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Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**18/6/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION UNDER THE EXTRADITION ACT 2003

Between:

VASILE-FLORIN CARPACI

Respondent/Appellant;

-v-

ROMANIA

Applicant/Respondent.

BURGESS J

Introduction

[1] This is an appeal by Vasile-Florin Carpaci (the requested person) against an order of the Recorder of Belfast dated 16 October 2015 by which the requested person was ordered to be extradited to Romania (the requesting state) to serve a sentence of 6 years imposed on him on 18 December 2009 for the offence of people trafficking alleged to have been committed since 2003.

The Proceedings before the Recorder

[2] The requested person was stopped by police in Lisburn and on checking his identity the existence of the European Arrest Warrant (EAW) became known and he was arrested. The initial hearing took place on 1 July 2015 and he was remanded in custody. The decision of the Recorder is challenged on the grounds that there is a real risk that the requested person will have to endure inhumane/degrading treatment contrary to Article 3 of the European Convention on Human Rights (ECHR). The basis of that claim is that there is overcrowding in Romanian prisons.

[3] On or about 3 July 2015 the Recorder was informed that in a case of Florea v Romania (No.1) [2015] 1 WLR 1953 the English Divisional Court had sought assurances in relation to detention conditions in Romania. In that case, on 27 February 2015 a representative of the Ministry of Justice of Romania wrote to the extradition unit of the Crown Prosecution Service in London. The letter is entitled:

> *"Re: Guarantees required by the courts of England and Wales referring on the detention conditions in the context of procedures related to the European Arrest Warrant"*

This was a covering letter to a letter issued by the National Administration of Penitentiaries (NAP) referred to in the next paragraph. However, in this covering letter it specifically states that the guarantee would be applied to "every person surrendered from England and Wales to Romania, pursuant to a Romanian EAW, after today's date until further written notice."

[4] The 'guarantee' from NAP was dated 26 February 2015 and was again addressed to the Ministry of Justice in London it stated:

> "Given the guarantees required by the Courts of England and Wales referring on the detention conditions that would be ensured to any person to whom the Romanian judicial authorities have issued European Arrest Warrants, in the case of their surrender being ordered by a judicial authority in England and Wales, we let you know that the National Administration of Penitentiaries guarantees that during any period of detention for the offences specified in the relevant EAWs:
>
> - the person 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. We state that the individual space includes beds and furniture:
>
> - where the percentage occupancy figures for any prison exceeds or may in the future exceed 100% the Romanian authorities nonetheless assure that the requested person personally will at all times be accommodated in his cell in which he/she will personally be provided with personal space in excess of 2 or 3 metres squared dependent on the regime in which he is detained."

[5] At the hearing at which the above guarantee or assurance was brought to the attention of the Recorder, he was advised that counsel for the requesting state had sought an identical guarantee referring to anyone to be extradited from Northern Ireland.

[6] The court has not had the benefit of seeing the letter that was subsequently written to achieve this purpose, but on 13 July 2015 the designated judge dealing with the matter in the Arad Court, Romania, wrote a detailed letter which, other than the final paragraph, related to the offences and the proceedings that had taken place in Romania prior to the imposition of the sentence which the requested person has now been sought to serve.

[7] The concluding paragraph reads:

> "Regarding the prison conditions in Romania, usually the convicted person is sent to the penitentiary found near the place of residence, in this case Arad Penitentiary but the court may not give any assurance about the detention place where the sentence will be served or about the conditions of prisons in Romania. For further details about these, please address to the National Administration of Prisons in Romania."

[8] A further letter was then written, this time to the NAP. Again, we do not have that letter but we do have the reply. Unfortunately, while that reply is dated 15 October 2015, it was not received until a date after the Recorder gave his judgment on 16 October 2015. We will return to its contents.

[9] The hearing of the extradition proceedings took place on 9 October 2015. No evidence was given nor representations made, both sides indicating that they were satisfied that the matter could be decided on the skeleton arguments and the authorities which had been lodged. This approach has some significance in the context of the argument by Mr Sean Devine BL before this Court on behalf of the requested person. We will return to this in a moment, but it is sufficient at this stage to say that at the hearing it was known that no further letter had been received from Romania identifying the prison or prisons in which the sentence would be served, the prison(s) conditions, or more pertinently giving the assurance which had been sought to those being extradited from Northern Ireland.

