[2020] IEHC 143

THE HIGH COURT

[No. 128 EXT. 2019]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 (AS AMENDED)

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PETRONEL PAL

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 9th day of March 2020

1. The surrender of the respondent is sought by the government of Romania pursuant to a European Arrest Warrant (EAW) dated 4th December, 2017. The warrant was endorsed by the High Court for execution on 8th April, 2019. The respondent was arrested by Garda Eoin Kane on foot of the endorsed warrant on 3rd May, 2019. In accordance with s. 13 of the European Arrest Warrant Act, 2003, the respondent was informed of his rights to consent to his early extradition to the requesting State under s. 15 and to obtain or be provided with professional legal advice and representation and, where appropriate, to obtain or be provided with the services of an interpreter. He indicated that he knew about the charges contained in the warrant when he was shown a copy of the warrant. He was served with a copy of the warrant in English and Romanian and a copy of s. 15 of the 2003 Act. No issue arises in respect of compliance with the statutory requirements in this regard.

2. On the same date, the respondent was brought before the High Court. The warrant was duly endorsed by the executing Garda who gave evidence of arrest and his compliance with the requisite statutory procedures. There is no issue concerning the lawfulness of the arrest or the procedures followed or the identification of the respondent as the person named in the warrant.

3. Under section 16(1) of the Act the High Court may make an order directing that a person be surrendered to the issuing state if it is satisfied that the person before it is the person in respect of whom the EAW was issued, that the warrant has been endorsed in accordance with s.13 for execution and states, where appropriate, the matters required by s.45, and that the High Court is not required, under ss. 21A, 22, 23 or 24 to refuse surrender and the surrender is not prohibited by Part 3 of the Act.

4. I am satisfied that Petronel Pal who was produced before the court is the same person in respect of whom the EAW issued and that the EAW was endorsed in accordance with the provisions of s.13. Having considered the documentation submitted to the court I am satisfied that I am not required to refuse surrender under ss. 21A, 22, 23 or 24 of the Act.

5. There are a number of issues which have been raised and fall to be considered under ss. 37, 38, 44 and 45 and Part 3 of the 2003 Act.

The offences

6. The warrant relates to four criminal offences under the criminal law of Romania. The accused is charged as follows:

   (a) That while in Ireland, he along with a number of other suspects "created an organised crime group led by the suspect A.I. and a number of other suspects" and "followed and stalked a number of persons considered to be rivals of the crime group led by the suspect A.I. and used extreme violence against such rivals. As a consequence, one of the victims died".

   (b) Aggravated murder as per Article 189, para. 1 of the Criminal Code of Romania. It is alleged that on 10th April, 2014 at 7 Academy Square, Navan, Co. Meath, Ireland, the respondent along with a number of others broke into an apartment at that address and repeatedly used "extreme violence against the victim Busa Virgil who finally died on 13.04.2014 in Dublin, Ireland as a result of the trauma suffered. The suspects stole several of the victim's goods from the apartment: 1 Apple laptop, 1 Apple tablet and 1 Apple mobile phone, as well as 1 rucksack".

   (c) An attempt to commit aggravated murder as per Article 32, para. 1 of the Romanian Criminal Code. It is alleged that on 10th April, 2014, the defendant and others broke into the same apartment at 7 Academy Square located on the ground floor of the building where Busa Virgil was living and repeatedly used "extreme violence (with crowbars and knives) against the aggrieved parties Marea Ionut and Constantine Doina Marina, hitting vital parts of their bodies (the head). The suspects stole from the apartment several goods that belonged to the victim Busa Virgil: 1 Apple laptop, 1 Apple tablet and 1 Apple mobile phone, as well as 1 rucksack;".

   (d) Aggravated robbery as per Article 233 of the Romanian Criminal Code. It is alleged that on the same occasion the respondent with others broke into the apartment at 7 Academy Square and "repeatedly used extreme violence against the victim Busa Virgil and the aggrieved parties Marea Ionut and Constantine Doina Marina. The suspect stole from the apartment several goods that belonged to the victim Busa Virgil: 1 Apple laptop, 1 Apple tablet and 1 Apple mobile phone, as well as 1 rucksack;".

7. The act of initiating or creating an organised crime group or joining or supporting such a group in any way is punishable under Article 376 of the Romanian Criminal Code by no less than 1 and no more than 5 years' imprisonment and a ban on the exercise of certain rights. When the offences included in the purpose of an organised crime group are punishable by life imprisonment or by a term of imprisonment exceeding 10 years, the offence "shall be punishable by no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights".

8. Aggravated murder under Article 189 of the Criminal Code committed in circumstances of premeditation, in order to facilitate or conceal the commission of another offence or with

cruelty is punishable by life imprisonment or no less than 15 and no more than 25 years' imprisonment and a ban on the exercise of certain rights.

9. An attempt to commit aggravated murder as per Article 32 of the Code if committed in circumstances of premeditation, in order to facilitate or conceal the commission of another offence, against two or more individuals, or with cruelty shall be punished by "life imprisonment or no less than 15 and no more than 25 years of imprisonment and a ban on the exercise of certain rights."

10. Aggravated robbery under Article 233 of the Criminal Code if committed under circumstances in which a person carries a weapon, an explosive, narcotic or paralysing substances or during night time or by trespassing in a domicile or professional office shall be punishable by "no less than 3 and no more than 10 years of imprisonment and a ban on the exercise of certain rights". Robbery is defined as theft committed by resorting to violence or threats or by rendering the victim unable to defend themselves.

11. While these offences were committed in Ireland, it is not intended to prosecute the respondent.

Points of objection

12. A number of points of objection are made to the respondent's surrender:-

    (a) the offences in respect of which surrender is sought all occurred outside the territory of Romania and are not amenable to prosecution within this State on an extraterritorial basis. As such, it is submitted that the respondent's surrender is prohibited by s. 44 of the European Arrest Warrant Act, 2003.

    (b) the respondent's surrender is prohibited under s. 37 (Fundamental Rights) of the European Arrest Warrant Act, 2003 in that his surrender would be in breach of Article 3 of the European Convention of Human Rights because, if surrendered, there is a real or substantial risk that he will be subject to inhuman or degrading treatment due to the poor conditions in which prisoners are confined in Romania. It is claimed that the Romanian prison in which the respondent would be imprisoned if convicted remains unknown.

13. Other points raised in the points of objection at an earlier stage of the proceedings claiming that the respondent's surrender was prohibited under s. 21A of the 2003 Act because the Romanian authorities did not appear to have made a decision to try the respondent for the offences set out in the warrant and a point based on a claim that the prosecuting authority in this State, the Director of Public Prosecutions, has concluded that it is not appropriate to charge the respondent with the crimes alleged in the European arrest warrant or to place him on trial were abandoned at the hearing.

Section 44

14. Section 44 of the 2003 Act provides:-

"A person shall not be surrendered under this Act if the offence specified in the European arrest warrant issued in respect of him or her was committed or is alleged to have been committed in a place other than the issuing state and the act or omission of which the offence consists does not, by virtue of having been committed in a place other than the State, constitute an offence under the law of the State."

15. In seeking the respondent's surrender, the Romanian authorities rely on Article 9(1) of the Romanian Criminal Code which addresses offences allegedly committed by Romanian citizens. Romanian courts have jurisdiction to try offences committed outside the territory of Romania by a Romanian citizen or by a Romanian legal entity if the punishment provided by Romanian law is life detention or imprisonment for more than 10 years. Article 9(2) provides that Romanian criminal law applies to offences committed by Romanian citizens outside of Romania in other cases if the deed is criminalised by the criminal law of the country where the deed was committed or if the offence was committed in a place that is not subject to any State jurisdiction. An authorisation for a criminal prosecution in those circumstances may be issued by a general prosecutor attached to the Court of Appeal. The Romanian authorities confirmed that this decision was taken by the general prosecutor in this case having considered Article 9 of the Criminal Code. This information was provided following a request by the Central Authority in Ireland to the Romanian authorities in respect of their exercise of extraterritorial jurisdiction over criminal matters on 17th July, 2019.

16. Section 44 derives from the terms of Article 4(7)(b) of the Framework Decision which sets out the grounds for "optional non-execution" of the EAW :-

"4. The executing judicial authority may refuse to exercise the European arrest warrant:

…7. Where the European arrest warrant relates to offences which:

(a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such; or

(b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory."

Organised Crime

17. The warrant alleges that the respondent under the supervision of A.I. created an organised gang for the purpose of committing murder. In addition it is alleged that the group followed and stalked members of a rival gang and seriously assaulted other members of that gang and killed Busu Virgil. Information later received from the Romanian authorities alleges that the respondent was part of an organised criminal gang of Romanian citizens who were operating in Ireland initially for the purpose of the sexual exploitation and control of prostitution by Romanian women in Ireland. The alleged

murder of Busu Virgil at 7, Academy Square , Navan , County Meath on the 10th April 2014 is said to have been carried out in the interests of one A.I. in order to maintain control over this prostitution activity. It is alleged that members of the organised crime group acted in a number of ways together and that they "premeditated" a number of crimes by following and monitoring the victims and were in possession of bats and crowbars to be used as weapons. It is alleged that they benefited from other information obtained from other "pimps" who were operating in Ireland at the time. They broke into the victim's home at night which was said to indicate their determination to carry out these particularly serious offences.

18. The Romanian authorities set out in this further information the nature and difficulty in the investigation of the crimes the subject of the EAW. The fact that the alleged murder of Busu Virgil was committed in Ireland made it difficult to carry out investigations because the perpetrators immediately left Ireland and fled to the North of Ireland. The mobility of the organised crime group which has manifested itself in a number of European States made it harder to investigate all of the "authors" or perpetrators of the act.

19. It is alleged against the respondent that he was one of a number of persons who created or were part of an organised crime group in order to commit murder.

Conspiracy

20. Section 71 of the Criminal Justice, 2006 provides

"71 (1) Subject to subsections (2) and (3) a person who conspires, whether in the State or elsewhere, with one or more persons to do an act-

(a) in the State that constitutes a serious offence, or
(b) in a place outside the State that constitutes a serious offence under the law of that place, and which would if done in the State, constitute a serious offence, is guilty of an offence

(2) Subsection (1) applies to a conspiracy committed outside the State if-

(a) the offence, the subject of the conspiracy, was committed, or was intended to be committed, in the State or against a citizen of Ireland…
(d) the conspiracy is committed by an Irish citizen or a person ordinarily resident in the State"

21. Under s.70 of the 2006 Act a serious offence is defined as "an offence for which a person may be punished by imprisonment for a term of four years or more."

22. Section 72 as inserted by the Criminal Justice (Amendment) Act 2009 provides that: -

"72(1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this sub-section, the person participates in or contributes to any activity (whether constituting an offence or not)

(a) intending either to

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of a serious offence, or

(b) being reckless as to whether such participation or contribution could either-

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of, a serious offence"

23. A criminal organisation is defined under s.70 (1) as "a structured group, however organised, that has as its main purpose or activity the commission or facilitation of a serious offence". A "structured group" means "a group of three or more persons which is not randomly formed for the immediate commission of a single offence and the involvement in which by two or more of those persons is with a view to their acting in concert". It is also provided, for the avoidance of doubt, that a structured group may exist notwithstanding the absence of all or any of the following- "(a) formal rules or formal membership, or any formal roles for those involved in the group (b) any hierarchical or leadership structure;(c) continuity of involvement by persons in the group."

