THE HIGH COURT

[RECORD NO. 2016 180 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

CORNEL IACOBUTA

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 20th day of March, 2019

1. This is an application for the surrender of the respondent to the Republic of Romania ("Romania") pursuant to a European Arrest Warrant ("EAW") dated 21st January, 2016 to serve an eight year sentence of imprisonment imposed upon him on the 16th April, 2015. This sentence was imposed in respect of four separate offences of rape, assault and two road traffic offences.

2. At the hearing, counsel for the respondent raised three core arguments:

a) an issue with the correspondence of one of the road traffic offences;

b) fundamental rights claims under Articles 3, 6 and 8 of the European Convention on Human Rights ("ECHR") arising from the respondent's treatment by the Romanian legal system and concern arising from Romanian prison conditions and;

c) an issue arising from the respondent's trial *in absentia* in Romania.

3. Before dealing with those matters, I must consider the uncontested issues:

A Member State that has given effect to the Framework Decision
4. The surrender provisions of the Act of 2003 apply to those member states of the European Union that the Minister for Foreign Affairs have designated as member states having, under their national law, given effect to the Framework Decision of the 13th June, 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). I am satisfied that the Minister for Foreign Affairs has designated Romania as a Member State for the purposes of the European Arrest Warrant Act of 2003, as amended ("the Act of 2003").

Section 16(1) of the Act of 2003
5. Under the provisions of s. 16(1) of the Act of 2003 the High Court may make an order directing that the person be surrendered to the issuing state provided that:

a) the High Court is satisfied that the person before it is the person in respect of whom the EAW was issued,

b) the EAW has been endorsed in accordance with s. 13 for execution,

c) the EAW states, where appropriate, the matters required by s. 45,

d) The High Court is not required, under s. 21A, s. 22, s. 23 or s. 24 of the Act of 2003 as amended, to refuse surrender,

e) The surrender is not prohibited by Part 3 of the Act of 2003.

Identity
6. I am satisfied on the basis of the affidavit Garda Brian MacLaughlin, member of An Garda Síochána, and the details set out in the EAW, that the respondent, Cornel Iacobuta, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
7. I am satisfied that the EAW has been endorsed in accordance with s.13 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003
8. Having scrutinised the documentation before me I am satisfied that I am not required to refuse the respondent's surrender under the above provisions of the Act of 2003.

Part 3 of the Act of 2003 as amended
9. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003 and having scrutinised the documentation before me, I am satisfied that I am not required to refuse the surrender of the respondent under any other section contained in Part 3 of the said Act.

Contested matters

Section 38 of the Act of 2003
10. Section 38 of the Act of 2003 provides for two situations in which surrender may be ordered for specific offences. If the offence is an offence referred to in para. 2 Article 2 of the 2002 Framework Decision then, provided the requirements of minimum gravity in terms of available sentencing powers have been met, there is no requirement to find correspondence for the offence set out in the EAW with an offence in this jurisdiction.

11. If the offence does not come within that list, correspondence of offences (double criminality) and a different requirement of minimum gravity must be shown. Section 5 of the Act of 2003 states that for the purposes of the Act, an offence specified in an EAW corresponds to an offence under the law of the state *"where the act or omission that constitutes the offence so specified would, if*

committed in the State on the date on which the EAW is issued, constitute an offence under the law of the State".

12. The issuing judicial authority has ticked the box of rape in point E(I) of the European arrest warrant. Ordinarily this is sufficient to establish that this is an offence to which Article 2 para 2 applies and correspondence is not required to be demonstrated. Unfortunately, the issuing judicial authority also completed point E(II) by including a reference to the rape offence. Point E (II) refers to a situation where a list offence is not being relied upon. In additional information, it was clarified by the issuing judicial authority that they were relying on Article 2, paragraph 2. I am satisfied that correspondence of this offence is not required as it is a ticked box offence. The provisions of minimum gravity are also met in respect of that offence.

13. The issuing judicial authority did not tick any box at point E (I) in respect of the other three offences. Correspondence/double criminality must be demonstrated in respect of these offences.

14. The factual description of the second offence is as follows:

> *"… on 20 November 2011, around 19.00 after the consumption of the offense of rape, more precisely after the parties met with the witness Popistasu Vasile, the accused applied blows with the fist to the aggrieved party Enescu Elena's mouth, causing lesions demanding 5-6 days of medical care for healing."*

15. The above facts outline an offence of assault. These facts, if committed in this jurisdiction would amount to an offence contrary to s.2 of the Non-Fatal Offences Against the Person, Act, 1997 (assault) and s. 3 of the said Act (assault causing harm). Given the information provided it is also arguably the case that this is an offence of recklessly or intentionally causing serious harm contrary to s. 4 of the said Act, but I do not have to determine that issue. I am satisfied that there is correspondence of offences. The provisions of minimum gravity have also been reached.

16. The factual description of the third and fourth offences is as follows:

> *"On 19 October 2008, he drove on the public roads of Dobrovat Town, the tractor U-650 M registered under plate no. DOBROVAT 017 IS, without possessing a driver's license and carried out sudden manoeuvres, which resulted in the overturning of the tractor, having as result the bodily injury of one of the passengers inside the tractor, passenger suffering from lesions demanding 40-45 days of medical care for healing. Soon afterwards, the convict left the scene of the accident."*

17. In Romanian law these offences are described as driving without a licence and leaving the scene of an accident. Section 38(1) of the Road Traffic Act, 1961 ("the Act of 1961") provides that "[*a] person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle."* I am satisfied that the 'driving without a licence' offence corresponds with an offence under s. 38 of the Act of 1961 in this jurisdiction. There is no issue with minimum gravity in respect of that offence.

18. The final offence raised a contested issue of correspondence. Relying on *Attorney General v. Dyer* [2004] 1 IR 40 counsel for the respondent submitted there was no correspondence with s. 106 of the Act of 1961. He submitted that the facts alleged did not fit within any subsection of the said s.106 which list the duties on occurrence of an accident. Furthermore, the respondent submitted that while he left the scene of the accident, he only did so to secure more help as the vehicle he was driving had overturned. The respondent contended that when he returned to the scene of the accident, the emergency services had arrived and he stated in his affidavit that he co-operated and subsequently attended the prosecutor's office. In those circumstances, the respondent contended that he could not lawfully be surrendered on this EAW, as the sentence for the four offences was an amalgamated one.

19. Section 106(1) of the Act of 1961 establishes a duty on the occurrence of an accident by stating that:

> *"where injury is caused to person or property in a public place and a vehicle is involved in the occurrence of the injury (whether the use of the vehicle was or was not the cause of the injury), the following provisions shall have effect:*
>
> *(a)…*
>
> *(aa) If injury has been caused to any person, or any person appears to require assistance, the driver of the vehicle shall offer assistance;*
>
> *(b) ….*
>
> *(c) the driver of the vehicle .... shall give on demand the appropriate information to a member of the Garda Síochána or, if no such member is present, to one person entitled under this section to demand such information.*
>
> *(d) if:*
>
> *(i) …. or*
>
> *(ii) injury is caused to a person other than the driver of the vehicle, the driver of the vehicle … shall, unless he had already given the appropriate information to a member of the Garda Síochána, report the occurrence as soon as possible to such a member and, if necessary, shall go for that purpose to the nearest convenient Garda station and also give on demand the appropriate information to the member."*

20. Point E of the EAW clarifies that the offence is committed in Romania where a person leaves the scene of an accident without permission of the investigating police officers if the accident resulted in the bodily injury of one or more persons, or if the accident occurred following the commission of an offence. In the present case, the respondent's passenger sustained bodily injuries and the respondent had committed the offence of driving without a licence. The facts reveal that the respondent admitted in his submissions that he left the scene before the emergency services had arrived. Further, in the additional information provided, the issuing judicial authority confirmed that "*the accused… left the scene of the accident, heading for his dwelling place, although the passengers of the tractor had been injured, later on motivating that he intended to look for an equipment to move the tractor off the road."* The additional information at paragraph 1.2 states that the respondent "*left the scene of the accident without informing the policeman….. [and] did not involve any policeman's permission*". The additional information also confirmed that the respondent did not inform the police until the next morning after the accident on the 20th October, 2008 at 11am.

