Neutral Citation Number: [2017] EWHC 1427 (Admin)

Case No: CO/4814/2016 AND CO/5981/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2017

Before :

LORD JUSTICE IRWIN
MR JUSTICE COLLINS

- -

Between :

IONEL-REMUS GRECU	**1st Appellant**
- and -	
CORNETU COURT (ROMANIA)	**1st Respondent**
COSMIN-IONUT BAGAREA	**2nd Appellant**
-and-	
CARAS SEVERIN TRIBUNAL ROMANIA	**2nd Respondent**

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Jonathan Hall QC and Benjamin Seifert (instructed by **Coomber Rich**) for the **1st Appellant**
Jonathan Hall QC and Graeme Hall (instructed by **Shaw Graham Kersh**) for the **2nd Appellant**
Julian Knowles QC and Julia Farrant (instructed by **Crown Prosecution Service**) for the **Respondents**

Hearing dates: 24 May 2017

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Approved Judgment

Lord Justice Irwin:

Introduction

1. These cases concern prison conditions in Romania. The Appellants contend that it is inconsistent with the United Kingdom's obligations under Article 3 of the European Convention on Human Rights to return individuals to Romanian prisons, where there is a real risk that their accommodation will consist of less than 3m² of personal space. Their submission is that such is the inevitable consequence of the recent decision of the Grand Chamber of the European Court of Human Rights in *Muršić v Croatia*, application number 7334/13, 20 October 2016, to the effect that individuals whether facing closed, semi- or open prison conditions must be granted at least 3m² of personal space, unless a series of identified cumulative mitigating factors are shown by the issuing judicial authority to be present.

The Facts: Outline

2. The Appellant Grecu's extradition is sought by an EAW issued on 20 June 2014 by the Cornetu Court, Romania, certified by the National Crime Agency on 3 February 2016. He was convicted of an offence involving the burglary of a door from a house in the course of refurbishment. He was made subject, following conviction, to a sentence of one year and six months, with all but 24 hours remaining to be served. Mr Grecu was arrested on 2 February 2016. The substantive extradition hearing took place on 1 September 2016 and in a judgment dated 19 September 2016, District Judge Ikram ordered the Appellant Grecu's surrender to Romania. His appeal was lodged on 21 September 2016.

3. Mr Bagarea is sought pursuant to an EAW issued on 6 May 2016, and certified by the National Crime Agency on 12 May 2016. His surrender is sought pursuant to a final decision of the Court of Appeal in Timisoara, finalised on 11 April 2016. He is subject to three years' imprisonment for an offence of cultivating cannabis. Bagarea was arrested on 25 September 2016 and brought before the Westminster Magistrates on the following day. His full extradition hearing took place on 23 November and his extradition was ordered on the same day by District Judge Ashworth. His appeal was lodged on 25 November 2016.

4. Since the Appellant Grecu is due to serve a term of less than three years on return, following the allocation system in Romania, he will be returned to semi-open conditions. According to the extant guarantees from the Romanian authorities, he will be guaranteed personal space of only 2m².

5. So far as the Appellant Bagarea is concerned, his sentence being three years, he will initially be detained in closed conditions. In respect of prisoners serving in closed conditions, arriving on transfer from the United Kingdom, the Romanian authorities have guaranteed personal space of 3m², conditions therefore in conformity with the minimum standard set by the ECtHR. However, as was set out by Blake J in *Florea v Romania* [2014] EWHC 4367 (Admin) ("*Florea II*") at paragraph 11, it is to be anticipated that the Appellant Bagarea will, after a relatively short time, be reallocated to semi-open conditions. It seems not to be in issue but that following such a transfer, he too would be placed in a prison where he is guaranteed only 2m² of personal space. The Respondent accepts that is to be anticipated in his case also.

6. I address below some of the contested detail in these cases, particularly as to the amount of time in and out of their cells, which the Appellants would spend under the semi-open regime in Romania.

The Assurances as to Space in Romanian Prisons

7. The assurances are simply expressed. Conditions are determined by whether the prisoner is serving in the closed or semi-open systems.

