

End ‘trust, but not verify’: Why the UK must halt extraditions to Romania immediately

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Due Process

Reform the European Arrest Warrant.
Protect Human Rights.

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1. Executive Summary

- There is a consensus among supranational organisations and human rights advocates that Romania's prison conditions are violating human rights on a massive scale.
- 33 of the country's 45 prisons are overcrowded, and there are consistent stories of dirty cells infested with insects and vermin, inadequate hygiene facilities, and poor medical care.
- These failings mean that Romania is the worst violator of human rights in the EU, including being the worst violator of Article 3 (prohibition of torture) of the European Convention on Human Rights (ECHR). Lack of action to remedy the systemic problems in the Romanian prison system have led to a backlog of 8,000 applications to the European Court of Human Rights (ECtHR).
- The breadth and scale of this problem led the ECtHR to issue a 'pilot judgment' in 2017, which requires the Romanian government to take action to fix the systemic problems in its prisons. This judgment makes it clear that without action, serious human rights violations in Romanian prisons will continue.
- The Romanian government's own plans say that building work will not begin to remedy overcrowding problems until 2022, and will not be completed until 2024. Therefore any person surrendered to Romania under a European Arrest Warrant (EAW) before 2022 faces a substantial risk of their human rights being violated.
- However, it is not clear that Romania's prison improvements plan will actually happen. The Minister for Justice has previously lied to the ECtHR about a one billion euro prison building programme which was later admitted to not exist. NGOs have expressed concern that the government's current prison improvements plan is not funded.
- At present, the UK attempts to fulfil its human rights obligations by seeking 'assurances' from Romanian authorities that any person surrendered under an EAW will be imprisoned in conditions that respect their human rights. However, there is significant evidence that Romania routinely does not stick to its assurances, and it is clear that even when given with the best of intentions, the dire state of Romanian prisons makes it near impossible for its government to protect the human rights of prisoners.
- Furthermore, the UK does not monitor whether or not these assurances have actually been followed through on, meaning that the full scale of the problem is not known.
- This policy can be summed up as 'trust, but not verify'.
- The UK knows that there are systematic human rights abuses in Romanian prisons, and the UK knows that assurances given by Romania have been broken. This means that the 'trust, but not verify' policy amounts to turning a blind-eye to human rights abuses.

- That Romania is an EU member state, and that the EU requires 'mutual recognition', does not excuse the UK from its human rights obligations under the ECHR.
- The 'pot luck' approach to human rights protections – where individual judges decide if assurances offered by Romania are sufficient – does not provide adequate safeguards for human rights.
- Further, there is evidence that the right to a fair trial has been routinely violated in so-called 'anti-corruption' cases.
- Previously secret protocols have revealed that the Romanian Intelligence Service (SRI) has interfered with prosecutors and the judiciary. There is also evidence that the National Anticorruption Directorate (DNA), the organisation charged with rooting out corruption, has pursued political targets and attempted to fabricate evidence.
- The true scale of these violations of the separation of powers – which is critical for the rule of law, fair trials and due process – is not known.
- Due Process urges the UK government to take action to protect human rights. It must end the 'trust, but not verify' policy and immediately halt extraditions to Romania. This is the only way for the UK to fulfil its human rights obligations – turning a blind-eye to the mounting evidence of serious systemic problems is not acceptable.
- Extraditions to Romania should only be restored when there are sufficient assurances that the problems outlined in this report have been resolved.
- Monitoring the situation in terms of progress on prisons is straightforward: the UK can simply defer to the judgment of the ECtHR, which is monitoring progress carefully through its pilot judgment mechanism.
- The violation of the separation of powers and the impact that has on the right to a fair trial is murkier. The UK must seek credible, independent verification that the problems in the DNA, SRI and judiciary have been resolved before resuming extraditions.

2. Introduction

The UK must immediately halt extraditions to Romania. That was the conclusion of the first report published by Due Process in August 2018, which found Romania is by far the worst violator of human rights in the EU, with a record comparable to Russia, Turkey and Ukraine.

This report builds on that analysis by digging deeper into Romania's human rights record. The conclusion of this deep dive supports earlier calls by Due Process to halt extraditions to Romania, and adds weight and urgency to our concerns.

Human rights violations

Human rights violations in Romanian prisons are serious and sustained. These abuses have been identified and criticised by a wide range of organisations, as detailed in this report. The problems that have been described run to a common theme: prisons are overcrowded, dirty, and infested with insects, bed bugs, rats, mice, and lice. Food and eating facilities are inadequate. In many prisons toilets and showers do not offer privacy, and often do not work. Medical care is of a poor quality, with multiple instances of prisoners becoming seriously ill in prison and not receiving adequate care.

These failings led the ECtHR to issue a 'pilot judgment', which identified a structural problem in the Romanian prison system which has led to thousands of human rights violations. The pilot judgment makes it clear that these human rights violating conditions continue across the Romanian prison estate, and will not change unless the Romanian government takes action.

Prospects for the future

However, Romania's record does not inspire confidence. The Ministry of Justice has previously admitted lying to the ECHR about one billion euros committed to a prison improvements programme – in reality, there was no funding for the scheme. The action plan put together by the same Ministry has been criticised by specialist human rights NGOs who have asked the pertinent question: how will it be funded?

Four things are clear:

- Romania's prisons systematically violate human rights, and have been doing so for many years.
- The human rights violations in Romania's prisons are set to continue until at least 2022, and will only be resolved after 2022 if Romania's government finds the money needed for improvements.
- The UK has an obligation under international law, and its commitment to the ECHR, to not surrender people if there is reasonable suspicion that their human rights will be violated.
- Romanian assurances to protect the human rights of people surrendered from the UK cannot be trusted for two reasons: first, there are enormous practical barriers to fulfilling assurances; and second, assurances cannot be taken in good faith since previous assurances have been broken and Ministers have lied about prison

improvement programmes. The 'trust, but not verify' system in place at present is not satisfactory.

