THE HIGH COURT

[2024] IEHC 391

Record Nos: 2016/190 EXT

2023/146 EXT

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

BETWEEN:

MINISTER FOR JUSTICE & EQUALITY

Applicant

-and-

DRAGAN RAKANOVIC

Respondent

Decision of Ms. Justice Melanie Greally delivered on the 28th day of June 2024

1. This decision concerns an application pursuant to Section 16(2) of the Act of 2003, as amended, for the surrender of the Respondent to the Republic of Croatia as the Issuing Judicial Authority (hereinafter the IJA) on foot of an European Arrest Warrant (EAW) dated the 9th of October 2016. The surrender of the Respondent is sought to prosecute him for two war crimes stated to be violations of international law. The EAW was issued by Darko Kruslin in the County Court in Osijek, Croatia and is stamped and signed.

2. The EAW was endorsed for execution on the 17th of October 2016 and the Respondent was arrested on the 1st of September 2023 on foot of a SIS alert.

3. On the same day the EAW was produced to the High Court and the presiding judge was satisfied that the person before it was the person in respect of whom the EAW was issued. Identity is not at issue.

4. According to Part B of the EAW the decision upon which the EAW is based is a decision ordering the Respondent's detention made on the 14th of November 2010 (reference Kio-80/10).

5. The maximum sentence available for the offences is stated in Part C to be twenty years imprisonment, therefore, the minimum gravity requirement is satisfied.

6. I am not required under Section 21A, 22,23 or 24 of the Act of 2003 to refuse surrender.

Objections to Surrender

7. The Respondent objects to his surrender on several grounds and puts the Applicant on proof of full compliance with the provisions of the EAW Act 2003 and the Framework Decision.

Ground One: Article 2.2/Correspondence

8. The IJA have invoked the ticked box procedure in accordance with Article 2.2 of the Framework Decision. The offence ticked is "crimes within the jurisdiction of the International Criminal Court".
   The objection taken to the ticking of this offence is that the offences in respect of which surrender is sought were committed prior to the establishment of the International Criminal Court in 2002. The allegations relate to events which occurred on the 2nd of May 1991 and, consequently, it is suggested that the ticking of the box for this offence is a "manifest error".

9. What constitutes a "manifest error" was addressed by Edwards J. in *Minister for Justice and Equality v Cuipe unreported 13th September 2013.*

   At page 17 of the judgement, it states:
   "*The point that requires to be stressed here is that the existence of an error would have to be truly manifest and the only reasonable conclusion before an executing Court would be justified in disregarding the ticking of a box on the grounds of an error. Having regard to the Supreme Court's clear and unequivocal statement in Ferenca that it is for the issuing state decide whether or not its national law defines the particular conduct which it alleges against the person whose surrender is sought, as one of the offences listed in article 2.2, if follows that it will only be in the rarest of case that an error will be truly manifest, as opposed to being suspected at the level of possibility. Accordingly, it seems to me that an executing Court should exhibit considerable reticence about engaging positively with an objection to reliance by an issuing judicial authority upon article 2.2 of the Framework Decision on the grounds of an allegedly manifest error, and that it should only do so in circumstances where it can be totally satisfied from what its contained on the face of the warrant that there has indeed been an unintended but significant drafting error involving inappropriate ticking of a particular box in the article 2.2 list"*

10. The issue raised by the Respondent is whether for the purpose of invoking the ticked box procedure the IJA may tick a box by reference to the classification of criminal acts on the date of ticking or by reference to the date on which the acts are alleged to have been committed.

The basic proposition advanced by the Respondent being that the offence is not one which can come within the jurisdiction of the International Criminal Court because in 1991, the International Criminal Court had yet to be established.

The Applicant has submitted authorities which address the issue of what might loosely be described as questionable or inappropriate ticking of particular offences, including Minister for Justice v *Ferenca I.R. [2008] 480* and *Cuipe*.

11. It is not being suggested by the Respondent that the conduct described in Part E1 of the EAW is not conduct which comes within the jurisdiction of the ICC, the issue relates to the date on which the alleged conduct occurred.

    The statement of Murray C.J. in *Ferenca* followed by Edwards J. in *Cuipe* make it clear that Article 2.2 aims to capture categories of conduct.

12. The Applicant refers to the judgement of C.J Murray in *Ferenca* which clearly states at page 495 that:

    "Article 2.2 does not of itself specify a form or course of conduct from which it can be deduced that a particular offence is one to which it applies. The paragraph does not refer to offences in any conceptual way but simply lists a number of offences by way of general name or label and it is exclusively for the issuing member state to determine what offences as defined by its law are offences to which article 2.2 are applicable."