[10] In his skeleton argument for this appeal Mr Devine states that 'the Court declined to adjourn the matter until such time as the Requesting State would provide such undertakings.' It was however still open at that time for further submissions to be made, in particular submissions in relation to any evidence of alleged overcrowding in Romanian prisons. For the purposes of the appeal Mr Devine referred the court to a CPT report which was available in September 2015, that is before the hearing, and which is said to be critical of overcrowding

conditions in Romania. The Report is in French, but Mr Devine referred to a 'Newsflash' from the United Nations which he says summarised the findings of the Report - that overcrowding in prisons in Romania was a continuing factor. Mr Devine did not seek to introduce this report as evidence before this court, his purpose in referring to it being that, in the absence of the assurance which had been sought, enquiries could have been made in the light of the Report to substantiate the requested person's contentions that his Article 3 rights would be prejudicially affected. However that course was open to the requested person before the Recorder made his decision, since no matter what the terms of the assurance such evidence was potentially relevant to the court's decision.

[11] In the event the Recorder proceeded to reach his conclusion in the absence of any further information or further assurances from Romania. In his judgment he set out part of the assurance set out in paragraph [4] above. He stated that:

> "[9] Although the guarantee is addressed to the Ministry of Justice of the United Kingdom, the guarantee does specifically refer to the courts of England and Wales, and not the courts in Northern Ireland (or Scotland). In the circumstances this matter was adjourned to enable Romania to furnish to this court a guarantee in similar terms referring to any requirements of the courts in Northern Ireland. Romania has been unable to produce such a guarantee, although it is acknowledged that the 7 day period may have been a little short, given the need for translation. Notwithstanding the lack of confirmation on this point, I consider that Romania may have failed to appreciate the nuances of the British legal jurisdictions. The letter is a clear undertaking and I am of the view that I can take sufficient comfort from its content, to be satisfied that Romania will be bound by it in relation to all persons returned by any jurisdiction within the United Kingdom under the provisions of the Extradition Act 2003."

[12] However it was the view of the requesting authority itself that a specific assurance in either identical or similar terms should be obtained specifically referring to requested persons being extradited from Northern Ireland, and two attempts had been made to obtain it. In addition this court has in other cases specifically sought assurances that the persons being extradited from Northern Ireland should be treated exactly the same as those from England and Wales, and that an assurance specifically addressed, and clearly addressed, in relation only to prisoners from England and Wales, has not been seen as sufficient.

[13] In those circumstances, and without more, this Court would conclude that the assurance relied upon by the Recorder would not afford protection to anyone being extradited from Northern Ireland.

[14] The Recorder, having decided that the assurance was satisfactory, did not decide whether the requested person had shown substantial grounds for believing that if returned he faced a real risk of being subjected to torture or inhumane or degrading treatment - see Soering v UK [1989] EHCRR 430. The only evidence relevant to any such submission was contained in a statement from the requested person that:

> "The prison conditions are very bad there. There is poor hygiene, the prison in Arid (sic) is very dirty and everyone has lice. The food is very poor quality and the cells are very overcrowded. As I am from the Roma community I will be discriminated against and bullied if I am returned."

As stated above no further evidence to substantiate these claims was given before the Recorder.

The position following the Decision of the Recorder

[15] The letter of 15 October 2015 from NAP – Arad Penitentiary arrived after the judgment of the Recorder. It was a detailed letter setting out information relating to Arad prison. It referred as to the capacity of detention rooms, lighting, ventilation, furniture, and toilet facilities. In particular it advised that the accommodation provided each prisoner with 4 square metres of personal space which allowed the authorities to state "that our unit does not confront itself with overcrowding effect". In addition details were given of the other facilities, including exercise and some sporting facilities. In its conclusion it stated:

> "With all, we would like to assure you what in Arad Penitentiary all the rights of the persons in custody are respected and the legal provisions are properly applied."

[16] While the letter does not confirm that the requested person will be sent to Arad prison, read in conjunction with the first response, the clear indication given was that it would most likely be the facility to which he would be sent.

[17] Mr Devine pointed to the difference in the wording between the assurance upon which the Recorder relied and that contained in the assurance provided in this particular matter. The difference appears to lie between:

> "We let you know that the National Administration of Penitentiaries guarantees that during period of detention

> for the offences specified in the relevant EAWs the person deprived to liberty will be detained in penitentiaries which will ensure [details of the individual spaces in particular types of custody prisons]."

Compared with:

> "With all, we would like to assure you that in Arad penitentiary all the rights of the persons in custody are respected and the legal provisions are properly applied."