Therefore, the only way the UK can ensure it meets its human rights obligations is to suspend extraditions to Romania immediately. Extraditions should only be resumed if and when Romania can prove it has addressed the systematic problems in its prisons that have led to repeated human rights violations. The best way to test this is through the ECtHR pilot judgment mechanism.

3. At the European Court of Human Rights

The Due Process report '*Human Rights abuses in European Arrest Warrant member states*¹ analysed violations of the European Convention on Human Rights (ECHR) in terms of judgments by the European Court of Human Rights (ECtHR) from 2014 to 2017. It found that the worst violator of human rights in the EU was Romania, with a record comparable to Russia, Turkey and Ukraine, and far worse than the next worst violator in the EU, Greece.

Top ten human rights violators compared with the UK, by ECtHR judgments finding at least one violation of the ECHR, 2014-17

		Total	2014	2015	2016	2017
1	Russian Federation	746	122	109	222	293
2	Turkey	349	94	79	77	99
3	<i>Romania</i>	272	74	72	71	55
4	Ukraine	241	39	50	70	82
5	<i>Greece</i>	170	50	43	41	36
6	<i>Hungary</i>	151	49	42	40	20
7	<i>Bulgaria</i>	110	18	28	33	31
8	<i>Italy</i>	98	39	21	10	28
9	<i>Croatia</i>	84	23	17	25	19
10	Serbia	76	16	16	19	25
	Total*	3187	756	694	829	908
	Average*	67.8	16.1	14.8	17.6	19.3
30	<i>United Kingdom</i>	17	4	4	7	2

* Total and average are for all Council of Europe states, not just the worst violators shown here.

Notes:

Includes violations of any ECHR article.

EU countries in italics.

Average = mean number.

Source: Council of Europe, *Violations by Article and by State, 2014-2017*

¹ Chris Alderton, Emily Barley and Lisl Biggs-Davison, *Human Rights abuses in European Arrest Warrant member states* (Due Process, 2018) <http://dueprocess.org.uk/wp-content/uploads/2018/08/Due-Process-Human-Rights-abuses-in-European-Arrest-Warrant-member-states.pdf>

Romania stood out in terms of violations of the convention that are critical to extradition: Article 3, the prohibition of torture, and Article 6, the right to a fair trial.

Top ten Article 3 violators compared with the UK, by ECtHR judgments, 2014-17

	Total	2014	2015	2016	2017
1 Russian Federation	370	71	76	80	143
2 <i>Romania</i>	143	34	40	40	29
3 Ukraine	106	17	33	37	19
4 Turkey	78	28	27	19	4
5 <i>Greece</i>	59	20	12	19	8
6 <i>Bulgaria</i>	44	13	16	8	7
7 Republic of Moldova	33	8	7	14	4
8 <i>Italy</i>	26	8	3	4	11
9 <i>Poland</i>	26	8	3	11	4
10 <i>Hungary</i>	19	1	6	7	5
Total*	1054	248	267	278	261
Average*	22.4	5.3	5.7	5.9	5.6
United Kingdom	0	0	0	0	0

* Total and average are for all Council of Europe states, not just the worst violators shown here.

Notes:

Includes violations of any ECHR article.

EU countries in italics.

Average = mean number.

Source: Council of Europe, Violations by Article and by State, 2014-2017

Top ten Article 6 violators compared with the UK, by ECtHR judgments, 2014-17

	Total	2014	2015	2016	2017
1 Russian Federation	240	38	33	69	100
2 Turkey	142	42	29	15	56
3 Ukraine	121	13	18	31	59
4 <i>Romania</i>	95	27	25	25	18
5 <i>Greece</i>	91	28	26	19	18
6 <i>Hungary</i>	76	32	22	19	3
7 Serbia	64	10	16	16	22
8 <i>Portugal</i>	47	16	10	16	5
9 <i>Italy</i>	37	22	2	3	10
10 <i>Croatia</i>	32	10	5	9	8
Total	1315	313	280	322	400
Average	27.9	6.7	5.9	6.9	8.5
30 <i>United Kingdom</i>	5	0	1	3	1

* Total and average are for all Council of Europe states, not just the worst violators shown here.

Notes:

Includes violations of any ECHR article.

EU countries in italics.

Average = mean number.

Source: Council of Europe, Violations by Article and by State, 2014-2017

Implementation

However, ECtHR judgments are no guarantee of change. Analysis by Politico in 2017 showed that 620 ECtHR judgments against Romania had not been implemented, including more than 150 cases where Romania was found to have violated Article 3 (prohibition of torture).²

The backlog

The scale of the problem with prison conditions in Romania, and lack of effective remedy at the national level, has led to a huge influx of applications to the ECtHR.

Guido Raimondi, President of the European Court of Human Rights, said that at the end of 2017 of the 79,750 cases pending, 17.6% of them were against Romania. This figure was higher than the number of pending cases against any other country.³

As of July 2018 there were 10,805 applications against Romania pending at the ECtHR⁴. 8,000 of these cases related to applications under Article 3, and were frozen under the pilot judgment mechanism⁵.

This enormous backlog of cases relating to Romanian prison conditions led the ECtHR to take further action in the form of a pilot judgment, explained in detail in Chapter Four.