<u>Decision</u>

13. This point of objection is a not a novel one. Donnelly J. addressed an identical point in the *Minister for Justice v D.S. [2015] 3 I.R. 1.* In common with present proceedings, the EAW in *D.S* pertained to a single allegation of a war crime concerning events in Croatia in November 1991. Donnelly J. held that the ICC did not have jurisdiction in relation to the offence alleged because it was allegedly committed prior to the entry into force of the Rome Statute which established the ICC in July 2002.
    In those circumstances Donnelly J. considered that the ticking of the box in question was a manifest error.
    There is no discernible distinction between the circumstances in *D.S* and those to which this EAW relates. Consequently, I am compelled to conclude that the ticking of the box by the Croatian authorities in this EAW was a "manifest error".

14. In *D.S* Donnelly J expressed herself satisfied, in line with the decision in *Cuipe,* that she was at liberty to consider the issue of correspondence with an offence in the State.
    As was the case in *Cuipe,* the point of objection is what Edwards J. termed "otiose" as dual criminality can be established without any difficulty by reference to the acts described in Part E1.

15. The description of the role attributed to the Respondent in the events of the 2nd of May 1991 is as follows:

    He is alleged to have participated in an assault during which he produced a rifle stock which he used to strike an injured policeman to the chest and head in addition to tearing a piece of flesh from the policeman's hand and saying "Let the dogs eat the Utasha flesh".

16. The conduct in question if committed in the State constitute the following offences:
    Assault contrary to Section 2 of the Non-Fatal Offences Against the person Act 1997
    Assault causing harm contrary to Section 3 of the Non-Fatal Offences Against the Person Act 1997.
    Grave Breaches of the convention, contrary to Section 3(1) of the Geneva Conventions Act, 1962.
    Using words to stir up hatred contrary to Section 2(1)(b) of the Incitement to Hatred Act, 1989.

    Accordingly, I dismiss this point of objection based on the correspondence.

Ground Two: Lack of detail in accordance with Section 11(1)(a) of the Act.

17. The Respondent submits that the description of the alleged offence in Part E of the warrant lacks sufficient detail to communicate to the Respondent the precise misconduct on which the EAW is based.
    In support of this argument the Respondent relies on the statement of Hardiman J. in *Minister for Justice v Connolly [2014] IESC* 34 where he states at paragraph 30:
    "*..the ability of the requesting State to put the respondent on trial is limited to the offences specified in the warrant. It is a mandatory requirement of the European arrest warrant procedure that there be unambiguous clarity about the number and nature of the offences for the person sought is so sought."*
    Part E of the EAW combined with the additional information dated 28th of September 2016 make it clear that the Respondent is alleged to have inflicted blows using a rifle stock on a wounded war prisoner.

    Accordingly, there is no substance to this ground of objection, and it is therefore, dismissed.

Ground Three: Surrender Should be Refused on the Ground of Lapse of Time/Delay.

18. This ground of objection is advanced on the basis that the alleged offences occurred more than 33 years ago. The associated point of objection is that the surrender of the respondent in the circumstances would amount to a disproportionate interference the

Respondent's family rights in contravention of Article 8 of the European Convention on Human Rights (ECHR).

History of the proceedings

19. The domestic warrant issued on the 14th of November 2010 and the EAW issued six years later, on the 9th of June 2016.

    In the Respondent's affidavit he deposes that he has been living openly in Ireland for 22 years and he has raised his three children in Ireland.

    He states that he applied for Irish citizenship in 2012 using his current address and that he used the same address to apply for two passports. The Respondent submits that a section 20 request issued by the High Court seeking an explanation for the delay yielded a response which does not adequately explain why it took 19 years for Court in Croatia to issue the domestic warrant or why the interview of the alleged injured party did not take place until 2010.The Respondent maintains there is no apparent reason for the further delay in executing the EAW and consequently, the imperative that requires an EAW to be executed as a matter of urgency has been contravened.

20. The Respondent acknowledges that it is firmly established since the decision of the *Supreme Court in Minister for Justice v J.A.T (No.2) 2016 IESC 17* that lapse of time alone is not a ground for refusing surrender but submits that the delay in the present case is extraordinary and must weigh heavily in the evaluation of factors the Court is required to conduct under Section 37 of the Act.

