; thirdly, even if the District Judge had been correct in her assessment, her obligation was to call for clarification or further assurances, not to discharge; and fourthly, in any event, Romania has provided a supplemental assurance.

19. Varga essentially makes two submissions. The first is that the District Judge's approach was correct and her assessment correct. There was no obligation on the District Judge to call for further assurances, since Romania had had time enough.

20. In relation to the fresh assurances, Mr Fitzgerald frankly concedes that the wording of the fresh assurance as set out above is sufficient to represent an adequate guarantee of $3m^2$ of personal space. However, the assurance came too late. The powers of the High

Court from an appeal on a discharge at the extradition hearing being defined by Section 29 of the Extradition Act 2003, Mr Fitzgerald, in relation to this submission, must satisfy this Court that the conditions under Section 29 are not satisfied. His submission is, in effect, that they are not.

21. In my judgment, the District Judge's decision, in so far as it rested on the potential that Varga would be held in other institutions than those indicated, was impermissibly wide. This was not a case where it was unclear at which prison Varga was destined to serve his sentence. The District Judge did not have the benefit of the decision of the CJEU, in *ML (Generalstaatsanwaltschaft Bremen)* C-220/18 PPU [2019] 1 WLR 1052. The CJEU made it clear that it is not appropriate for an executing judicial authority to set out to review prison conditions in all the institutions to which it is theoretically possible the individual might be sent. The assessment should be "specific and precise", see paragraph 78. The Court recognised that:

> "84. An obligation on the part of the executing judicial authorities to assess the conditions of detention in all the prisons in which the individual concerned might be detained in the issuing Member State is clearly excessive. Moreover it is impossible to fulfil such an obligation within the periods prescribed in Article 17 of the Framework Decision. Such an assessment could in fact substantially delay that individual's surrender and, accordingly, render the operation of the European arrest warrant system wholly ineffective.
>
> …
>
> 87. Consequently, in view of the mutual trust that must exist between Member States, on which the European arrest warrant system is based, and taking account, in particular, of the time limits set by Article 17 of the Framework Decision for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. The compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is … a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State.
>
> …
>
> 117. Having regard to all the foregoing considerations, the answer to the questions referred is that Article 1(3), Article 5 and Article 6(1) of the Framework Decision must be interpreted as meaning that when the executing judicial authority has information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State … the executing judicial authority is

> required to assess only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis…"

22. In relation to the terms of the existing assurance, Mr Summers QC for Romania emphasises that this assurance was in identical terms to that considered in *Scerbatchi v Romania* [2018] EWHC 3612 (Admin), where the Court considered the language in the assurance to be "clear and specific" (paragraph 50), and the foundation of the Court's conclusion that the assurance could be relied upon to provide "specific or bespoke arrangements … in his case…" (paragraph 52).

23. I am less convinced of this submission. The meaning of an assurance is in the end a question of fact. Whilst the view taken of a given formulation of language by the Divisional Court will be of the highest persuasive importance, it is not a conclusion of law. The decision in *Scerbatchi* cannot have been cited to DJ Crane, since the judgment was handed down in December 2018, some five months after DJ Crane's ruling. I would therefore not conclude, in relation to this ground, that the District Judge "ought to have decided the relevant question differently".

24. However, there is in my view much more force in Mr Summers' third submission. It has all along been clear that there is the strongest public interest in the effective operation of the system of extradition between Member States using the EAW system. The suspension of the presumption that Romania will provide effective production of the Convention rights of extraditees in their prisons does not in any sense detract from the desirability of operating this system effectively. The *Aranyosi* process of seeking specific further information and/or assurances is, in its fundamentals, an approach designed to ensure that the system can continue to operate. That is where the public interest lies. Of course, the executing judicial authority must make a priority of ensuring Convention rights and, in particular, Article 3 rights. But, where ambiguity or uncertainty arises the proper course is to seek clarification or further assurance, at least until it becomes clear that such clarification or assurance cannot be obtained within a reasonable time. This approach has been underlined in the course of *Aranyosi* itself (see paragraph 104), in *Georgiev v Bulgaria* [2018] EWHC 359 (Admin) at paragraph 8(ix) and in respect of Part 2 extradition, in *Government of India v Chawla* [2018] EWHC 1050 (Admin), see paragraph 32. I am of course unaware as to whether these authorities were cited to DJ Crane, but they were all available before her decision.