8. The semi-open system is described as follows:

> "The main characteristics of the semi-open regime of enforcement of custodial sentences are as follows:
>
> Detainees have access to walking areas (daily), clubs, sports fields, sports room, church, classrooms and other spaces which are dedicated for the exercise of their rights.
>
> The semi-open regime offers numerous opportunities to detainees, as for example:
>
> - The possibility to walk unaccompanied in areas within the detention facility on routes which are established by the prison management;
>
> - The possibility to organize the spare time they have, under surveillance, in compliance with the schedule as established by the prison management.
>
> Within the semi-open enforcement regime room doors are not locked throughout the day. Detainees have access all day long, based on a schedule established by the prison management, to the walking areas which also include smoking areas. On the hall-ways of detention sections, as well as in walking areas phones are available for the use of detainees, who can make 10 phone calls daily, with a total duration of 60 minutes, as well as research and electronic information kiosks where detainees can check their prison related situation (number of credits, educational activities they were involved in, legal status, etc.).
>
> Convicted persons who serve their sentence in the semi-open regime may work and get involved in educational, cultural, therapeutic, psychological assistance, social assistance, moral and religious activities, schooling and vocational training outside prison, under surveillance.
>
> Within the semi-open regime detainees have the right to 5 visits every month with a maximum duration of 2 hours. Detainees have the right to buy every week in the prison shops, for not more than ¾ of the value of the minimum gross wages food,

> fruits, vegetables, mineral water, refreshments, cigarettes and other goods which may be introduced into the prison.
>
> Educational, psychological assistance, social assistance programs and activities involving detainees in the semi-open regime are conducted based on the recommendations in the Individual Plan for Evaluation and Educational and Therapeutic Intervention within groups, in spaces inside and outside the detention facility which remain unlocked during the day, as well as outside the detention facility. Detainees who serve their sentences in the semi-open regime and who leave the detention facility for such purposes are accompanied and monitored outside with unarmed staff.
>
> Detainees who serve their sentences in the semi-open regime have the possibility to spend their spare time outside the detention rooms, all day long. They have to return to their rooms only for having the meals and before the evening roll call. This means that apart from the time dedicated to participation in activities and programs and the exercise of rights, this category of detainees may spend their spare time outside the detention room, in open air, using the detention room only for rest or various administrative and hygiene activities."

9. The closed system is described as follows:

> "We would like to mention some of the characteristics of the closed system for the enforcement of custodial sentences:
>
> The daily schedule of detainees in the closed system includes work, educational, cultural, therapeutic and sports activities, psychological assistance, social assistance, moral and religious activities, schooling and vocational training, healthcare, walking, rest and other activities which are necessary for the stimulation of the interest of detainees in closed system to assume responsibilities. The activities with detainees in the closed system are conducted individually or in groups, under the permanent guard and surveillance of the staff. Detainees in the closed system who for whatever reasons are not used for work, schooling and vocational training activities are involved in activities like walking, education, psychological assistance and social assistance, sports and religious activities for a maximum of 4 hours a day. Detainees who do not work and are not involved in other activities have the right to at least 3 hours of walking every day and detainees who work, are involved in educational activities or psychological assistance and social assistance have the right to at lest one hour of walking every day.

> We would like to mention that educational, psychological assistance, social assistance programs and activities are conducted based on the recommendations in the Individual Plan for Evaluation and Educational and Therapeutic Intervention in groups, in spaces inside the detention facility; outside the detention facility detainees in the closed system may get involved in educational and cultural activities, under permanent guard and surveillance, with the approval of the prison manager."

10. The Romanian authorities then give the following assurance:

> "We would like to reiterate the fact that the safeguards offered for extradited persons are based on detention conditions as compared to the minimum individual area (2 square meters in case of the enforcement of the sentence in the open or semi-open regime and 3 square meters in case of the enforcement of the sentence in the closed system). We furthermore would like to mention that all detainees with the Romanian prisons can exercise their legal rights."

The Law

11. It is helpful to begin by considering the establishment by the Council of Europe of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment Punishment ["CPT"]. Since 1991 the CPT has issued successive general reports on conditions for detention within Europe, in the face of continuing prison overcrowding in some member states. In the report entitled *"Living Space per Prisoner in Prison Establishments: CPT Standards*" (CPT/Inf (2015) 44 of 15 December 2015), the CPT provided a clear statement of its position and standards regarding minimum living space per prisoner. The CPT indicated that during the 1990s a basic "rule of thumb" standard for the minimum amount of living space in multiple occupancy cells had been developed at 4m² of living space per prisoner, excluding the sanitary facilities. This was said to be a minimum standard, with a desirable standard of a rather greater measure.

12. In paragraphs 19 and following, the CPT explain that as a preventive monitoring body they do not seek to pronounce on whether a given situation amounts to inhuman or degrading treatment or punishment, a question of breach of Article 3 being left to the ECtHR. It is the job of the Court to decide whether or not holding prisoners in cells offering a "very limited living space per person (usually less than 4m²) constitutes a violation of Article 3" (paragraph 19).