24. Section 70(2) provides that "facilitation" of an offence does not require knowledge of a particular offence the commission of which is facilitated or that an offence actually be committed. "Ordinary residence" is defined by s.70(3) for the purposes of s.71(2)(d).

25. It is submitted on behalf of the applicant that under Irish law an Irish person who joins with a number of other persons to form an organised criminal group for the purpose of committing murder all done outside the territorial jurisdiction of this State is liable to be prosecuted on a charge of conspiracy laid under s.71(2) of the 2006 Act as amended. In addition, it is submitted such acts amount to the offence of participating in or contributing to the activities of a criminal organisation contrary to s.72 of the Act.

26. On the basis of the information furnished it is submitted that the respondent is alleged to have formed an organised group with a number of other individuals which clearly required an agreement between two or more persons to form that group for the purpose of committing a murder – a conspiracy to commit an unlawful act under s. 71(2). It is submitted that the group was a criminal organisation within the meaning of s.70(1): it was a structured group of two or more persons that had as its main purpose or activity the commission or facilitation of a serious offence and was not randomly formed for the commission of a single offence. It is submitted that under s.70 the term "structured group" is widely defined and that the facts and information set out in the warrant and later supplied insofar as they constitute a conspiracy to commit murder and amount to conduct which, if committed by an Irish citizen extra-territorially, render the respondent amenable to prosecution in Ireland for an offence under s.71(2) and/or s.72 of the 2006 Act.

27. The facts underpinning the charges of attempted aggravated murder and aggravated robbery are also said to support the proposition that the respondent is alleged to have committed acts which were done with the intention of enhancing the ability of the criminal organisation or members of it to commit or facilitate the commission by its members of serious offences and in which he participated. The relevant acts were breaking into the apartment at 7 Academy Square, Navan thereby enhancing the ability of the organisation or its members or facilitating them in the commission of murder or serious assault on the victims. Similarly, in respect of the aggravated robbery it is submitted that the respondent participated in the theft of items of property from the apartment in the course of carrying out the criminal conspiracy of the crime group to murder its rivals and that he participated in criminal activity which included extreme beatings with crowbars and knives and theft with the intent of facilitating the commission of other serious offences including murder.

28. The facts stated in the warrant said to be an allegation of creating an organised crime group allege;-

> "Between March and April 2014, while being in Ireland, the Defendant Pal Petronel and the suspects AI, CML, DBM,MMI, PGN,VCBL,PI,DB and BI and another unidentified male , *created an organised crime group* led by the suspect AI in order to commit murder. As such under the coordination of the suspect AI, the suspects CML,DBM, and the defendants Pal Petronel, MMI,PGN,VC,BL, and PI along with SB and BI, followed and stalked a number of persons considered to be rivals of the crime group led by the suspect AI, and used extreme violence against such rivals. As a consequence, one of the victims died…."

29. Additional information was received concerning this charge when information was sought by the executing authority from the issuing authorities as to why part (d) of the warrant had been completed to indicate that the respondent was not present at his trial but was legally represented when it appeared that no trial had yet taken place. The reply dated 14th May 2019 clarified that he had not been tried but had been the subject of a preliminary application concerning a provisional detention order in Romania. He was legally represented at that hearing in which the court considered whether a provisional detention order ought to be made against him under the relevant Romanian criminal procedure which is not in issue in these proceedings. However, in explaining that process, the issuing authority stated by way of additional information that inter alia:-

> "….the defendant Pal Petronel is part of an organised crime group of Romanian citizens who acted on the territory of Ireland the initial purpose of this organised crime group being the sexual exploitation of women, and the commission of the murder was based on the interest of the suspect AI to maintain control over the prostitution activity in Ireland carried out by women from Romania.
>
> Moreover, for the commission of the crimes, the members of the organised crime group….. premeditated the crimes by following and monitoring the victims and holding bats and crowbars as weapons, benefited from information from other

pimps who were operating in Ireland. Also, the fact that the perpetrators broke into the victim's home at night highlights their courage and determination in committing particularly serious crimes.

The fact that the murder of the victim was carried out in the territory of Ireland was such as to make it very difficult to carry out the investigations, since the authors immediately left the territory of Ireland after the crime and hid in the territory of the UK (Northern Ireland).

Also, the mobility of the organised crime group, which has manifested on the territory of several European states, has made it harder to investigate all the authors of the acts…."

30. I am satisfied that the facts as outlined and the offence alleged of creating an organised criminal group provide a basis by reason of the offence created under s.71(2) to surrender the respondent in the circumstances of this case. It is correct that a criminal conspiracy contrary to s.71(2) entered into outside the State by an Irish citizen or a person ordinarily resident in the State to commit murder in Ireland is a criminal offence. In the course of these proceedings it was accepted by the respondent in his application for bail that he had been resident in the State for a period in excess of ten years. He is also a citizen of Romania. There is no doubt that he could have been prosecuted in this jurisdiction for the alleged offence. He could also be prosecuted in this jurisdiction for a similar offence if it had been committed outside Ireland. I am satisfied that an alleged conspiracy to murder formed by a person(s) who is an Irish citizen or ordinarily resident in the State is an offence over which Ireland may claim an extra-territorial jurisdiction. It does not matter whether the act, the subject of the conspiracy, is completed or not. I am not satisfied that the allegation here is that a group was randomly formed for that purpose, which is not within the contemplation of the section. Therefore, I am satisfied that the offence corresponds in the circumstances of this case to an offence under s.71(2). It is an offence in respect of which the Romanian authorities are entitled to seek and be granted his surrender on the basis of their exercise of extra-territorial jurisdiction over the offence and offender in circumstances which are the same as those exercisable by Ireland over its citizens. Thus the acts constituting the offence for which surrender is sought are acts committed outside the issuing state but are such as constitute an offence under Irish law, the law of the state where the offence was allegedly committed. The respondent's surrender for this offence is not prohibited by s.44 of the 2006 Act as amended.

31. It is clear that the most serious offence as set out in the warrant alleges that the respondent with others created an organised crime group led by A.I. to commit a murder in Ireland. The "conspiracy" offence alleges that the criminal group was created for that purpose. The later information contextualises that allegation and provides in essence the background material which in this jurisdiction would also constitute evidence of intention and motive that might properly be led if the charge of murder were to be prosecuted here. The substance of the allegation in the warrant enhanced by the further information

received, insofar as it alleges agreement and engagement with others in the murder and other offences would also be embraced by an allegation of common design on the part of the actual perpetrators of the offences and those named but who are not alleged to have been present when the victim was allegedly murdered and the others attacked. The fact that they may also be involved in other criminal activity together which is linked to the alleged aggravated murder and the events of that night is further evidence supportive of the existence of a common design to murder forged between those who committed it. However, the agreement between the various persons named in the charge and information, though related in the charge to the creation of a criminal group formed to execute a murder does not, in my view establish that it is an allegation of the random formation of a group in the sense contemplated by the section.

32. The formation of a criminal group randomly for the commission of the offence of murder would not qualify as an offence under s.71(2). It is however, claimed that the respondent, the other perpetrators and others involved in the conspiracy were already part of a criminal group engaged in nefarious activities and that the motive for the killing, attempted killing and aggravated robbery was the protection of that group's criminal business. Therefore, the allegation that the respondent and others, as members of the criminal group created to carry out the crime of murder as set out in the warrant, already formed part of a criminal group is to an extent correct. It is clear that the activity mostly described in the later information also falls within the statutory definition of the offence. However, the essence and reality of the allegation set out in the warrant is that they agreed to create a murder or assassination group and commit murder for the benefit of the criminal organisation as it existed. The alleged reason that the organisation was created appears to be narrowly drafted and focussed on a limited objective or purpose namely, the specific crime of murder, which was partly highlighted in bold type and underlined in the warrant but I do not consider that to be determinative. The application for surrender is rooted in a factual reality and background of organised criminal endeavour which allegedly informed the intention and purpose of the criminal conspiracy to create a group to commit aggravated murder at 7 Academy Apartments, Navan.

33. However, I am not satisfied that ss.71(2) or 72 are offences that could under Irish law be regarded in the circumstances of this case as corresponding to the offences of attempted aggravated murder or aggravated robbery or as providing a basis upon which to conclude that Ireland operates an extra-territorial jurisdiction in respect of those offences or some conspiracy to commit them.

34. In addition, I am not satisfied that the applicant has established that the charge concerning the creation of a criminal group constitutes an offence for which the respondent would be amenable to prosecution under s.72 of the Act. Facilitation as a concept is something that requires an act or omission to act which is removed from direct participation in for example, a murder: it contemplates an ongoing engagement with a criminal organisation already formed which includes an intention to enhance the ability of that organisation or any members of it to commit an offence, in this case the offence as stated in the warrant, murder. I do not consider that it is an offence that could properly

be laid against the respondent in this jurisdiction in the circumstances of this case. I am satisfied that to direct his surrender on that basis whether by reference to the charge of aggravated murder, attempted aggravated murder or aggravated robbery could not be justified. Unlike an offence under s.71(2) it would require the court to compress the facts alleging his direct participation in these very specific occurrences into what is a very general, if not nebulous allegation which is not in any event addressed in any material or discernible way in the charge of creating an organised criminal group as framed by the Romanian authorities.

The three other charges

35. The further allegations made against the respondent are contained in the charges concerning aggravated murder, attempted aggravated murder and aggravated robbery which were committed with a high degree of planning: these are alleged offences based on events which have occurred and in respect of which the respondent is alleged to be a principal offender. The motive for committing these offences may be established from the other surrounding facts and is said to arise from grievances held by one organised gang of criminals in respect of other alleged criminals. However, it is central to the case against the respondent that he and others attended at the deceased's home in Navan at night, violently entered it, murdered the deceased, attempted to murder two other persons present and stole a number of items from the premises under threat of or while using a high degree of violence.

36. Under s. 9 of the Offences Against the Person Act, 1861 as adapted by the Offences Against the Person Act, 1861 (s. 9) Adaptation Order, 1973, an Irish citizen is liable to be prosecuted in Ireland for any murder or manslaughter committed extraterritorially in another jurisdiction.

37. In *Minister for Justice, Equality and Law Reform v. Bailey* [2012] 4 I.R. 1, a European arrest warrant was issued by the Republic of France seeking the surrender of the respondent in respect of a murder that occurred in Ireland and in respect of which the Director of Public Prosecutions made a decision not to prosecute the respondent on any charge relating to the murder. In refusing to order the respondent's extradition, Denham C.J. summarised the effect of the section on the operation of the 2003 Act as follows:-

> "Thus, applying the above law, Ireland could request France to surrender to Ireland an Irish citizen for an alleged murder committed in France. However, Ireland could not make a successful request to France to surrender to Ireland a citizen of the United Kingdom for the offence of an alleged murder committed in France. The act of murder in another state is not an offence which may be prosecuted in this State except where it is committed by an Irish citizen. There is no jurisdiction in Ireland to prosecute for an offence of murder committed outside the area of the application of the laws of the State, unless an ingredient in that crime is that the alleged offender was an Irish citizen."