[18] The latter assurance relates to one particular facility, Arad, the one to which we have been informed the requested person is most likely to be sent to serve his sentence. In plain terms the authorities have given an assurance to the Court in Northern Ireland that in that specific penitentiary all the rights of the requested person will be respected and the legal provisions properly applied. What is not guaranteed is that the requested person will serve the whole of his sentence at Arad Prison. If not, then at the very least evidence in respect of any other facility would have been required.

The introduction in evidence of the letter of assurance

[19] Mr Devine argues that we should not at this stage seek to rely on the assurance contained in the letter of 15 October 2015, nor seek any further information or assurances since the requesting state had been dilatory. In fact the Recorder acknowledged the time given of 7 days had been short, and the letter arrived the following day. Rather than dilatory the requesting state acted with commendable speed.

[20] He also referred the court to the rule in Henderson v Henderson [1843] 3 Hare 106 which is encapsulated in the judgment of Sir Thomas Bingham MR in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 where he says at page 260:

> "The rule in Henderson v Henderson … is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the

> desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed."

[21] The rule has quite close affinity with the policy which lies behind authorities and statutes which regulate the admission on an appeal of evidence which one or other of the parties did not adduce at first instance. In extradition proceedings it is reflected in Section 27 of the Extradition Act 2003 (EA) and for the purposes of this judgment Section 27 (2) and (4) which states:

> "(2) The Court may allow an appeal only if the conditions in subsections (3) or subsection (4) are satisfied;
>
> (4) The conditions are—
>
> (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."

[22] Section 106 of EA replicates these conditions in circumstances where the lower court had decided not to extradite the requested person, and that decision was under appeal.

[23] In the circumstances of this case, these provisions are predicated on an assurance letter being considered "evidence" in the sense contemplated in Section 27 and Section 106. This matter was addressed by the Administrative Court in The United States of America v Roger Alan Giese [2015] EWHC 3658 (Admin) where Sir Richard Atkins stated at paragraph 14:

> "We do not accept that the assurance letter constitutes "evidence" in the sense contemplated in Section 106(5)(a). The assurance letter is not a statement going to prove the existence of a past fact; nor is it a statement of an expert opinion on a relevant matter. It is a statement about the

> US Department of Justice's intentions as to its future conduct and that of the Orange County District Attorney's Office in relation to Mr Giese's possible referral to the civil commitment procedure in California. It is true that the assurance letter is evidence that this statement as to future conduct has been made by Ms Rodriguez, but that fact is not what is in issue. Mr Lloyd accepted expressly that he did not challenge the good faith of the Government, or Ms Rodriguez. He accepted that the assurance, as far as it went, had been made. The question is whether the assurance letter is sufficient to neutralise the conclusion of the DJ and this court that the civil commitment process would constitute a "real risk" of a flagrant breach of Mr Giese's Article 5 rights."

<u>The standing of an assurance</u>

[24] Therefore we are satisfied that the provisions of sections 27 and 106 are not engaged in relation to such assurances.

[25] The standing of any assurance has been the subject of judicial decision. In <u>Florea v Romania</u> (2) [2014] EWCH 436 (Admin) the requested person claimed that to return him to Romania would be a breach of his Article 3 rights on the basis of overcrowding in Romanian prisons. Evidence was given in relation to the condition of Romanian prisons before the lower court but the question of seeking an assurance was not raised. Further evidence was given and addressed at length by the Divisional Court. It expressed concerns that if the requested person was sent to certain prisons there would be a breach of his Article 3 rights, and in those circumstances the appeal of the requested person would be granted. However, the court then undertook a number of enquiries from the Romanian authorities. Assurances were received on a number of specific issues, including the space which would be made available to the requested person in any prison to which he may be sent and that in each of such prisons there would be supervision provided. In the light of those assurances the court determined that:

> "The assurances are sufficiently precise and reliable to eliminate the substantial grounds for believing that there would be a real risk of violation by reason of prison overcrowding."

[26] The court also determined that together with the correspondence from the Ministry of Justice, the letter from NAP constituted assurances at inter-governmental level for which there was no reason to doubt they were given in good faith, would be respected, and would be communicated to all members of the Executive of the Government of Romania.

[27] The court also went on to determine that there were "abundant means by which this general assurance of Romania could be monitored".

[28] It is clear that in Florea the Appeal Court saw no difficulty in seeking an assurance during the course of the appeal hearing, and indeed did so more than once in order to satisfy itself that it addressed the specific issues as they related to the requested person.