25. Had DJ Crane made an urgent request for clarification or a further assurance whilst adjourning the extradition hearing, it is clear what would have been the outcome. The Court would have been furnished with the further assurance which has since been given. Since it is acknowledged by Mr Fitzgerald that the recent assurance makes clear beyond doubt that Varga will be accorded the necessary minimum personal space throughout his sentence, then the result of an adjourned extradition hearing would have been that the District Judge would have "decided the relevant question differently" within the meaning of Section 29(3)(a).

26. I would therefore allow the appeal on that Ground, remit the case of Varga to another Judge, DJ Crane having been elevated to the Circuit bench, and direct the judge to proceed as they would have been required to do had the assurance now obtained been obtained below.

27. It follows that consideration of the effect of the after-coming assurance on the premise that the decision below was correct, is academic and does not arise for decision. I note one interesting aspect of the argument advanced by Mr Fitzgerald. It is at least arguable that an after-coming assurance in a case where there was no error of law or procedure below, cannot be the basis of a conclusion that the judge "ought to have decided the relevant question differently" within Section 29(3). If the matter does arise in a future case, it will be necessary to consider whether, for the purposes of Section 29(4)(a) at least, such a fresh assurance can be regarded as "evidence", despite the consistent approach hitherto that "an assurance is not evidence", see *United States of America v Giese* [2015] EWHC 3658 (Admin) [2016] 4 WLR 10, at paragraph 14 and *India v Chawla* at paragraph 31.

Turcanu

28. The Appellant Turcanu's extradition is sought pursuant to an EAW issued on 19 February 2018 and certified on 2 March 2018. The warrant relates to a prison sentence in relation to serious motoring (drink-driving) offences. One of the offences is set out in the EAW and the other particularised in further information. The offence particularised in the EAW put the Appellant in breach of a previous suspended prison sentence, which has now been activated. The Appellant is sought to serve a total of two years and eight months' imprisonment.

29. On 24 May 2018, Romania provided a written individual assurance for the Appellant in identical form, in Romanian, to that provided in respect of Varga. The assurance came from Dr Onaca. The only distinction of substance is that it is predicted and intended that Turcanu will serve his substantive sentence in the Târgu Jiu Prison.

30. As I have already indicated in relation to Varga, the assurance relates to the minimum 3m² of personal space. In the light of the way this case has developed, it will be helpful to quote rather more fully from the original assurance:

> "2. At the end of the quarantine period, in view of his punishment period, he will most likely serve the imprisonment punishment, at first, in semi-open enforcement. Furthermore, considering the person's home, he will most likely serve the punishment, at first, in the Târgu Jiu Penitentiary.
>
> When determining the enforcement type, members of the speciality board will take the following criteria into consideration:
>
> - imprisonment punishment period;
> - convict's risk degree;
> - prior criminal convictions;
> - convict's age and health condition;
> - convict's behaviour, positive or negative, including the behaviour during prior detention periods;

> - convict's identified needs and skills, necessary to be included into educational, psychological and social assistance programs;
>
> - convict's willingness to work and to attend educational, cultural, therapeutic, psychological counselling, social assistance, moral-religious, school training and professional training activities;
>
> Administrative authorities cannot influence or modify board decisions.
>
> Detention rooms provide to each prisoner individual bed, mattress and proper bedclothes, furniture to deposit personal possession and for serving meals. Rooms provide proper ventilation and daylight and, depending on weather conditions, heating of spaces is provided so that detention rooms have optimum temperature. Prisoners have permanent access to running water and sanitary items to satisfy their physiological needs.
>
> The semi-open enforcement provides prisoners several possibilities, such as:
>
> - to walk unaccompanied in areas within the detention place on roads set by the penitentiary administration;
>
> - to organize their leisure time under supervision complying with the program set by the administration.
>
> In the semi-open enforcement detention rooms are open during the day. They have access throughout the day to walking courtyards equipped with special smoking areas."

31. In addition to the matters quoted above, the assurance goes on to describe rather more fully the aspects of the semi-open regime, including details of the ability of the prisoners to move around the prison when not confined to their cells, to work and so forth. This is the regime analysed quite closely in *Grecu*, see paragraphs 8 and 17.

32. The assurance then concluded with the following paragraph:

> "In the light of the implementation of measures included in the "2018-2024 Schedule of measures to solve overcrowding in solitary cells and detention conditions" the National Administration of Penitentiaries can, at present, guarantee to provide a personal space of 3 sq.m., including bed and proper furniture."

