THE HIGH COURT

[RECORD NO. 2017 293 EXT]

BETWEEN

MINISTER FOR JUSTICE AND EQUAILTY

APPLICANT

AND

RAZVAN TACHE

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 11th day of February, 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 24th November, 2016, to serve a composite sentence of 1 year and 81 days imprisonment. This sentence was imposed upon him on the 13th October, 2016 in respect of three offences: having sexual intercourse with an underage girl between April and October 2012 who was 14 years of age at the material time; and two concurrent forestry offences involving the cutting and the unlawful removal of 12 unmarked turkey oak and hornbeam trees that belonged to the Stejarul Forest Division in the Fârdea area of Romania.

2. At the hearing, counsel for the respondent raised two core arguments; a personal rights claim under Articles 3 and 8 of the European Convention on Human Rights resulting from the Romanian prison conditions and an issue arising from the respondent's trial in absentia in Romania. He also raised a point concerning the lack of clarity with regard to the date of the sentence. Before turning to those matters, I will deal with the uncontested issues:

The background to the European Arrest Warrant

A Member State that has given effect to the Framework Decision
3. The surrender provisions of the European Arrest Warrant Act of 2003 as amended ("the Act of 2003") apply to those Member States of the European Union that the Minister for Foreign Affairs has designated as 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 Act of 2003.

Section 16(1) of the Act
4. 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 ss. 21A, 22, 23 or 24 of the Act of 2003, to refuse surrender,

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

Identity
5. I am satisfied on the basis of the affidavit Garda Padraig Brennan member of An Garda Síochána, and the details set out in the EAW, that the respondent, Razvan Tache, who appears before me, is the person in respect of whom the EAW has issued.

Endorsement
6. 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
7. 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
8. 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.

Section 38 of the Act of 2003
9. 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 set out 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 for which the person is requested with an offence in this jurisdiction. If the offence does not come within that list, correspondence 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".*

10. The issuing judicial authority has not opted for the ticked box offence and has given a full description of the offences in E2. Correspondence must be demonstrated.

11. The factual description of the first offence is as follows:

> *"On December 12, 2013 the defendant Tache Razvan committed two concurrent forestry offences, namely: he cut a number of 12 unmarked (turkey oak and hornbeam trees), belonging to "Stejarul" Forest Division"*

The detailed description provided at EII in the EAW states that this was done without right.

12. The above description makes clear that the offence being described is one of criminal damage. This is an offence contrary to section 2(1) of the Criminal Damage Act, 1991 which states *"[a] person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence*". This Court is satisfied that the 'cutting' of the trees belonging to the Stejarul Forest Division without right is sufficient to come within this definition of criminal damage if committed in this jurisdiction. Therefore, this Court is satisfied that there is correspondence with an offence in this jurisdiction.

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

"…and stole the 12 unmarked turkey oak and hornbeam trees"

14. The above description makes clear that the offence being described is one of theft. This is an offence contrary to section 4(1) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which states that "a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it." This Court is satisfied that the 'stealing' of the trees is sufficient to come within this definition of theft. Therefore, this Court is satisfied that there is correspondence with this offence.

15. The factual description of the third offence is as follows:

> *"Between April 2012 and October 2012, the defendant Tache Razvan committed an offence: he had sexual relations with the underage girl…. who was under the age of 15."*

16. The above description makes clear that the offence being described is one of sexual intercourse with a child under 15 years of age. It is possible to give the term "sexual relations" its ordinary and common meaning; sexual intercourse. That is not necessary because the EAW also states that the crime is one of "sexual intercourse with a juvenile". It is appropriate to take that into account as the EAW must be read as a whole (per *Minister for Justice Equality and Law Reform -v- Dolny* [2009] IESC 48).

17. Sexual intercourse with a child under the age of 15 years is the offence of defilement contrary to section 2(1) of the Criminal Law (Sexual Offences) Act, 2006 as amended by section 16 of Criminal Law (Sexual Offences) Act, 2017 states *"[a] person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment."* A sexual act in the Act of 2006 is defined as including an act of sexual intercourse. This Court is satisfied that as the EAW and the additional information states that the respondent had sexual intercourse with a girl under the age of 15, these facts are sufficient to come within this definition of this offence. Therefore, this Court is satisfied that there is correspondence with this offence.