21. The Respondent submits that the passage of time did not arise from an inability on the part of the Croatian authorities to detect the alleged crime any sooner, as was the case in *JAT (No2*). Consequently, the Respondent submits there has been blameworthy prosecutorial delay on the part of the Croatia authorities.
    The Respondent also relies on the statement of McMenamin J. in *Vestartas* [2020] IESC 12 where he stated: "*there may come a point where the delay is so lengthy and unexplained as to constitute an abuse of process, or to raise other constitutional or ECHR issues".*

22. In addition, the Respondent refers to the judgement of Charleton J. in *Minister for Justice and Equality v. Palonka [2022] IESC 6* where it states *a*t page 31:

    "*This is not a case of potential infringement of fundamental rights. Rather what is involved is a real, exceptional, and oppressive disruption to family life in the most extreme and exceptional of circumstances. Of itself, that would not justify a refusal to surrender as delay does not create rights, but delay may enable the growth of circumstances where a new situation has emerged that engages Article 8 of the European Convention in a genuinely exceptional way as set in the context of the individual procedural circumstances of the case."*

The Respondent accepts that the threshold is a high one and that in accordance with the statement of McMenanim J. in *Verstartas "the circumstances must be shown to be well outside the norm, that is, truly exceptional"*.

23. By way of response, the Applicant refers to the explanation provided by the IJA for the delay in issuing the warrant in its letter dated 28th September 2016 which states the following:

"…*in the course of the entire proceedings the accused was inaccessible for the authorities of criminal prosecution of the Republic of Croatia which was the reason for issuing the detention order*".

24. The lapse of time between the endorsement of the warrant on the 17th of October 2016 and the Respondent's arrest on the 1st of September 2023 is explained in an affidavit sworn by Sergeant Adrian Murray from the Extradition Unit in which he explains the original EAW was mislaid during that period. He also deposes that once the SIS alert was circulated on the system on the 2nd of May 2023, the arrest of the Respondent took place four months thereafter.

25. The Applicant maintains that there was no delay between endorsement and arrest and no prejudice arises from it. The Applicant relies primarily on the judgement of O'Donnell J. in *JAT (No2)* and the substantial weight attributed to the public interest in ensuring that persons charged with offences face trial. It is submitted that a refusal of surrender will arise only in circumstances when there is an unusual combination of specific factors weighed cumulatively.

Decision

26. There are unquestionably aspects of the delay in investigating the offence and in issuing and executing the EAW which were either inadequately explained, or culpable, or both.

27. The lapse of time in initiating the prosecution is not explained at all. It is evident that he alleged injured party was not interviewed until 2010. It is tempting to speculate that suspected war crimes simply take a long time to investigate but the Croatian authorities have opted not the provide any such explanation. The court proceedings underlying the EAW in Croatia commenced in 2010 with the issuance of an arrest warrant for the Respondent. The EAW lay in abeyance until its transmission and endorsement in 2016. The delay in executing the EAW between 2016 and 2023 is explained solely by reference to the fact that the original EAW could not be located. The cumulative delay was in no way attributable to the respondent who left Croatia many years before he was sought by the authorities.

28. Despite the foregoing failings, the law is clear that lapse of time alone will rarely ground a refusal of surrender. There is a compelling public interest in ensuring that persons suspected of serious offences face trial. This is particularly true of war crimes, even those towards the lower end of the scale. The weight of the public interest in the context

of significant and culpable delay was highlighted in the High Court decision in *Minister for Justice v Corry [2016] IEHC 678* where surrender was ordered notwithstanding significant culpability on the part of the IJA.

29. The threshold for refusal of surrender based on an accumulation of circumstances created by delay is set at a high level. I do not consider that delay in the present case reaches the high threshold, although it is perilously close. The delay, while substantial and culpable, has not created circumstances which are sufficiently unusual or exceptional as to justify the refusal of surrender.

    In light of the above, I dismiss this ground of objection.

Article ECHR 8 argument

30. In considering the Article 8 argument, the Court has had regard to the guidance provided by Donnelly J. in *Minister for Justice v D.E [2021] IECA 221* which clearly indicates that the evidential burden of proving incompatibility with Article 8 of the ECHR lies with the Respondent.

It is clear from the Respondent's affidavit that his family circumstances are unremarkable and unexceptional and the likely interference with his family life is that which is presupposed when a requested person is surrendered.

It falls significantly short of engaging his rights under Article 8 of the European Convention on Human Rights.

Accordingly, this point of objection is dismissed.

Ground Four: Section 37(c) Respondent's Right to a Fair Trial will be Breached.

31. The Respondent submits that if he is surrendered, he is exposed to a real and substantial risk that he will not receive a fair trial. The Respondent bases this argument on his ethnic background, his orthodox faith, and the area in Croatia where he lived. In his affidavit he expresses the view that he will be regarded as a Serb and suggests that the Croatian Courts have a bias against Serbs who are prosecuted for war crimes. In support of this argument the Respondent relies on a report of the International Red Cross dated March 2006 and a Human Rights Watch World Report dated 2008.