² Ginger Hervey, *Europe's human rights court struggles to lay down the law* (Politico, 2017) <https://www.politico.eu/article/human-rights-court-ilgar-mammadov-azerbaijan-struggles-to-lay-down-the-law/>

³ Registrar of the Court, *President Raimondi presents the Court's results for 2017* (European Court of Human Rights, 2018) <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5984719-7658615&filename=Press%20Conference%20of%20the%20President%20of%20the%20European%20Court%20of%20Human%20Rights%202018.pdf>

⁴ Press Unit, *Romania: Press Country Profile* (European Court of Human Rights, 2018) https://www.echr.coe.int/Documents/CP_Romania_ENG.pdf

⁵ Committee of Ministers, *Supervision of the execution of judgments and decisions of the European Court of Human Rights 2017* (Council of Europe, 2018) <https://rm.coe.int/annual-report-2017/16807af92> b

4. Widespread condemnation of prison conditions

It is not only the ECtHR that has noticed the seriousness of human rights abuses in Romania. They have also been noted by governments, supra-national organisations, and NGOs. Among experts in the field of human rights there is consensus that human rights violations in Romania, and most especially in Romanian prisons, are serious and sustained.

Many of these organisations recognise that though the Romanian authorities have made some progress towards improving overcrowding and conditions, they are still a long way from reaching a level of acceptability.

The US Department of State

The US Department of State, in its 2017 country report⁶, highlighted problems with prison conditions in Romania. It said:

"Prison conditions remained harsh and overcrowded and did not meet international standards. The abuse of prisoners by authorities and other prisoners reportedly continued to be a problem."

The report also noted inadequate food, heating, light, medical care, overcrowded conditions, and that most pre-trial detention facilities were inadequate.

On human rights abuse investigations the report concludes: "Independent authorities did not always investigate credible allegations of inhuman conditions."

Fair Trials International

Fair Trials International is a Brussels based NGO which, as the name suggests, campaigns for fair trials. It provides regular updates on the status of human rights in countries of concern – including Romania – and coordinates groups of legal experts in order to provide legal opinions to various committees and information gathering exercises. According to Fair Trials International, prison conditions are not the only human rights violations going on in the Romanian criminal justice system.

The group highlights a long list of instances in which Romania has violated Article 5 of the ECHR (right to liberty) and Article 6 of the ECHR (right to a fair trial) in its Country Report in 2016⁷. And went into detail about violations of the right to a fair trial in a position paper in 2014⁸, which features two cases:

⁶ Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2017: Romania* (US Department of State, 2017)

<https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2017&dliid=277209>

⁷ *Country Report: Romania* (Fair Trials International, 2016) <https://www.fairtrials.org/wp-content/uploads/Country-Report-Romania.pdf>

⁸ LEAP, *Joint position paper on the proposed directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceeding* (Fair Trials International, 2014) <https://www.fairtrials.org/wp-content/uploads/Presumption-of-Innocence-Position-Paper2.pdf>

- Judicial statements in the trial of Dan Adamescu failed to respect the presumption of innocence, including the judge referring to the 'illegal actions committed by him' before the verdict, and the refusal of an appeal because Adamescu continued to deny his guilt.
- Da An Chen was convicted in Romania in his absence, and surrendered from the UK under a European Arrest Warrant (EAW) following Romanian assurances that he would be given a re-trial. However, the procedure Romania subsequently used did not constitute a full retrial as Chen was not able to interrogate all of the evidence presented at the initial trial, and was not able to introduce important new evidence of an alibi.

APADOR-HC

The Association for the Defence of Human Rights in Romania – the Helsinki Committee (APADOR-CH) is an NGO which focuses on human rights in Romania. In 2015, it worked with Prison Insider worked to produce a report on prison conditions in Romania⁹.

This report says that overcrowding is a 'serious concern' and that the length of pre-trial detention is 'well above' the European average. It makes a series of observations about overcrowding, the impact of overcrowding, and prison conditions in general:

- *"Overcrowding means that medical care is insufficient and prison conditions are poor."*
- *"There is not enough natural light or too much artificial light in cells. Aeration and heating are insufficient, mould, poor hygiene and old and dirty mattresses have all been reported."*
- *"There is a climate of fear in prisons where "special units" tend to replace the prison staff and use violence as a first resort."*

UN Human Rights Committee

The Office of the High Commissioner for Human Rights (UN Human Rights) Committee against Torture considered Romania's performance on implementation of the convention on human rights with regards to torture and cruel, inhuman or degrading treatment or punishment. The report from the hearing in 2015 raises a number of concerns about prison conditions, including:¹⁰

- *"Overcrowding in prisons remained a very serious issue, said an Expert. The number of people in prison far exceeded the official capacity of Romania's prisons. Despite a recent drop in the number of detainees, overcrowding was still a problem."*
- *"In some prisons, especially those with the so-called 'special intervention units', there had been numerous allegations of the ill-treatment of prisoners, mainly*

⁹ Romania: Annual Report (APADOR-HC and Prison Insider, 2015) <https://www.prison-insider.com/countryprofile/prisonsromania#introduction-577e269702da8>

¹⁰ Committee against Torture considers the report of Romania (UN Human Rights, 2015) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15892&LangID=E>

conducted by officers wearing balaclava masks and from the special intervention units."

- *"Regarding conditions in places of detention, an Expert spoke about reports of poor conditions in places of detention which she referred to as 'dungeons'."*

The hearing also raised concerns about the use of pre-trial detention:

"An Expert raised the use of pre-trial detention in remand facilities, often in police stations, saying the Committee's view differed from the delegation in that regard. Although it may not be torture, instances of mistreatment and misconduct by police officers were still frequently reported."

UN Subcommittee for Prevention of Torture

In May 2016 the UN Subcommittee for Prevention of Torture, following a visit to Romania to inspect prisons and other places of detentions, said that much work still needed to be done to improve conditions:¹¹

"Romania has made progress in improving conditions of detention in the country but much remains to be done, including reducing overcrowding in prisons and other places where people are deprived of their liberty."