21. The facts set out in the EAW and additional information therefore demonstrate that:

a) the respondent was the driver of a vehicle involved in an accident in a public place,

b) there was injury caused to a person other than the driver,

c) he did not report the occurrence to a member of the police as soon as possible because he did not inform the police of the accident until the next day when he went to the police station and

d) he did not render assistance to his injured passenger.

22. The respondent submitted that the Court must have regard to the facts that he sets out in his affidavit. That approach to assessing correspondence must be rejected. Section 5 of the Act of 2003 refers to the "*the act or omission that constituted the offence so specified…. [in the EAW]"*. It is therefore the facts in the EAW that must correspond to an offence in this jurisdiction. Indeed, to hold otherwise would require the executing judicial authority to act as a court of trial. Such an approach would be completely contrary to the scheme and purpose of the Framework Decision.

23. On the basis of the facts set out in the EAW and the additional information, the respondent's conduct, if committed in this jurisdiction would amount to an offence under s. 106(1) of the Act of 1961. I am satisfied that the conduct comes within s. 106(1)(d) of the Act of 1961. It appears also to come within s.106(1)(aa) of the said Act of 1961.

24. Counsel for the minister also put forward the alternative offence of 'careless driving' contrary to s. 52(1) of the Road Traffic Act, 1961. Section 52(1) of the Act of 1961 states that *"[a] person shall not drive a vehicle in a public place without due care and attention, or without reasonable consideration for other persons using the place*." The additional information provided that the respondent "*drove on the public roads of Dobrovat Town … and carried out sudden manoeuvres, which led to the overturn of the tractor, with the consequence of the bodily injury of one of the passengers of the tractor*." I am satisfied that this alternative offence would reach the threshold required by s. 52(1) of the Road Traffic Act, 1961 as making sudden manoeuvres which caused the overturning of the tractor is indicative of careless driving.

25. Furthermore, the making of sudden manoeuvres which leads to the overturning of the tractor amounts to inconsiderate driving contrary to s. 51(A) of the Road Traffic Act, 1961. Section 51(A) establishes the offence of 'Driving without Reasonable Consideration' which states that: *"[a] person shall not drive a vehicle in a public place without reasonable consideration for other persons using the place*." That is another offence to which the factual circumstances correspond.

26. The respondent has been sentenced for all these offences to a term of imprisonment in excess of the requirements of minimum gravity. In all the circumstances, I am satisfied that the surrender of the respondent is not prohibited under s. 38 of the Act of 2003.

Section 37 of the Act of 2003
27. The respondent raised two issues regarding a breach of his s. 37 rights; that the trials in Romania breached his fair trial rights contained in Article 6 of the European Convention on Human Rights and that being held in a prison in Romania would constitute a breach of his fundamental rights contrary to Article 3 and 8 of the European Convention on Human Rights.

Fair Trial Rights – Article 6 of the European Convention on Human Rights
28. In the respondent's submission and during the oral hearing, he alleged on the basis of his affidavit that he believed "*powerful individuals can influence the criminal process in Romania".* Specifically, in the respondent's affidavit he alleged that his case *"had been fabricated by Vasile Popistasu who was an official in [his] village*." This was presented as being a contention by the respondent that his trials in Romania were a breach of his fundamental fair trial rights in Article 6 of the European Convention on Human Rights.

29. Where a person claims that there has been a breach of fair trial rights in the issuing state, and that surrender would contravene a provision of the Constitution, the Supreme Court in *Minister for Justice and Equality v. Brennan* [2007] 3 IR 732 held that the mere fact that the legal system or system of trial in another jurisdiction differed from that envisaged by our Constitution would not mean that surrender would contravene our Constitution. Murray C.J. went on to state that:-

> *"That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."*

30. Judgment was given in the case of *Minister for Justice v. Stapleton* [2008] 1 IR 669 shortly after the decision in Brennan. The Supreme Court quoted with approval the *dicta* of Murray C.J. in Brennan. In *Stapleton*, Fennelly J. identified the principles of mutual trust and mutual recognition as being at the heart of the EAW system. Fennelly J. stated that the principle of mutual confidence was broader than the principle of mutual recognition. Mutual confidence encompassed the system of trial in the issuing state. It followed therefore that the courts of the executing member state, when deciding whether to make an order for surrender, must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "*respect human rights and fundamental freedoms*". Fennelly J. went on to link the requirement the need to find a clearly established and fundamental defect in the system of justice of the requesting State, to both a claim under constitutional and Convention breaches.

31. In *Stapleton*, what was at stake was a trial in the future, i.e. after surrender. In the case of *Minister for Justice and Equality v. Rostas*, [2014] EHC 391, the High Court (Edwards J.) addressed a claim that the original trial had been unfair in the issuing state. Edwards J. stated as follows at para. 87: -

> *"In Minister for Justice, Equality and Law Reform v. Marjasz [2012] IEHC 233, (unreported, High Court, Edwards J., 24th of April, 2012) this Court acknowledged that, notwithstanding the principle of mutual recognition, it might be possible, in an exceptional case, for a respondent to resist surrender on foot of a European arrest warrant seeking his or her surrender for the purpose of executing a sentence, on the basis that the underlying conviction was the result of an unfair trial. However, I went on to state: "The Court would add, however, that this jurisdiction is likely to be exercised very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that*

there was a truly egregious unfairness in the circumstances of the underlying trial, and where there is also evidence that all possible remedies / avenues of review / appeals in the issuing state have been tried without success and have been exhausted.

It follows from what the Court has just said that in a conviction case the Court will, in general, be most reluctant to engage in any review of the trial process leading to the conviction on foot of which the warrant is based to determine whether it was fair and lawful. The default and starting position in all cases will be that the Court must proceed upon a presumption that the trial leading to the conviction in question was fair and respected the respondent's fundamental rights, and that in the event of him having some complaint in regard to the fairness of the trial that led to his conviction that it was incumbent upon him, at the material time, to seek an effective remedy in regard to that before the courts of the issuing state."

32. This Court applies the above *dicta* in its consideration of this matter. In order for this respondent to establish that his surrender is prohibited under s. 37 of the Act of 2003, he must establish that there was an egregious breach in the system of justice in the issuing state. The respondent must satisfy the Court that he has no remedies as regards that breach in the issuing state such that it would be egregious to surrender him.

33. The only evidence presented by the respondent in his written and oral submissions was the allegation contained in his affidavit. I am satisfied that this evidence falls far short of the required standard of proof, as this evidence does not reach the level of egregious circumstances which would require the Court to set aside the presumption applicable to a trial that has been conducted in a member state of the European Union.

34. In the circumstances, I am satisfied it has not been established that the respondent's surrender is prohibited under s. 37 arising out of any allegation that his trial or trials were unfair.

Inhumane and Degrading Treatment and Personal Rights

Articles 3 and 8 of the European Convention on Human Rights
35. The respondent made written and oral submissions that owing to the prison conditions in Romanian prisons, there were reasonable grounds for believing that he will be exposed to

(i) inhumane or degrading treatment in breach of 37(1)(c)(iii)(II) of the Act of 2003 and Articles 3 of the ECHR, and/or

(ii) An impermissible interference with the respondent's rights to family and private life under article 8 of the European Convention on Human Rights.

Inhumane and Degrading Treatment: Article 3 of the European Convention on Human Rights
36. In the recent case of Minister for Justice and Equality v Tache [2019] IEHC 68 this Court dealt with a claim that the conditions in Romanian prisons violated Article 3 of the European Convention on Human Rights. The Court set out the applicable legal principles at paras 33-38. Those principles apply in the present case.

The Evidence
37. Much of the evidence in this case was the same as that presented in the Tache case. Although there will of necessity be repetition in this judgment, it is appropriate to set out the consideration this Court has given to the evidence and the issues raised in the present case.

38. At the initial hearing, counsel for the respondent relied on a pilot judgment, *Rezmives and Others v Romania* [2017] ECHR 378, that identified a number of concerns about prison conditions in Romania. Counsel for the minister submitted at the oral hearing that the evidence on prison conditions in the pilot judgment was not sufficiently recent. This Court could not ignore, however, a pilot judgment from the European Court of Human Rights. A pilot judgment represents a very specific decision taken by that Court in the face of numerous cases which have demonstrated persistent and systemic breaches of Article 3.