38. Denham C.J. in considering s. 44 of the 2003 Act stated:-

> "I construe s. 44 of the Act of 2003 as enabling Ireland to surrender a person in respect of an offence alleged to have been committed outside the territory of the issuing State in circumstances where the Irish State would exercise extra-territorial jurisdiction in reciprocal circumstances. Ireland would not have jurisdiction to surrender to France a citizen of the United Kingdom for a murder committed in France. Applying s. 44, and the principles upon which it was founded, the appellant has established grounds to succeed on the first legal issue. The reciprocity that is required in construing s. 44 is a factual reciprocity concerning the circumstances of the offences. Offences that take place outside of the territory of a State require specification of the circumstances when that State will exercise jurisdiction. The reciprocity in this case requires Ireland to examine its law as if the circumstances of the offence were reversed. Here the circumstances are that a non-citizen of either the issuing or executing State is sought by the issuing State in respect of a murder of one of its citizens which took place outside the issuing State. The Court then must determine under Irish law if Ireland could request the surrender of a non-citizen of either Ireland or the executing State in respect of a murder of one of its citizens which took place outside Ireland. Ireland does not have jurisdiction to seek the surrender of a British citizen from France in respect of a murder of a person of any citizenship and which took place outside of Ireland…".

39. In this case, the Romanian authorities seek the extradition of a Romanian citizen who is amenable to prosecution under Romanian law for a murder alleged to have been committed in Ireland outside the territorial jurisdiction of Romania. In those circumstances, I am satisfied that, having examined the situation if circumstances were reversed, an Irish citizen who is alleged to have murdered an individual outside the territorial jurisdiction of Ireland is amenable to prosecution for murder before the Irish Courts. I am satisfied that s. 44 enables Ireland to surrender the respondent in respect of a murder charge alleged to have been committed outside the territory of Romania in circumstances in which the Irish State would exercise extraterritorial jurisdiction in reciprocal circumstances. That is, it would seek to prosecute an Irish citizen who commits a murder, for example, in Romania. I am, therefore, satisfied that there are no grounds upon which to refuse the respondents surrender in respect of the charge of aggravated murder. The Romanian authorities seek the surrender of the respondent, a Romanian citizen, for the murder of a Romanian citizen in Ireland: an Irish citizen who commits a murder abroad would be amenable to prosecution in Ireland for murder.

40. I do not accept the submissions made on the respondent's behalf that s. 44 as interpreted by the Supreme Court in the *Bailey* case precludes his surrender. It was submitted that the various judgments of the Supreme Court do not support the conclusion which I have reached for a number of reasons. It is submitted that the judgments do not suggest that the court should simply examine the situation as if the circumstances were reversed as to whether a reciprocal extra-territorial jurisdiction would be exercised when a Romanian citizen is sought for a murder committed in another jurisdiction. It is submitted that the judgments do not support the proposition that Mr. Bailey would have been surrendered

had he been a French citizen. It is also submitted that the essential feature of the case was that Mr.Bailey was not an Irish citizen, not that he was not a French citizen and that the only important analogous feature between this case and the *Bailey* case is the locus in quo: the important fact under s.44 is said to be that the offence was allegedly committed outside the issuing state. It was incidental that it was committed in the executing state. Particular emphasis was placed on what was said to be the central question relating to surrender in the *Bailey* case namely, whether the person concerned was an Irish citizen or not. I am satisfied that the well established basis upon which Ireland exercises extra-territorial jurisdiction over a murder committed by an Irish citizen abroad does not lead to a situation in which the Romanian authorities who exercise a similar jurisdiction over their citizens would be precluded from seeking the surrender of one of their citizens from Ireland who had allegedly murdered a person here or indeed in some third country. If the amenability of the alleged wrongdoer is defined under the issuing state's criminal law by reference to the location in which the offence was committed and the fact that the alleged offender must be a citizen of the issuing state, a reciprocity is established which enables surrender under s.44.

41. I am satisfied that this result was clearly contemplated in the judgment of Denham C.J. already quoted. In the concluding part of his judgment Hardiman J., succinctly points to this important result:

> "357. The crime was committed not only outside France, but in Ireland.
>
> 358. If the positions were reversed, a murder outside Ireland is not a crime in Irish law, unless committed by an Irish citizen.
>
> 359. The appellant is not an Irish citizen….
>
> 360. Section 44 of the Act of 2003 operates to preclude his forcible delivery to France because Irish law does not confer a power to prosecute on the same basis as France: there is an absence of reciprocity.
>
> 361. I would refuse to deliver the appellant to France on this ground independently…."

42. Fennelly J., expressed his conclusion :-

> "459. In my view, it is perfectly possible to interpret s.44 ….in conformity with art.4.7(b). Under that provision, correctly interpreted, the surrender of the appellant is prohibited for the following reasons. Firstly, the offence specified in the European arrest warrant was committed outside France, the issuing member state. Secondly, murder committed outside Ireland is not an offence under Irish law, unless the alleged perpetrator is an Irish citizen. Interpreted in the light of the Framework decision, s.44 applies where Ireland would not have the power to prosecute on the same basis as France: under Irish law, a person who is not an Irish citizen cannot be prosecuted for a murder committed outside Ireland. "

43. This conclusion followed an extensive review of the development of the concept of reciprocity in the context of the exercise of extra-territorial jurisdiction in extradition cases in the case-law and text-books which used expressions such as "corresponding circumstances" and "equivalent circumstances" as designating the occasion upon which extradition might be granted in such cases and the commentary in the leading Irish text book on the subject: Remy Farrell and Anthony Hanrahan, "The European Arrest Warrant in Ireland" (paras 437-447). The learned judge also noted that art.4.7(b) must mean that the issuing state has jurisdiction to prosecute the person sought even though the offence was committed outside its territory. However, that would not end the matter. The court's search must be for reciprocity in the exercise of that jurisdiction and in the case of France and Ireland that did not exist - their extraterritorial laws were "the converse of each other". Thus, if the executing state exercises extra-territorial jurisdiction in respect of offences of the same type for which surrender is sought in the same circumstances as those exercised by the issuing state, surrender will not be prohibited. That is the situation in respect of the aggravated murder charge in this case. I am satisfied that the surrender of the respondent on that charge is not prohibited under s.44 as considered in the Bailey case. Murray J., agreed with the analysis and conclusions of Fennelly J., and Denham C.J.

44. I do not consider that the two offences of attempted murder and aggravated burglary or robbery which are the corresponding offences in Ireland to attempted aggravated murder or aggravated robbery are the subject of extra-territorial jurisdiction by Ireland as is the case with murder, a situation that is not alterable by reference to ss 71(2) and 72 of the 2006 or otherwise. Consequently, I am not satisfied to direct the applicant's surrender on those charges.

Prison conditions in Romania

45. It is submitted that Mr. Pal's surrender would be in breach of Article 3 of the European Convention on Human Rights and Fundamental Freedoms because of the conditions he would face if incarcerated following his surrender in a Romanian prison. It is submitted that his surrender is prohibited under s. 37 of the European Arrest Warrant Act, 2003. There is no doubt that for a number of years Romanian prison conditions have given rise to a substantial body of case-law in which it has been contended that they are not compliant with Romania's obligations under Article 3 of the Convention (Article 4 of the Charter of Fundamental Rights).

46. Article 3 of the Convention provides that:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 4 of the Charter of Fundamental Rights is in identical terms.

47. Section 37(1) of the European Arrest Warrant Act, 2003 provides inter alia:

> "A person shall not be surrendered under this Act if—

(a) his or her surrender would be incompatible with the State's obligations under—

(i) the Convention, or

(ii) the Protocols to the Convention, …

(c) there are reasonable grounds for believing that—

…

(iii) were the person to be surrendered to the issuing state—….

(II) he or she would be tortured or subjected to other inhuman or degrading treatment."

48. It is submitted by the respondent that if surrendered he would be exposed to a real or substantial risk of torture or other inhuman or degrading treatment in breach of Article 3 of the Convention and s. 37(1)(a) and (c)(iii)(II) of the 2003 Act.

49. An affidavit in support of this submission was furnished from Mr. Bugnariu Danut-Ioan a criminal lawyer practising in Romania. He provided an extensive report on the history of prison conditions in Romania and the litigation that has occurred before the European Court of Human Rights in respect of violations of Article 3 in Romanian prisons. He also gave an outline of the various legislative provisions in respect of prison conditions in Romania. A number of other affidavits sworn by him were submitted at various stages of these proceedings concerning the various prisons which became the focus of the courts consideration of this issue.

The legal principles applicable

50. The principles applicable to an application of this kind were set out in the judgment of the Supreme Court in *Minister for Justice v. Rettinger* [2010] 3 I.R. 783 and are not seriously in issue. Denham J. (as she then was) stated when delivering her judgment that the Article 3 issue should be considered in this way:-

"(i) A court should consider all the material before it, and if necessary material obtained of its own motion;

(ii) A court should examine whether there is a real risk, in a rigorous examination;

(iii) The burden rests upon a respondent, such as the respondent in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention;

(iv) It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the

requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court;

(v) The court should examine the foreseeable consequences of sending a person to the requesting State;

(vi) The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America;

(vii) The mere possibility of ill treatment is not sufficient to establish a respondent's case;

(viii) The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this Court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary…" (pp. 801-802).

51. The court's obligation in respect of this issue on this application is to consider all the material before it and if necessary, material sought by its own motion. It should examine whether there is a real risk in the course of a rigorous examination. The burden of proof rests upon the respondent to adduce evidence capable of proving that there are substantial grounds for believing that if he is returned, in this case to Romania, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention. The requesting state may present evidence to dispel doubts in relation to this aspect of the case.

52. The application of Article 3 was further considered by the Supreme Court in *The Attorney General v. Davis* [2018] IESC 27 in the context of an application for the extradition of the respondent to the United States. McKechnie J. delivering the judgement of the court was satisfied to apply the principles articulated in Rettinger to such a case. The learned judge noted that they in turn were derived from the principles set out by the European Court of Human Rights in *Saadi v. Italy (App. No. 37201/06)* [2009] 49 E.H.R.R. 30. and *Orchowski v. Poland (App. No. 17885/04, European Court of Human Rights judgment of 22nd October, 2009)*. The learned judge also stated in relation to the application of these principles:-

"86. The only additional observations I would make are more in the nature of clarification than qualification:

- Some authorities say that "substantial grounds" must be established such as would give rise to a real risk; others say "reasonable grounds". Given the difficulty of obtaining credible evidence which is current at the time of

hearing, I would prefer the latter, though in substance there may be no difference between the two.

- A respondent does not have to show that if returned he would or probably would suffer a violation of his Article 3 rights: a real risk thereof is sufficient.
- Neither the objectives of the Framework Decision nor those underpinning the Washington Treaty [in respect of extradition to the United States] can defeat an established risk of ill-treatment.