33. As the matter was put to DJ Goozée, the Appellant Turcanu, then represented by different counsel, relied on Article 8 and on Article 3. The Article 8 objections were unsuccessful and no point is now taken in respect of that. The arguments in relation to

Article 3 were exclusively formulated in terms of the personal space of 3m². DJ Goozée summarised the submission as follows:

> "20. … The assurance provided by the Romanian authorities is inadequate. It does not give sufficient details to satisfy the 3 square meters of personal space requirement. It does not stipulate whether the sanitary facilities are separate or inside the cells in line with the methodology outlined in *Mursic v Croatia* 7334/13 ECHR. Mr Kendridge also highlights the final paragraph of the assurance "In the light of the implementation of measures included in the '2018-2024 Schedule of Measures to solve overcrowding in solitary cells and detention conditions' the National Administration of Penitentiaries can, <u>at present</u>, guarantee to provide a personal space of 3 sq. m, including bed and proper furniture". [my emphasis]. Mr Kendridge submits the phrase "at present" does not provide sufficient guarantees for a reliable assurance."

34. The District Judge reviewed the relevant authority bearing on the Article 3 issue and concluded as follows:

> "31. … The assurance confirms at all time he will be provided with a minimum individual space of 3 sq meters including bed and furniture. That is made clear throughout the assurance. Albeit I accept no specific reference is made to whether sanitary facilities are in the cells or separate, it does describe what each detention room has, which includes "access to running water and sanitary items" indicating they are in cell facilities. Nevertheless, there is nothing within the assurance that gives the impression that in-cell sanitary facilities have been counted as part of the calculation of minimum personal space allocated to the RP. The assurance provides full details of the open prison facilities. It also confirms that when determining where the RP will serve his sentence there are a number of factors which will be considered demonstrating any risk to the RP will be managed by the authorities. The existence of procedures for monitoring detention conditions by the Ministry of Justice in Romania is set out in the final paragraph of the assurance, through the implementation of measures to solve overcrowding and detention conditions, such measures are for the period 2018-2024 which clearly covers the period the RP would be detained in serving his sentence. Romania is a signatory to the ECHR and a member State of the European Union. There is a strong presumption that Romania is willing and able to fulfil its human rights obligations and any assurance given in support of those obligations. I accept the Assurance provided by the Romanian Ministry of Justice. I find the RP has adduced no cogent reasons to believe it will not be fulfilled. The assurance meets the test set out in *Mursic* and the terms of the assurance are such that, considering the document as a whole, on a holistic basis, it is an

> assurance the RP will not be subjected to treatment contrary to Article 3; the assurances is given in good faith; there is a sound objective basis for believing that the assurances will be fulfilled and fulfilment of the assurances are be (*sic*) capable of being verified.
>
> …
>
> 40. In relation to his Article 3 challenge, it is accepted that there is clear and cogent evidence that prison conditions in Romania were part of a wider systematic problem which have breached Article 3. However, the Romania authorities have provided me with an individual assurance relating to the conditions in which the RP will be held in Romania. I have accepted that assurance as per my findings above. Based on that individual assurance the JA have satisfied me that there is no real risk of the RP being subjected to inhuman or degrading treatment. The JA have satisfied the legal burden to discount the existence of a real risk of violation in relation to the RP. I reject the Article 3 challenge."

35. Grounds of Appeal for Turcanu were served and filed on 13 September 2018. It is worth emphasising that the grounds of appeal were also exclusively focussed on whether the minimum 3m² of personal space would be made available throughout the time of incarceration.

36. Subsequently the question of service of the Notice of Appeal arose and as a consequence, while that matter was not as yet subject to a concession by Romania, directions were given for the issue to be tried before the Divisional Court. I have addressed that above.

37. On 12 February 2019, Supperstone J gave directions that the Turcanu and Varga cases were to be heard together. He also addressed an application on behalf of Turcanu to instruct Dr Radu Chiriţă to prepare a report "concerning the overcrowding at Târgu Jiu Prison and poor material conditions at this facility". In the course of his ruling, Supperstone J observed:

> "2) The Appellant has, since the grant of permission, obtained further evidence from Dr Radu Chirita, an expert on prison conditions in Romania, which points to serious concerns regarding overcrowding at the Targu Jiu facility as of January 2019, and poor material conditions of detention. Given the Divisional Court is to consider the substantive Article 3 issue, it is important that the most up to date evidence is made available."