18. This Court must also be satisfied that the offences meet the minimum gravity requirements as set down in the Act of 2003. The composite offence that the respondent is requested to be surrender for is 1 year and 81 days and he is required to serve all of it. That is in excess of the minimum sentence of not less than 4 months that has been imposed on the person in the issuing state. Therefore, this Court is satisfied that the offences meet the minimum gravity requirements of the Act of 2003.

19. Therefore, I am satisfied that the respondent's surrender is not prohibited on the basis of s 38 of the Act of 2003.

Contested matters

Section 11 - Lack of Clarity

Section 45 – Trial in Absentia

20. Counsel on behalf of the respondent objected to surrender on the basis that the EAW did not contain sufficient information about the sentences contained therein. In particular, this was a complaint about the lack of information about the proceedings that had already taken place and that might take place again. It was submitted that this was of significance given the reference to a retrial in part D. It is appropriate to examine these issues together.

21. At part B of the EAW, under the heading "Arrest warrant or final court order having the same effect:" there is a reference to "Decree of imprisonment no. 164/November 24th, 2016." This date of 24th November, 2016 is the same date as the date of the issue of the European arrest warrant. What follows is a reference to "Final and enforceable court order (judgment): "Judgement in criminal matters no. 139/October 13th 2016, final by lack of appeal on October 31st 2016".

22. The EAW contains part D in the form provided originally by the 2002 Framework Decision. Within part D, the issuing judicial authority has ticked the box stating that the respondent:

> *"has been neither personally summonsed and nor otherwise informed by other means regarding the date and place of the trial following which the court decision has been delivered, but the person benefits from the following legal guaranties after his/her surrender to the competent authorities (if such guaranties (sic) may be presented in advance)." There is then a further statement in the EAW: "Indication of legal guaranties (sic): Not applicable."*

23. That indicates that there had been a trial in absentia but was contradictory about the guarantees. Quite properly the central authority requested a new form part D from the issuing judicial authority. This was completed. The issuing judicial authority stated at part D2 that he was not present at the trial. The box at part D3.2 was ticked to indicate that "*being aware of the scheduled trial, the person had given a mandate to a legal counsellor who was either appointed by the person concerned or by the State, to defend him or her at the trial and he was indeed defended by the counsellor at the trial*". At part D3.4, where the issuing judicial authority must provide relevant information as to how the condition was met, the issuing judicial authority stated that a presiding judge appointed a lawyer *ex officio* to defend the defendant at the trial. This is insufficient to come within the terms of part D3.2 as the lawyer must have a mandate from the requested person. The lawyer can be personally hired or appointed by the State but it cannot be an *ex officio* appointment without a mandate (see *Minister for Justice and Equality v Fiszer* [2015] IEHC 664).

24. Part 3.4 is also ticked in the part D contained in the additional information which confirms that the respondent:

> *"…will be personally served with [the decision resulting in their conviction] without delay after the surrender, and*
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> *-when served with the decision, the person will be expressly informed of his/her rights to a retrial or appeal, in which he or she has a right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and*
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> *-the person will be informed of the time frame within which he or she has to request a retrial or appeal…."*

25. The issuing judicial authority did not fill in the number of days in which he can request a retrial. The central authority again wrote seeking that information. The issuing judicial authority stated that within one month from the date the court order/decision is served he will be entitled to ask for a retrial and within 3 days from the service of the court order/decision in criminal matters he is entitled to lodge an appeal.

26. In light of this additional information guaranteeing the respondent a right to a retrial of the decision resulting in his conviction, this Court is satisfied that his surrender is not prohibited by s. 45 of the Act of 2003.