39. The pilot judgment made reference to a number of reports produced by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"). These reports appear to identify systemic issues of significant overcrowding and poor hygiene conditions in the facilities the CPT visited. The most recent CPT report was undertaken in 2015. This pertained to four prisons located in Arad, Oradea, Târgºor and Bucharest-Rahova as well as a number of police detention facilities. The 2015 CPT report found that similar poor conditions, such as overcrowding, dilapidation, lack of hygiene, and insufficient natural light and ventilation, continued to exist in Târgºor and Bucharest-Rahova prisons.

40. The pilot judgment at para 97, identified a number of steps taken by the Romanian authorities to address the concerns highlighted by the CPT and previous jurisprudence of the European Court of Human Rights. These measures include increasing the number of probation officers with a view to reducing the prison population and an investment plan totalling over 8 million Euro aimed at modernising prison conditions and building new prison places. This plan was stated as being in progress and to be completed by 2023.

41. The ECtHR in their pilot judgment discuss the developments adopted by Romania in response to their prison issues at paragraphs 113 to 116. At paragraph 116, the ECtHR expressly welcomed the improvement plan adopted by Romania. The ECtHR however, found a violation of Article 3 of the ECHR on the basis that in the individual case before the court, the Romanian authorities had not been able to remedy the violation given that the case had occurred before the improvement plan had delivered a sufficient level of improvement. In their judgment, the ECtHR noted that there were general measures that needed to be adopted by Romania in order to bring their prison system up to minimum human rights standards. Firstly, there was a need for Romania to address their overcrowding problem by reducing the prison population and/or building new prison spaces. Secondly, there was also a need for rapid remedies for those faced with a breach of their fundamental rights by ensuring that there is a means to put an end to violations of human rights occurring in Romanian prisons.

42. In light of the pilot judgment, this Court requested further information under s.20 of the Act of 2003. The Court did so on the basis that the decision amounted to specific, updated and reliable information that there is a real risk on account of systemic and generalised deficiencies in the Romanian prison system that persons surrendered may be subjected to conditions violating Article 3. The request sought confirmation of the prison to which the respondent would be sent, the name of the prisons and/or prison detention facility he would be sent to should he be entitled to a retrial, and whether alternative measures to detention would apply if he secured a retrial. The request sought assurance that the respondent, if surrendered:

i. will be kept in a prison with 4m2 of living space in shared cells;

ii. will be kept in a prison with adequate sanitary conditions;

iii. will have access to natural light and artificial lighting and ventilation;

iv. will be provided with clean mattresses and bedding;

v. will be provide with adequate and partitioned toilet facilities;

vi. will have access to basic hygiene products;

vii. will have outdoor exercise of at least one hour a day;

viii. will be provided with satisfactory food.

43. The issuing state replied with further information and assurances. At the hearing that took place subsequent to the receipt of the reply, the Court asked the parties to address the Romanian response to the Committee of Ministers as required by the pilot decision of the European Court of Human Rights. The Romanian Government's response identified a firm timetable of measures aimed at addressing the concerns raised by the European Court of Human Rights. This timetable of measures identified two core components of the Romanian Government plan at paragraph 10; "*increasing prison capacity and reducing the number of detainees*." This action plan is an attempt by the Romanian authorities to address the concerns found by the ECtHR on their prison conditions.

44. At paragraph 20, the Romanian Government state that they will adopt a two pronged to improve their prison conditions:

> " *(i) administrative measures to reduce overcrowding and improve the material conditions of detention,*
>
> *(ii) legislative measures to ensure an efficient remedy for the damage caused such as a preventative and a specific compensatory remedy."*

45. Prior to the pilot judgment, the administrative measures included the creation of 672 new prison places in 2016, a further 170 new prison places in 2017 and the modernisation of 200 existing prison places in 2017. Post the pilot judgment, the Romanian authorities stated that the administrative measures include the approval of the construction of a new prison capable of housing 1000 inmates. The Romanian authorities stated that the procurement process for the construction of this prison was in progress. The Romanian authorities also stated that they have taken a decision to acquire two existing buildings held by the Ministry of Defence with a view to transferring them to their National Prison Authority so that a further 900 new prison spaces could be created. The response stated that at the date of the timetable this development was at the design stage prior to construction. Additionally, the Romanian authorities stated there is a "*repair and maintenance works conducted each year within the prison system which aims at upholding the standards of the conditions of detention, both in respect of detention rooms and in terms of auxiliary spaces*" used for "*hallways, clubs dining rooms, medical practices, educational spaces..".* (para 29). Other administrative measures identified include the allocation of public funds to allow for the construction of new prisons capable of housing 5,110 inmates to be started in 2019 and to be completed by 2023.

46. In addition to the administrative measures, the Romanian authorities catalogued a number of legislative developments aimed at improving prison conditions. Prior to the pilot judgment these included new rules on cleaning and personal and collective hygiene, a new direction on the equipment provided to prisoners housed in detention facilities, the provision of hygiene kits to persons deprived of their liberty upon admission into detention facilities and a profiling of detention facilities so that they accurately match the needs of prisoners. Post the pilot judgment, the Romanian authorities stated that new laws were enacted to allow for a compensation remedy for inmates housed in improper places which allowed for 6 days actually served to count as 30 days served. Other legislative measures include the enactment of laws providing for minimum mandatory rules on the conditions of accommodation of persons deprived of their liberty and the minimum standard of food to be provided to prisoners.

47. At paragraphs 12-14, the Romanian Government stated that on the 1st February, 2014 a new Code of Criminal Procedure and three pieces of legislation, Laws 213/2013, 254/2013 and 252/2013 were also enacted to support their plan to reduce the size of their prison population. These laws along with the new Code provide the judiciary with a greater range of non-custodial sentencing and probation options in addition to affording the prison authorities new powers to ensure they can implement the new criminal law measures. Alongside this development the Romanian authorities have undertaken a review of their criminal laws and have adopted measures to "*decriminalising those crimes which do no entail… social danger", "establishing sufficient instruments for the determination of penalties", "facilitating the diversion from the penitentiary system … such as [adopting a] suspension of a sentence on probation", "providing for alternatives to pre-trial detention", "replacing in some cases the imprisonment penalty with alternative measures", "extending the possibility for conditional release", the use of "alternative measures to imprisonment" and the "sanctioning of minors" with imprisonment as being "absolutely exceptional".*

48. The specific timetable of measures for improvements was also outlined by the Romanian authorities in their communication. This timetable categorises prison places into four groups.

> i. Firstly, the timetable stated that high security enforcement regime prison places were proper given that all prison floor spaces ranged between 3 and 4 m2. Therefore, their timetable states that for this category of prison accommodation, the focus is on improvement.
>
> ii. Secondly, those prisoners housed in 'closed enforcement regimes' had a deficit of 1,087 spaces to allow for a floor space of 3 and 4 m2. The Romanian authorities stated that their focus here is on reducing the prison population through their legislative measures and also building new facilities.
>
> iii. Thirdly, those prisoners housed in 'half open enforcement regimes' had a deficit of 3,013 spaces to guarantee 4m2 or a deficit of 1,206 places to guarantee 3m2. The Romanian authorities stated that their plan focuses on improving conditions and reducing the prison population.
>
> iv. Fourthly, those prisoners housed in 'open enforcement regimes' do not have a deficit and as a result the focus here is on improving existing conditions.

49. In its reply to the request for further information from this Court, the issuing state sent a response from the Chief Commissioner of Prisons, Razvan Constantin Cotofana, ("Chief Commissioner"). This response was headed "*Ministry of Justice, National Authority of Prisons*". The Chief Commissioner stated that if the respondent was surrendered he would be initially sent to Burcharest Rahova Prison for a period of 21 days for quarantine during this time he would have a cell of at least 3m2. The Chief Commissioner confirmed that during this initial 21 day quarantine, the respondent would be entitled to "*all of the rights provided for under the law for the execution of punishments*." He would attend a programme of adapting to imprisonment conditions.

50. The Chief Commissioner noted that upon the completion of the 21 day quarantine, the respondent would most likely be sent to Iasi City Prison to begin his punishment. The Chief Commissioner confirmed that the precise prison designation is undertaken by members of a speciality board by assessing each prisoner individually. A variety of factors are taken into account when making their determination.

51. The information provided further details of the cells and also described how the execution regimes of punishment was based on progressive and regressive systems whereby prisoners pass from one regime to another as stipulated by law. After the execution of a fifth of the punishment there is a reassessment with a view to changing the regime. It was stated that depending on conduct the respondent would most probably be transferred to Botosani City Prison. The content of the assurances will be further discussed below.