13. The CPT go on to say:

> "21. The CPT has never considered that its cell-size standards should be regarded as absolute. In other words, it does not automatically hold the view that a minor deviation from its minimum standards may in itself be considered as amounting to inhuman and degrading treatment of the prisoner(s) concerned, as long as other, alleviating, factors can be found, such as, in

> particular, the fact that inmates are able to spend a considerable amount of time each day outside their cells (in workshops, classes or other activities). Nevertheless, even in such cases, the CPT would still recommend that the minimum standard be adhered to.
>
> 22. On the other hand, for the Committee to say that conditions of detention could be considered as amounting to inhuman and degrading treatment, the cells either have to be extremely overcrowded or, as in most cases, combine a number of negative elements, such as an insufficient number of beds for all inmates, poor hygiene, infestation with vermin, insufficient ventilation, heating or light, lack of in-cell sanitation and in consequence the use of buckets or bottles for the needs of nature. In fact, the likelihood that a place of detention is very overcrowded but at the same time well ventilated, clean and equipped with a sufficient number of beds is extremely low. Thus, it is not surprising that the CPT often enumerates the factors that constitute appalling detention conditions, rather than just referring to inadequate living space. In addition - but by no means in every case - other factors not directly related to the conditions are taken into account by the CPT when assessing a particular situation. These factors include little out-of-cell time and generally a poor regime; reduced outdoor exercise; deprivation of contacts with relatives for several years, etc.
>
> 23. The Appendix to this document contains a non-exhaustive list of factors (other than the amount of living space per prisoner) to be taken into consideration when assessing detention conditions in prison."

14. In the course of the Court's judgment in *Florea v Romania* [2014] EWHC 2528 (Admin) (*Florea I*), Blake J considered the extant authority from the ECtHR on prison overcrowding and in particular quoted the relevant passages from *Ananyev v Russia* (Applications Nos 45/07 and 60800/080910) of January 2012. That review of authority, set out in paragraphs 143-149 of *Ananyev* is quoted in paragraph 9 of *Florea I*. It is not necessary for me to rehearse that sequence of authority, since the Divisional Court went on to draw conclusions from that learning. In short, their conclusions were that:

> "Where a detainee has less than 3m² of personal floor space there is a strong presumption of a violation of Article 3 by itself without any other aggravating factor. We recognise that the Court is still talking about a strong presumption and not an inevitable violation."

Florea I (paragraph 10)

15. The Court recognised that in all the Strasbourg authorities, the ECtHR was "looking back at particular historic experiences by prisoners" and making "a holistic

assessment" (paragraph 11). In paragraph 15, the Divisional Court concluded that "standards for personal space for prisoners have become more precise over the years". In paragraph 22 the Court noted the longstanding difficulty with the conditions in Romanian prisons arising from "overcrowding, unacceptably poor prison conditions and related problems with respect to the treatment of prisoners". The Court went on to review a number of cases involving Romanian prisons. The Court noted that:

> "neither the case law of the European Court nor the report prepared for the committee of ministers in May 2012 indicates that personal space of less than 3m² is acceptable where there is greater time spent out of the cell." (paragraph 27(vi))

16. In paragraph 36 the Court noted:

> "Nevertheless, we also accept the submission of Mr Josse that where there is a real likelihood that a prisoner will serve a sentence in personal space of less than three metres, a serious issue of breach of Article 3 arises, without the need for other aggravating features and despite the good faith of the Government in seeking to address a problem of historic inadequacy in the prison estate."

17. However, the Court went on to consider the implications of the prisoner serving his sentence in semi-open conditions and concluded as follows:

> "44. We therefore propose to answer the issue arising in this appeal in the following way. We conclude that it would be a breach of this appellant's human rights if he were to be returned to serve his sentence in any prison where he had two square metres or less of personal space. If the state were able and willing to provide undertakings that the appellant would serve his sentence in semi-open conditions in a cell where he had personal space in excess of two metres, we would not be satisfied that there where substantial grounds for believing that there was a real risk of a violation of Article 3 by reason of overcrowding.
>
> 45. In reaching this conclusion we are merely deciding the appeal on the particular facts of the case and not attempting to set new standards for Romania or elsewhere."

18. The factual basis of that judgment had to be reviewed in *Florea II*. In the course of this second judgment, it became clear that the Appellant Florea would begin his sentence in the closed regime and would be likely to serve "probably no more than one fifth in closed conditions" (paragraph 27). In respect of any such period, the Romanian authorities gave the undertaking, which we understand to apply in these appeals, to the effect that whilst serving in closed conditions the prisoner would be accorded 3m² minimum personal space. On that basis, the Court's ruling stood.