27. In respect of the s. 11 issue about lack of clarity, the central authority also asked whether the EAW was issued on the same date as the domestic sentence i.e. 24/11/2016. That question appears to have been asked because of the reference at part B in the EAW under the heading of arrest warrant or final court order having the same effect to "*decree of imprisonment no. 164 November 24th, 2016".* The answer that was returned by the issuing judicial authority was "I *hereby confirm that the European Arrest Warrant no. 4 was issued on November 24th 2016, the same date when the domestic sentence under which the court granted the request for the release of a new European Arrest Warrant for TACHE Razvan, was delivered."*

28. In my view there is no lack of clarity. The EAW indicates at part B under the heading final and enforceable court order (judgment) that it is "*Judgment in criminal matters no. 139/October 13th 2016, final by lack of appeal on October 31st 2016*". The issuing judicial authority in its reply is indicating that the decision of the 24th November 2016 was the decision to issue the European arrest warrant. That is a clear reference to the enforceable judgment in the EAW, which is the judgment in October, 2016.

29. It is also important to note that there is no suggestion that this is a similar situation to that which arose in *Bob-Dogi* (Case C-241/15) where the CJEU did not accept that Hungarian provisions under which a domestic arrest warrant was also a European arrest warrant, complied with the provisions of the 2002 Framework Decision. The problem in that case was that there was no domestic arrest warrant which was distinct from the European arrest warrant. The opposite is the case here; there is an enforceable judgment, of the 18th October 2018. It is that judgment to which this Court is being asked to give mutual recognition. The decree of imprisonment dated the same day as the EAW is the domestic decision to issue the European arrest warrant. If there was no underlying enforceable judgment (or arrest warrant) the situation would be different, as there would have been no distinct domestic arrest warrant. That is patently not the case where there is a clear reference to the enforceable judgment, which is the sentence of imprisonment.

30. I am satisfied that there is no lack of clarity as to offences for which he has been convicted, the sentence imposed upon him or the dates on which that sentence was imposed, became final and on which he was liable to be arrested to serve that sentence.

Section 37 of the Act of 2003

31. The respondent raised issues regarding a breach of his s. 37 rights. He claimed that the prison conditions in Romania were such that they constituted a breach of his fundamental rights contrary to Articles 3 and 8 of the ECHR and the period of delay in the case represented a breach of his fundamental rights contrary to Article 8 of the European Convention on Human Rights.

32. The respondent argued in his submissions, and at the oral hearing, that owing to the prison conditions in Romanian prisons, there are reasonable grounds for believing that he will be exposed to

> (i) inhuman 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.

Article 3 ECHR – the legal principles

33. Section 37(1)(a) of the Act of 2003 prohibits surrender where surrender would be incompatible with the State's obligations under the European Convention on Human Rights. The Supreme Court in the case of *Minister for Justice and Equality v Rettinger* [2010] 2 IR 783 set out a series of principles to be applied when a court is asked to prohibit surrender because of a perceived risk of a violation of Article 3 in the issuing state. Those principles derived from European Court of Human Rights case law. The principles have been discussed and applied in many subsequent cases in this jurisdiction.

34. In *Attorney General v Davis* [2018] IESC 27, the Supreme Court again considered the appropriate test that should be applied when determining a breach of fundamental rights. The Court concluded that whether one applies the tests in *Minister for Justice and Equality v Rettinger* [2010] 2 IR 783, *Attorney General v O'Gara* [2012] IEHC 179 or *Attorney General v Marques* [2015] IEHC 798 on the one hand, or the principles ascertainable from the jurisprudence of the ECtHR on the other, there was little practical difference. At paras 85 and 86, McKechnie J. observed:

> *"The test set out by Denham J. in Rettinger was expressly said by her to be adopted in its entirety from the principles set out by the ECtHR in Saadi v Italy (App. No 37201/06) (2009) 49 EHRR 30. Her judgment was also heavily influenced by the judgment in Orchowski v Poland (App No 1788/04, European Court of Human Rights, judgment of the 22nd October, 2009). Rettinger in turn informed the subsequent case law in this jurisdiction. The appellant has relied solely on Ahmad v. United Kingdom in his written submissions, but the principles laid down in that case and the ECtHR's analysis of the facts are in fact entirely consistent with the approach which the Irish courts have taken to the issue. Indeed Ahmad v. United Kingdom was considered and cited by Donnelly J. at paragraphs 9.23-9.24 of her judgment in Marques.*
>
> *86. The only additional observations I would make are more in the nature of clarification than qualification:*

• Some authorities say that "substantial grounds" must be established such as would give rise to a real risk; others say "reasonable grounds". Given the difficulty of obtaining credible evidence which is current at the time of hearing, I would prefer the latter, though in substance there may be no difference between the two.