32. He also deposes that the Judge in Osijek who issued the warrant for his arrest has been arrested and suspended for alleged corruption. The source of Respondent's information is newspaper articles which are also exhibited.

Decision

33. This ground of objection is a speculative ground and based on reports which are out of date and could not be regarded as real or cogent evidence that the respondent will be treated less favourably by the Croatian Courts on the basis of his ethnicity and religion.

34. In accordance with Section 4A of the 2003 Act the Court must presume that the Croatian judicial authorities will comply with the requirements of the Framework Decision and will respect his fundamental rights including his right to a fair trial.

35. Accordingly, this point of objection is dismissed.

Ground Five: Prison Conditions/Article 3 objection

36. The Respondent submits that his surrender is prohibited by Section 37 of the Act of 2003 as surrender would expose him to a real risk that he will be detained in conditions which contravene his right under Article 3 of the European Convention on Human Rights. In seeking to discharge the burden of proving a real and substantial risk of a breach of his Article 3 rights the Respondent's solicitor has exhibited the Report of the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT report 2023) published on the 23rd of November 2023 relating to the visit conducted by the CPT to Croatia from the 19th to the 29th of September 2022.

37. The 2023 report follows the CPT report published in 2018 which followed a visit in 2017 and raised significant concerns regarding overcrowding in Croatian prisons including Osijek County prison. At that time the personal space available to available to detainees had fallen below 3 m^2 of floor surface in multi-occupancy accommodation.

    The CPT report 2023 notes that the prison population had increased significantly since the committee visited in 2017 and the occupancy in Zagreb Prison has increased to 151%.

38. In its executive summary the CPT is particularly critical of the position of the Croatian authorities to apply an assessment of living space based on 3 m^2 per person even in the absence of important mitigating factors such as general out-of-cell entitlements and the offer of a purposeful regime of activities.

    The report notes overall prison overcrowding remains a serious problem in the Croatian penitentiary system, *particularly in pre-trial detention* and closed regime units.

39. The committee observe at paragraph 30 of its report that in the course of 2021 the Croatian Law on the Execution of Prison Sanctions was amended and the reference to the requirement of a minimum living space of 4 m^2 per prisoner in multi-occupancy cells was removed.

40. The 2023 report notes at paragraph 40 that in Zagreb Prison all wings accommodating remand prisoners were seriously overcrowded and, in principle, standard cells of 19.5 m^2 could accommodate between six and eight prisoners, who were confined to their

cells for 22 hours a day which meant that most of the remand population was offered a living space of between 2.5 m^2 and 3.2 m^2 each.

At paragraph 41 it states the following:

> "*The CPT takes note of the efforts made to maintain the prisons in an adequate state of repair and to offer appropriate conditions, in particular, at Zagreb Prisons, in light of the serious overcrowding. Nevertheless, the Committee would like to recall that, in its decision in Mursic v Croatia, the European Court also established the notion of the existence of three mitigating factors which must be met cumulatively to avoid a possible violation of Article 3 of the Conventions in respect of prisoners provided with less than 4m^2 of living space in multi-occupancy cells.*
>
> *Such mitigating factors are: 1) the length of the period of detention in conditions of minimum personal space; 2) the provision of adequate out of cell entitlement and activities and 3) the absence of other aggravating aspects of the conditions of detention. Further, the CPT must re-iterate that it has long advocated a standard of 4m^2 of living space per prisoner in multi-occupancy cells (and a desirable standard that is even higher) still conceding the possibility of minor deviations to the standard which must be compensated. The CPT has never considered that its cell-size standards should be regarded as absolute. In other words, it does not automatically hold the view that a minor deviation from its minimum standards may in itself be considered as amounting to inhuman and degrading treatment, as long as other alleviating factors can be found, such as, in particular the fact that inmates are able to spend a considerable amount of time each day outside their cells engaged in purposeful activities (work, education, sport, recreation). The preventative approach of the CPT means that it aims to prevent situations that may result in violations of Article 3 of the ECHR arising.*
>
> *By not guaranteeing 4m^2 of living space per person in multiple occupancy cells, the Croatian Authorities are on the cusp of subjecting prisoners to conditions which may be considered inhuman and degrading. For this reason, the CPT recommends that the minimum standard of 4m^2 of living space per person be complied with*."