19. Since *Florea II*, there have been a number of English authorities dealing with Romanian prisons. In *Blaj v Romania* [2015] EWHC 1710 (Admin) a similar line to

Florea II was adopted. The Romanian assurances as characterised in *Florea II* were relied on in the court in *The Court in Mures and Bistrita-Nasaud Tribunal v Zagrean; Petru Sunca v Iasi Court of Law, Romania; Stelian Chihaia v Bacau Court of Law, Romania* [2016] EWHC 2786 (Admin) (*Zagrean*).

20. In *Verdeş v Romania* (Application no 6215/14) (24 February 2016) the Fourth Section of the ECtHR found there was a violation of the Convention where the applicant had been held in less than 3m² of personal space, in semi-open conditions which were described as "squalid", for a period of around seven months. For some of that time his personal space had been "as low as 2.51m²" and the space was in fact lower in reality, taking into account the space occupied by beds and furniture. The Court went on to remark:

> "in this connection, the Court reiterates that the fact the applicant was assigned to a semi-open detention regime and was allowed to leave his cell cannot amount on its own to a solution to insufficient personal space in prison …" (paragraph 76)

21. The authority on which the Appellants rely most heavily is *Muršić v Croatia*. This was a decision of the Grand Chamber concerning an Appellant who had spent periods detained in Bjelovar Prison, Croatia. The Appellant stayed for a total of 50 days in shared cells where the total area at his disposal was less than 3m² of personal space. This total included a period of 27 consecutive days in such restricted space. The conditions in the prison were poor.

22. The Court reviewed the standards set down by the CPT as summarised earlier in this judgment. The Court also considered the European Prison Rules which give comprehensive coverage of the proposed standards for detention, including available space. The Court also considered the United Nations Standard Minimum Rules for the Treatment of Prisoners as the relevant global standard. In addition they had material before them from the International Committee of the Red Cross.

23. The Court considered the principles set down in the pilot judgment of *Ananyev and Others v Russia*, as well as the decision of the Grand Chamber in *Idalov v Russia* (No 5826/03 of 22 May 2012). The Court also reviewed pilot judgments in respect of other states, that review being summarised in paragraphs 94 and 95 of the judgment.

24. The Court reaffirmed its approach in the following terms:

> "111. With regard to the standards developed by other international institutions such as the CPT, the Court would note that it has declined to treat them as constituting a decisive argument for its assessment under Article 3 (see, for instance, *Orchowski*, cited above, § 131; *Ananyev and Others*, cited above, §§ 144-145; *Torreggiani and Others*, cited above, §§ 68 and 76; see also *Sulejmanovic*, cited above, § 43; *Tellissi v. Italy* (dec.), no. 15434/11, § 53, 5 March 2013; and *G.C. v. Italy*, no. 73869/10, § 81, 22 April 2014). The same applies with regard to the relevant national standards, which, although capable of informing the Court's decision in a particular case

(see *Orchowski*, cited above, § 123), cannot be considered decisive for its finding under Article 3 (see, for instance, *Pozaić*, cited above, § 59; and *Neshkov and Others*, cited above, § 229).

112. The central reason for the Court's reluctance to take the CPT's available space standards as a decisive argument for its finding under Article 3 relates to its duty to take into account all relevant circumstances of a particular case before it when making an assessment under Article 3, whereas other international institutions such as the CPT develop general standards in this area aiming at future prevention (see paragraph 47 above; see also, *Trepashkin*, cited above, § 92; and *Jirsák*, cited above, § 63). Likewise, the relevant national standards vary widely and operate as general requirements of adequate accommodation in a particular penitentiary system (see paragraphs 57 and 61 above).

…

114. Lastly, the Court finds it important to clarify the methodology for the calculation of the minimum personal space allocated to a detainee in multi-occupancy accommodation for its assessment under Article 3. The Court considers, drawing from the CPT's methodology on the matter, that the in-cell sanitary facility should not be counted in the overall surface area of the cell (see paragraph 51 above). On the other hand, calculation of the available surface area in the cell should include space occupied by furniture. What is important in this assessment is whether detainees had a possibility to move around within the cell normally (see, for instance, *Ananyev and Others*, cited above, §§ 147-148; and *Vladimir Belyayev*, cited above, § 34).