[29] A similar approach was adopted by the Divisional Court in the case of Giese (see above) where, having indicated that there was a real risk that the requested person would be made the subject of an order which would be a flagrant breach of his rights under Article 5(1) of the EHCR, it stated at the end of its judgment:

> "… it seems to us that … the Government should be given a further opportunity to decide whether or not it will offer a satisfactory assurance that, should the requested person be found guilty of any of the offences charged, there will be no attempt to make him the subject of a civil commitment order. We therefore propose, subject to any further arguments from Counsel, that the Government should be given 14 days from the date that this judgment is handed down, to state, in open court, whether such an assurance will be given. We will hear argument on what orders should be made when this judgment is handed down if such an assurance is to be given in due time. If it is not, then this appeal must be dismissed."

[30] The court then set a timescale within which the letter of assurance, if any, was to be received. A letter was received. In the event however it was not acceptable to the court and the appeal was dismissed.

[31] The reliance that courts in this jurisdiction can place on such an assurance resides in the Council Framework Decision of 13 June 2002 on which Part I of the EA is based. In Blaj and others v Romania [2015] EWHC 1710 (Admin) Lord Justice Atkins referred to the "mutual confidence and presumptions of compliance by other member states with EU law and in particular fundamental rights", reflecting closely the provisions of paragraph [5], [10] and [12] of the preamble to the Framework Document. At paragraph [38] he states:

> "There can be no doubt that a suitably worded assurance from the competent national authority of a Member State of the EU can be sufficient to dispel [any] such doubts, if it is "Othman compliant", to use a short-hand: see Ilia v Greece [2015] EWHC 547 (Admin) at 39-40 in particular.

> Although counsel for the Appellants made submissions on the revocable nature of the assurance and the issue of whether the assurance could be monitored satisfactorily, those were not the major focus of objection."

[32] At paragraph 4 of Ilia it states:

> "It is important also to recall that we are dealing with cases in which the assurance will have been given by the JA (Judicial Authority) or a responsible minister or responsible senior official of a Government Department of a Council of Europe or EU State. In our view there must be a presumption that an assurance given by a responsible minister or responsible senior official of a Council of Europe or EU State will be complied with unless there is cogent evidence to the contrary …"

[33] We are therefore satisfied on the above authorities that such assurances are not "evidence" so as to invoke the provisions of either sections 27 or 106 of the EA and that such assurances may be sought by the Appropriate Judge or subsequently during the course of the appeal from any decision of the Appropriate Judge.

The approach to seeking assurances

[34] Since the above decisions in our jurisdiction the issues engaged in this matter have been considered by the Grand Chamber in Aranyosi and Robert Cidraru v Generalstaasanwaltschaft Bremen dated 5 April 2016. The background to both cases is similar and nothing turns on any difference in the facts. The German Court had determined that detention conditions in a number of Hungarian prisons did not satisfy minimum European standards. It determined further that a decision whether or not to surrender would depend essentially on whether or not the impediment to surrender could still be overcome, in accordance with the Framework Decision, by means of assurances given by the issuing Member State – and that if that impediment cannot be removed by such assurances, it would follow that the surrender would be unlawful. The referring Court sought a preliminary ruling as to

(a) whether the executing Member State could lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance or assurances have been sought; and

(b) whether Articles 5 and 6(1) of the Framework Decision are to be interpreted as meaning that the issuing authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State.

[35] At paragraph 104 of the judgment it states:

> "104. ….. Where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk can be discounted within a reasonable time, the executing judicial authority must decide whether the surrender approved procedure should be brought to an end."

[36] The obligations therefore on the executing judicial authority are expressed in absolute terms - that where it has determined that a particular individual will be exposed to a real risk of inhuman or degrading treatment, it <u>must</u> request supplementary information, and in doing so set a reasonable period of time to the issuing judicial authority to provide that information. The issuing judicial authority <u>must</u> then provide that information within the time limit set by the executing judicial authority.

The present appeal

[37] Turning to the facts in this case, the court has determined that, based on a number of reports, including a recent report from CPT, and on decisions of the European Court, conditions in certain detention facilities in Romania are such as would expose an individual to a real risk of inhuman or degrading treatment. It therefore sought additional information both in respect of the prison facility at Arad, but also information as to whether Mr Carpaci:

- Would serve all of his period of detention at that facility: and
- If not, at which facility he may or would serve any part of his sentence.