41. On the 27th of March 2024, arising from the content of the CPT report, this Court issued the first of two requests pursuant to Section 20 of the Act of 2003 requesting further information pertaining to the prison in which the Respondent is likely to be detained and the living space for the entirety of his detention.

42. The Response received on the 5th of April 2024 confirmed that the Respondent will be detained at Osijek Prison and the letter from the Governor of Osijek prison stated as follows:

"Regarding your inquiry of 3 April 2024 in which you requested that we provide a report on prison conditions at the Osijek Prison, below we are delivering the requested information.

Osijek Prison receives prisoners sent to serve sentences the remaining unserved portion of which is less than 3 years, prisoners pending the finality of the sentence, repeated offenders sentenced to imprisonment, prisoners with ongoing criminal proceedings, high-risk prisoners, persons subject to pretrial detention measures suspected of committing a criminal offense, or persons sentenced to imprisonment or detention in misdemeanor proceedings. The spatial capacity of the prison cells ranges from 6.43m^2 to 36.77m^2. Prisoners are generally accommodated in rooms designated for multiple prisoners. Prisoners who are expected not to have a negative impact on each other may be accommodated together. Due to the continuous influx of prisoners at the Osijek Prison, we cannot know with certainty which prisoner will be admitted to which cell, so we cannot accurately predict how many prisoners will be accommodated in the prison cell at the time of the extradition of the accused Dragan Rakanovic to the Republic of Croatia. (Emphasis added)

Each prisoner is provided with separate bedding. Daily outdoor walks are provided to prisoners according to the daily schedule of the Osijek Prison for all categories of inmates.

Every room where prisoners stay has natural and artificial light enabling reading and work without hindrance to vision, as well as sanitary facilities for physiological needs, and access to drinking water. In the prisoners' unit, on the ground floor of the building, one room has been repurposed for the needs of persons with disabilities, equipped in a manner that allows these individuals to perform basic life activities in line with their health condition. Prisoners in the rooms must clean and maintain the space where they reside daily. Due to reduced space capacity, prisoners take their regular meals in their rooms, where there is a table and chairs. In the rooms, prisoners can watch TV, have a kettle for preparing hot drinks, as well as bedding, their own bed, and a locker for personal belongings.

Prison cells are not unlocked except for the requirements of regular and planned prisoners' activities (e.g., work assignments, court appearances, individual or group treatment interventions, visits to a doctor or health institution). (Emphasis Added).

Prisoners of all statuses are provided with the possibility of work

assignments according to the prisoner's capabilities and the needs and organizational capabilities of the prison.
Prisoners are provided with three meals a day according to the nutritional standards for planning daily prisoners' meals. Additionally, prisoners who are working also receive a supplementary, hot, or cold meal (Ordinance on the Standards of Accommodation and Nutrition of Prisoners, Official Gazette 78/22). Other victuals can be obtained, if necessary, from the prison shop.
Persons deprived of liberty at Osijek Prison are provided with medical treatment and other healthcare measures and activities in the designated prison infirmary. Healthcare for prisoners of Osijek Prison is provided by a general practitioner and nurses. If necessary, prisoners for whom healthcare cannot be provided in the infirmary are referred for treatment to an appropriate healthcare institution or to the prison hospital."

43. In response to the statement by the Croatian authorities that they cannot accurately predict how many prisoners will be accommodated in the prison cell at the time of the extradition of the Respondent, a second Section 20 request issued in accordance with the judgement of the ECHR in *Mursic* v *Republic of Croatia* seeking confirmation that the Respondent will be accommodated in a cell with a minimum individual space of 3 m^2 per occupant.

    The following Response was received on the 10th of May 2024:

> *"Regarding the request of the central authority for European arrest warrants, number 191/96/16 of 2 May 2024, below we are delivering the requested information:*
> *Due to frequent overcapacity of the Osijek Prison, we are not able to confirm that there will be no more than 2 people in the smallest size cell (measuring 6,43 square meters) and no more than 12 people in the biggest size cell (measuring 36,77 square meters). However, we would like to draw your attention to the fact that in complying with the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and following the case law of the European Court of Human Rights as regards Article 3 of the ECHR, especially in connection with the judgments issued against the Republic of Croatia (e.g. Mursic v Republic of Croatia), the Osijek Prison ensures the best possible conditions of prison detention for persons deprived of liberty, respecting their human rights.*
> *In line with the above, we can confirm that any reductions in*

the required minimal space in the Osijek Prison last only for a short time period. Furthermore, we make sure that if there is a possibility of a prolonged reduction in minimal space due to the inability to influence the increased number of persons deprived of liberty, we act in accordance with legal possibilities, utilizing the option of transfer of persons deprived of liberty to penal institutions where overcrowding is lower and where they will have better conditions. We point out that the possibility of transfer is used with the consent of the competent court and does not affect the course of judicial proceedings.