• A respondent does not have to show that if returned he would or probably would suffer a violation of his Article 3 rights: a real risk thereof is sufficient.

• Neither the objectives of the Framework Decision nor those underpinning the Washington Treaty can defeat an established risk of ill-treatment."

35. Arising from this jurisprudence, the respondent bears an evidential burden of adducing cogent evidence capable of proving that there are substantial/reasonable 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. That evidence can be supplied in a number of ways, including relevant material from international treaty bodies, courts and non-governmental organisations. The Court of Justice of the European Union ("CJEU") in *Aranyosi and Caldararu v. Generalstaatsanwaltschaft Bremen* (C-404/15 and C-659/15 PPU, Grand Chamber, 5th April 2016) has also adopted an approach which is broadly similar. That is unsurprising as the tests all have their origin in the case law of the European Court of Human Rights.

36. Each case must be decided on the strength of the evidence before the court and the application of the well-established law to that evidence. The principles require the High Court, as executing judicial authority, to engage in a rigorous examination of the material placed in front of it. The High Court must be forward looking in its approach as it is the foreseeable consequences of surrender that the court must examine.

37. The CJEU in *Aranyosi and Caldararu* requires an executing judicial authority, not only to consider that there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrate that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or which may affect certain places of detention, but to consider whether those deficiencies affect the individual concerned. If the executing judicial authority makes that determination it must postpone its decision on surrender until it obtains the supplementary information that allows it to discount the existence of such a risk.

38. In the case of *ML (Generalstaatsanwaltschaft Bremen*) [2018] C-220/18 PPU, the CJEU considered whether or not the executing judicial authority was required to assess the conditions of detention in all the prisons in which a person subject to the warrant might potentially be detained (including on a temporary or transitional basis), or only the conditions of the prison in which they were going to be detained for most of the time of their sentence. The CJEU concluded as follows:

> *"The prisons to be assessed:*
>
> > *77 In accordance with the case-law referred to in paragraphs 61-66 of this judgment, the executing judicial authorities responsible for deciding on the surrender of a person who is the subject of a European arrest warrant must determine, specifically and precisely, whether, in the circumstances of a particular case, there is a real risk that that person will be subjected in the issuing Member State to inhumane or degrading treatment.*
> >
> > *78 It follows that the assessment which those authorities are required to make cannot, in view of the fact that it must be specific and precise, concern the general conditions of detention in all the prisons in the issuing Member State in which the individual concerned might be detained.*
>
> *87 Consequently, in view of the mutual trust that must exist between Member States, on which the European arrest warrant system is based, and taking account, in particular, of the time limits set by Article 17 of the Framework Decision for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. The compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is, in accordance with the case-law referred to in paragraph 66 of this judgment, a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State."*

The evidence

39. At the oral hearing, counsel for the respondent relied on a pilot judgment of the ECtHR, *Rezmives and Others v Romania* [2017] ECHR 378, concerning prison conditions in Romania. Pilot judgments were developed as a technique for identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems. This procedure resulted from multiple applications coming before the ECtHR which shared the same root cause.

40. The pilot judgment makes 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 identified significant overcrowding and poor hygiene conditions in the facilities the CPT visited. The most recent CPT report was published in 2015 which 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. The CPT visit to Romania upon which the report was based took place in 2014.

41. At para 97 of the pilot judgment, the ECtHR refers to the Romanian Government's submissions as to the steps that have been taken in order to address the concerns highlighted by the CPT and previous jurisprudence by 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 €800 million aimed at modernising prison conditions and building new prison places. This plan is stated is as being in progress and to be completed by 2023.