87. Regardless of whether the proper test is couched in terms of "reasonable grounds" or "substantial grounds", it may be thought that in some respects this is not a difficult bar for a proposed extraditee to overcome: the combination of "reasonable/substantial grounds", allied to the inherently forward-looking assessment of "real risk", may at first blush suggest a low threshold to be met in order to prevent one's extradition. This is not so. There is a default presumption that the other country will act in good faith and that it will respect a proposed extraditee's fundamental rights; although this presumption is weaker and more easily rebutted in respect of countries outside of the European Arrest Warrant system, it remains in play and it is for the proposed extraditee to rebut… The basis for this presumption is the underlying principle of mutual trust, reciprocity and confidence which goes to the heart of the bilateral/multilateral extradition arrangements that have been entered into by the State on the international plane. Experience has shown that the presumption can indeed be rebutted, but such a conclusion will not be reached lightly. Thus while the courts will conduct a rigorous inquiry into any proposed objections to extradition, intervening where necessary to safeguard the subject respondent's fundamental rights, the onus is on that person to establish by evidence that there is a real risk of a violation of such rights if surrendered and extradited. In so stating I am not endeavouring to set forth any new principle, but merely summarising the practice that the courts in this jurisdiction have hitherto engaged in when called upon to assess the objections so raised.

88. Accordingly, it is the *Rettinger* principles, as subsequently explained and adapted in the *O'Gara* and *Marques* cases in relation to extradition to the U.S., which form the applicable test in an Article 3 situation: the question, as stated, is whether the evidence establishes that there is a real risk that, if surrendered and extradited, the proposed extraditee will be subjected to torture or inhuman or degrading treatment. This test applies where the objection raised is based on what is prohibited by that provision, including where a person who is suffering from a mental condition or disorder would be detained in a foreign country. As one can never be definite regarding future events, the aim of the exercise is to measure risk. This requires a fact-specific inquiry conducted in part against known facts and in part against future events. The matters for consideration will inevitably be particular to the person concerned and may range over an extensive area; likewise, in relation to the prison conditions, and perhaps even in respect of the legal and judicial regimes of his intended destination. The exercise

so conducted should and must be as thorough as the facts and circumstances demand".

53. The application of Article 3 to applications for surrender under the Framework Decision was also considered in the cases of *Aranyosi and Caldararu, Judgement of the European Court of Human Rights, Grand Chamber, 5th April, 2016* in which the court stated as follows:-

"88. It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State, having regard to the standard of protection of fundamental rights guaranteed by EU law and, in particular, by Article 4 of the Charter[Article 3 of the Convention]… that judicial authority is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European arrest warrant. The consequence of the execution of such a warrant must not be that that individual suffers inhuman or degrading treatment.

89. To that end, the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that 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. That information may be obtained from, inter alia, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN.

90. In that regard, it follows from the case law of the ECtHR that Article 3 of the ECHR imposes, on the authorities of the State on whose territory an individual is detained, a positive obligation to ensure that any prisoner is detained in conditions which guarantee respect for human dignity, that the way in which detention is enforced does not cause the individual concerned distress or hardship of an intensity exceeding the unavoidable level of suffering that is inherent in detention and that, having regard to the practical requirements of imprisonment, the health and well-being of the prisoner are adequately protected…

91. Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant.

92. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned

will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.

93. The mere existence of evidence that 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, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.

94. Consequently, in order to ensure respect for Article 4 of the Charter [Article 3 of the Convention] in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are substantial grounds to believe that, following the surrender of that person to the issuing Member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment, within the meaning of Article 4.

95. To that end, that authority must, pursuant to Article 15(2) of the Framework Decision, request of the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State".

The court also held that 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 cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

54. In *ML v Generalstaatwaltschaft Bremen Case* C-220/18 PPU (25th July 2018 First Chamber) the court was asked for a preliminary ruling in respect of a surrender request made by Hungary to the Federal Republic of Germany in respect of ML for trial for a number of offences. While the request was pending ML was convicted *in absentia* in respect of these offences in Hungary: the court imposed a sentence of one year and eighteen months imprisonment upon him. A further request was made for his surrender based upon this conviction and sentence. In the course of the earlier surrender proceedings before his conviction a request for information was submitted to the Hungarian authorities concerning the conditions of imprisonment at Budapest Prison where it was indicated he would be initially held and a local named prison to which he would be transferred following completion of the surrender procedure. The Hungarian Ministry of Justice gave an assurance that ML would not be subjected to any inhuman or degrading treatment within the meaning of Article 4 of the Charter and stated that this assurance could be given in respect of any prison to which he might be transferred.

55. The German court later requested further information about Budapest Prison and any other prison to which ML might be detained to serve his sentence following receipt of the second request. The Hungarian Ministry of Justice replied giving an assurance that wherever ML was incarcerated he would not be subjected to inhuman or degrading treatment within the meaning of Article 4. The referring court was uncertain whether its assessment of detention conditions must concern all prisons in which ML might be held or should be confined to those prisons in which it was likely he would be held. On the facts of the case the Bremen court accepted the absence of a real risk of inhuman or degrading treatment in the prison nominated as that to which ML would be transferred following an initial period in Budapest Prison but stated that it did not have enough information to reach the same conclusion in respect of Budapest Prison or any other prison within the system to which ML could be transferred. The questions posed by the Bremen Court are set out at paragraph 40 of the judgment and concern the extent to which it was obliged to assess the conditions of detention generally in prisons in the requesting state for compliance with Article 4. In that context the Bremen court also asked whether the assessment of the conditions of detention in each individual prison could be rendered superfluous by a general assurance by the requesting State that the person concerned would not be subject to any risk of inhuman or degrading treatment or could surrender be made contingent upon his not being so exposed. If this question were answered in the negative the court was asked whether the duty to assess prison conditions extended to all prisons envisaged.

56. The CJEU held that the Framework Decision

> " must be interpreted as meaning that when the executing judicial authority has information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, the accuracy of which must be verified by the referring court in light of all the available updated data:
>
> ….- the executing judicial authority is required to assess only the conditions of detention in the prisons in which, according to the information available to it, it is likely that that person will be detained, including on a temporary or transitional basis.
>
> -the executing judicial authority must assess, to that end, solely the actual and precise conditions of detention that are relevant to the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter…
>
> -the executing judicial authority may take into account information provided by authorities of the issuing Member State other than the issuing judicial authority, such as, in particular, an assurance that the individual concerned will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter…"

57. The CJEU at paragraphs 48 to 70 of the judgment set out the underlying principles which the executing judicial authority should apply when considering the existence of a real risk. It held that the cornerstone of the Framework decision is that Member States save in exceptional circumstances are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust. A refusal to execute a warrant is intended to be an exception. The grounds for refusal exhaustively listed in Article 5 of the decision are to be interpreted strictly. One of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to Article 4 as already discussed. The court stated:

> "61 a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, to the refusal to execute a European arrest warrant. The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State (judgment of 5 April 2016, *Aranyosi and Caldararu*.C-404/15 and C-659/15 PPU,EU:C:2016:198, paragraphs 91 and 93).
>
> 62. Thus in order to ensure observance of Article 4 of the Charter in the particular circumstances of a person who is the subject of a European arrest warrant, the executing judicial authority, when faced with the existence of such deficiencies that is objective, reliable, specific and properly updated, is then bound to determine , specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing, that following the surrender of that person to the issuing Member State, he will run a real risk of being subject to inhuman or degrading treatment within the meaning of Article 4, because of the conditions for his detention envisaged in the issuing Member State(…*Aranyosi and Caldararu* [supra])"

58. The executing court is obliged to request all necessary supplementary information on the conditions in which it is envisaged the person concerned will be detained. If upon receipt of that information the executing court determines that there is a real risk that he will be subject in inhuman or degrading treatment "the execution of the warrant must be postponed but it cannot be abandoned"(paragraph 65).The court in *ML* answered the questions posed on the basis that the Bremen court had concluded as a matter of fact that there were systemic and generalised deficiencies in Hungarian prison conditions.

59. The court stated that since the assessment to be made of prison conditions in the requesting state must be "specific and precise", it cannot concern the general conditions of detention in all prisons in that state in which the person might be imprisoned: Article 15 of the Framework Decision is not to be used as a matter of course to seek such information. The court also noted at paragraph 81 that in most cases it is generally not

possible to identify all prisons in which a person may be held on their surrender; a decision which may be affected by unforeseen circumstances which may be unrelated to the person concerned. In this case it is clear that there is a national legal procedure for determining the place of imprisonment and the regime under which each prisoner may be required to serve the sentence imposed and it is clear that as in most prison systems (including Ireland's), the transfer of prisoners may be required at some stage during their sentences to another facility for any number of reasons. The court stated:

> "87. Consequently, in view of the mutual trust that must exist between Member States, on which the European arrest warrant system is based, and taking account, in particular of the time limits set by Article 17 of the Framework Decision for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. The compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is, in accordance with the case-law referred to in paragraph 66 of this judgment, a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State"

Of course, this passage must be considered on the basis of the court's clear obligation to be satisfied that there is no real or substantial risk that the person will be subjected to inhuman or degrading treatment (re-affirmed in paragraphs 65 and 66 of the judgment) and the absolute nature of that protection.

60. The court in *ML* also stated that in accordance with the principle of sincere cooperation contained in the first sub-paragraph of Article 4(3) TEU the executing and the issuing judicial authorities may respectively request information or give assurances concerning the actual and precise conditions in which the person will be detained in the requesting state. The assurance provided by the competent authorities of the issuing state that irrespective of where he is detained the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and "the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter." If the guarantee that such an assurance represents is not given by a judicial authority "it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority" (paragraphs 108 -112).

61. In the case of *Dumutriu-Tudor Dorobantu (Case C-128/18)(Grand Chamber 15th October)* the Higher Regional Court in Hamburg sought guidance as to the scope and extent of the review to be carried by an executing judicial authority when in possession of information

indicating that there are systemic or generalised deficiencies in prison conditions in the issuing Member State (in that case Romania) when considering whether there is a real risk of being subjected to inhuman or degrading treatment and in particular whether "that review must be comprehensive or, on the contrary, limited to cases of manifest inadequacies in those conditions of detention" (para.41).

62. The court addressed the scope of the review to be undertaken by the executing judicial authority at paragraphs 58-69 of the judgment. It stated:-

> "64 It follows that the assessment which that authority is required to make cannot, in view of the facts that it must be specific and precise, concern the general conditions of detention in all the prisons in the issuing Member State in which the individual concerned might be detained(see to that effect , judgment of 25 July 2018, Generalstaatanswaltschaft(Conditions of detention in Hungary), C-220/18 PPU,EU:C:2018:589, Paragraph 78)
>
> 65. Furthermore , an obligation on the part of the executing judicial authorities to assess the conditions of detention in all the prisons in which the individual concerned might be detained in the issuing Member State would be clearly excessive. It would, moreover, be impossible to fulfil such an obligation within the periods prescribed in Article 17 of Framework Decision 2002/ 584. Such an assessment could thus in fact substantially delay that individual's surrender and, accordingly, render the operation of the European arrest warrant system wholly ineffective. That would result in the risk of impunity for the requested person..[C-220/18 supra at paragraphs 84 and 85]…
>
> 66. Consequently, in view of the mutual trust that must exist between Member States on which the European arrest warrant system is based, and taking account, in particular, of the time limits set by Article 17….for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them , it is actually intended that the person concerned will be detained, including on a temporary or transitional basis..[C-220/18 supra paragraph 87]…."