Furthermore, the Osijek Prison allows persons deprived of liberty to have outdoor walks for a minimum of two hours per day, between 8 am and 7 pm. The outdoor area designated for walks is a multifunctional area that includes an asphalt playground for futsal and basketball, as well as a gym area with a shade structure, where daily recreation is provided for persons deprived of liberty. The outdoor walking area also includes a water fountain, waste bins, and a seating bench. In addition to the above, persons deprived of liberty can stay outside their cells voluntarily during haircut periods organized on Saturdays, during medical examinations organized twice a week and as necessary, and during bathing organized in such a way that persons deprived of liberty bathe twice a week during the summer and once a week during the winter. In addition to the mentioned bathing schedule, persons deprived of liberty can also bathe after sports recreation, after work, or in accordance with the approval of a physician. Persons deprived of liberty may, in accordance with medical approval and their personal willingness, be employed in various jobs within the Prison, which are carried out between the hours of 8 am and 2 pm or 3 pm, depending on the workplace. Also, when weather conditions permit, employed persons deprived of liberty mostly spend their time in the outdoor area within the Osijek Prison, and in such cases, their stay in the cells is reduced to a minimal number of hours. Persons deprived of liberty are also allowed family visits every Wednesday, and on the 1st and 3rd Sundays of the month, during which time they are outside their cells. In addition to such visits, they are allowed to participate in religious activities outside their cells every month. Furthermore, regarding the treatment of persons deprived of liberty, they have access to various sports tournaments within the prison, as well as access to treatment groups, and counselling sessions during which they also spend time outside their cells.

In light of the options provided by the Osijek Prison to persons deprived of liberty, we are unable to confirm the exact number of hours per day such persons may spend outside their cells, as this number is, in fact, their choice. The Osijek Prison provides various activities for persons deprived of liberty that take place outside of cells, but all these activities are voluntary, and persons deprived of liberty decide for themselves whether or not to use them."

44. In the High Court decision of *Minister for Justice v Anghel [2020] IEHC 699,* Burns J. set out a non-exhaustive list of the principles offering guidance in cases where an Article 3 argument related to prison conditions is advanced:

> *"(a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;*
>
> *(b) a refusal to execute a European arrest warrant is intended to be an exception;*
>
> *(c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union ("the Charter");*
>
> *(d) the prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory;*
>
> *(e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;*
>
> *(f) the threshold which a respondent must meet in order to prevent extradition [or surrender is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;*
>
> *(g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;*
>
> *(h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;*
>
> *(i) the relevant time to consider the conditions in the requesting state at the time of hearing;*

(j) when the personal space available to a detainee falls below 3m^2 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 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption 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 m^2 are short, occasional, and minor;

(2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and

(3) The detainee is confined to what is when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention;

(k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained;

(l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and

(m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state."

The guidance provided by Burns J. originates from the 2015 judgment of ECHR in *Mursic v Republic of Croatia* Application no. 7334/13 which sets out the approach to be taken as follows:

> "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: (*emphasis added*)*
>
> *(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).*

45. An Article 3 ground of objection based on prison conditions in Croatia was rejected by Keane J in the recent decision of *Minister for Justice v Dario Celik [2023] IEHC 102.* The Article 3 concerns arose from the content of the CPT report 2018. Arising from the report the High Court issued three requests to the Croatian authorities to provide it with information on the conditions of detention Mr Celik was likely to experience in order to enable the Court make a specific and precise assessment of whether substantial grounds exist under Article 3.

In the first response The IJA confirmed Mr Celik would be detained at Osijek prison, if surrendered.

46. In response to the second and third requests seeking an assurance that personal space of at least 3 m^2 would be available to Mr Celik during his detention or, if unable to provide that assurance, to identify factors capable of adequately compensating for the lack of personal space to rebut the strong presumption of a violation of Article 3 that would then arise, the IJA furnished the following response:

> *'The Republic of Croatia is committed to the protection of rights guaranteed in the [Convention] and in particular to the protection of all persons, including prisoners, from torture or inhumane (sic) or degrading treatment or punishment. For these reasons, all prisoners staying in cells with more than one prisoner are provided a minimum individual space of 4m2 for the entirety of their detention. However, given that the convicted person shall serve his prison*

sentence in the Prison at Osijek, where there is a continuous influx of new prisoners assigned to pre-trial detention, it is possible that some prisoners will not be provided minimum individual space of the named 4m2 for the entirety of their detention. Even if such a situation arises, the prisoners are provide other mitigating factors compensating for a lack of individual space, thus guaranteeing that such lack of individual space will be of shorter duration and to the smallest possible extent during their term of imprisonment, that during this time the prisoners shall be guaranteed free movement the cell, participation in physical and other activities outside the cell and that the physical conditions of the stay will be appropriate at all times (access to natural light and air, heating, meeting basic hygiene requirements, private toilet use etc). These circumstances shall ensure that the rights of the prisoners are protected at all times and that the prisoners shall not be subject to inhumane or degrading treatment during their imprisonment.'