52. In the respondent's second affidavit, he exhibited a medical report that detailed a work placed injury sustained on the 03rd September, 2015. This general medical report provided details of a back injury that caused the respondent 'moderate' difficulties with lifting/carrying, bending/kneeling/squatting, sitting, standing, climbing stairs and walking. The medical evidence consisted mainly of a series of medical notes and some very brief reports. At no point did the authors of the report engage with the effect extradition and in particular the effect the alleged deficiencies in the Romanian prisons would have on his medical condition. As a result, this Court cannot discern any specific impact that his medical condition would have on him if he were to be surrendered.

Discussion and Analysis on Article 3 of the European Convention on Human Rights

53. In accordance with the decision in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45 this Court must examine the evidence before it in a rigorous fashion. The height of the respondent's case was the pilot judgment itself. As pointed out above, that pilot judgment acknowledged that certain improvements had been made since the date of the detentions at issue in that case. The Court must also consider the subsequent response of the Romanian Government to the Committee of Ministers as required by the pilot judgment. That response identified a series of actions already taken to begin addressing the problems raised in the judgment and also a firm timetable of subsequent measures to be taken. Finally, the Court must have regard to the unchallenged information which has been received from the issuing judicial authority for the purpose of discounting any risk to this individual. These have been given in accordance with the procedure identified by the CJEU in *Aranyosi and Cãldãraru* (C-404/15) and provided for by Article 15(2) of the Framework Decision as implemented by s. 20 of the Act of 2003.

54. It is evident from the Romanian Government's response to the pilot judgment that they have put in place procedures to address the concerns highlighted by the European Court of Human Rights. This Court must sift carefully through that information. In so far as it refers to prison places to be built in the future, the Court cannot act on the basis that these are *in situ* now. In the view of this Court, however, the response demonstrates that significant steps have already been taken to reduce overcrowding.

55. This Court must also take into account the jurisprudence of the ECtHR and the CJEU in determining whether the evidence of general conditions to date but more specifically, the additional information given by the issuing state, can now be considered as being sufficient to comply with Article 3 of the European Convention on Human Rights. In *Mursic v Croatia* [2015] ECHR 420, building upon the earlier decision *Ananyev v Russia* [2012] 55 EHRR 18, the ECtHR confirmed that

> "*Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour*." (para 96).

56. Further, the ECtHR in *Mursic* stated that:-

> *"[i]ll-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim."* (para 97).

57. In the context of prison overcrowding, the ECtHR determined that

> *"the standard predominant in its case-law of 3 sq. m of floor surface per detainee in multi-occupancy accommodation as the relevant minimum standard under Article 3 of the Convention."* (para 136).

58. The ECtHR went on to state that:-

> "*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. (see paragraphs 126-128 above).*
>
> *138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:*
>
> > *(1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor (see paragraph 130 above):*
> >
> > *(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities (see paragraph 133 above);*
> >
> > *(3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention (see paragraph 134 above).*

139. In cases where a prison cell - measuring in the range of 3 to 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 (see paragraph 106 above). 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 referred to above (see paragraphs 48, 53, 55, 59 and 63-64 above) remain relevant for the Court's assessment of adequacy of an applicant's conditions of detention under Article 3 of the Convention (see, for example, Story and Others v. Malta, nos. 56854/13, 57005/13 and 57043/13, §§ 112-113, 29 October 2015)."

59. The CPT has set out minimum standards for personal living space in prison establishments as 6m2 of living space for a single occupancy cell + sanitary facility and 4m2 of living space per prisoner in a multiple occupancy cell + fully-partitioned sanitary facility (see Living space per prisoner in prison establishments: CPT standards, Council of Europe CPT/Inf (2015) 44.) In that paper, the CPT distinguished between the concept of minimum standards and that of inhuman and degrading treatment. It is a matter for the ECtHR (and other courts) to assess whether conditions are inhuman and degrading. The role of the CPT is a preventative monitoring body and its responsibility does not entail pronouncing whether a certain situation amounts to inhuman and degrading treatment. *Mursic* demonstrated that the decision as regards inhuman and degrading treatment is not a straightforward assessment of the amount of living space provided to a prisoner. There will however be a strong presumption of a violation where the space falls below 3m2 living space. That living space must exclude the sanitation area but may include furniture.

60. The practical effect of the existence of the pilot judgment, *Rezmives*, is that effective assurances were required as to the conditions in which a requested person may be held in Romania so as to ensure that there is no risk of ill-treatment. It is the view of this Court that the pilot judgment on the one hand expresses a number of concerns about general prison conditions in Romania whilst recognising that the Romanian authorities have taken steps to begin addressing these prison condition concerns. On the other hand, this Court has received express assurances as to how the respondent will be housed in detention. Those assurances have not been challenged by calling into doubt their *bona fides* by means, for example, of past breaches of *bona fides* or by other evidence of contrary conditions in the institutions provided. Those assurances are from a member state of the EU and the principle of mutual trust applies to the receipt of that information. It also appears that at present in Romania the National Administration of Penitentiaries can now guarantee 3m2 of living space per prisoner.

61. The fact that 4m2 of living space as requested by the Court has not been provided, is not determinative of the issue. The Court may only refuse to surrender where there is a violation of Article 3 ECHR, or Article 4 of the Charter on Fundamental Rights as regards the absolute prohibition on subjecting a person to inhuman and degrading treatment. This must be considered carefully taking into account the minimum standards imposed, by in particular, the European Court of Human Rights. As stated above, the absolute minimum is 3m2 of living space (and even then in exceptional circumstances for short periods it may be reduced). In those circumstances, the Court must address whether the assurances as given, come within the minimum standards expected.

62. At the resumed oral hearing, the respondent argued that the initial part of the guarantee appeared to be premised on the fact that the respondent would be surrendered at Rahova in Romania. The respondent argued that the surrender may happen in Dublin Airport which he stated could affect the guarantees given. This Court has taken account of the respondent's contention and rejects it entirely on the basis that there is no credible belief that the guarantee could or would be altered no matter where surrender would take place.

The 21 day detention period

63. The information given by the issuing judicial authority, emanating from the Chief Commissioner of Prisons is that the respondent will be initially taken to Rahova Bucharest Penitentiary in order to carry out the 21 day quarantine and observations period.

64. In the *Rezmives* judgment, it appears that the third applicant was held in Rahova penitentiary for several months before he was transferred elsewhere. This detention was in 2009 and it refers to overcrowding, lack of ventilation cells, mould on the walls, poor-quality food and the presence of bed-bugs. No further or updated information has been given in respect of that prison. It also appears that his detention there was for other than the 21 day observation period.

65. The position, therefore, is that this Court has no specific information about inhuman and degrading conditions in the observation cells at Rahova penitentiary. It appears that the respondent will be housed adequately and separately there with a minimum cell space of 3m2. This will be in a room where there will be a minimum of 3m2. During this period there is a programme of assessment performed. This is a program set out for the purpose of adaptation to prison and for ensuring that he is incarcerated in an appropriate place of detention. The information from the Romanian response to the Committee of Ministers is that before 2017 new rules on cleaning and personal and collective hygiene were in force. There was a new direction on the provision of hygiene kits to persons deprived of their liberty upon admission into detention facilities. The assurances in this case also indicate ample stimulation during this initial 21 day observation period as he will be undergoing a range of assessments as set out above. The minimum amount of space is at the lower end of what is optimal, but there is nothing to suggest that this type of imprisonment for these purposes, where a prisoner will be engaging in a programme of assessment, would reach the threshold for a violation of Article 3.

66. In all the circumstances there is no cogent evidence that establishes reasonable grounds for believing that this respondent is at real risk of being subjected to inhuman and degrading conditions by virtue of being detained in Rahova prison during this 21 day period.

Iasi City Prison

67. The information given by the Chief Commissioner is that it is likely that the respondent, if surrendered, would be taken to Iasi City Prison after the 21 day quarantine period. In the *Rezmives* judgment, it appears that the third applicant was held in Isai City Prison for four years before he was transferred elsewhere. This detention was in 2010 and it refers to overcrowding, lack of ventilation, mould on the walls, poor quality food and the presence of bed bugs. No further information or updated information was given in respect of this prison.