The Council of Europe CPT

In the report following its 2014 visit to Romania to assess the conditions of people deprived of their liberty, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) noted the overcrowding, lack of healthcare staff and lack of activities in prisons. It also noted allegations of violence against prisoners:¹²

"...numerous credible allegations consistent with physical ill-treatment (punches, including with reinforced gloves, kicks with the knee and feet and blows with a truncheon) were received by the delegation."

The CPT visited Romania again in February 2018 and has presented its report on detention conditions to the Romanian government. However, as per the CPT's conditions, the report will only be made public if the Romanian authorities request it to be.

¹¹ UN torture prevention experts urge Romania to tackle prison overcrowding (UN Human Rights, 2016) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19953&LangID=E>

¹² Council of Europe anti-torture Committee publishes report on Romania (CPT, Council of Europe, 2015) <https://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-publishes-report-on-roman-1?desktop=true>

5. Prison improvement schemes

The problem of Romanian prison conditions was first identified by the ECtHR in 2012, in the case of *Iacov Stanciu v. Romania*¹³, which dated back to conditions in 2004. In this case the court found that there had been a violation of Article 3 due to poor and overcrowded prison conditions. These conditions included poor hygiene and nutrition, the prisoner having to share a bed due to overcrowding, no hot water, and infestations of insects, rats and lice. The court also found that the applicant had not received proper medical care whilst in prison.

In 2012 the ECtHR noted that 80 similar applications were before the court, and urged the Romanian government to take action to solve the structural problems which had led to the violation.

Unfortunately, the history of Romanian prison improvement programmes is not straightforward. A low point came in October 2016 when the Romanian Minister of Justice, Raluca Pruna, admitted that she had previously lied to the ECHR when she said that Romania planned to spend one billion euros on seven new prisons in order to address human rights concerns. Explaining the lie, Pruna said that she had 'good intentions' but that 'we do not have the money in the budget'.¹⁴

A series of promises and plans have been made and then broken, and that has left the international human rights community sceptical of promises made by the Romanian government.

ECtHR pilot judgment

The lack of progress and scale of the problem prompted the ECtHR to take further action, and in April 2018 it issued a 'pilot judgment' against Romania.

Pilot judgments are a mechanism developed by the court to identify – and oblige states to address – structural problems that have led to large numbers of repetitive cases. As part of a pilot judgment states are required to produce – and stick to – a plan to rectify the structural problems that are resulting in multiple human rights violations, and on condition of this action the ECtHR 'freezes' cases relating to the structural problem which are before the court.¹⁵

It should be stressed that pilot judgments are only used in exceptional circumstances, where violations are serious and repetitive, resulting from widespread structural problems, and the court does not have confidence that the problem is being dealt with properly. The Romanian prison system met this conditionality because the vast majority of its prison estate does not meet the requirements for space per person, hygiene and other conditions which have been developed and set out in ECtHR case law.

¹³ *Chamber judgment Iacov Stanciu v. Romania* 24.07.12 (European Court of Justice, 2012) <http://hudoc.echr.coe.int/eng-press?i=003-4029365-4701508>

¹⁴ Claudiu Surmei, *Declarație uluitoare a Ministrului Justiției, Raluca Prună, în fața CSM: Am mințit la CEDO că am asigurat buget pentru șapte penitenciare - VIDEO* (MediaFax, 2016) <https://www.mediafax.ro/social/declaratie-uluitoare-a-ministrului-justitiei-raluca-pruna-in-fata-csm-am-mintit-la-cedo-ca-am-asigurat-buget-pentru-sapte-penitenciare-video-15780817>

¹⁵ Press Unit, *Pilot Judgments* (European Court of Human Rights, 2018) https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf

The ECtHR pilot judgment came as a result of the case of *Rezmiveş and others V. Romania*¹⁶. Representations during the case highlighted serious overcrowding, poor lighting, poor furniture and other facilities, infestations of bed bugs, rats, lice, and mice, water supply unfit for consumption, and inadequate hygiene facilities including showers unfit for use. The court found that these conditions amounted to a violation of Article 3 of the ECHR.

The Romanian authorities opposed the pilot judgment, arguing that it was already addressing the structural problems that had led to human rights violations. The court disagreed, noting that overcrowding and poor conditions were a long-standing problem in Romania, and that the numbers of applications to the ECtHR (and judgments against Romania) were increasing year-on-year. The judgment reads (our emphasis added):

*"The **continuing existence of major structural deficiencies** causing repeated violations of the Convention is not only an aggravating factor as regards the State's responsibility under the Convention for a past or present situation, but **is also a threat for the future effectiveness** of the supervisory system put in place by the Convention".*

It goes on (our emphasis added):

*"The Court notes that the applicants' situation cannot be detached from the general problem originating in a structural dysfunction specific to the Romanian prison system, which has affected large numbers of people and is **likely to continue to do so in future.**"*

The Romanian action plan

The pilot judgment required Romania to produce an action plan to address the structural problem it identified with regards to prison overcrowding and poor conditions. This plan was published in January 2018.¹⁷

The action plan acknowledged that the Romanian prison system is significantly over capacity, with detention rates an average of 121.54% over capacity across the estate, but with some variation between prisons.

The action plan outlines measures to reduce the prison population through reducing use of pre-trial detention, greater use of alternatives to detention, and an early release scheme for some prisoners. It also outlines a prison building scheme to create 8,095 new places by 2024. However, 7,227 of these places are planned to be created from 2022 onwards, leaving the over-crowding situation almost exactly as it is for four years.