115. The Court would also observe that no distinction can be discerned in its case-law with regard to the application of the minimum standard of 3 sq. m of floor surface to a detainee in multi-occupancy accommodation in the context of serving and remand prisoners. Indeed, in the *Orchowski* pilot judgment the Court applied the same standards for the assessment of minimum personal space under Article 3 with regard to prisons and remand centres (see *Orchowski*, cited above, § 124), and the same standard was applicable in other pilot judgments relevant for the conditions of detention of remand prisoners (see *Ananyev and Others*, §§ 143-148) and serving prisoners (see *Torreggiani and Others*, cited above, §§ 65-69). Other leading judgments on the matter followed the same approach (see *Iacov Stanciu*, cited above, §§ 171-179; *Mandić and Jović*, cited above, §§ 72-76; and *Štrucl and Others*, cited above, § 80). Moreover, the same standard was applied in more recent case-law with regard to Russian correctional colonies (see

> *Butko v. Russia*, no. 32036/10, § 52, 12 November 2015; for the previous case-law see, for example, *Sergey Babushkin v. Russia*, no. 5993/08, § 56, 28 November 2013 and cases cited therein)."

25. The Court went on to emphasise that "a strong presumption of a violation of Article 3 arises when the personal space available to a detainee falls below 3m² in multi-occupancy accommodation" (paragraph 124): the "strong presumption" test should operate as a weighty but not irrebuttable presumption of a violation of Article 3. This in particular means that in the circumstances, the cumulative conditions of detention may rebut that presumption. It will, of course, be difficult to rebut it in the context of flagrant or prolonged lack of personal space below 3m² (paragraph 125). When it has been established that a detainee disposes of less than 3m² of floor surface, then it:

> "…remains for the respondent government to demonstrate convincingly that there were factors capable of adequately compensating for the scarce allocation of personal space. The cumulative effect of those conditions should inform the court's decision …" (paragraph 126)

Further, the Court noted:

> "…in the light of its post-*Ananyev* case law, that normally only short, occasional and minor reductions in the required personal space will be such as to rebut the strong presumption of a violation of Article 3" (paragraph 130).

26. In a critical passage, the Court went onto say this:

> "138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:
>
> (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor (see paragraph 130 above):
>
> (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see paragraph 133 above);
>
> (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above)."

27. The Court went on to review the general circumstances in Bjelovar Prison which they found represented "an adequate state of repair and cleanliness" (paragraph 167) and the Court concluded by finding that the extended period of 27 days did represent a breach of Article 3, whereas the shorter "non consecutive periods" could be "regarded as short and minor reductions in personal space, during which sufficient freedom of movement and out-of-cell activities were available to the applicant" (paragraph 169).

The Parties' Submissions

28. The Appellants rely four-square on the proposition that the Strasbourg Court in *Muršić* was setting down minimum standards which, although not absolute, could only be thought not to give rise to a breach of Article 3 if all three factors set down in paragraph 138 "are cumulatively met". The "required minimum personal space" means exactly that: space dedicated to the individual prisoner. As the outcome in *Muršić* demonstrates, a period of a few days may be insufficient to pass the threshold.

29. The second factor is explicitly "cumulative": that is to say, prohibitively cramped conditions cannot in the medium or long term be sufficiently relieved by "sufficient freedom of movement outside the cell and adequate out-of-cell activities" or by confinement in a detention facility without "other aggravating … conditions". Mr Hall submits that the conditions in Romania simply cannot be brought within this standard. In *Muršić*, the prisoner was to be outside his cell for approximately 7 hours out of 24. Here, Romanian prisoners on the semi-open regime were likely to be out of cell for some 8.5 hours a day, if full advantage was taken of the regime. At 2m² only, the individual space was far below the minimum acceptable standard indicated in *Muršić*.

30. Mr Hall emphasises that the ECtHR has dealt directly with Romanian detention facilities in *Rezmives et autres v Roumanie* (App. Nos 61467/12), another decision of the Fourth Section of the Court, given on 25 April 2017. In this decision, the Court found that the conditions in Romanian prisons and police stations routinely breached Article 3, and that the problem was systemic. The Court initiated the pilot judgment procedure under Article 46 ECHR and Rule 61 of the Rules of the Court. The Court analysed the overall numbers in the Romanian system, and the overall living space available. With some expected variations over time the number incarcerated ranged between 33,434 and 28,062, for a capacity calculated at 18,820 (*Rezmives* judgment, paragraph 37). The Court recited the obligations of a member state under Article 46 and Article 1 of the Convention (judgment, paragraph 102) and concluded that the pilot judgment procedure was necessary to address "the structural problems at the origin of the violations" (judgment, paragraph 103).