63. The court also stated that "to that end" the executing judicial authority must in accordance with Article 15(2) of the Framework Decision (s.20 of the 2003 Act as amended), request of the judicial authority of the issuing state all necessary supplementary information on the conditions in which it is actually intended that the individual concerned will be detained.

64. The court also held that when an assurance has been given or at least endorsed by the issuing judicial authority to the effect that the person concerned will not suffer inhuman or degrading treatment on the account of the actual and precise conditions of his detention, irrespective of the prison in which he is detained in the issuing Member State,

the executing judicial authority must rely on that assurance "at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter". Therefore, it is only "in exceptional circumstances, and on the basis of precise information, that the judicial authority can find that, notwithstanding [such] an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment…because of the conditions of that person's detention in the issuing Member State"(paragraphs 68-69).

65. I have considered and applied the principles set out in the case-law cited and quoted above to this issue. Initially, the evidence received by the court from the requesting Member State concerned general prison conditions in Romania. Having considered the information and evidence received from both sides I was satisfied that if surrendered the respondent would be held at Rahova prison for an initial period and if convicted, would likely be sent to Iasi Prison. The court was particularly concerned that there was a real or substantial risk to the respondent's Article 3 rights if he were to be imprisoned in Iasi prison. Later, following a further request for information the court was informed that, if convicted and sentenced, he would "start" his sentence in Tulcea Prison. The court, mindful of its obligations under the relevant case-law sought information from the requesting authorities concerning this proposal twice because it was deemed necessary to enable the court to reach an appropriate conclusion under Article 15 of the Framework decision and the Act. It was then necessary to seek further information from the issuing authorities because the court was not satisfied concerning the use of the word "start" in respect of Tulcea prison that the respondent would likely serve his sentence in that prison and queried whether the possibility existed that he might at some stage be detained in Iasi prison following a transfer at some future date . When clarification was sought about the conditions in Tulcea prison and other matters, the issuing authority responded, without explanation, by stating that he would not be imprisoned in Tulcea prison but in a different prison, namely, Margineni Prison where the conditions of imprisonment were said to be Article 3 compliant. Further information was then sought concerning how and why this change was now indicated and whether the court could be assured that he would not be imprisoned in Iasi prison in circumstances which amounted to a real or substantial risk of inhuman or degrading treatment or, if he were to be imprisoned there, whether the court could be assured that it would only be in conditions that were Article 3 compliant.

Prison Conditions in Romania

66. The general conditions under which prisoners are detained in Romanian prisons and detention centres gave rise to a number of applications for relief for violations of Article 3 before the European Court of Human Rights (ECHR). In *Rezmives & Ors. v. Romania* (Applications nos 6147/12,39516/13,48231/13 and 68191/13 -Judgment 25th June 2017) the ECHR considered a number of applications made in 2012 and 2013 concerning the conditions of detention in Romanian prisons and detention facilities attached to police stations. The many cases that were taken to the ECHR concerned the dreadful conditions in many Romanian prisons which it was held were systemic and not just confined to individual prisons. These cases did not relate to extradition or surrender under the

Framework Decision but provided relevant material which was and remains relevant to the consideration of any proposed surrender to Romania. It is relevant to this application that the prison conditions in Rahova and Iasi prisons were considered in the course of these applications.

67. In the course of its judgment the court recorded the history of issues concerning prison conditions in Romania. It is useful to note some of the evidence and materials addressed by the court concerning those conditions:

(a) On 7th May, 2012 the Committee of Ministers in a memorandum evaluated the general measures adopted for the execution of judgments in 93 Romanian cases related mainly to overcrowding and material conditions of detention in prisons and police detention facilities. The situation in police detention facilities (relating to pre-trial detention) was described as giving rise to "serious concerns" because in addition to overcrowding the cells were located in police station basements, had inadequate ventilation and access to natural light and opportunities for out of cell activities. The Committee of Ministers noted that significant additional measures were still required to ensure that police detention facilities afford conditions that were fully compatible with the requirements deriving from Article 3 of the Convention. The authorities were encouraged to transfer everyone detained on remand to prisons. More generally, overcrowding in the vast majority of Romanian prisons was also said to give rise to "serious concerns".

(b) On 12th February, 2015 the Committee of Ministers published a memorandum assessing the general measures to be taken in these 93 cases to resolve overcrowding and poor conditions of detention. Due to the continuing inadequacy of police detention accommodation the Romanian authorities were encouraged to provide appropriate living conditions in cells and to review the system of pre-trial detention on police premises and ensure that prisoners were not held in such facilities for extended periods and were transferred promptly to prisons. The measures introduced in the code of criminal procedure to reduce prison overcrowding and in particular, house arrest, a provision for the suspension of sentences and discharge did not appear likely to contribute to a significant reduction in the prison population. It concluded that Romanian prisons were still severely overcrowded and that material conditions were "precarious". It was recommended that the Romanian authorities diversify the range of alternative measures to imprisonment and relax the conditions of access to conditional release, ensure a proper functional probation service and continue with plans to modernise the prison estate.

(c) In the seventh general report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (22nd August, 1997), the Committee referred to situations of overcrowding in Romanian prisons and unhygienic accommodation. It noted a lack of privacy and reduced out of cell activities due to demand outstripping the staff and facilities available.

The health care services were overburdened and there was increased tension and therefore more violence between prisoners and staff. The adverse effects of overcrowding had resulted in inhuman and degrading conditions in detention. The CPT visited various Romanian prisons and police detention facilities in 1995, 1999, 2001, 2002, 2003, 2004, 2006, 2009 and 2010. These reports recorded significant overcrowding and poor hygienic conditions in the facilities visited. In its report published on 24th November, 2011 following a visit to Romania between the 5th to 16th September, 2010 the CPT gave a detailed overview of the situation encountered in various police detention centres. It found overcrowding and a poor state of repair, restricted access to natural light and ventilation. Some detainees and some facilities were given only one meal a day and food was of poor quality. In some facilities detainees were kept in their cells for 23 hours a day.

68. The same report contained observations on the facilities at Poarta Alba prison. It issued a number of recommendations in respect of that prison. From 5th – 17th June, 2015 a CPT delegation visited a number of police detention facilities and four prisons including Bucharest Rahova. Its report was published on 28th September, 2015. In respect of detention conditions in the prisons it visited (Arad, Oradea, and Targsor), the CPT noted that overcrowding remained a significant problem and recommended that the Romanian authorities redouble their efforts to develop a penal policy placing emphasis on noncustodial measures. In respect of prisons, the CPT recommended a number of measures in light of its observations namely:

"58. - review cell occupancy rates in order to guarantee a minimum of four square metres of living space per detainee in shared cells not including sanitary facilities (Oradea and Targsor prisons);

- Carry out the necessary renovation repair works in wings at Oradea prison and ensure that any damaged furniture and mattresses are replaced;

- Guarantee that all detainees in E3 at Oradea prison and in the darker closed regime cells at Targsor prison have sufficient access to natural light and adequate ventilation in the cells during the day time;

- Access to artificial lighting should also be improved in the closed regimes at Targsor prison: solutions should be found to avoid keeping the light on all night for example by installing night lights;

- Carry out regular de-infestation of the buildings at Arad prison."

- Cells at the prisons visited should be provided with signalling systems.

- Sanitary facilities at the prisons required repair and renovation and prisoners should be provided with sufficient personal hygiene products and detergent to clean their cells.

69. The court reviewed its lengthy history of engagement with the Romanian prison system and the numerous applications from inmates and violations of Article 3 of the Convention made by detainees and prison inmates. It stated:

"106. The court notes that the first findings of a violation of Article 3 of the Convention on account of inadequate detention conditions in certain prisons in Romania date back to 2007 and 2008 (see *Bragadireanu v. Romania* No. 22088/04, 6th December, 2007, and *Petrea v. Romania* No. 4792/03, 29th April, 2008) and that since the adoption of the judgments in question there has been increasing numbers of such findings. Between 2007 and 2012 there were 93 judgments finding violation; most of these cases like the present ones, concerned overcrowding and various other recurrent aspects linked to material conditions of detention (lack of hygiene, insufficient ventilation and lighting, sanitary facilities not in working order, insufficient or inadequate food, restricted access to showers, presence of rats, cockroaches and lice, and so on).

107. Having regard to the significant inflow of cases concerning the same subject the court found it necessary in 2012 to issue guidance to the Romanian authorities under Article 46 of the Convention. The existence and extent of the structural problem identified by the court in *Iacov Stanciu* … justified the indication of general measures to improve the material conditions in Romanian prisons, in combination with an adequate and effective system of domestic preventive and compensatory remedies, in order to achieve full compliance with Articles 3 and 46 of the Convention (see *Iacov Stanciu*, … 195 – 199).

108. At the same time the Committee of Ministers has twice assessed the general measures adopted by the Romanian authorities in response to the Court's findings, and this conclusion only served to confirm the worrying state of affairs in the vast majority of Romanian police detention facilities and prisons, which continue to be beset by severe overcrowding and precarious material conditions. The Committee of Ministers found that additional measures were needed in order to set up an adequate and effective system of remedies (see para. 47 above). The reality of the situation is also confirmed by the latest CPT reports, emphasising the significance of the problem with overcrowding in the Romanian custodial facilities. The same reports note that police detention facilities are inappropriate for prolonged periods of detention as they are generally overcrowded, have no direct access to a toilet and are poorly ventilated and unhygienic. The CPT has also found that overcrowding is a persistent problem in Romanian prisons, at some of which it has noted a lack of hygiene, insufficient lighting and ventilation, sanitary facilities not in working order, inadequate food and insufficient socio cultural activities (see paras. 52-54 above). All these findings are also borne out by the recommendations of the Peoples Advocate, who, after visiting certain prisons, called on the prison authorities to put an end to overcrowding, poor hygiene conditions, the lack of a canteen, the presence of rats, mice and bed bugs and the lack of partitions for toilets, and also urged

them to provide drinking water and sufficient furniture and to allow access to working showers (see paras. 34-40 above).

109. More than four years after identifying the structural problem, the court is now examining the present cases having already found a violation of Article 3 of the Convention in 150 judgments on account of overcrowding and inadequate material conditions in several Romanian prisons and police detention facilities. The number of findings of convention violations on this account is constantly increasing. The court notes that as of August, 2016, 3,200 similar applications were pending before it and that these would give rise to further judgments finding violations in the convention. 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 (see *mutatis mutandis, Broniowski*, cited above, para. 193).

110. 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 the future. Despite the legislative administrative and budgetary measures taken at domestic level, the structural nature of the problem identified in 2012 still persists and the situation observed thus constitutes a practice that is incompatible with the convention (see, *mutatis mutandis Torreggini & Ors*. cited above para. 88).