¹⁶ *Case of Rezmiveş and others V. Romania* (European Court of Justice, 2017)

<https://hudoc.echr.coe.int/eng#%7B%22languageisocode%22:%5B%22ENG%22%5D,%22appno%22:%5B%2261467/12%22,%2239516/13%22,%2248231/13%22,%2268191/13%22%5D,%22documentcollectionid%22:%5B%22CHAMBER%22%5D,%22itemid%22:%5B%22001-173351%22%5D%7D>

¹⁷ *Timetable for the implementation of measures 2018-2024 to resolve the issue of prison overcrowding and conditions of detention with a view to executing the pilot judgment Rezmives and Others V. Romania delivered by the ECtHR* (Romanian Ministry of Justice, 2018)

https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5a9e7a6fec212d0cc097e6b3/1520335519718/20180125_Action+plan_Communication+from+Romania+concerning+the+cases+of+R+EZMIVES.pdf

Criticisms of the Romanian action plan

This action plan was criticised by human rights NGO APADOR-HC, which published a response in March 2018.¹⁸

The APADOR-HC response notes that the Ministry of Justice's action plan received no public debates or consultations, and that the annexes – the specific action plans – have not been made public. APADOR-HC also questions the financial resources committed to the programme of improvements, as except for money already secured through EEA grants no new finances are outlined in the action plan. In light of the lies told by the Minister for Justice in the past about investment in prisons, this point about finances is especially important.

The response also questions the efficacy of the Romanian government's changes so far:

"The only solution found by the government so far to address the issue of overcrowding is the introduction in the law of the conditional release as effective remedy. However, this effective remedy refers only to the issue of overcrowding and it did not actually solve the problem. The important issues of lack of medical services and appropriate hygiene remain unaddressed and unsolved."

APADOR-HC goes on to note that as of February 2018 33 out of Romania's 45 prisons were overcrowded, with occupation numbers higher than their capacities. Prisoners had an average of 3.34 square metres of personal space, against the requirement of 4 square metres per person that the ECtHR has established.

¹⁸ Briefing paper *Bragadireanu v. Romania* group of cases (22088/04): Detention conditions in Romanian prisons and police lock-ups (APADOR-HC, 2018)
https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/5a9e7a45ec212d0cc097e16a/1520335445839/BragadireanuvRomania_Memo.pdf

6. The (un)reliability of assurances

When considering EAWs courts across Europe frequently rely on assurances given by the Romanian authorities. These assurances essentially promise that after the person is surrendered, they will have their human rights respected. In some cases specific assurances about the specific prisons and cells people will be kept in are given.

The background

Use of these assurances was clarified by the judgment set out by the European Court of Justice (ECJ) in April 2016¹⁹, following a request by a German court. The ruling stated that the EU's principle of mutual recognition is not absolute, and that human rights concerns can be a reason for refusal of an EAW. It set out a two stage test: first, the court must assess whether or not there is a general risk of human rights violations, relying on objective information from bodies such as the ECtHR or UN; and second, it must assess whether that risk applies to the specific individual, and can only refuse the EAW when the grounds are substantial.

Many judges have taken this to mean that if the requesting state makes assurances that human rights will not be violated, even if there are systemic problems, those assurances must be accepted.

However, the reliability of these assurances has been questioned further by organisations such as Fair Trials International. In its written comments on the *Prisacaru v. Belgium and Romania* case (8339/15)²⁰, Fair Trials International questions the role of assurances given by requesting states and their acceptance by EAW executing states:

"...assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment."

The NGO concludes:

"Fair Trials accepts that such assurances, being solemn undertakings issued as between EU Member States, have to be accorded due weight. However, we would submit that in some circumstances – in particular where Council of Europe authorities continue to express concerns as to the implementation of relevant judgments or where evidence of past breaches of assurances can be shown – the executing state must be willing to look behind such assurances as part of its duty to provide 'independent and rigorous scrutiny' of an Article 3 complaint under Article 13. It will, otherwise, simply return to blind faith and the 'automatic and mechanical' application of mutual recognition."

¹⁹ *Joined Cases C-404/15 and C-659/15 PPU* (European Court of Justice, 2016) <http://curia.europa.eu/juris/document/document.jsf?text=&docid=175547&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=966233>

²⁰ *Prisacaru v. Belgium and Romania App. No 8339/15: Written comments of Fair Trials* (Fair Trials International, 2018) <https://www.fairtrials.org/wp-content/uploads/2018/03/Fair-Trials-Prisacaru-Intervention1-final-clean.pdf>

The legal community has also raised questions about the reliability of assurances. As Ben Keith, a barrister at 5 St Andrew's Hill, wrote in magazine *The Barrister*:²¹

"The problem with assurances are that they are fundamentally unable to change their physical situation. The fact that a country promises to be better is not doubted but how can they produce more prison places at the drop of a hat and find more space in already appalling and overcrowded prisons."

The House of Lords Select Committee on Extradition Law has also raised concerns about the reliability of assurances, stating:²²

"We believe the arrangements in place for monitoring assurances are flawed. It is clear that there can be no confidence that assurances are not being breached, or that they can offer an effective remedy in the event of a breach."

For the Select Committee, the implications of that difficulty are clear:

"It is questionable, in our view, whether the UK can be as certain as it should be that it is meeting its human rights obligations"

What happens in Romania

There is some difficulty in assessing how often assurances given by Romania are realised in extradition cases from the UK and other European states. Fair Trials International notes²³ that at present surrendering states do not monitor whether assurances they have been given have been realised, and the only monitoring is carried out by lawyers that keep in touch with clients and document detention conditions.

In order to make an accurate assessment, in 2018 Fair Trials International produced the report *Beyond Surrender*²⁴, which assesses what happens to people after they have been surrendered under EAWs.

This report highlights the chequered history of assurances given by Romania to the UK, starting with the Rusu case, which halted extraditions from the UK to Romania for a time due to compelling evidence presented by 11 people who had been surrendered with assurances that had subsequently been broken.