[38] The Crown Solicitor's Office has been assiduous in seeking to obtain responses to successive requests from the Court to obtain specific information in order to consider whether the conditions in any prison to which the requested person may be sent would allow the court to discount any risk of inhuman or degrading treatment. A number of adjournments were granted given the incentive to foster the extradition system. The court is satisfied that the letters written to the Romanian authorities set out those requirements in clear terms.

[39] On the 25 April 2017 the Fourth Section of the ECtHR handed down its decision in Rezmives and others v Romania (App. Nos. 61467/12). In that 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 judgement procedure under Article 46 ECHR and Rule 61 of the Rules of the Court on the basis that it was necessary to address "the structural problems at the origin of the violations" (judgement paragraph 37) . It is of note that the issues being addressed extended beyond overcrowding to physical conditions. It foresaw it likely that the structural dysfunction would affect many people in the future.

[40] The judgement of the Court in Rezmives required Romania inter alia to introduce measures to reduce overcrowding and improve the material conditions of detention. Within 6 months of the judgement becoming final the Romanian Government were to provide, in co-operation with the Committee of Ministers, a precise timetable for the implementation of the appropriate measures to address these shortcomings. That period expired on the 24 October 2017. However while those provisions considered the structural failures, it is the case that any assurance requires to address the specific provisions as regards detention for the individual requested person, a guarantee that would need to be in clear terms, and terms which cover the whole of the anticipated terms of detention – see Grecu and others v Romania [2017] EWHC 1427 (Admin) para 50 where Irwin LJ adopted the test in Mursic v Croatia, a decision of the Grand Chamber of the ECt.HR (App No. 7334/13) dated 20 October 2016 at paragraph 138, which stated:

> "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 130n 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)."

[41] By this date the ECt.HR had determined that the area required was to be 3 sq.m whether the person was held in detention in a closed, semi-closed or open regime.

[42] On the 16 June 2017 the court granted a further adjournment on the basis that the court would proceed to make its decision on the 27 October 2017 based on such information furnished by the issuing judicial authority by that date. That would allow for a response to be considered to the requirements of the Court in Rezmives, together with such further information which would allow this court to consider the submissions on the part of the requesting state in respect of the proposed arrangements for the requested person during the duration of his term of detention. The court was satisfied that this latest time-limit in itself was sufficient to afford a reasonable time to the issuing judicial authority to provide information, but that when combined with previous adjournments it has had more than reasonable time to respond.

[43] On the 27 October 2017 the court had before it a letter previously received dated 10th of October 2016 from the Chief Commissioner of Penitentiaries seeking to address previous questions raised by the court. The relevant extracts are:

- "1. If a person deprived of freedom will be surrendered to the Romanian authorities of the Bucharest Henri Coanda Airport, he/she will be put in the Rahova Bucharest Penitentiary in order to perform the quarantine time (21) days;

  2. After the quarantine time ends, the prisoner will have set a regime in serving the sentence, being transferred to an appropriate penitentiary, found near his place of living area. We should state that the regime in serving the

sentence with regimes of freedom deprivation are based on progressive and regressive systems, the convicted persons passing from one regime to another, according to the law, being distributed in facilities appropriate to their profile, based on the survey regime". There then follows a series of criteria addressed by a specialty commission which inform the serving regime. The administrative authorities cannot influence or alter the decisions of that commission.

- "Considering the absence of information about the time of the sentence with freedom deprivation, if the person will be distributed in closed regime or maximum safety regime, he will most likely serve the freedom deprivation sentence in the Arad Penitentiary."

  Apart from the fact that the request for information was in response to an EAW setting out the sentence for which extradition is sought, the issuing judicial authority could go no further than saying that Mr Carpaci would be "most likely" to serve his sentence in Arad.

- "Pursuant to the law, after serving a fifth of the sentence, the convicted person will be analysed again, in order to change the sentence serving regime. The progress of the sentence serving regime cannot be predicted, due to the fact that mainly depends on the behaviour adopted during the sentence serving time."

  It therefore appears that no matter what the length of the sentence might be, the sentence regime will be revisited, presumably with potential of the prisoner being moved to another facility.

- "If to the said person a semi-open regime in serving the sentence will be set, he could be transferred to Timisoara Penitentiary, facility focused on the detention of the detainees that serve the sentence in a semi opened and opened regime."

  Again the court is informed of what 'could' happen, but with no degree of specificity or certainty, nor any details of the proposed conditions of detention.