It should therefore be noted that the question of the other "material conditions of detention" in Târgu Jiu not only was not raised before DJ Goozée but was not the subject of any evidence at the extradition hearing.

38. The Appellant Turcanu seeks to introduce three reports from Dr Chiriţă. The first report is dated 26 February 2019. The second "addition to expert legal opinion" is dated 5

March 2019, and the third tranche of expert material was handed to us on the day of hearing and was said to have been served on 26 March. In the course of the hearing, we agreed to consider this material *de bene esse*, considering the application to introduce the material bearing in mind the well-established test of admissibility of further evidence laid down in the judgment of Sir Anthony May PQBD in *Szombathely City Court v Fenyvezi* [2009] 4 All ER 324.

39. No statement or other written form of explanation was advanced by Turcanu as to why this report had not been commissioned and served before the extradition hearing. In my view, this should be regarded as a basic requirement. I return to this issue later in the judgment. The closest the Court was able to get to an explanation for the late attempt to introduce this evidence was the rather engagingly frank explanation passed through Mr Fitzgerald following the Court's request for further information. Those representing Turcanu at the extradition hearing considered they had a winning point on the adequacy of the language of the assurance, believed they were confined by case law to questioning the assurance and therefore did think the expert report was an expenditure that could be justified to the legal aid agency. In my view this is not an adequate or reasonable explanation as to why this evidence was not brought to bear earlier. There is simply no basis for saying that Dr Chiriță could not have been instructed in time for the hearing below. He has been instructed in a number of the other reported cases.

40. The essence of what he advances in these reports can be compressed into two short points: firstly, that the overcrowding in Târgu Jiu is such that the assurance of 3m² of personal space to an individual extraditee may not be capable of being fulfilled and secondly that the other "material conditions" in Târgu Jiu Prison are poor and of such a low quality that they must be considered under the rubric of the remarks of the ECtHR in paragraphs 138 and 139 of *Muršić*. It will be recalled that in those passages the Court indicated there was "a strong presumption of a violation of Article 3" where even short periods of personal space less than 3m² of floor surface arise unless the reductions in such minimum space are "short, occasional and minor" and where:

> "…the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention."

41. Further, where the personal space is 3m² or up to 4m² per inmate:

> "…a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements."

42. Mr Fitzgerald supports his argument for the admission of this material essentially by reference to the requirement of this Court, being a public authority, to pay continuing regard to the Appellant Turcanu's Convention rights. When taxed with the question as to whether such an approach was not only counter to the way the matter was addressed in *Fenyvesi* but would render the *Fenyvesi* test ineffective, his answer was to submit that the grant or withholding of permission to appeal represented an effective filter,

protecting the Administrative Court from being turned into a court of first instance. In my view, with respect to the grace and elegance with which Mr Fitzgerald put this argument, it is without merit. Indeed, the facts of this case illustrate very well the problem which was being addressed in *Fenyvesi* that, by the attachment of a "human rights" label to evidence which should have been brought to bear below, the finality of extradition proceedings would be undermined.

43. We have, of course, read Dr Chiriță's reports and appendices in order to consider the proper course. I do not intend to engage in close analysis of what he said. His evidence is detailed and with twin themes. The first is the degree of overcrowding in Târgu Jiu in the areas of the prison (sometimes described as "rooms" when a more apt term might be "wings"). In particular, those areas occupied by prisoners in the semi-open regime represent in his view very considerable overcrowding. His evidence as to poor material conditions: damp, cleanliness, etc. is more difficult to decode. Looking at the material he produced, including reports from the Romanian Ministry of Justice and from the Romanian Prisons Ombudsman, there is a degree of ambiguity about the extent of such poor conditions. For example, it is quite unclear as to whether evidence of damp in a "room" (meaning "wing") will be recorded as such, if it is in one cell within the room/wing, or only if the problem is more widespread. In my judgment, Mr Summers QC has force in his submission that such evidence as this really does need to be deployed in the extradition hearing, so that the expert witness can be cross-examined and the evidence tested.

44. For myself, I could not possibly reach the conclusion on the basis of the written material only that the assurances from Romania as to personal space and (as they developed following the hearing below) as to material conditions of incarceration, are impossible of performance. In short, if this evidence was to be advanced, it had to be advanced below so that it could be addressed properly. Even if accepted in written form before us, it could not be, and is not, decisive.