Fair Trials International details how surrenders to Romania were resumed when the Romanian authorities presented details of a prisons building programme, and then were halted again when that programme was shown to be false. Surrenders have since resumed because a judge ruled that evidence of broken assurances could only be given in person or

²¹ Ben Keith, *Romanian criminals avoid extradition under UK law* (*The Barrister*, 2017) <http://www.barristermagazine.com/romanian-criminals-avoid-extradition-under-uk-law/>

²² *Extradition: UK law and practice - Select Committee on Extradition Law* (House of Lords, 2015) <https://publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/12615.htm>

²³ *Prisacaru v. Belgium and Romania App. No 8339/15: Written comments of Fair Trials* (Fair Trials International, 2018) <https://www.fairtrials.org/wp-content/uploads/2018/03/Fair-Trials-Prisacaru-Intervention1-final-clean.pdf>

²⁴ *Beyond Surrender* (Fair Trials International, 2018) <https://www.fairtrials.org/publication/beyond-surrender>

via video link, not by written statement, and as a result the evidence has not been able to be given as Romanian authorities have not cooperated in providing video link equipment.

Westminster Magistrates' Court has previously accepted that Romanian assurances are not always followed through. A description of the situation was given in a case law update by the Defence Extradition Lawyers Forum (DELF):²⁵

"It acknowledged the existence of evidence – including Romanian admissions – that post-assurance extraditees had been held in conditions inconsistent with those guarantees."

However, the court still allowed extraditions to Romania to proceed:

"Having absolved the Romanian authorities for past breaches the risk of future breaches of assurances was dealt with shortly."

Fair Trials International details a case where a re-trial was promised by Romania, but not given²⁶:

- After being convicted in absentia – without any notice that a trial was going on – an EAW was issued to surrender Dan from the UK to serve a prison sentence. Romanian authorities claimed that Dan was present at the trial, but Dan was able to prove he was attending a doctors' appointment in the UK on the day. As part of the conditions of surrender, the UK demanded a retrial and the Romanian authorities agreed. However, after the surrender Romania changed its mind and sent Dan straight to prison.

Refusals to extradite

In a number of cases courts have refused to surrender people to Romania on human rights grounds. In each case the courts involved did not receive any assurances of the conditions the people concerned would be detained in, or else did not judge the assurances to be adequate. Examples of such cases include:

- Fair Trials International has highlighted cases where German courts have refused to extradite to Romania on the basis of prison conditions, and the inability of the Romanian authorities to provide sufficient guarantees.²⁷
- In December 2017 an Italian court refused to extradite a Romanian national to Romania due to concerns over prison conditions, and the expectation that those conditions would lead to the violation of the person's human rights under the ECHR.²⁸

²⁵ DELF November 2016 Newsletter (Defence Extradition Lawyers Forum (DELF), 2016) <http://delf.org.uk/wp-content/uploads/2017/02/DELF-Newsletter-2-29.11.16.pdf>

²⁶ *Beyond Surrender* (Fair Trials International, 2018) <https://www.fairtrials.org/publication/beyond-surrender>

²⁷ Dr. Anna Oehmichen, *Poor prison conditions in Romania prompt German court to refuse surrender* (Fair Trials International, 2017) <https://www.fairtrials.org/news/poor-prison-conditions-romania-prompt-german-court-refuse-surrender>

²⁸ Valeria Pescini, *Citing Torture Concern, Italy Court Blocks Prisoner Extradition to Romania* (Liberties, 2017) <https://www.liberties.eu/en/news/italian-cassation-stops-surrender-to-romania/13782>

- In July 2017 the Nuremberg Higher Regional Court, in Germany, refused an extradition request by Romania on human rights grounds. The court concluded that the assurances it had received were not enough.²⁹

²⁹ *Higher Regional Court Nuremberg: Extradition to Romania is not permitted* (Rudolph Rechtsanwälte, 2017) <https://www.rudolph-recht.de/higher-regional-court-nuremberg-extradition-to-romania-is-not-permitted/>

7. A backdrop of corruption

Concerns about extradition to Romania go beyond prison conditions. Romania has been recognised as one of the most corrupt countries in the EU. When measures were taken to tackle that corruption they were lauded, only for those measures to be revealed as corrupt themselves.

Corruption in Romania is of a type common to post-communist countries, including arbitrary application of rules, and requests for bribes from government administrators, judges, police and public services³⁰. International attention has led to anti-corruption plans and drives, including the introduction of new criminal codes. The EU has identified the issue of corruption and has been monitoring the situation since 2007 through its Cooperation and Verification Mechanism (CVM)³¹.

Progress has been praised by the European Commission, as well as others such as the US Department of State, who said³²:

"Romania's fight against high and medium-level corruption has become increasingly credible, with significant numbers of prosecutions and convictions of corrupt public officials in recent years."

However, these bodies accept that significant problems still remain, as shown by the EU's continued monitoring of the situation under the CVM – which will continue until its criteria have been met – and global assessments like Transparency International's Corruption Perception Index for 2017, which showed that Romania was the third worst EU state for corruption, with only Hungary and Bulgaria performing worse³³.

The next stage in the fight

Romania's anti-corruption battle has exposed the weaknesses in its criminal justice system. One consequence of the rising numbers of convictions under anti-corruption legislation has been the overcrowding of prisons that has led to so many human rights violations.

Another consequence has been the creation of an additional level of corruption in anti-corruption and criminal justice structures, as in their haste to tackle corruption these organisations have violated the separation of powers and failed to abide by the rule of law. Important questions about the right to a fair trial and politically motivated prosecutions have arisen as a result of the lack of separation of powers.