111. Having regard to that state of affairs the court considers that the present cases are suitable for the pilot judgment procedure ..."

70. The court made a number of recommendations as to the measures to be taken to reduce overcrowding and improve the material conditions of detention in Romanian centres of detention and post-conviction imprisonment. The court concluded that within six months from the date upon which the judgment became final the Romanian government must provide in cooperation with the Committee of Ministers a precise timetable for the implementation of the appropriate general measures to remedy the prison conditions the subject of the matter of the litigation.

71. In the course of the Rezmives judgment the court noted the government's submissions at para. 96 and 97 concerning steps taken to remedy prison conditions. The government submitted that the existing legislative framework including law no. 254/13 afforded an effective preventive remedy in respect of material conditions of detention. This remedy consisted in applying to the post sentencing judge to order the prisons concerned to provide detainees with the minimum accommodation standards as laid down in the court's case law. With a view to executing the relevant judgments the ANP recommended that the prison transfer certain prisoners to other cells or other prisons. The government submitted 22 examples of domestic decisions including 19 in which different prisons had

been ordered to guarantee prisoners four square metres of living space and three in which prisons had been required to take particular action such as repairing furniture in an applicant's cell. The government submitted that the aims of the general measures set out had been to reduce the number of prisoners, to encourage noncustodial sanctions and increase the capacity of detention facilities and improve conditions. The government was however conscious that there were still gaps which needed to be filled before the existing system complied with convention standards and detention conditions. It claimed it had made efforts to tackle overcrowding and was continuing with a modernisation and investment plan. This included a plan to improve detention conditions. There was a projected investment totalling €838.45million to be shared between the ANP, the National Probation Service and the Ministry of the Interior during 2016 to 2023. By the end of 2023, 10,895 new places for detainees would be created, 1,651 places will be modernised and 5,847 staff will be recruited by the ANP. Notwithstanding these submissions and other improvements which the government contended made it inappropriate to apply the pilot judgment procedure, the court nevertheless concluded that it was necessary to do so. The court, while acknowledging these developments observed that despite these efforts the occupancy rate in Romanian prisons remained very high which was confirmed by the findings of the People's Advocate, the Committee of Ministers and the CPT. The judgment in Rezmives was delivered on 25th July, 2017.

72. The CPT submitted in the course of these proceedings is dated 19th March, 2019 following a further visit to Romania between 7th and 19th February, 2018. In its executive summary the CPT noted positively the efforts made to reform the prison system since 2014 and in particular, the development of a probation service, the reduction in prison population by some 30% as well as the introduction of some compensatory remedies for inmates held in overcrowded conditions. It noted that prison overcrowding was not evenly spread among or within prisons, the most serious levels being observed in closed regime, retrial and admission quarantine cells. It stated that the reform agenda of the Romanian authorities should aim to ensure that all prisoners are held in decent conditions and provided with a minimum of four square metres of living space each (excluding the sanitary annex).

73. The court received an affidavit and report from Mr.Bunariu Danut-Ioan, an experienced criminal lawyer in Romania which addressed prison conditions in Romania. He cites evaluations carried out by the Ministry of Justice which issues orders from time to time listing prisons with improper or sub-standard conditions.

74. He referred specifically to Rahova Prison to which the respondent will likely be committed following surrender if refused bail pre-trial - in effect the prison where he would be received and detained for processing following surrender. He concluded that the general prison conditions in Rahova were "rather satisfactory save for overcrowding " and some hygiene issues concerning the cell accommodation. The respondent would be no more than 180 days in custody on remand. If conditions are unsatisfactory there is a compensatory appeal mechanism which affords the possibility of a reduced term of imprisonment whereby he might serve less time as a result.

75. The Romanian Ombudsman for Prisons prepared a draft report in 2018 which highlighted overcrowding as a major concern. There were a number of cases domestically in which inmates succeeded in securing the minimum space of 4 square metres.

76. The issue concerning allegedly deficient conditions of detention at Rahova prison have not been pursued during the course of this hearing and no issue is said to arise under Article 3 in respect of the respondent's proposed detention there.

77. Mr.Danut-Ioan also stated that if the respondent were to be convicted of the offences for which his surrender is sought and received a sentence of imprisonment of thirteen years or more, he would likely be sent initially to the nearest maximum security facility. Article 11 par.(5) of the Romanian Prison Law no 254/2013 stipulates that in principle the convicted prisoner should be placed in a prison that is closest to his Romanian domicile. The Romanian domicile set out in the EAW is Neamt County, Romania. The closest prison with a maximum security regime to that address is Iasi Prison.

78. He sets out the conditions that prevailed in Iasi Prison as described in the Romanian Prison Ombudsman's report issued on 23rd January 2018. The prison was said to hold 1203 inmates in a prison designed to accommodate 730 prisoners. The occupancy rate for the prison was 137%. On 11th June 2019 the occupancy rate was 662 prisoners for 426 spaces and 17th June 663 prisoners – an occupancy rate of approximately 155%. This indicated a floor space per prisoner of less than 3 sq.m at that time. The overcrowding is said to be the main cause of other prison problems such as improper hygiene and inter-prisoner conflict and violence. He stated and it is clear from the extract of information set out in his report and recognised in the Order of the Ministry of Justice no.2773/17.11.2017 that the conditions in Iasi Prison are considered to be very poor. However, there is also a compensatory scheme in respect of such poor conditions whereby the prisoner may institute a compensatory appeal and his term of imprisonment may as a result be reduced. There have also been some cases in which inmates have secured judicial direction that the minimum space of 4 square metres be provided but these rulings have not always been properly executed: prisoners may be transferred to another prison regime or another prison.

79. On the basis of the materials initially submitted to the court I was satisfied that the relevant prisons in which the respondent will likely be detained if surrendered were Rahova Prison (the remand prison) and Iasi Prison post-conviction. Iasi Prison functions as a detention centre and a postconviction prison. It was the respondent's likely imprisonment postconviction in Iasi which was the main focus of the respondent's submission that if surrendered there was a real or substantial risk that his Article 3 rights would be breached.

80. In the CPT 2019 report Iasi prison is described as located in the city centre and accommodating 1087 inmates though having an official capacity for 697 places which was an occupancy rate of 156%. The occupancy rate is determined on the basis of allowing 4 square metres as the appropriate space per prisoner under Romanian regulations. At the time of the visit the prison held 967 adult male inmates. 167 were held in a maximum

security regime and 106 in pre-trial detention. The prisoners were held in two large accommodation blocks within an inner secure perimeter. A recently renovated adult male semi-open and open unit was not examined: it held 200 inmates. Though it is not entirely clear, it seems that the major works envisaged in the 2019 report have reduced the prisons capacity as now described by Mr.Danut-Ioan.

81. The Report noted a number of matters of general concern. There were a considerable number of allegations of physical ill-treatment of prisoners by members of the prison staff, notably by members of "masked intervention groups" in a number of prisons including Iasi. It noted that over-occupation may often lead to increased inter-prisoner violence. Prisoners in maximum security may spend up to 22 hours per day in their cells: the lack of contact and activity meant that this operated as a punishment additional to that imposed by the court and a review of this regime was recommended. Conditions in all prisons visited were poor including Iasi – this included flaking walls, humid conditions, poor access to natural light, inadequate ventilation, mould on sanitary annexes, rusting pipes and broken fixtures. Inadequate portions of food were provided.

82. Since the visit in 2018 the CPT received confirmation that Block A in Iasi Prison which accommodated 600 inmates in large, severely overcrowded dormitories had been closed down and would be demolished and a new block constructed.

83. Block B contained the maximum security unit. There was a need to renovate cells in many of which the sanitary annexes were broken, mattresses were infested and cockroaches were visible. Humidity in the cells meant the mattresses were often damp. It found that overcrowding in the cells was reduced considerably in the months prior to the visit. However, efforts needed to continue as a number of cells of 16 square metres accommodated five or six persons. The CPT recommended that Block B be renovated and that the occupancy levels be reduced to ensure that all prisoners are provided with a minimum of 4 square metres of living space each in multi-occupancy cells excluding the sanitary annex. Staffing levels and medical facilities were also criticised.

84. In its response to the CPT report the Romanian government stated that in 2018 repair work had been performed in 17 cells in Block B and it was expected that a new Block A to house 720 inmates in maximum security and closed systems or regimes would be open by 2022. In its response to complaints about limited living space the government noted that the case-law of the ECHR stipulated a minimum living space per person of 4 square metres. It also noted that in *Mursic v Croatia* [2015] ECHR 420, it was held that a living space of 3 square metres per inmate together with compensatory administrative measures with more out of cell time would not involve a violation of Article 3.

85. In *Mursic* the ECHR determined that the standard predominant in its case-law of 3 square metres of floor space per detainee in multi-occupancy accommodation was the relevant minimum standard under Article 3. It stated:-

> "137. When the personal space available to a detainee falls below 3 sq.m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space

is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent government, which could however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space…

138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if one of the following factors are cumulatively met:

(1) the reductions in the required minimum personal space of 3 sq.m are short occasional and minor…
(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities…
(3) the applicant is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention.

139. In cases where a prison cell- measuring in the range of 3-4 sq.m of personal space per inmate – is at issue, the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements…

140. The Court also stresses that in cases where a detainee disposed of more than 4 sq.m of personal space in multi-occupancy accommodation in prison and where therefore no issue with regard to the question of personal space arises, other aspects of physical conditions of detention… remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under Article 3…."

The 3 sq.m space excluded sanitary area space.

86. In *Minister for Justice and Equality v Tache* [2019] IEHC 68 (delivered on the 11th February, 2019) Donnelly J. considered the deficiencies in Romanian prison conditions under Article 3 in the context of the CPT report of 2018 and a detailed response to a request for information made by the court. It was accepted by the court that the Romanian government's response to the pilot judgment in *Rezmives* indicated that significant steps had been taken to address the concerns of the ECHR. The prison at Rahova was designated as the reception prison to which the respondent would be surrendered and the prison at Timisoara as the semi-open prison where he might be later imprisoned. There was an overall assurance that he would be provided with the 3 sq.m of floor space in each. The Chief Penitentiary Commissioner gave guarantees about other issues such as out of cell time, heating, ventilation, hygiene and sanitation. The court

held there was no cogent evidence to believe he was at a real risk of being subjected to inhuman and degrading conditions.

87. In *Minister for Justice and Equality v Iacobuta* [2019] IEHC 250 the same issue arose specifically in respect of Iasi Prison (paras 67 – 72). It was likely that the respondent would be committed to Iasi Prison on surrender following an initial 21 day detention for assessment. The prison was the focus of the *Rezmives* decision on the basis of overcrowding in 2010 and lack of ventilation, mould on the walls, poor quality food and bed bugs. The court in *Iacobuta* was provided with specific information about the cells at Iasi. The prisoner would have an individual bed and mattress. All cells had furniture for storage of personal items and the service of meals. Cells were ventilated and there was adequate natural lighting. Heating depending on the weather would be at an optimum temperature. There was no specific information about inhuman and degrading conditions at Iasi. It was submitted that the court had not been furnished with a guarantee that was sufficiently precise that the respondent would be provided with a minimum personal cell space of 3 sq.m. The court noted that the Chief Commissioner stated that the National Authority of Prisons currently guaranteed that the respondent would have a minimum cell space of 3 sq.m throughout his sentence. The court was satisfied that this guarantee by the prison authority to the Chief Commissioner applied to whatever prison might receive him. The court was satisfied that there was no cogent evidence that the respondent would be at a real risk of being subjected to inhuman and degrading treatment if surrendered and committed to Iasi Prison.