68. The issuing state has provided information about the cells at Iasi City Prison. He will have an individual bed, mattress an accommodation. All cells are equipped with the furniture deemed necessary for storage of personal items, as well as for serving means. Cells with assured venting and adequate natural illumination are provided. Depending on the weather, the heating of the cells is assured so as to provide an optimum temperature. It is confirmed by the Chief Commissioner that "*the administration of each prison*

assures adequate conditions for the preparation, distribution and serving of meals, according to hygiene standards of the food industry, depending on age, health condition, kind of work delivered, by observing the religious convictions assumed by the inmate". Further, the Chief Commissioner noted that "*inmates benefit from walks outside according to the legal provisions and are entitled to psychosocial programmes and activities*".

69. The position, therefore, is that this Court has no specific information about inhuman and degrading conditions in the cells at Iasi City Prison. On the contrary, it has information confirming that adequate facilities will be provided there so as to provide accommodation that rises above the threshold below which the conditions must be said to be inhuman and degrading.

70. At the resumed oral hearing, counsel for the respondent raised concerns that the further information pertaining to the guarantee was not sufficiently precise as to the guarantee of minimum space after the 21 day quarantine period. Specifically, the respondent argued that the guarantee did not expressly confirm that his possible detention at Iasi or Bostoani City Prison would have a minimum cell space of 3m2.

71. In response to this argument, the Court notes that the Chief Commissioner stated that the National Authority of Prisons currently guarantees that the respondent will have a minimum cell space of 3m2 "*throughout the entire period of the execution of the punishment".* Therefore, the Court is satisfied that the assurance applies no matter which prison the respondent will be placed. The letter of assurance stated that should the prison population increase, the "*National Authority of Prisons shall inform the Ministry of Justice pertaining to the alteration of the operational situation, with the consequences on the guarantees offered."* This Court must operate on the basis of mutual trust that the issuing state will comply with their fundamental right obligations and the current guarantee will not be violated.

72. In all the circumstances, there is no cogent evidence that establishes reasonable grounds for believing that this respondent is at real risk of being subjected to inhuman and degrading conditions by virtue of being detained in Iasi City Prison during his next period of detention.

Botosani City Prison
73. The Chief Commissioner noted that it is possible that the respondent could be moved to Botosani City Prison for his final period of detention. It is noted that each inmate is given "*an individual bed, mattress and accommodation deemed necessary; all cells are equipped with the furniture deemed necessary for the storage of personal items, as well as for the serving of meals*." Further, it is confirmed that the cells are ventilated and illuminated with adequate natural light with provision to adjust the temperature according to the prevailing weather conditions. It is also confirmed that there are quarterly anti-pest control systems with a full disinfection occurring each semester. The Chief Commissioner also confirmed that there are educational programmes, psychological care and social activities.

74. This Court accepts that there have been adverse findings pertaining to the Romanian prison conditions but it cannot accept that these findings remain static. Even the pilot judgment demonstrates, that the Romanian authorities then had plans to improve their prison conditions and those improvements were confirmed by their reply to the Committee of Ministers. From this information taken with the assurances received from the issuing state, the Court is satisfied that there are no substantial grounds for believing that if he were returned to the issuing state, he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights.

Personal Rights - Article 8 of the European Convention on Human Rights
75. The respondent submitted that it would be a disproportionate interference with his right to respect for his personal life to surrender him to the issuing state to serve an eight year sentence in a Romanian prison system where there are alleged generalised deficiencies. He relied particularly upon his medical condition. This condition is not grave or even unusual. His medical report did not demonstrate any specific difficulties he would have with imprisonment either in general or in a Romanian prison. His family circumstances are also unremarkable.

76. For some considerable time now there has been an acceptance by the courts in this jurisdiction that surrender ought to be prohibited where surrender would amount to an unjustified or disproportionate interference with respect for the personal and family rights of a requested person. The basis of the approach to be taken by the courts has been carefully analysed by the High Court in the cases of *Minister for Justice and Equality v. T.E.* [2013] IEHC 323 and *Minister for Justice and Equality v. R. P.G.* [2013] IEHC 54 in which Edwards J. outlined twenty-two principles on which the court should operate. It is unnecessary to set out those tests in full. What is required is to balance the public interest in surrender against the personal and family interests of the requested person. This must be carried out on a case by case basis.

77. It is important to also note that the Supreme Court has, in the case of *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 clarified that while exceptionality is not the test, it will only be in a truly exceptional case that extradition will be refused. At the heart of all of these principles is that this is a case specific analysis. The best starting point is to determine what is the public interest in individual cases.

78. In this particular case, the requesting state is asking for surrender on the basis of a sentence warrant for crimes that involve a very serious sexual crime; rape, in addition to a serious physical assault and two driving offences. Serious offences of violence bring with them a particularly high public interest. O'Donnell J. in *J.A.T. (No. 2)* identified a clear distinction between the necessity for extradition in the public interest that may apply in cases involving serious violence as against other types of crime. Therefore, even where extradition may interfere very significantly with personal and family rights, the public interest in extraditing the requested person will be higher where the crime alleged is one of serious violence.

79. In light of all of the above matters, they are offences of substance and significance. In considering both the gravity of the offences and the public interest in extraditing the respondent, it can be seen that on all counts whether taken individually or separately there is a high public interest in his extradition. Therefore, I am satisfied that extradition would not be a disproportionate interference with the respondent's Article 8 ECHR rights. I have considered whether there is any aspect of his personal and family circumstances, not merely because of prison conditions, that would mean it would be disproportionate to surrender him. I am quite satisfied that there is no basis for refusing to surrender him because of a disproportionate interference with his personal and family life.

Section 45 of the Act of 2003
80. In its amended form, s.45 of the Act of 2003, implements the amendments made by the 2009 Framework Decision to that part of the 2002 Framework Decision dealing the optional ground for refusal to surrender where there has been a trial *in absentia*. A person may not be surrendered under s. 45 if he or she did not appear in person at the proceedings resulting in the sentence or detention

order in respect of which the EAW was issued, unless the EAW indicates the matters required to be set out at points 2, 3 and 4 of point D in the new form EAW required by the 2009 Framework Decision. In essence, if a person was not present at trial but a) had actually received official notification of the trial, or b) with knowledge of the trial was represented by their own lawyer, or c) was served with the decision and did not appeal, or d) has been given a guarantee of a retrial, surrender is not prohibited.

81. There have been a number of decisions from the CJEU concerning the interpretation of Article 4a(1) of the 2009 Framework Decision. The cases of *Openbaar Ministerie v Tadas Tupikas* (C-270/17), *Openbaar Ministerie v Slawomir Andrzej Zdziaszek* (Case C-271/17) and *Openbaar Ministerie v Pawel Dworzecki* (C-108/16 PPU, 25th May 2016), are most pertinent. In *Tupikas*, the CJEU ruled that that Article 4a(1) applied "*to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case.*"

82. In *Zdziaszek*, the court ruled that the concept of "*trial resulting in the decision*" not only applied to the proceedings which finally determined the guilt of the person but also to certain subsequent proceedings. These were proceedings such as those leading to a cumulative sentence, "*at the end of which the decision that finally amended the level of the initial sentence was handed down in as much as the authority, which adopted the latter decision enjoyed a certain discretion in that regard*" (para 96).

83. In the *Dworzecki* decision, the CJEU held that the expressions "*summoned in person*" and "*by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial*" have an autonomous meaning in EU law. Where a summons is not served directly on the person but handed over to an adult belonging to that household who undertook to pass it on and it cannot be ascertained from the EAW whether and if so when it was actually passed on, this does not in itself satisfy the condition. The CJEU stated in the course of its decision, that as the scenarios in Article 4a(1) were conceived as optional grounds for non-recognition of national judgments, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.

84. In Dworzecki, the CJEU confirmed that "[*i*]*n order to exercise [fair trial rights], the person concerned needs to be aware of the scheduled trial*." (para 8). Further, the CJEU confirmed that "[*u*]*nder th[e] Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that [European] Convention*." (para 8). The CJEU went on to state that "*particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her*." (para 8).

85. In *Minister for Justice and Equality v Skwierczynzki* [2016] IEHC 802 this Court applied the *Dworzecki* decision to a situation where although the requested person had not been validly notified of the trial date, the notification of conviction and subsequent failed appeal was sufficient to comply with s. 45 as his rights of defence had therefore been met. In the particular circumstances of that case, the Court of Appeal (*Minister for Justice and Equality v Skwierczynzki* [2018] IECA 204) upheld that decision.