³⁰ *Romania Corruption Report* (GAN Business Anti-Corruption Portal, 2017) <https://www.business-anti-corruption.com/country-profiles/romania/>

³¹ *report from the Commission to the European Parliament and the Council: On Progress in Romania under the Co-operation and Verification Mechanism* (European Commission, 2017) https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf

³² *Bureau of Economic and Business Affairs, Investment Climate Statements for 2018* (US Department of State, 2018) <http://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm?year=2018&dliid=281627>

³³ *Corruption Perceptions Index 2017* (Transparency International, 2018) https://www.transparency.org/news/feature/corruption_perceptions_index_2017

Academics have raised concerns about the use of politically motivated prosecutions, and noted the resemblance to communist regimes:³⁴

- *"The use of the justice system by the Romanian executive, and its agencies, to destroy political opponents remains a serious and ongoing problem."*
- *"EU-led external pressure to separate the judiciary and politics has failed, with the executive, including the Ministry of Justice, retaining considerable de facto power and political instruction of judges remaining commonplace."*

Pointing to revelations about the involvement of the Romanian Intelligence Service (SRI) in anti-corruption prosecutions, MEDEL (European Magistrates for Democracy and Liberty), an association of judges, raised serious concerns about the independence of the judiciary and the right to a fair trial in Romania in 2016:³⁵

- *"This raises serious concerns about the integrity of the judiciary system as a whole, as well as the independence of the judges. In almost a year since this scandal erupted, the Romanian authorities have failed to clarify the involvement of SRI in the judiciary process."*
- *"The SRI Director stated publicly that this secret service agency is in partnership with the prosecutors to conduct criminal investigations, an activity that it is forbidden by the law."*
- *"In the context that SRI is part of the criminal investigation and it is also involved in the courts, corroborated with the failure of authorities to clarify transparently these matters, this raises serious doubts about the respect for basic human rights and the guarantee of a fair and just trial of any person accused by the state."*
- *"With SRI legally participating now in the penal investigation, and with SRI transforming the courts as their "tactical fields", profiling judges and "maintaining their interest/attention until a final court decision has been reached in each case", Romania is violating the human rights, independence of the judiciary, rule of law and separation of power principles."*

The long suspected secret protocols between the SRI and Romania's Prosecutor's Office referred to by MEDEL in 2016 were finally published in March 2018 following a parliamentary investigation. In response, Dana Girbovan, the chairman of the Romanian National Union of Judges (UNJR) said:³⁶

³⁴ Piercamillo Falasca, Lorenzo Castellani, Radko Hokovsky, *European Union at Risk: The Judiciary under Attack in Romania* (CEJISS, 3/2016)

http://www.cejiss.org/static/data/uploaded/147988797656041/cejiss_s.pdf

³⁵ *Is Europe under Siege? MEDEL Declaration* (MEDEL, 2016)

https://www.medelnet.eu/index.php?option=com_content&view=article&id=240:is-europe-under-siege-medel-declaration&catid=45&Itemid=61

³⁶ Valeriu Laza, *UNJR President Girbovan, on the Secret protocol between SRI and Prosecutor General's Office: Stunning, it breaches constitutional norms* (Romania Journal, 2018)

<https://www.romaniajournal.ro/unjr-president-girbovan-on-the-secret-protocol-between-sri-and-prosecutor-generals-office-stunning-it-breaches-constitutional-norms/>

"The protocol signed in 2009 is breaching the constitutional and international norms regarding the rule of law, democracy, separation of powers, justice independence and observing the human rights. This is the conclusion after reading the protocol. The gravity is stunning for anyone, with minimum law studies and elementary notions about the rule of law."

Awareness of the issues around interference in the judiciary deepened when recordings emerged of Romania's Anti-Corruption Directorate (DNA) chief, Laura Kovesi, ordering subordinates to find evidence that would lead to ministers and the prime minister. Kovesi was later fired from her role at the DNA, though she continues as a prosecutor. Around the same time, evidence emerged of DNA prosecutors attempting to force a witness to fabricate evidence.³⁷

This interference led former FBI director Louis Freeh to assert the importance of judicial independence:³⁸

"They undermine the integrity and independence of the judicial system by unfairly helping the prosecutors and compromising the independence of magistrates."

Freeh also set out a five point plan to restore the rule of law in Romania's anti-corruption fight, including a pledge to fight corruption within the law, relief for individuals who have been convicted without due process or under the SRI secret protocols, an independent commission of international legal experts to examine the impact of the secret protocols, an investigation into the judges affected, and offices of professional responsibility for the Prosecutor General, DNA and SRI.

The European Commission has recognised some issues around political interference in the judiciary, on the basis of political appointment of judges:³⁹

"the law on appointments of top prosecutors and the practice of its implementation is not sufficiently robust in terms of avoiding excessive political discretion in the appointments."

However, others, such as SRI whistleblower Daniel Dragomir, have argued that the EU does not understand the full reality of what is happening in Romania's anti-corruption fight:⁴⁰

"Ignorance of the assault on freedom ongoing in Romania, trickles down from the very top of the European Union and we must fight to ensure this story is heard."