31. The Court also noted the continuing difficulties identified by the Committee of Ministers:

> "108. At the same time, the Committee of Ministers has twice evaluated the general measures adopted by the Romanian authorities in response to the findings by the Court and its findings merely confirmed a worrying situation in the vast majority of police stations and prisons, which continued to be severely overcrowded and whose physical conditions were precarious. According to the Committee of Ministers, additional measures were needed to put in place an adequate and effective system of remedies (see paragraph 47 above). The reality of the situation is also confirmed by the CPT's latest reports, which underline the importance of the problem of overcrowding in Romanian penal institutions … As for prisons, the CPT found that overcrowding persisted in Romanian prisons, that some of them suffered from poor

hygiene, insufficient lighting and ventilation, non-functional sanitary facilities, inadequate food and inadequate socio-cultural activities (see paragraphs 52-54 above). All these findings are also confirmed by the recommendations of the People's Advocate who, after visiting some prisons, asked the prison authorities to put an end to overcrowding, poor hygiene, the absence of canteens, the presence of rats, mice and bedbugs, the absence of a partition for toilets, and the provision of clean drinking water and furniture, and access to functioning showers (paragraphs 39-40 above).

109. More than four years after the identification of the structural problem, the Court proceeded to examine the present cases after having already found, in 150 judgments, a violation of Article 3 of the Convention on account of overcrowding and physical conditions in several Romanian prisons and police stations. The number of findings of violations of the Convention in this respect has grown steadily. The Court notes that, by August 2016, 3,200 similar applications were pending before it and that they could give rise to new judgments in the future, finding a violation of the convention. The persistence of major structural deficiencies causing repeated violations of the convention is not only an aggravating factor in the State's responsibility under the convention for a past or present situation but also a threat to its effectiveness, in the future, of the supervisory machinery established by the Convention (see, mutatis mutandis, Broniowski, cited above, paragraph 193).

110. The Court notes that the situation of the applicants cannot be dissociated from the general problem arising from a structural dysfunction peculiar to the Romanian prison system, which has affected and is likely to affect many people in the future. In spite of the internal legislative, administrative and budgetary measures adopted, the structural nature of the problem identified in 2012 persists and the situation ascertained constitutes a practice incompatible with the Convention (see, mutatis mutandis, Torreggiani and others cited above, paragraph 88).

…

113. It notes that the Romanian State has recently taken steps to reduce the phenomenon of overcrowding in prisons and the consequences of it. It welcomes the steps taken by the national authorities and can only encourage the Romanian State to continue in this direction. Nevertheless, despite the efforts made, the rate of occupation of Romanian prisons remains very high, a situation which confirms the findings made by the People's Advocate, the Committee of Ministers and the CPT (paragraphs 39-40, 46 and 54, supra)."

32. On that basis, the Appellants submit that, even if the periods out of the cell in the semi-closed regime are as generous as claimed by the Respondents, the conditions under which the Appellants would serve clearly breach Article 3, following the approach of the ECtHR.

33. The Appellants rely on the well-established principle, reiterated in *R (Hicks and Others) v Commissioner of Police of the Metropolis* [2014] 1 WLR 2152, that it is the duty of national courts to enforce domestically enacted Convention rights; that it is the European Court of Human Rights which must "ultimately" interpret the meaning of the Convention, and that an English court will normally follow an interpretation of the Convention, unless it becomes apparent that the ECtHR has "misunderstood or overlooked some significant feature of English law or practice which, properly explained, would lead to "an altered view", *Hicks* paragraph 80. The Appellants say no such situation arises here.

34. For Romania, Mr Knowles QC emphasised that it would be an error to treat the formulation in *Muršić* as an absolute rule. He submits there is a strong presumption that Romania, as a signatory to the Convention, is willing and able to fulfil its Convention obligations, only to be upset if there is "clear, cogent and compelling evidence to the contrary": *Krolik v Poland* [2013] 1 WLR 490 at paragraph 4. Moreover, when a claimed Convention breach is examined, a Court must consider the specific facts when looking at a risk of breach: see Cases C-404/15 and C-659/15/PPU Criminal Proceedings against *Aranyosi and Caldararu* [2016] QB 921. I accept those propositions.

35. Mr Knowles emphasised that Romanian assurances can be and have been accepted by the English courts: a Romanian assurance was accepted as worthy of reliance in *Florea v Romania (No 2)*. That, too, I accept. The issue is not reliance but the content of the assurance.