The information provided in point D

86. It is now necessary to analyse the information contained in the EAW and the additional information in so far as it relates to the issue of trial *in absentia*. The issuing judicial authority ticked that part of point D which shows that this respondent appeared in person at the trial resulting in the decision. It said that he was assisted by the lawyer he chose.

87. It will be recalled that this EAW concerns an eight year sentence imposed as a cumulative sentence in respect of four separate offences which arose out of two separate incidents. Those incidents had led to trials in 2001 (the driving offences) and 2015 (the rape incident). It was in the course of the 2015 trial that the cumulative sentence was imposed for all offences. It is important also to recall that the final and enforceable court decision was said to be "*criminal sentence no 1300 of 16 April 2015 of Iasi Court of Law, maintained and remained final through criminal decision no. 915 of 29 December 2015 of Iasi Court of Appeal*"

88. It was not entirely clear that the indication given in point D covered both trials (and indeed the appeal). Quite correctly, the central authority sought further information as to whether the respondent was present at both trials prior to the endorsement of the European arrest warrant. The issuing judicial authority replied on the 2nd June, 2016.

The 2012 proceedings and the issue of trial in absentia

89. With respect to the 2012 trial, the issuing judicial authority stated in its reply of 2nd June, 2016, that the respondent "*was heard during the criminal lawsuit*", he admitted committing the offences "*which statements were corroborating (sic) with the evidence administered during the criminal lawsuit*". The issuing judicial authority went on to state that "*during the criminal lawsuit carried out before Iasi Court of Law the accused, although legally summoned, did not appear before the court and did not require evidence.*"

90. Having received the above information, the central authority wrote seeking a completed point D in respect of the trial in 2012. On the 5th July, 2016, the issuing judicial authority replied stating that the point D in the EAW did not concern the trial in 2012, but that details had been sent in the reply of 2nd June, 2012. The central authority wrote again seeking a point D and advising that the endorsement of the EAW was unlikely to be successful if this was not granted.

91. The issuing judicial authority replied in letter form and by way of a completed point D on the 11 July, 2016. In its letter the issuing judicial authority repeated what had been said; that he had been heard during the criminal lawsuit and made admissions. The issuing judicial authority said that

> "*on the occasion of the hearing before the criminal lawsuit bodies, the accused was informed with regard to the obligation to notify, in writing, within 3 days, any change of his dwelling place throughout the criminal trial, fact which the accused did not bring to the attention of the court. Accordingly, the accused was summoned, throughout the criminal trial both at his address of residence mentioned in the two statements given during the criminal lawsuit (address checked with the Directorate of Vital Statistics and Databases Administration), as well as through listing at the headquarters of Dobrovaj Town Local Council. In the criminal trial conducted before Iasi Court of Law, although duly summoned, the accused was not present before the court; the accused was personally summoned at all hearings and, therefore, informed with regard to the date and place set for the trial resulting in the decision and was informed that a decision may be rendered in the event he is not present at the trial; on behalf of the convict the court issued warrants for the hearing of 25 October 2011, 22 November 2011, 14 February, respectively 14 March 2012.*
>
> *The court appointed a lawyer* ex-officio *for the accused on 31 August 2011, to defend him during the trial and was*

indeed defended by that lawyer during the trial."

92. The point D that was sent in that reply of 11th July, 2016, was completed by indicating the application of a number of boxes (by bolding parts of the form). This point D contained a number of different statements. Having ticked box 2, which stated he did not appear in person at the trial resulting in the decision, the issuing judicial authority stated directly underneath that *"the accused was represented before the court, upon each hearing set for the case, by a lawyer appointed ex-officio*". The issuing judicial authority then ticked box 3.1a saying that he was summonsed in person on all hearings. Contrary to the requirement to fully complete box 3.1a, the issuing judicial authority did not indicate therein a date on which he was summons in person. The issuing judicial authority then also ticked a partial piece of box 3.3 saying that the respondent did not request a retrial or appeal within the applicable timeframe. The issuing judicial authority then also ticked box 3.4 which is a guarantee of a retrial.

93. On the 13th July, 2016, the central authority sent a further letter requesting information about that guarantee of a retrial. In particular, they sought information that he will be entitled to a retrial because he was not present at that trial. They also sought confirmation that if he was successful in any such appeal, the cumulative sentence would be reconsidered.

94. The issuing judicial authority responded on 20 July, 2016 giving further detail of the merger of the two sentences. In relation to his presence at the criminal trial which was settled through criminal sentence of 27 March, 2012, they said that although duly summoned, the accused was not present before the court. They said that the legal assistance was provided by the lawyer appointed *ex-officio*. It was also stated that he did not challenge, via appeal, the criminal sentence imposed in 2012. In that reply it was stated that with regard to reanalysis of the cases *"such reanalysis may occur under the circumstances regulated according to the provisos of Article 466 of the Criminal Procedure Code…".* The provisions of Article 466 were then provided.

95. This Court sent a further request for information on the 8th November, 2018. This request arose in circumstances, where it seemed that contrary to the information in the point D provided, there was in fact no personal service indicated in all the other information provided by the issuing judicial authority. Details were requested about that personal service. If no personal service was being indicated, the issuing judicial authority were expressly requested to confirm that he would be entitled to a retrial with respect to the driving offences. The request referred to the provisions of the Criminal Procedure Code which had been provided by the issuing judicial authority that, it was only a person who was not summonsed and who did not take cognizance by any other official means of such trial, who will be regarded as having been tried in their absence and thereby entitled to enjoy the benefit of a retrial.

96. The issuing judicial authority replied on 20 November, 2018 at some length. They said that they had already informed this Court that he had been notified in the course of the hearing before the criminal lawsuit bodies of his obligation to notify in writing of any change of dwelling place within a three day deadline. They then described the manner in which he was summonsed at the address of residence that he mentioned:

> i. 27th September, 2011 with the summoning being carried out on the 20th May, 2011 by posting but the mother of the accused refused reception.
>
> ii. 25th October, 2011 with the summoning being carried out on the 7th October, 2011 which was received by a relative of the respondent.
>
> iii. 22nd November, 2011 with the summoning being carried out on the 4th November, 2011 by posting with the respondent's mother refusing reception.
>
> iv. 17th January, 2012 with the summoning being carried out on the 13th December, 2011 which was received by the respondent's mother.
>
> v. 14th February, 2012 where the proof of summoning was returned by the respondent's mother stating she did not know about his whereabouts.
>
> vi. 13th March, 2012 with the summoning being carried out at the respondent's known address and a notice being placed on the door of Dobrovat Town Council.

97. The additional information also confirmed that for the court hearings of the 25th October 2011, 22nd November 2011, 17th January 2012, 14th February 2012 and 13th March 2012, the respondent was ordered to stand trial by way of a bench warrant. According to the minutes, the respondent was not found at his known address where his mother confirmed she did not know of his whereabouts. The additional information provided in the bundle at page 19 confirmed that the respondent was convicted *in absentia* at the 2012 trial which resulted in the conviction through criminal sentence no 911 on the 27th March, 2012. The additional information also confirmed that a town hall notice was placed on the door of Dobrovat Town Council on the 13th March, 2012.

98. That additional information also referred to Article 466 where one may demand the reopening of the criminal trial in case of the convict's judgment *in absentia*. This is again a confirmation that a person who is judged *in absentia* via a final court ruling may demand the reopening of the criminal trial within a deadline of one month of the date of cognisance (or one month after the handing over on an EAW when served with the decision). The issuing judicial authority stated *"we considered as judged in absentia the person convicted who was not summoned as the trial and who did not take cognizance of the trial in any other official way, respectively, although he was aware of the trial, he was absent, on justified grounds from such trial and could not inform the court. We do not consider as judged in absentia the person convicted who chose a lawyer or an agent, if the latter appeared before the court at any moment of the trial, and neither the person who, after being served with the conviction ruling, as stipulated by the law, did not fill appeal, renounced to declare it or withdrew his appeal."* This statement reflects a commitment based upon the wording of Article 466 as already provided.