88. Though the CPT Report is dated 2019 the Committee's visit was in 2018. Mr.Danut Loan's evidence is somewhat more up to date in that it provides further information in respect of these prisons for 2019.

89. Following receipt of this information this court made a decision on the basis that there was specific, updated and reliable information that there is a real risk on account of deficiencies in the Romanian prison system that persons surrendered may be subject to conditions violating Article 3 of the Convention. It then made a request under s.20 of the 2003 Act, as amended and Article 15.2 of the Framework Decision to be provided with additional information in respect of prison conditions in Romania. By reference to the CPT report 2019 and the Romanian Prison Ombudsman's latest reports, updated information was sought regarding prison conditions in such prisons as the respondent may be held if surrendered and if convicted. In particular, updated information was sought as to:-

    (a) The minimum living space the Respondent will be held in and whether in a single or a shared cell:

    (b) The sanitary conditions which will be provided

    (c) The availability of natural light, artificial lighting and ventilation to prisoners:

    (d) The provision of clean mattresses and bedding:

(e) The provision of adequate and partitioned toilet facilities:

(f) The provision of basic hygiene products:

(g) The availability of outdoor exercise each day: and

(h) The provision of satisfactory food."

Assurances were sought by reference to the Ombudman's latest visits to the prisons that if surrendered the Respondent would be provided with a minimum of 4 square metres of living space with shared cells and would be provided with all adequate and basic facilities set out at (b) to (h) above. At this stage the request made no express reference to Iasi prison. Though information received suggested that it was the prison in which the respondent might likely be imprisoned if convicted under the maximum security regime, the Romanian authorities had not at this stage indicated that this would be so: the court considered it most likely on the basis of the Romanian lawyer's affidavit.

90. In response to this request a reply was received from the Romanian Bucharest Court First Criminal Division with information provided by the Ministry of Interior, General Inspectorate of the Romanian Police, on the 19th August 2019 relating to pre-trial detention. This stated that if surrendered the respondent would be imprisoned in a unit and detention room with an area of 9.2 square metres excluding the area of the restroom for two persons with a personal space of at least 4.6 square metres. He will be provided with an individual bed, mattress and bedding and storage and dining furniture. The room will have proper ventilation, natural lighting and appropriate heating and air-conditioning. He will have permanent access to running water and sanitary facilities. Each detention room is provided with a restroom with sink, toilet and shower, separated from the rest of the room to allow for personal hygiene in privacy with a PVC door with locking mechanism. He will be provided with three meals a day, an outdoor walk and psychosocial assistance during the detention. I am entirely satisfied from the information furnished in respect of pre-trial detention on the basis of all information and evidence received by the court, including the evidence of Mr. Danut-Ioan that the respondent if surrendered will not be at any or any real or substantial risk of a violation of his Article 3 rights if detained under these conditions during pre-trial detention.

91. The Prison Chief Commissioner Mr. R.C Cotofana in a report submitted to the Prison Police Chief Commissioner Mr.C Plesa, General Manager of the National Prison Administration and forwarded by the Bucharest Criminal Court by way of further response to the s.20 request addressed the possible prison regime applicable to the respondent were he to be convicted following his surrender. It also confirmed that pursuant to Article 11(5) of Law 254/2013 regarding the enforcement of penalties and custodial measures ordered by judicial bodies during criminal proceedings "the prison where the convicted person will serve the custodial sentence shall be established by the National Prison Administration. When establishing the prison, a location as close as possible to the place of residence of the convicted person should be considered, also taking account of the custodial system, the security measures to be taken, the social reintegration needs identified, sex and age".

It noted also that the following custodial regimes applied to convicts under the same law namely: maximum security system, closed custodial system, semi-open custody and open custody.

92. The maximum security system initially applies to persons sentenced to life imprisonment, persons sentenced to more than 13 years imprisonment as well as those who pose a risk to the security of the prison. Exceptionally, the nature and manner of committing a crime as well as the nature of the convict may cause him to be included immediately in the next lower custodial system. The report indicates that each sentenced prisoner is the subject of an assessment when committed to custody. The regime under which he is to serve the sentence will be designated after this initial assessment. The regime is determined by the application of a number of criteria including the duration of the custody order, his degree of risk, criminal record, age and health, conduct including conduct if previously imprisoned, identified needs and abilities including social, educational, cultural and psychological and his availability to work and participate in various programmes. It stated that it was not possible for the prison service to assess the custodial system or regime to which the respondent might be assigned or the prison unit where he might be incarcerated because "there is no information regarding the amount of the prison sentence".

93. The report also outlined the general facilities available to each sentenced person. It states that the National Prison Administration guarantees that during the entire sentence, the inmate will benefit from minimal personal space, including the provision of a bed and related furniture for storage and dining. The minimal personal space to be provided without including the space for a bathroom will be 3 square metres if the custodial sentence is served under a maximum safety system and the same area if served under any of the other regimes. The report stated that rooms provide adequate ventilation and natural lighting. There is appropriate heating and access to running and sanitary water to meet the inmate's needs. It states that the administration of each prison provides adequate conditions for the preparation, distribution and serving of food according to food hygiene rules. The report does not contain any reference to Iasi Prison.

94. The request for information was not specific to any particular prison. I was satisfied that it was likely that if convicted and sentenced for the more serious offences set out in the EAW following surrender that the respondent will be committed to a maximum security system or regime having regard to the main criterion applicable, namely, the nature of the sentence likely to be imposed. In addition, under the relevant law the prison to which he would be committed would likely, in accordance with Romanian law be that nearest to his domicile, Iasi Prison. A submission was made that the failure to address the conditions obtaining in Iasi Prison and address the important issues raised in Mr.Danut-Ioan's affidavit and report concerning that prison constituted a failure to provide the information requested by the court. Unfortunately, the precise issue raised in that affidavit in respect of Iasi Prison was not brought to the attention of the Romanian authorities when the request was made or prior to the receipt of their response. The affidavits exchanged in these proceedings were not as a matter of course furnished to the requesting authorities.

I did not consider that this constituted a failure by the authorities in Romania to address the information sought. I considered that a more focussed request for information in respect of Iasi Prison was required which I hoped would elicit a more focussed response directed specifically to issues arising in respect of conditions in Iasi prison and relevant to the issues raised under Article 3 about which the court expressed its concerns. By this stage it was clear that the court's focus was not on the prison conditions that prevailed throughout the Romanian prison system but in a specific way on Iasi prison, because that is where the evidence suggested he would be imprisoned: indeed the challenge to his surrender is not one based on a general proposition that prisons in Romania are not compliant with Article 3 but that Iasi prison is, that there is a likelihood or real possibility that he will be imprisoned there post-conviction and that this gives rise to a real or substantial risk of inhuman and degrading treatment.

95. The court has a statutory duty to make a request under s.20(1) if it not satisfied that the documentation or information provided to it was sufficient to enable it to perform its function under the Act, and to require the issuing judicial authority or Member State to provide it with such additional documentation or information within such period as it might specify. I was satisfied on the basis of the information and evidence furnished that it was likely that if convicted and sentenced to a period of 13 years or more the respondent would be required to serve his sentence under a maximum security regime in Iasi Prison. I was also satisfied on the basis of the information and evidence then available that if imprisoned in Iasi prison post-conviction there was a real risk that he would be subjected to inhuman or degrading treatment. I reached this conclusion notwithstanding the fact that the Romanian authorities state that the prison of confinement will not be determined until a preliminary assessment is made post-conviction and sentence. I did not consider that the response made adequately addressed the potential risk posed on the evidence to the respondent's Article 3 rights. There may well be reasons as to why the place of confinement may be changed in the course of a sentence in any jurisdiction. However, Romanian law favours serving the sentence in a local facility. I was satisfied that in order to fulfil the court's duty under s.37 and Article 3 it was essential that the court be furnished with "a specific assurance" that the respondent if surrendered and convicted would not be imprisoned in Iasi Prison or that if he were, it would only be under conditions that were Article 3 compliant.

96. If the former assurance was not forthcoming the court requested detailed information specific to Iasi prison concerning the minimum living space in which he would be held and whether he would be detained in a single or shared cell. In effect, the court sought the same information previously sought at paragraphs (a) to (h) of its first request but this time with specific reference to Iasi prison and requested that it should be supplied within two weeks from the date of request.

97. It was noted in the request that the Romanian authorities had no difficulty in addressing conditions specifically referable to Iasi Prison in the *Iacobuta* case. The information sought would assist the specific and precise assessment of any real or substantial risk of a breach of Article 3 and is in accordance with the focused approach to that issue as set out in

Mursic, ML, Dorobantu and other cases. I therefore directed that this further information be sought from the Romanian authorities in a ruling made on 11th November 2019.

98. The court also requested specific assurances that the conditions of imprisonment which were set out at paragraphs (a) to (h) would honour the respondent's Article 3 rights if the respondent were to be surrendered and detained in Iasi prison.

99. A response to this request dated 29th November 2019 was received by the court. It included a report from Emil Rancu, Director Prison Safety and Enforcement Regime of the National Administration of Penitentiaries at the Ministry of Justice which was addressed to Ms Viviana Onaca PhD the head of Department of the Department for International Law and Judicial Cooperation, Ministry of Justice. The report and response do not mention Iasi prison at all. Having recited the various types of regime within the prison system ranging from maximum security to open regime it states:

> "The detainee shall start serving the penalty in Tulcea Prison….Detention rooms in Tulcea Prison are equipped with
>
> - bathroom with access door from the detention room, equipped with one sink, one toilet and one shower;
> - natural lighting through a window sized 1.13m x 1.15m and artificial lighting with white neon light 4 x 18W;
> - natural ventilation in the room through the above-mentioned window and in the bathroom through a window sized 0.52m x 0.45m;
> - furniture made up of table, chair, clothes hook and shelves, with an area of 0.78 square metres."

100. The response then describes other features of detention in Tulcea Prison. It states that cold drinking water is available and warm water for bathing three times per week. There is a pest control regime in place. Personal clothes are washed weekly in the prison laundry. The regime ensures appropriate conditions for the preparation, distribution and serving of food in accordance with applicable food regulations and taking account of age, health, work undertaken and religious belief. Those prisoners who are not involved in work are provided with 4 hours daily walk: others engaged in work or other activities receive one hour's daily walk. A very detailed statement of the prison conditions applicable to each regime is set out. Though framed in terms which appear to be of general application, I am satisfied that the description provided relates to how each type of regime operates in Tulcea Prison. On the final page of the translated text the question of space allotted per prisoner is addressed. It states that

> "Against this background the National Administration of Penitentiaries guarantees that throughout the enforcement of the warrant based on which the detainee was transferred, he/she shall be granted a minimum individual space, including the bed and the furniture belonging to it , without however including

the lavatory, depending on the enforcement regime [of] ….3 square meters….The penitentiary system ensures the proper exercise of rights as provided for in the applicable legislation"

101. The space issue is therefore the subject of an assurance that the area in which the respondent will be confined even if transferred will comply with minimum Article 3 standards; though the source of the assurance is a branch of the executive, it is transmitted by the issuing judicial authority in response to a request for information. It must be taken into account in my assessment of the relevant risk. I consider that this constitutes an assurance by the Romanian prison authorities that the respondent's Article 3 rights will be respected wherever he is imprisoned during any sentence imposed. It pointedly does not give any assurance that he will not be detained in Iasi prison at any stage during his sentence.