42. The ECtHR in their pilot judgment discuss the developments adopted by Romania in response to their prison issues at paras 113 to 116. At paragraph 113, the ECtHR expressly welcomed the improvement plan adopted by Romania and encouraged the state to

continue the work. However, the ECtHR 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.

43. Counsel for the Minister referred to the response by the Romanian authorities to the Committee of Ministers as required by the pilot judgment. This response sets out an action plan that Romania has adopted which is in progress to deal with their prison condition issues. Counsel for the Minister also referred to a visit by the CPT to Romanian prisons in February, 2018 but the contents of this report has not yet been published.

44. In light of the pilot judgment, this Court at a very early stage in the hearing requested further information under s.20 of the Act of 2003 as to the conditions under which this respondent will be held if he is surrendered. The reply came in the form of a letter from the Chief Penitentiary Commissioner addressed to a named delegated judge in Fâget District Court, which is the issuing judicial authority. In this reply, the Chief Penitentiary Commissioner identified 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 Penitentiary Commissioner confirms that during this initial 21 day quarantine the respondent would be entitled to *"exercise all their rights under implementing law and undergo the program of adaption to the conditions of a deprivation of liberty."* Furthermore, the Chief Penitentiary Commissioner confirms that

> *"during the quarantine period … the behaviour and personality of the detainees are analysed, medical exams are performed, health education activities are carried out and educational, psychological and social needs are assessed in order to establish the areas of intervention and assistance,"*

45. The additional information states that at the end of the quarantine period, the respondent would likely be sent to a semi-open prison regime to serve the initial period of imprisonment. The Chief Penitentiary Commissioner acknowledges that the definite prison where the respondent would be sent to, if surrendered, would only be determined after their initial 21 day quarantine period by a specialised committee given that this initial quarantine period is designed to assess the needs of each prisoner. The factors that the specialised committee would take into account when determining which prison to send the respondent, if he were surrendered, include:

> ☐ "the period of the imprisonment sentence;
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> ☐ the degree of risk of the convicted person;
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> ☐ his criminal record;
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> ☐ the age and health of the convicted person;
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> ☐ the conduct of the convicted, positive or negative, including previous detention periods;
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> ☐ the identified needs and abilities of a convicted person required to be included in educational programs, psychological assistance and social assistance;
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> ☐ the convicted person's willingness to work and participate in educational, cultural, therapeutic, psychological counselling and social, moral-religious, school and vocational training activities."

46. The additional information confirms that based on the factors listed above and current information that the Chief Penitentiary Commissioner has on the respondent the most likely prison where the respondent would be sent is Timisoara Penitentiary. It is confirmed that in Timisoara Penitentiary:

> *"[e]ach room is provided with a private bathroom, with a sink, shower and toilet. The access to cold water is permanent and hot water is provided daily in accordance with the program approved by the prison manager. Each room is equipped with furniture, standard wardrobes for storage of personal belongings and an additional storeroom, where shelves are installed so that detainees can store their personal belongings."*

47. Furthermore, the Chief Penitentiary Commissioner also confirmed that:

> *"[r]egarding hygiene in the rooms, [they] specify that periodic actions are carried out for the disinsectization and disinfection of the detention spaces." Additionally, "[t]he detainees have access to walking yards (daily), clubs, sports grounds, gymnasium, church, classrooms and other spaces for the exercise of their rights. The semi-open regimes grants to detainees numerous opportunities such as:*
>
> > ☐ The possibility of moving unaccompanied in areas within the place of detention on the routes established by the administration of the penitentiary.
> >
> > ☐ The possibility of organising their free time, under supervision, in compliance with the program established by the administration."
>
> *"The person convicted, serving the punishment in a semi-open regime may work and perform educational, cultural, therapeutic, psychological and social assistance, moral-religious, school and vocational training outside the penitentiary, under supervision".*

48. The Chief Penitentiary Commissioner also noted that

> *"[u]nder the law, after serving a fifth of the imprisonment sentence, the convict will be reconsidered, in order to change the penalty enforcement regime. The evolution of the penalty enforcement regime cannot be predicted because it depends mainly on the behaviour adopted during the period of serving the punishment. In the event that [the*

respondent] will be assigned to serve the punishment with an open regime, he could remain in the custody of the Timisoara Penitentiary."