99. It is of note that the issuing judicial authority in this reply did not resile from their statement that with regard to reanalysis of the cases *"such reanalysis may occur under the circumstances regulated according to the provisos of Article 466 of the Criminal Procedure Code…"* That reply, therefore, stated that the reanalysis may occur only when the conditions are met. In the view of the Court, it does not amount to a clear statement that the conditions have been met in the present case.

100. The issuing judicial authority confirmed that, if the criminal sentence in the 2012 proceedings was amended following the reopening of the case, then the 2015 sentence would be reanalysed. In the view of this Court, no issue arises from this that gives rise to any concern. If his original sentence is changed, the subsequent sentence would be reconsidered.

The 2015 proceedings and the issue of trial in absentia

101. In the reply of 2nd June, 2016, the issuing judicial authority confirmed he was present in person at the 2015 trial. It was stated that *"pertaining to the criminal trial carried out before Iasi Court in 2015, the criminal lawsuit following which the accused was convicted through criminal sentence no. 1300 of 16 April 2015 of Iasi Court of Law, maintained and remained final through criminal decision no. 915 of 29 December 2015 of Iasi Court of Appeal, we point out that he was present in person at the trial resulting in the rendering of the decision"* This was confirmed again in a later response dated 5th July, 2016 by the issuing judicial authority.

102. In further information of 20th July, 2016, the issuing judicial authority confirmed that he was present before the court and legal assistance was provided by his chosen lawyer. The issuing judicial authority went on to state that *"the appeal filled (sic) by the convict Iacobuta Cornel against criminal sentence no. 13000 of 16 April 2015 of Iasi court of Law was settled through criminal decision no. 915 of 29 December 2015 of Iasi Court of Appeal."* No further information about that appeal was given.

Discussion and Analysis on Section 45 of the Act of 2003

103. Counsel for the respondent raised two connected objections; pursuant to s. 45 of the Act of 2003 and under Article 6 ECHR claiming interference with the right to fair trial. The respondent submitted that he was tried *in absentia* and without notice of his trials. The respondent argued that there was insufficient information to demonstrate that his fundamental rights had been met. It was contended by him that a person should not be surrendered under Act of 2003 where he/she did not appear in the proceedings resulting in his/her conviction.

104. At the oral hearing, specific arguments were presented by the respondent that there was limited information on the notification of his trials and who legally represented him. However, when pressed on the matter during the oral hearing, counsel for the respondent accepted that in respect of the 2015 trial at first instance, the additional information reveals that the respondent was present and he had a lawyer of his own choosing, which was unchallenged by the respondent. It is clear that he also appealed this matter.

105. The respondent did not refer the Court to any particular ECtHR judgment concerning a breach of Article 6. His submissions were instead focussed upon a failure to abide by the formal provisions of s.45 of the Act of 2003. It was more by implication that he submitted that fair trial rights had been breached. The manner in which s. 45 has been dealt with in this jurisdiction and in the CJEU, does not support the contention that, simply because the formal scenarios set out in s. 45 do not cover the situation there is a breach of a fair trial right. As has been stated above, the decision in *Dworzecki* clarified that from the perspective of the interpretation of Article 4a, as inserted by the 2009 Framework Decision, surrender is not prohibited if defence rights have been met. Thus, the CJEU acknowledged that the overall objective is to ensure that fair trial rights have not been violated.

106. According to the CJEU at para 31 of *Dworzecki*, the 2009 Framework Decision was designed to enhance judicial cooperation in order to achieve uniformity but without regulating the forms and methods, including procedural requirements, which are a matter for the law of the member state. At para 50 of their decision, the CJEU pointed out that even having found that the scenarios described in Article 4a(1) of the Framework Decision do not cover the situation in hand, the executing judicial authority may take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence. The Court may have regard to the diligence exercised by the person concerned in order to receive information addressed to him or her (that reflects the case law of the European Court of Human Rights).

107. There is no doubt that the respondent was present at his initial trial in 2015 and was legally represented. On the other hand, all that has been communicated by the issuing judicial authority about his appeal is that he filed for an appeal. The respondent, in his affidavit, in a less than forthright manner, appears to accept that he was present at a court hearing in Romania in relation to the rape and assault allegations. The respondent said it was apparent that the complainant had given a few different versions of the alleged events and that other testimony was fabricated. The respondent said he left thinking it would be the end of the matter and he was informed that he would be notified if he was required again. The respondent said he was not notified and thought no more about it, and he did not attend any other court hearings as he was unware of any. The respondent was therefore putting in issue that he was present at the appeal.

108. In *Tupikas*, the enforceable judgment was that of the court of first instance but there had been an appeal by the requested person which had been dismissed. That meant the sentence at first instance was not amended. The decision of the CJEU in *Tupikas*, requires the executing judicial authority to look at the final judgment passed in the proceedings, even if the enforceable sentence arises from the first instance proceedings. Unfortunately, despite the large amount of communication between the central authority/executing judicial authority and the issuing judicial authority in the present case, there has been no request about what occurred at this appeal.

109. In the absence of information about his presence or otherwise at the appeal, I am of the view that I must seek further information from the issuing judicial authority. This is particularly unfortunate in the present case. The respondent has been in custody for some period. On the other hand, this is a serious offence for which he has been convicted and sentenced to a significant period of imprisonment. It is necessary to ask for this piece of information, as it appears to have been overlooked in all the requests that have been made in this case, including the request at the behest of this Court in November 2018. This Court is entitled to enter into a dialogue with the issuing judicial authority where there is insufficient information to allow it to take a decision on the surrender. It is also the case that the issuing judicial authority have been prompt in answering requests.

110. The information should be asked to address whether he was present, if not did he have notification or was he represented by the lawyer of his choice. The precise details of this information may be subject to further discussion with counsel.

The 2012 proceedings and the issue of trial in absentia

111. A perhaps more difficult issue is that of the proceedings resulting in the 2012 decision. The task of this Court is to decipher whether the conditions set down in s. 45 have been met, which has not been made easier by the completion of point D for the 2012 proceedings by the indication of reliance upon two separate boxes, namely 3.1a and 3.4 and by partially filling in box 3.3. Normally, there may be no difficulty in filling in two parts, although it should be noted that Recital 6 of the 2009 Framework Decision indicates that these are alternative conditions. Recital 6 states that *"when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the European arrest warrant or of the relevant certificate under the other Framework Decisions, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition."*

112. In the view of the Court, point D 3.1a cannot be accepted for two separate and distinct reasons. Firstly, it does not contain the date the respondent was alleged to have been served. That is a requirement in the form to be completed. Even more importantly in this case, the other information provided by the issuing judicial authority as set out above, indicates that the respondent was not *personally* served with notification of the trial. It is difficult to understand how the issuing judicial authority could have sought to rely

on point D 3.1a in such circumstances as there is a clear difference between personal service and any other type of service which may or may not be satisfactory at national or under the Framework Decision. Moreover, from the information provided there is no information that he actually received the official notification of the trial; the contrary is in fact indicated in the additional information. For the reasons set out, this Court must reject the reliance upon point D 3.1a as there has been no summons in person in this case, within the meaning of the 2002 Framework Decision. Furthermore, it is not indicated that the actually received official notification of the trial.

113. Point D 3.3 refers to the situation where a person has been served with the decision and informed of their respective rights about appeal/retrial but has not exercised them. Only that part of 3.3 which states that *"the person did not request a retrial or appeal within the applicable time frame"* has been filled in. It did not say that he had been served with the decision. Clearly, this part of point D cannot be relied upon to satisfy the requirements of s. 45 or of the 2009 Framework Decision. It is perhaps less than satisfactory that the issuing judicial authority did not apply due care when completing point D of the European arrest warrant.

114. Point D 3.4 states that *"the person was not personally served with the decision, but: the person will be personally served with this decision without delay after surrender; and when served with the decision, the person will be informed of his or her right to a retrial or appeal…."* At the oral hearing, it was contended by counsel for the minister that I should rely upon the guarantee provided therein. When pressed however, counsel found it difficult to explain the concern that the central authority had following on from the point D sent by the issuing judicial authority, when the central authority sent a further s. 20 request on the 13th July, 2016 asking whether the respondent will be entitled to a retrial or an appeal in respect of the 2012 proceedings. Instead, it was submitted that the answer given by the issuing judicial authority was not a retraction from the guarantee that was already given. Counsel submitted that the reply repeated the guarantee. Counsel submitted that the completed point D which contained the guarantee was clearly stated by the issuing judicial authority to apply to the 2012 proceedings.