102. Mr.Burnaru Danut-Ioan supplied a further affidavit commenting on this response dated 14th December 2019. He averred that Tulcea Prison has for the most part proper detention conditions subject to some reservations about overcrowding and other matters in one of its units and lack of fresh air activities in another. He stated that though Tulcea prison is further away from the respondent's domicile than Iasi prison (130 Km as opposed to 84 Km) conditions there were far better than in Iasi prison and concluded that this might be the reason it was chosen by them for the execution of his sentence if convicted. He noted that even if he started his sentence there he could be transferred to another prison for various reasons under Law 254/2013 (par.6 of his exhibited report). He was not aware of any case in which the Romanian authorities had undertaken that a sentence would be executed in a specific prison and did not honour the undertaking.

103. In the response it is stated that the respondent if convicted would "start" serving his sentence at Tulcea prison. I was concerned that the response did not provide the assurance requested that the respondent would not be detained during the course of any sentence imposed in Iasi prison and that this court was not provided with information as set out in the request at paragraphs 2(a) to (h) and the assurance sought in paragraph 3(a) to (h). The response makes no reference at all to these specific and precisely formulated paragraphs in the request for information. It is said that this assurance is to be implied from the latest response furnished. I am asked to infer that the respondent will not be incarcerated in Iasi prison from the fact that it is now said for the first time and without any prior indication that this was even a possibility, that he will start to serve his sentence in Tulcea prison. It was legally possible that he might be transferred from Tulcea prison to another prison or indeed to Iasi prison at some future date during his sentence. Indeed the legal position as previously outlined to the court is that Iasi prison being his local prison is as a matter of Romanian law the prison to which he would first be committed following sentence: however, I am told without explanation that this will not be so. It would have been very simple to indicate to the court that he would not be detained in Iasi prison or that if he were, to assure the court that his conditions of confinement there would not violate his right not to be subject to inhuman or degrading treatment either by reference to the information requested or by means of an assurance

to that effect or indeed both. Indeed the information previously supplied indicated that a building and renovation programme at Iasi was under way and may well be concluded within the next two years which suggests that such an assurance could have been considered.

104. If the respondent were to serve any sentence imposed at Tulcea Prison, the evidence and information furnished satisfied me that his imprisonment there would have been under conditions that respected and protected his right not to be subject to inhuman or degrading treatment. It might of course have been appropriate to transfer him to another prison for any number of reasons during the course of any sentence imposed and I was satisfied from the information furnished that any such transfer would preserve and respect his Article 3 rights. However, if that meant that there was a possibility that he could be transferred to Iasi Prison on the information presently available that would give rise to a real or substantial risk to those rights. No specific assurance that he would not be incarcerated in Iasi prison was given. I considered that it was important having regard to the history of deficiencies in conditions in Iasi prison and the findings in that regard which led to the court's request for information and the history of the requests made and information furnished that the ambiguity which arises from the latest information furnished as to whether the respondent would be required to serve any part of his sentence in that prison be addressed as a matter of urgency to enable this court to finally determine this case. I therefore submitted a further request for information to the requesting authority under s.20 to seek clarification to the effect that no part of any sentence to be imposed on the respondent would be served in Iasi Prison or that if it were to be served there that this court would be assured that the minimum space and conditions of confinement necessary to ensure that he is not subjected to inhuman or degrading treatment if so transferred would be provided. I did not consider this to be a request of the wide-ranging type seeking information on all prisons in Romania of which disapproval was expressed by the CJEU in its case-law: rather this is a focussed request which arises directly from the sequence of events and concerns outlined above in respect of conditions at Iasi prison.

105. On 20th January, 2020 the court made a further request for information seeking a specific assurance that the respondent would not serve any part of any sentence that he might receive if convicted in Iasi prison and failing that, detailed information concerning conditions of confinement at that prison and a specific assurance that those conditions if he were to be imprisoned there at any stage would be Article 3 compliant. Additional information which did not address any of these issues was received dated 23rd January 2020. The court was then informed inter alia:

> "Currently the National Administration of Penitentiaries scrutinizes the adequacy of re- structuring Tulcea Prison to house detainees in the half open and open enforcement regime…
>
> Against this background we inform you that safeguards offered to the British(sic) authorities in relation with aforementioned person shall be implemented in

Margineni Prison, a prison which specialises in the housing of detainees in the high security and closed enforcement regimes…"

106. This appeared to suggest for the first time and without any further explanation that it was proposed to detain the respondent, if convicted of an offence appropriate to the maximum security regime in Margineni Prison and not Tulcea Prison where it had been said he would "start" his sentence in previous information supplied. The court therefore sought further information by letter dated 6th February 2020, as a matter of urgency as to the reason for this abrupt change and detailed information about the conditions of confinement to which the respondent might be subjected in Margineni Prison in the terms originally set out in its original request for information.

107. A response to this request was transmitted by the issuing judicial authority which was compiled by Prison Chief Superintendent Marian Ilie for Mrs Viviana Onaca,PhD, Directorate for International Law and Judicial Cooperation, Ministry of Justice dated 18th February, 2020. This information suggests that an administrative decision was taken to limit the use of Tulcea Prison to categories of convicted person under a semi-open regime inapplicable to the respondent. This decision was apparently taken after the information furnished to this court that he would start his sentence in Tulcea Prison. The updated information indicated that if surrendered he would initially be detained in Rahova Prison as previously indicated. If convicted, should his sentence indicate that he would be assigned to a maximum security or closed prison regime he will be detained in Margineni Prison which specialises in the detention of such convicts. It has three wings and seven detention units. The details furnished provide sufficient information to satisfy the court that his confinement there would not give rise to any real or substantial risk of inhuman or degrading treatment. In reaching that conclusion I have considered the general assurances previously given as to the area of cell accommodation that will be afforded the respondent if imprisoned and which is reaffirmed in this information i.e. that the court has an assurance that a minimum individual space of 3 sq.m., including the bed and related pieces of furniture, without including the area reserved for sanitary facilities will be provided to him throughout the execution of the entire custodial sentence (p.10 of the additional information). I have considered that assurance with all other details provided concerning the facilities at Margineni Prison. These include the overall area of the various wings and description of the detention rooms provided. The detention room for each prisoner has a separate toilet accessed from the room and includes WC and washbasins. Other details furnished establish that appropriate furnishings and facilities, ventilation, lighting, exercise and nutrition are provided within a regime which is Article 3 compliant. The prison currently holds ten other prisoners subject to individual assurances given to other countries in respect of conditions of detention in respect of which it is said there have been no breaches notified to the National Administration of Prisons or by the prisoners. I have considered a further updated assessment from the respondent's Romanian lawyer on conditions in Margineni prison.

108. I have considered the manner in which this information emerged or was elicited from the issuing authorities and their consistent reluctance to engage with queries in respect of

Iasi Prison. It is difficult to understand why the court's questions in respect of Iasi Prison were not specifically addressed by the Romanian authorities. Very specific queries were raised and unanswered. The issuing authorities chose to give a general assurance that the respondent would be detained only in Article 3 compliant conditions rather than address the specific assurance sought or answer the questions raised in respect of Iasi prison. It was not done in my view in the open, frank and transparent way which should be the hallmark of dealings between the authorities of two Member States. The Romanian prison authorities had to be pressed for the assurances and information which they ultimately produced in a piecemeal fashion. However, it is clear that the Romanian authorities, when this court raised the concern that Iasi prison was not compliant with Article 3, endeavoured to produce an alternative compliant regime, however unsatisfactory the process they followed to achieve that result and communicate the ultimate decision to this court.

109. At this stage the court has been informed that the respondent will be detained in Article 3 compliant conditions in Margineni prison if it is determined that he is to serve a sentence which is appropriate to a maximum security regime. While the reluctance to deal specifically with Iasi prison may reflect continuing difficulties there as already outlined above, it may also indicate the state of development which is ongoing at that prison which also emerges from the various reports considered by the court including the building works (a new Block A) due to be completed in 2022. Be that as it may, I am satisfied on the basis of the present assurances given to this court that the respondent will not be detained at Iasi prison under a non-Article 3 compliant regime. It may be that after substantial rebuilding or renovation Iasi prison is made compliant with Article 3 which might properly result in the future transfer of prisoners there under a compliant regime.

110. I regard the assurance given by the issuing judicial authority that the respondent will be detained at Margineni prison as evidence that he will, if imprisoned following conviction, be detained under Article 3 compliant conditions. This includes an assurance that he will be imprisoned under Article 3 compliant conditions in any prison to which he may be transferred during the currency of any sentence imposed. I am satisfied to interpret and accept this assurance as constituting an assurance that he will not serve any sentence which may be imposed upon him at Iasi prison but will serve it in Margineni prison. If his transfer is contemplated for any reason to any other prison while serving a sentence at Margineni prison the court has been assured that it will be Article 3 compliant and that he will not be subjected to conditions that constitute inhuman or degrading treatment or give rise to any risk that this may happen. This in effect is an assurance that if now surrendered and convicted he will not be imprisoned in Iasi prison as that prison is, on the materials available, not Article 3 compliant at this time. It is open to the Romanian authorities once the renovation and/or completed to a standard that renders that prison Article 3 compliant to house prisoners there. That is not a matter that is or can be the subject of review by this court in these proceedings but it leaves open the possibility that the respondent could be transferred in the future to Iasi prison but only if it is at that time Article 3 compliant: to do otherwise would be a breach of the assurance given to this court on this application by the issuing judicial authority.

111. It is to be hoped that in any future applications for surrender by the Romanian authorities it will not be necessary to engage in the type of protracted search for information which should be very easily accessible. It is regrettable that the responses framed in respect of Iasi prison were of such a nature as to give rise inevitably to the necessity to requests for further information. The delay in processing this application was wholly avoidable by the requesting authorities had the prison authorities in Romania been more focussed in their responses: the difficulties that arose from their responses were not conducive to adherence to the time-frame for decision-making under the Framework Decision and frustrated the prompt processing of this application.

112. I am, notwithstanding these difficulties, satisfied that the respondent's surrender does not give rise to a real or substantial risk that he will be subject to inhuman or degrading treatment if convicted on the charges set out in the warrant.

Conclusion

113. I am therefore satisfied in all the circumstances that the respondent may be surrendered to the Romanian authorities in respect of the charges of creating an organised criminal group in order to commit murder and the offence of aggravated murder.