47. On the basis of the foregoing information, Keane J. was satisfied first, that the prisoners staying in cells would be provided with a minimum individual space of 4 m^2 for the entirety of their detention, subject only to a the possibility that, because of the influx of new prisoners assigned to pre-trial detention, some prisoners will not be provided with individual space of $4m^2$ the entirety of their detention and second, by the mitigating factors including the guarantee that the availability of personal space will be of shorter duration and to the smallest extent possible during their term of imprisonment and the guarantee that they will be afforded free movement outside the cell, participation in physical and other activities outside the cell and appropriate physical conditions in the cell. (Paragraphs 23 and 24).

48. It is worth pointing out at this stage that the assurance offered to the Respondent regarding out-of- cell movement is a significant curtailment of the movement offered to Mr Celik in 2022 when the minimum standard of personal space applied was $4m^2$.

49. In *Minister for Justice v Anghel,* Burns J. followed the decision of the ECHR in *Rasinski v Poland (429/69/18),* concluding that he was required to refuse surrender under Section 37(1)(c)(iii) on the basis of a breach of Article 3 in circumstances where surrender was sought for the purpose of executing a 2 year 6 month sentence and the Hungarian prison authorities would only guarantee a minimum individual space of $2m^2$ under the prison's semi-open regime. The availability of liberal out-of-cell movement and purposeful activities and the absence of other aggravating factors did not compensate for the lack of individual space.

50. The decision of Burns J. in *Anghel* serves to highlight the cumulative nature assessment to be conducted in accordance with *Mursic*.

Decision

51. First, in accordance with the decision in the cases of *Aranyosi and Caldaru C-404/15 and C-659/15 PPU,EU:C:2016:198,* I am satisfied that the CPT 2023 report exhibited by the Respondent consists of objective, reliable, specific and updated evidence on prison conditions in Croatia and that it discloses systemic or generalised deficiencies of such concern that it is necessary to consider whether in the specific circumstances of this case are substantial grounds for the belief that the Respondent will be exposed to a real risk of being detained in inhuman and degrading conditions.

52. The response of the IJA on the 5th of April 2024 candidly states that the Croatian authorities are unable to confirm that there will be no more than 2 people occupying the smallest cell (6.43 m^2) and no more than 12 in the largest cell (36.77 m^2).

53. On the assumption that the surplus in each instance will be limited to one additional prisoner, the living space in the smallest cell is 2.143m^2 per occupant and 2.828m^2 in the largest.

54. The response from the IJA on the 10th of May 20124 fails to confirm that personal space will not fall below 3$m^{2.}$

55. The CPT report 2023 and the response from the prison Governor of Osijek, viewed together, raise a strong presumption of a violation of Article 3.

56. In accordance with the decision in *Mursic,* the burden of proof rests with the Croatian authorities to rebut the presumption by demonstrating the mitigating circumstances which may compensate for the lack of individual space. In accordance with paragraph 138(1) of *Mursic* this Court has sought confirmation from the Croatian authorities that any reductions in the required minimal space will be short, occasional, and minor.

57. The reply received on the10th of May 2024 contains a statement by the Croatian authorities that the reductions to the required minimum space of 3m^2 will be "short". There is no specific confirmation in relation to whether reductions will be occasional or minor.

58. The letter dated 10th May 2024 refers to the option of a transfer to a less overcrowded prison where a prolonged reduction in individual space is possible.

59. The term "short" is not related to any identifiable metric and is itself a relative term. The reference to "prolonged reduction" concedes prolonged reduction as a possibility but, once again, does not indicate any unit of time by which the Court can measure how long detention in space of less than 3m^2 will be countenanced by the Croatian prison authorities. In short, it does not communicate whether any reductions in the minimum standard of 3m^2 will last for days, weeks or months.