³⁷ David Clark, *The battle to clean up Romanian politics has a long way to run* (New Statesman, 2018) <https://www.newstatesman.com/world/europe/2018/03/battle-clean-romanian-politics-has-long-way-run>

³⁸ Andrew Cave, *Former FBI Director Outlines Five Steps To Restore The Rule Of Law In Romania* (Forbes, 2018) <https://www.forbes.com/sites/andrewcave/2018/08/23/former-fbi-director-outlines-five-steps-to-restore-the-rule-of-law-in-romania/#10d94bec5737>

³⁹ *Report from the Commission to the European Parliament and the Council: On Progress in Romania under the Co-operation and Verification Mechanism* (European Commission, 2017) https://ec.europa.eu/info/sites/info/files/com-2017-44_en_1.pdf

⁴⁰ Daniel Dragomir, *Romania's anti-corruption crackdown echoes a darker past* (EU Observer, 2018) <https://euobserver.com/opinion/140824>

This position was also supported by David Clark, a former advisor to the UK Foreign Office, when he gave evidence to a US Helsinki Commission hearing. The report from the hearing says that Clark:^{41 42}

“...doubted the accuracy of the European Union’s CVM progress reports due to the Union’s “epic capacity for wishful thinking,” as evidenced by how slow the EU has been to respond to the serious deterioration of democratic standards in Hungary and Poland. He pointed to several troubling human rights violations in Romania and urged the Helsinki Commission to ask hard questions of the State Department and support better reporting on corruption issues in the annual State Department Country Reports on Human Rights.”

⁴¹ *The Romanian Anti-Corruption Process: Successes and Excesses* (US Commission on Security and Cooperation in Europe, 2017) <https://www.csce.gov/international-impact/events/romanian-anti-corruption-process-successes-and-excesses>

⁴² See also: David Clark, *Fighting corruption with con tricks: Romania’s assault on the rule of law* (Henry Jackson Society, 2017) <http://henryjacksonsociety.org/wp-content/uploads/2017/01/Romania-paper.pdf>

8. Conclusions and recommendations

Conclusions on prison conditions

- Romania's prisons systematically violate human rights, and have been doing so for many years. The problems that have been described run to a common theme: prisons are overcrowded, dirty, and infested with insects, bed bugs, rats, mice, and lice. Food and eating facilities are inadequate. Toilets are not private, showers do not work, and medical care is of a poor quality.
- At present, the Romanian prison estate is an average of 121.54% over capacity. 33 out of its 45 prisons are overcrowded
- Criticisms of prison conditions in Romania have come from a range of organisations, including: the US Department of State, Fair Trials International, APADOR-HC, the UN Human Rights Committee, the UN Subcommittee for Prevention of Torture, and the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This amounts to a consensus on this issue.
- Romania is the worst violator of human rights under Article 3 of the ECHR in the EU. There is a backlog of 8,000 applications to the ECtHR brought against Romania under Article 3.

Conclusions on the prospect of prison conditions

- This systemic nature of Romania's prisons problems has been recognised by the ECtHR in its 2017 pilot judgment. This makes it clear that human rights violations will continue without serious action.
- The Romanian government's prison improvement programme shows that significant improvements will not begin to be achieved until 2022, meaning systemic problems in prisons leading to human rights violations will continue until to at least then.
- The Romanian government has been caught out lying about its investment in prisons in the past. This casts doubt over its current improvement plans, especially as NGOs such as APADOR-HC have noted that the commitments to improvements between 2018 and 2024 under the ECtHR pilot judgment are not funded.

Conclusions on assurances

- The ECJ has clarified that 'mutual recognition' under EU law does not require states executing EAWs ignore the human rights records of requesting states. Instead, 'assurances' should be sought for each individual requested.

- Multiple cases have shown that Romania does not always fulfil the assurances it gives to UK courts. However, after people are surrendered with assurances their condition is not monitored by UK authorities, and so the true scale of this problem is not known. This policy can be summed up as ‘trust, but not verify’.
- This problem around not fulfilling assurances is likely to be due to the difficulty – and near impossibility – of respecting human rights due to the systemic problems in the Romanian prison system.
- Courts across the EU have refused EAW requests by Romania on the grounds of human rights, over concerns about prison conditions. There is no consistent case law in this area, and decisions to extradite are down to individual judges.
- This ‘pot luck’ approach to human rights protections is not adequate and means that the UK is not fulfilling its human rights obligations. Mutual recognition under EU law does not absolve the UK of its human rights obligations.

Conclusions on corruption

- There are serious and widespread concerns that efforts to tackle corruption in Romania have undermined the rule of law and resulted in unfair trials.
- There is evidence that political interference in the justice system has led to politically motivated prosecutions and convictions.
- SRI protocols have violated the separation of powers, with interference in prosecutions and the judiciary which are reminiscent of the communist Securitate.
- SRI protocols have undermined the right to a fair trial, and it is unknown how many people have been affected. It is fair to say that in the absence of action to fully tackle this problem, this interference in the justice system continues.
- There is evidence that DNA prosecutors have pursued specific targets and fabricated evidence in ways which violated suspects’ right to due process, and compromised the rule of law.
- There are strong arguments that the EU does not fully appreciate – or else has turned a blind eye – to these problems in the Romanian justice system.

Recommendations

- It is unacceptable that UK's 'trust, but not verify' approach to extraditions is exposing people surrendered to Romania to a substantial risk of serious human rights violations. In this context, the only way for the UK to meet its human rights obligations is to halt extraditions to Romania immediately.
- The surrender of people by the UK to Romania under EAWs must not resume until such time as:
 1. Romanian prison conditions improve sufficiently to end its systemic problems. The UK should follow the judgment of the ECtHR on if and when Romanian prison conditions have sufficiently improved, through the pilot judgment mechanism.
 2. The Romanian authorities have fully investigated and resolved the severe issues in its anti-corruption prosecutorial bodies, including but not limited to the credible allegations of corruption within the National Anticorruption Directorate (DNA) and related organisations. This must be verified by independent organisations and NGOs.
 3. The Romanian authorities have fully investigated and made the reforms necessary to restore the independence of its judiciary from political and security service interference, and the judiciary is delivering fair trials in a consistent and reliable manner. The UK must seek independent verification that unlawful involvement of security services in judicial proceedings has ended, and that no secret protocols continue to exist between the intelligence services and any branch of Romania's justice system.



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