36. Mr Knowles then pointed to the decision of the Divisional Court in *Blaj v Romania* [2015] EWHC 1710 (Admin). In that case the Court upheld extradition to Romania in the face of an assurance in terms very similar to those made here. So far as space is concerned, the assurance read:

> "The persons deprived of liberty will be detained in penitentiaries which will ensure exceeding 2 sqm of individual space if they execute the penalty to the semi-open or open regime and exceeding 3 sqm of individual space if they execute the penalty in the closed regime."

37. The Court in *Blaj* made reference to the decisions in *Florea I* and *Florea II*. Mr Summers QC, Counsel for Romania in that case, accepted that there was a "real risk" that *Blaj* would be sent to a semi-open prison, and thus he conceded that the Article 3 "threshold" was crossed. However, he submitted that in *Florea II*:

> "Blake J had held, after a review of all the materials before him, that there was no current evidence of a systemic failure to meet the national standard of a minimum of 4 square metres…" (*Blaj,* paragraph 34)

38. Mr Summers went on to submit that the Court should follow *Florea I*. There was no ""Strasbourg bright line" that all prisoners must have at least 3 square metres of personal space" (*Blaj*, paragraph 35).

39. The Court in *Blaj* went on to consider Strasbourg authority as it then stood, in the following terms:

> "43. In our view the law as stated by the ECtHR with regard to breaches of Article 3 by reason of prison overcrowding in closed prison conditions remains the same as stated in *Ananyev*. In summary it is: where a prisoner is in a multi-occupancy cell he must "dispose of" at least three square metres of floor space and the cell must be such that prisoners can move freely between items of furniture. If one or other of those elements is absent, then there is a strong presumption of a breach of Article 3. There is no requirement that a prisoner will have 3 square metres of floor space available to him net of his bed and furniture.
>
> 44. As Trebuian has not demonstrated that he would be sent to a particular closed prison that fails to meet these standards, his appeal on the Article 3 ground must be dismissed. Because Roman has demonstrated that it is likely that he would go to one of two closed prisons where there is a substantial ground for believing that these standards will not be fulfilled, it is necessary to consider the terms of the 26 February 2015 assurance. In the case of Blaj, however, because it is likely that he would go to a semi-open prison (either straight away or after a short time), it is also necessary to see whether the provision of a minimum of 2 square metres of personal space would be an infringement of his Article 3 rights."

40. Mr Knowles relies on those dicta.

41. Mr Knowles also developed his submissions on the facts concerning the semi-open regime. Whilst not contending there was any precision about these matters, Mr Knowles did emphasise the extent to which the semi-open regime permits the prisoner to be out of his cell, as he put it "to have the run of the prison most of the day". The figures advanced by Mr Knowles amount to: confinement to the cell between 10pm and 8.30am, for lunch for 1½ hours and for the evening meal for 1½ hours. Thereafter he said it appears prisoners may be permitted to leave the cell for specific activities in the prison, if given permission to do so. The basic regime would appear to be 13½ hours in the cell, reduced by any additional time out in the evenings. This made a material difference, in Mr Knowles's submission. He suggested that the time between 10pm and 8.30am when the prisoner would be sleeping, should not "really count". There was enough flexibility in the *Muršić* formulation to accommodate this regime, given the term "normally".

42. Mr Knowles very properly took us to the decision in *Verdes v Romania*, a decision finalised on 20 February 2016, some months before the decision in *Muršić*. The prisoner Verdes had been detained under the Romanian semi-open regime in 2013. The hours were then said to be that he had "free access to a leisure yard, library and educational activity classes from 8am to 12pm, and 2pm to 6pm" (*Verdes*, paragraph 71). The Court concluded that "a serious lack of space weighs heavily" even in the context of this regime. In addition, conditions in one of the prisons in which he served were "squalid". The Court found the detention was in breach of Article 3, in respect of Verdes' detention in both prisons. Mr Knowles did make the point that there was no evidence in our case of particularly squalid conditions, and emphasised that the degree of freedom under the semi-open regime must logically be taken to reduce the impact of confined space, when considering the application of Article 3.

43. Finally, Mr Knowles took us to the decision of the Divisional Court in *Owda v Court of Appeals, Thessaloniki (Greece)* [2017] EWHC 1171 (Admin). Obviously this case did not address the Romanian semi-open regime. The Court emphasised the strong presumption that a member state will abide by its legal obligations (paragraph 5), a presumption :

> "Which can be displaced only by strong evidence, usually amounting to an international consensus, that supports strong grounds for believing that it will not or cannot do so."

If there is such evidence, then further information and/or assurances must be sought from the requesting state, following the decision of the Luxembourg Court in *Aranyosi and Caldararu* [2016] QB 921.