45. For my part, therefore, I would refuse to admit the evidence for substantive consideration in the appeal before us.

46. In any event, no doubt under the pressure of developing events, Romania has given further assurances in relation to Turcanu's conditions in prison. Firstly, on 28 February 2019, in the form of a letter from a Mr Coţofană to Dr Onaca, Romania indicates the following:

> "Having regard to the perspective for the implementation of the measures included in the TIMETABLE FOR THE IMPLEMENTATION OF MEASURES 2018-2024 TO RESOLVE THE ISSUE OF PRISON OVERCROWDING AND CONDITIONS OF DETENTION, as well as to the trend which the number of detainees incarcerated with the National Administration of Penitentiaries displays following the criminal policies adopted by the Romanian state, the **National Administration of Penitentiaries 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, <u>without including the lavatory</u>.

> During the enforcement of the custodial measure in prison detainees may be summoned to appear before judicial authorities in other areas of the country where other prisons exist, whereas such situations cannot be forecast by the prison administration or by us and which require the transfer of the detainees for shorter periods of time to other prisons, however ensuring the daily access to open air walking areas.
>
> In case of multiple summons which require the transfer of the detainee to other prisons than those for which the safeguards were offered, the administration of the prison in which the detainee is accommodated shall take measures for complying with the safeguards offered exactly as they were phrased."

47. Finally, on 22 March 2019 a further assurance was given, again in similar form from Superintendent Coţofană. Romania undertook as follows:

> "**Târgu Jiu Prison**
>
> Detention rooms provide each convict with an individual bed, mattress and the required outfit, they are equipped with the pieces of furniture required in order to store personal items, as well as for serving food. The rooms provide proper ventilation and natural light, and depending on meteorological conditions, these rooms are provided with heating, so that the temperature inside should reach an optimal level. The inmates have permanent access to running water and sanitary items required for personal needs, the toilet is separated from the bathroom with a door and the natural ventilation is provided.
>
> Taking into consideration the issues presented above regarding the accommodation conditions within the Bucharest Rahova and Targu Jiu prisons, we can assure you of the fact that, the moment when Mr. Turcanu Dumitru Laurenţiu will be taken into custody in one of the prison units mentioned in the assurances provided, he will benefit from proper detention conditions, as no mould or infiltration was found within the detention rooms."

48. For these reasons I would dismiss the appeal of Turcanu also.

Postscript

49. Three significant points for practice require emphasis, in the light of this case.

50. First, as I have indicated in paragraphs 5 to 7 above, there is a requirement that an appellant should serve Notice of Appeal on a Respondent, in appeals to the High Court in extradition. That requirement stands. It must be absolutely clear that would-be appellants and their lawyers should not treat the staff of the Administrative Court as a post-box, or unofficial agents, to effect service. The court staff owe no duty to prospective appellants or their legal representatives, and must not be placed in such a false position.

51. Secondly, this case exemplifies once more the obligation to consider carefully the obligation of appellants and their legal representatives to consider what grounds should be advanced before the District Justice, and what evidence must be deployed in that hearing. The *Fenyvesi* test for admission of fresh evidence will be actively applied by the Courts, and cannot be circumvented (as Sir Anthony May PQBD put it) by attaching "a human rights label" to the case: see *Fenyvesi*, paragraph 35. That is not to be understood as an encouragement to take worthless points or adduce flimsy evidence in the extradition hearing, as a misconceived precautionary measure. It is the responsibility of appellants and their representatives to advance the proper points and evidence available to them, and no more. Where there is an application to justify fresh evidence before the High Court, the Court will expect a witness statement explaining why the evidence was not available before. An explanation fed through counsel, to the effect that "we did not think of it" or "we did not consider it necessary then but we have changed our minds now" must and will get short shrift.

52. The third point is to restate the obligation of a Requesting Judicial Authority seeking to introduce further information or assurances to supply at the same time the letter or letters requesting or stimulating the further information. Rarely, if ever, will this practice lead to infringement of legal professional privilege. Particularly in extradition cases, where important documents are generated in a whole range of languages, and where foreign legal processes are often in question, knowledge of the questions asked can be of great assistance in understanding the information or assurance proffered.

Mr Justice Stuart-Smith:

53. I agree and have nothing to add.