60. Free movement outside the cell and liberal access to activities is the most significant mitigating factor when individual space of $3m^2$ is not guaranteed. The supplementary information received from the IJA addressing those factors may be summarised as follows:

    5 April 2024

    - Daily walks are provided to prisoners according to the daily schedule for all categories of inmates;
    - Prisoners take their regular meals in their rooms;
    - Prison cells are not unlocked except for the requirement of regular and planned prisoners' activities (e.g. work assignments, court appearances, individual or group treatment interventions, visits to a doctor or health institution);
    - Prisoners of all statuses are provided with the possibility of work assignments according to the prisoner's capabilities and the needs and organisational capabilities of the prison.

    10 May 2024

    - Outdoor walks are allowed for a minimum of 2 hours per day between 8am and 7pm;
    - The outdoor area for walks is equipped with a playground for futsal and basketball as well as a gym area;
    - Prisoners are permitted to be outside their cells during haircut periods, medical examinations, bathing (twice weekly in summer months, once a week in winter);
    - Persons employed in various jobs in the prison carry them out between 8am and 2pm or 3pm. Employed persons mostly spend their time in the outdoor area;
    - Family visits every Wednesday and 1st and 3rd Sunday of every month;
    - Religious activities every month;
    - Access to sports tournaments, treatment, and counselling.

61. The Governor concludes that he is unable to confirm the exact number of hours prisoners spend outside their cells, as the number is, in fact, their choice.

62. The supplementary information makes it clear that the cells are "not unlocked" and regular meals are taken in the cell. Outdoor exercise of a minimum of two hours is guaranteed. Access to weekly bathing is assured and family visits on Wednesdays and two Sundays each month is also assured. Access to out-of-cell activities such as haircuts, medical treatment employment, sports tournaments, treatment groups, counselling, and religious activities is available but not guaranteed.

63. It is manifestly the case that the only *guaranteed* out-of-cell movement every day is the 2 hours outdoor exercise. In other words, except for days which involve bathing or the

possibility of a family visit, prisoners who are not employed can expect to be confined to their cells for 22 hours per day.

64. This level of restricted movement and reduced individual space is precisely what the CPT committee observed in Zagreb Prison in 2022 where most of the remand population were confined to their cells for 22 hours a day in a living space of between $2.5m^2$ and $3.2m^2$ and which led to the following observation in paragraph 41:

"*In this respect, the situation observed in Zagreb Prison, where remand prisoners may be detained for months on end confined to their cells with less than $4m^2$ of living space, with no communal facilities and no purposeful regime except for two hours of outdoor exercise, raises clear issues under Article 3 of the European Convention on Human Rights".*

65. The final factor which the Court should take into account is information provided by the IJA in its cover letter dated 10th of May 2024 in which it is stated that a county court judge visits the prison weekly and is familiar with conditions of the stay in the Prison as well and prisoner's individual requests and proposals.

66. The CPT report addresses a similar arrangement that is in place at Zagreb at paragraph 44.

"In view of the serious levels of overcrowding at Zagreb Prison, it is not surprising that the majority of the complaints lodged with the prison management and supervisory judges by detained persons related to the level of overcrowding and the poor material conditions in the cells, combined with the restrictive regime in place and the lack of communal facilities. An overview of the complaints filed during 2021 and 2022 show that he judicial authorities generally rejected these complaints if the inmates could not prove that they had been placed in cells with less than $3m^2$ of living space per prisoner. In so doing, the supervisory judges accepted the arguments put forward by prison management…"

67. While the role of the supervisory judges must be regarded as a positive development, the CPT's review of complaints in 2022 would suggest their capacity to rigorously investigate detainees' complaints regarding overcrowding is unproven.

Hence the recommendation of the CPT 2023 report that complaints by prisoners should be subjected to more rigorous scrutiny.

68. The presumption under Section 4A of the 2003 Act that the issuing state will comply with its international obligations is not to be discarded lightly. However, the presumption sits side by side with the strong presumption which has been raised in the present case and I am satisfied that the duration of the periods during which the Respondent is likely be detained in personal space of less than $3m^2$ cannot be measured, even in general terms and that the IJA has failed to specifically address the question of whether reductions will be occasional and minor.

69. Second, I am satisfied that the *guaranteed* out-of-cell movement is limited to two hours daily and does not constitute a mitigating factor.

70. Consequently, the information provided by the IJA has failed to rebut the strong presumption that the likely conditions of the Respondent's detention will be in breach of his right not to be subjected to inhuman or degrading treatment under Article 3 of the ECHR.

71. The surrender of the Respondent is therefore prohibited by Section 37 of the Act of 2003, and I am obliged to refuse surrender.

JUDGE MELANIE GREALLY