44. In the *Owda* case, the Court went on to consider the "compensating factors" which, when prisoner space falls below the 3m² threshold, might nevertheless avoid a finding of violation of Article 3, quoting the decision in *Achmant v Greece* [2012] EWHC 3470. However, none of this constituted the answer in *Owda*. The answer in that case was supplied by acceptance of the Greek undertaking that the detainee would be provided a minimum of 3m² of space, which saved the Court from considering if the conditions of detention in the Greek prison would be sufficient to dispel the real risk of breach.

45. Mr Knowles also referred us to *Achmant* itself, and to the earlier case of *Dolenec v Croatia* (Application No 25282/06). In each of these cases, of course decided before *Muršić*, the Court found that extensive periods outside the cell, and the identified conditions of detention, were sufficient to avert breach. And in essence Mr Knowles's submission comes to this proposition: the degree of flexibility and movement, and the periods out of the cell under the Romanian semi-open regime, are sufficient, taken together, to mean that there is no real risk of a breach of Article 3.

My Conclusions

46. I am unable to accept Mr Knowles's argument, however elegantly formulated. It seems clear to me that the ECtHR has stated a deliberately crisp approach in *Muršić*, in the passage from paragraph 138 quoted above [26]. The Court has been careful to stipulate that the factors must be "cumulatively" met. The first "factor" cannot be met here at all, on the present state of the assurances. The assurance is that 2m² will be

guaranteed. That cannot be thought a "minor" reduction from a minimum of 3m². And it is the guaranteed minimum for the overall semi-open regime: that is to say, that is the long-term and normal provision of space. It cannot be characterised as either "short" or "occasional".

47. For myself, other things being equal, I would find considerable importance in the degree of freedom of movement and the activities on offer. It seems to me that Mr Knowles overstates his proposition somewhat when he suggests one should ignore completely the period from evening lockdown until morning, on the ground that the prisoner should be asleep all of that time. Nevertheless, the regime does permit a good amount of movement and the facilities appear reasonable. In commonsense terms, this must alleviate the effects of a cramped cell to some degree. But we come back to the fact that the ECtHR has interpreted the application of Article 3 so clearly as requiring all the "factors" to be cumulative.

48. I recognise the force of the presumption of compliance by a Member State, and the requirement for "something approaching international consensus", in the language of the Court in *Owda* quoted above. However, it appears to me that it is hard to apply a "presumption" in the face of the lucid test set out in *Muršić*. Moreover, the broad and critical conclusions as to Romanian prison overcrowding and conditions in *Rezmives* must constitute an authoritative and general comment on the regime. I can find no more ambiguity in those observations as to the general prison conditions in Romania, than in the formulation in *Muršić*. I do not see how the presumption of compliance can survive both, taken together.

49. Mr Knowles makes an ancillary submission. He says that, if the conclusion would otherwise go against the Respondents, the Court should permit a further opportunity to them to remedy the situation by giving a different undertaking: in effect to comply with a minimum requirement of space for these individuals, even if such a guarantee cannot be given generally. This is consistent with the approach taken in *Florea I* and, for example, in *Giese v Government of the USA* [2015] EWHC 2733 (Admin) (paragraph 69). This is opposed by Mr Hall, who says that the Respondent's position is of long standing, and they have had every opportunity to change it if they so desired.

50. For myself, I would grant a final opportunity for varied undertakings. There is the greatest incentive to foster the extradition system. It will be very highly undesirable if extradition to Romania stalls, in respect of these requested persons and no doubt others to follow. There are precedents for specific provisions in custody conditions (and indeed trial arrangements) to secure continuing extradition. Any undertaking will have to satisfy the Court that prisoners extradited will, save for short periods, and to a minor extent (meaning a minor reduction below 3m²), be guaranteed at least 3m² of personal space. Moreover the guarantee would need to be in clear terms, and terms which cover the whole of the anticipated terms of detention. In other words, the assurance would have to be in compliance with the test in *Muršić*.

51. I would not be prepared to leave an open-ended period, or indeed a long period, for decision by the Respondents. There has been a considerable passage of time already. I recognise that the Romanian authorities will now be faced with a stark choice and will need to consider their position. For myself, I would consider submissions from the Respondents as to whether the period for decisions should exceed four weeks

from the date of this judgment, if so desired. The Appellants must have the opportunity to respond in writing, if desired. I would allow 14 days from the date when the Respondents' submissions are filed and served. I would suspend making an Order in this case to permit that avenue to be explored, within such time limits.

Mr Justice Collins:

52. I agree. I would endorse my Lord's indication in paragraphs 49 to 51 that a further opportunity should be given to enable undertakings to be given if possible.