49. Finally, the response includes the following statement:

> *"Considering the prospect of implementing the measures included in the "Measure Schedule – 2018-2014 for solving the issues of overcrowding and detention conditions", the National Administration of Penitentiaries can now guarantee the provision of an individual minimum space of 3 square meters for the whole period of serving the punishment, including the bed and related furniture.*
>
> *Any changes to system indicators will be notified to the Ministry of Justice."*

50. The timetable of measures set out in the Romanian response to the Committee of Ministers identified two core components of the Romanian Government plan at paragraph 10; "*increasing prison capacity and reducing the number of detainees*." It seems that this action plan is an attempt by the Romanian authorities to address the concerns found by the ECtHR on their prison conditions. In assessing the response of the Romanian Government to this Court and to the Committee of Ministers, it is important to note that this Court is obliged to assess the foreseeable consequences as regards detention conditions at the time of surrender. Therefore, intention to build further prisons or reduce detentions in the future are not sufficient responses in themselves to overcome the real risk of being detained in inhuman and degrading conditions on surrender. On the other hand, the response refers the matters already completed and the Court is entitled to have regard to those matters.

51. 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."*

52. 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 state that the administrative measures include the approval of the construction of a new prison capable of housing 1000 inmates. The Romanian authorities state that the procurement process for the construction of this prison is in progress. The Romanian authorities also state 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 can be created. The response states that at the date of the timetable this development was at the design stage prior to tendering and construction.

53. Additionally, the Romanian authorities state 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.

54. In addition to the administrative measures, the Romanian authorities catalogue a number of legislative developments aimed at improving prison conditions. Prior to the pilot judgment, this 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 state that new laws were enacted to allow for a compensation remedy for inmates housed in improper places. This compensation remedy allows for 6 days actually served by prisoners 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.

55. At paragraphs 12-14, the Romanian authorities state 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 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".

56. 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 state that their focus here is on reducing the prison population through their legislative measures and also building new facilities.
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> 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 state that their plan focuses on improving conditions and reducing the prison population.
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> 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.

Analysis
57. It is necessary for this court to examine the evidence before it in a rigorous fashion. The height of the respondent's case was the pilot judgment itself. As pointed out, the judgment acknowledged that certain improvements had been made since the date of the detentions at issue in that case. There is also the subsequent response of the Romanian Government to the Committee of Ministers which identified a series of actions already taken to address the problems raised in the judgment and also a firm timetable of subsequent measures to be taken. Finally, the Court has to 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 Caldararu* and provided for by Article 15(2) of the Framework Decision as implemented by s. 20 of the Act of 2003.

58. 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, the response demonstrates that significant steps have already been taken to reduce overcrowding.

59. 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).*

60. 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).*

61. 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).*

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)."*

62. 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. The decision in *Mursic* demonstrates 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.

63. 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.

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

Semi –open prison
67. Even greater information has been provided about the conditions in the semi-open regime at Timisoara penitentiary. It is perhaps noteworthy that the Timisoara prison did not feature in the *Rezmives* case as a prison about which there was a complaint. Indeed, two of the applicants in that case were in Timisoara at the time of the decision by the European Court of Human Rights.

68. The information provided by the issuing judicial authority from the Chief Penitentiary Commissioner gives minimum guarantees as regards out of cell time, other activities, hygiene, sanitation and ventilation. From all the information provided, the most relevant of which is referred in the paragraphs above, there are no concerns arising with regard to the semi-open prison should he be sent there. There is also an overall assurance as to the minimum space of 3m2 being provided in the overall penitentiary system. It was not in any way disputed that those provisions would violate the minimum standards set out in Article 3 of the European Convention on Human Rights.