[44] Given the above information it is perhaps not surprising that the writer concluded:

> "In this context, the National Administration of Penitentiaries finds itself in the impossibility of guaranteeing that the said person will serve the freedom deprivation sentence exclusively within a penitentiary facility, but can provide assurance that the whole time the warrant on which the repatriation

> of the said person is served, he will be provided with a minimum individual space, with the bed and afferent furniture or included, related to the regime of serving the freedom deprivation sentence, as follows:
>
> - 3 square meters minimum individual space, if serving a freedom deprivation sentence in closed regime:
>
> - 2 square meters minimum individual space, if serving the sentence in semi-open or open regime.
>
> Withal the penitentiary system provides the appropriate exercise of rights, as they are stated by the criminal executional legal frame."

[45] The culmination of the above responses was that at the date of that letter the issuing judicial authority could not confirm that Mr Carpaci would serve his entire sentence in Arad, and it was not possible to advise the court as to which other penitentiary or detention centre he may be sent to serve any part of that sentence. While in the concluding paragraph of the letter of 10 October 2016 there was an assurance given as to minimum space, without detail as to which prison Mr Carpaci may be sent, the proposed semi-open regime would provide for a space of 2 sq.m; and there was the possibility of other issues being present which may inform the decision of the court as to the risk of inhuman or degrading treatment arising from the systemic failures identified by the ECt.HR. The concluding part of the paragraph gives no more than a general assurance regarding the penitentiary system in Romania, but that could satisfy this court that inhuman or degrading treatment can be discounted.

[46] At the adjourned hearing on the 27 October 2017 there were responses outstanding from the requesting state. Again in the spirit of fostering a proper extradition procedure a short period was given on an assurance that only translation issues were involved. Subsequently the Court has considered the contents of the two letters.

[47] The first letter, dated 7 November 2017, dealt with the response of the requesting state to the pilot judgement given in Rezmives. In short terms it set out a proposed building programme for the period up to 2021; a new action plan spread over an 8 year period to deal with prison conditions; and a compensation scheme which in effect potentially reduces sentences in line with a formula based on periods when a detained person is held in 'improper conditions'. These conditions are defined but include lack of access to outdoor activities, lack of natural light or ventilation, sanitary conditions that fall short of hygiene requirements; dampness or mould on prison room walls. Inherent in this latter procedure is the existence of

conditions that could well contribute to breaches of Article 3. No mention is made in relation to the specific conditions in which the requested person would be held, if extradited.

[48] The second letter is dated 8 November 2017 and does relate to the requested person. This can be summarised as follows:

- There would be a minimum personal space, including bed and related furniture of 3 sq.m if in a closed regime and 2 sq. m in a semi-open or open regime;
- Both spaces are 'directly influenced by the compliance with the time limits provided in the Plan of measures related to the Memorandum on the subject: *ECHR intention to enforce the pilot procedure in cases concerning prison conditions*, and also by the dynamics in the occupation of the available accommodation capacity.
- The dynamics could not be accurately forecast, reflecting potential increases in prison sentences due to changes in the penal codes.
- The timetable of investment 'may undergo changes dependent on the will and efforts made at the level of the prison system'.

[49] There is no reference to where the requested person would be detained, either initially or any change based on the process referred to in the letter of 10 October 2016. There is no assurance given whether generally or specifically as to the regime to which he would be admitted. There is no detail given of the conditions to which he would be extradited. Given the approach to be adopted in circumstances where the court has determined that the prison conditions in Romania expose detained persons to breaches of Article 3, the absence of any such details do not allow the court to consider if they could discount such concerns.

Conclusion

[50] The court therefore cannot be satisfied that the risk of degrading or inhuman treatment can be discounted if the court were to extradite Mr Carpaci, and therefore the appeal is granted

[51] Finally while "evidence" was not the subject of consideration by the court in this case, the court is mindful of the provisions of both sections 27 and 106 in the context of introducing evidence which was available at the lower court but was not given at the lower court. The court would be concerned lest it should be thought that the fact that either party, having set out the basis of their respective claims before the lower court, only to find that it failed, could then seek to rely on another substantive ground or grounds before this court, on the basis that was not raised at the earlier hearing. In such circumstances any application to introduce evidence for such purpose could be excluded as an abuse of the process. Where any ground is available to be relied upon by any party, it should be included in the proceedings

before the extradition court, and in deciding the matter the Appropriate Judge should deal with all such grounds, even if the decision of the Court does not depend on reaching a conclusion on those other grounds. This approach would then accord with the basic principles of the Framework Decision that extradition proceedings should be concluded expeditiously.