115. A real concern arises because the issuing judicial authority has apparently indicated two things which appear on their face to be contradictory. On the one hand, they have indicated that it is their view that he was summoned in person on all hearings and thereby informed of the schedule date and place of the trial. On the other hand, they say that he will have a guarantee of a retrial. The information about that retrial however, referring to the Romanian Criminal Procedure Code, indicates that the guarantee applies to a person who was not summoned to appear before the court at the trial and did not take cognizance by any other official means of such trial. From the totality of the information provided, it appears that the issuing judicial authority are nonetheless still relying on the fact that he had been *summoned* to attend.

116. Article 466 of the Criminal Procedure Code, the provisions of which were sent by the issuing judicial authority, appears to state that a reanalysis of the case can only occur in certain limited circumstances as set out above. If the only information before this Court was an indication of reliance on this guarantee of a retrial/appeal, then the Court would have no hesitation, relying on the principle of mutual trust, in accepting it.

117. Unfortunately, in light of the totality of the information provided by the issuing judicial authority, there is no real clarity that he will have a guarantee of his 2012 trial being reopened should he request it. In the present case, the issuing judicial authority has given its repeated view that this respondent was summoned to the hearing. With regard to the guarantee of a retrial, what appears to be indicated is that he will have an opportunity to have his case reanalysed with regard to whether it was a true trial *in absentia*. That is because of the specific statement that *"such reanalysis may occur under the circumstance regulated according to the provisions of Art.466 of the Criminal Procedure Code".* That statement was not resiled from in the later communication.

118. The question then must arise as to whether the reference in Article 466, to person who was "*not summoned to appear before the court at the trial and did not take cognizance by any other official means of such trial*" includes a person who was summoned in accordance with Romanian law. This uncertainty has been created by the particular facts of this case, namely by the indications given by the issuing judicial authority.

119. Article 4a(1) of the Framework Decision and s. 45 of the Act of 2003, were not designed to interfere with each member state's criminal procedures. What the 2009 Framework Decision was designed to do was ensure a uniformity in how information would be presented. The aim is to permit those member states who have opted to include this ground for non-recognition of the judgment to be sure that the circumstances which permit trial *in absentia* have been met. Point D requires sufficient information to be given to the executing judicial authority to show that the circumstances have been met. The decision of the Court of Appeal in *Minister for Justice and Equality v Palonka* [2015] IECA 69 confirmed the importance of this requirement. The executing judicial authority is entitled to review if the circumstances have been met. If the conditions are not met there can be no surrender.

120. In *Dworzecki* the CJEU confirmed that the conditions set out in point D were autonomous ones. The CJEU did not accept that the member state's means of service in that case satisfied the condition in point D 3.1b (official communication by other means). The situation here is that conditions 3.1a, 3.1b, 3.2 or 3.3 have not been met. There is an indication of a guarantee given that a person may be entitled to a review of their case, but (it appears) only on the basis that there is no compliance with national law provisions on trial *in absentia*. Can that truly be what is intended by point D 3.4? That a guarantee of a retrial is only a guarantee so long as it is proven that national law permits it? Is this true even where national law appears not to permit trial *in absentia* in the circumstances indicated by the issuing judicial authority and where those circumstances do not otherwise come within the scenarios envisaged under Article 4a(1)?

121. If the true position is that the guarantee of a retrial/appeal is only given to the extent that the requested person demonstrates that *national legal provisions* as to service were violated, it would appear insufficient to protect the very rights of entitlement to be present at trial that the 2009 Framework Decision was intended to cover. Such a situation would not ensure that a person who had neither been summonsed in person or by other official means actually received notice of the scheduled trial would be guaranteed a retrial, if national legal provisions permitted trial *in absentia* if service was proven by other means (such as leaving the notification of trial at the registered address with a family member).

122. The decision in *Dworzecki* demonstrated that the legal position that applied in the member state concerned was not, by itself, sufficient to demonstrate to an executing judicial authority that surrender can be allowed because defence rights have been met. The legal provisions allowed service on an adult member of the household on condition that they undertake to pass the summons on to the addressee. It is questionable therefore if it is a requirement to surrender where the guarantee is only that the right to a retrial will be assessed from the perspective of whether national law has been complied with.

123. In my view, in the particular circumstances of this case, in the absence of a clear indication that Romanian law will actually permit a retrial in the situation as it pertains to notice of the proceedings which this respondent actually had, the Court has to have doubt that point 3.4 has been met. It is the situation however, that there remains some confusion as to what has been said and for

the reasons set out above, a final opportunity should be given to the Romanian judicial authority to give further information in light of what has been set out in this judgment.

124. One final issue remains however. This is whether the Court, on the evidence before it, could be satisfied that defence rights have been met in the circumstances of the numerous attempts that were made to serve him. This is particularly so where the respondent was aware that there was a criminal lawsuit in being, he had participated in that by admitting committing the offences and he had given an address for service during the course of those proceedings. In *Dworzecki*, the requested person had also indicated an address for the service of the process and the summons was served on an adult member of that household. In those circumstances, the CJEU nonetheless held that the requirement for actual notice had not been met. On the other hand, it may be arguable that defence rights have been met (and the ECHR complied with) where a person, being aware of the proceedings, left the address given to the authorities, without informing the authorities of a change of address and thereby did not receive the summons.

125. In the present case, this respondent had knowledge of the proceedings against him, he was required to give and address and did give the address. He apparently left that address. There were many attempts to serve him at that address. Family members were still present there. A summons was actually taken by the respondent's family on occasion. The respondent's failure to notify either the authorities of his change of address in the knowledge of the case might possibly indicate a waiver of his right to be present. The respondent's failure to leave a forwarding address with his family (or so it appears) is also an indication of a lack of due diligence. Furthermore, he apparently did not raise this issue of lack of knowledge when the 2015 proceedings were before the court. Furthermore, an *ex officio* lawyer represented him at the proceedings in 2012.

126. The respondent did not engage with any of the facts as set out by the issuing judicial authority. He is under no obligation to do so when relying on s. 45 (see Palonka) to resist surrender. However, where an issue of due diligence arises, as it clearly did here, the lack of any information from the respondent is also a factor that the Court may take into account.

127. If the Court were to hold that his defence rights had been met, an issue would then arise as to whether the Court is required to prohibit his surrender where his particular situation does not come within one of the exceptions set out in the Table to s. 45 of the Act of 2003. The Court decided in *Skiewzynski* that surrender was not prohibited in those circumstances. That decision was appealed to the Court of Appeal. It is possibly more correct to characterise that latter decision as one based upon the narrow facts of the case, rather than as a clear upholding of the general principle articulated in this Court. In light of the more recent decision of the Supreme Court in *Minister for Justice Vilkas* [2018] IESC 69, it may be that the decision in *Skiewerzynski* has to be revisited.

128. In view of the foregoing, and in light of the adjournment to seek further information from the issuing judicial authority in respect of other aspects of s. 45, I will request further submissions on this aspect of the case from counsel.

Conclusion

129. For the reasons set out above, this Court finds that the respondent's surrender is not prohibited under the provisions of s. 38 of the Act of 2003. The Court also rejects the respondent's argument that he is at real risk of being subjected to inhuman and degrading treatment on surrender by virtue of the prison conditions in Romania. The Court also rejects the respondent's objection that his surrender would amount to a violation of his right to respect for his personal and family life. The Court also rejects his point of objection that his surrender should be prohibited because he was unfairly convicted at his first instance trial in 2015.

130. The judgment deals with issues arising under the provisions of s. 45 of the Act of 2003 and his presence at his trial in 2012, and his trial and appeal in 2015. For the reasons set out in the judgment, the Court requires further information from the issuing judicial authority in respect of the guarantee provided in respect of the 2012 trial and an indication as to whether the conditions of Article 4a of the Framework Decision have been met regarding the appeal from the 2015 decision. I have considered that despite the length of time these proceedings have taken, it is appropriate and proportionate to seek this further information. This is a significant sentence for at least two serious offences for which he has been convicted. There is an element of recidivism in the commission of these offences. Finally, I also require the parties to address the issue of whether defence rights have been met in the circumstances of the 2012 trial and whether his surrender is therefore not prohibited by s. 45 of the said Act of 2003.