69. 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 Timisoara penitentiary.

Open prison regime
70. On the basis of the evidence set out above, if he is transferred to an open prison 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 Timisoara prison.

Detention on Remand
71. The respondent complained about the lack of information about where he might be sent if he succeeds in having his trial reopened and therefore may become a remand prisoner. This Court has been given information about his immediate place of imprisonment and his placement after 21 days. The decision of the CJEU in *ML* clarifies that this Court is *"solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained including on a temporary or transitional basis."*

72. The Court is satisfied that the issuing judicial authority has in fact answered the questions asked concerning his placement in the response received. The Court has to have regard to the reality of the situation which prevents itself; the respondent has a month in which to claim his right to a retrial or an appeal. There is no guarantee that he will have made this claim within the 21 day period and he would therefore be transferred as set out above. Furthermore, the respondent may well be considered to have been a convicted person up to that point of the retrial on the basis that there is an enforceable sentence against him. In those circumstances, this Court is surrendering him to serve an enforceable sentence. It must be presumed he will serve that sentence until such time as he is acquitted of the offence or has his sentence altered if convicted on the retrial. Under the *ML* decision, this Court does not have to examine all possible prison establishments in which he may be held but only those according to the information available in which he may be held.

73. Moreover, the Chief Penitentiary Commissioner has now stated that the National Administration of Penitentiaries can now guarantee the provision of an individual minimum space of 3m2 for the whole period of serving the punishment. This is an important consideration as it appears now that the Romanian approach is to guarantee that minimum living space throughout its prison complex. The Court has already referred to the legislative changes that have taken place to deal with overcrowding but also to deal with rules on cleaning and person and collective hygiene in the prisons. There is no cogent evidence, therefore, which establishes on reasonable grounds that there is a real risk that this respondent will be subjected to inhuman and degrading treatment should he be surrendered to Romania.

74. The Court concludes therefore that the surrender of this respondent is not prohibited by s. 37 of the Act of 2003 on the basis that there is a real risk of a violation of Article 3 of the European Convention on Human 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 and a general delay arising from the execution of the European Arrest Warrant.

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; sexual intercourse with an underage girl, in addition to two property offences; criminal damage and theft. In the requesting state they carry significant penalties of imprisonment.

79. Serious offences of violence bring with them a particularly high public interest. O'Donnell J. in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 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.

80. 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. The respondent also raised an issue in respect of a delay in executing the European Arrest Warrant.

81. In this particular case, the crimes for which the respondent was convicted involved a serious form of sexual violence and two property offences. The additional information states that the respondent committed the sexual offence between April 2012 and October 2012 and the forestry offences were committed on the 12th December, 2013. The hearing resulting in the sentence was delivered on 24th November, 2016 which is less than 3 years. This Court does not view this length of time as diluting the public interest in returning the respondent.

82. The personal and family interests of this respondent are entirely unremarkable. Indeed, he simply makes a bald assertion that his family reside here and his rights under Article 8 will be violated if surrendered. He has included the prisons conditions under his claim for breach of Article 8 rights. He has put forward nothing of substance to demonstrate why, in his particular case, the prison conditions would be a factor in determining whether it would be disproportionate to surrender him. A claim that prisons conditions are less than ideal in a given country may possibly form part of an Article 8 argument, but that would be in circumstances where there were particular factors which made them oppressive to the requested person. There are no such factors here.

83. The facts of this case represent the type of automatic claim to a breach of Article 8 rights that this Court has to deal with on a regular basis. The threshold for refusing surrender on Article 8 grounds is high (see *J.A.T. (No. 2)* above). It will only be exceptionally that the High Court will refuse extradition on Article 8 grounds. These facts are very far removed from coming close to a case which can be said to be truly exceptional in its features. It is not necessary to give any elaborate factual analysis or weighing of the matters in this case. The Court emphatically rejects this ground of objection.

Conclusion

84. For the reasons set out above, this Court rejects all the points of objection raised by the respondent to his surrender. The Court will therefore make an Order for his surrender to the person duly authorised by the issuing state to receive him.