THE HIGH COURT

Record No. 2017/18 EXT

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

- AND-

DAMIEN JOSEPH MCLAUGHLIN

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered this 20th day of October, 2017.

1. The surrender of the respondent is sought by the United Kingdom of Great Britain and Northern Ireland ("the U.K.") on foot of a European Arrest Warrant ("EAW") dated 18th January, 2017, which was endorsed by the High Court on 20th January, 2017. The respondent was arrested thereunder on 2nd March, 2017, brought before the High Court on 3rd March, 2017 and subsequently remanded in custody.

2. The respondent objects to his surrender. He claims his constitutional right and his right under Article 3 of the European Convention on Human Rights ("ECHR") not to be subjected to inhuman and degrading treatment would be breached by virtue of the prison conditions he would be subject to in Maghaberry prison in Northern Ireland on surrender. The respondent claims that the full-body searches (strip-searches) which take place in Maghaberry of themselves, and also in conjunction with the background of controlled movement within the prison, reaches the threshold of inhuman treatment and the threshold of degrading treatment.

A Member State that has given effect to the 2002 Framework Decision
3. The surrender provisions of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003") apply to member states of the European Union ("E.U.") that the Minister for Foreign Affairs has designated as having, under their national law, given effect to the Council (EC) Framework Decision of 13th June, 2002 (2002/584/JHA) on the European Arrest Warrant and the surrender procedures between member states ("the 2002 Framework Decision"). By the European Arrest Warrant Act, 2003 (Designated Member States) Order 2004 (S.I. 4 of 2004), the Minister for Foreign Affairs designated the United Kingdom of Great Britain and Northern Ireland as a member state for the purposes of the Act of 2003.

Section 16 (1) of the Act of 2003
4. Under the provisions of s. 16(1) of the Act of 2003, the High Court may make an order directing that a requested 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 of the warrant,

(c) The EAW states, where appropriate, the matters required by s. 45 of the Act of 2003,

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

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

Identity
5. The Court is satisfied on the basis of the information contained in the EAW, the additional information and the affidavit of Padraig Boyce, member of An Garda Síochána, that Damien Joseph McLaughlin, who is before the Court, is the person in respect of whom the EAW has issued.

Endorsement
6. I am satisfied that the EAW was endorsed in accordance with s. 13 of the Act of 2003 for execution in this jurisdiction.

Sections 21A, 22, 23 and 24 of the Act of 2003
7. The Court is satisfied that it is not required to refuse to surrender the respondent under any of the above sections in relation to the European arrest warrant.

Part 3 of the Act of 2003
8. Subject to further consideration of s. 37, s. 38 and s. 45 of the Act of 2003, the Court is satisfied that it is not required to refuse the surrender of the respondent under any other section contained in Part 3 of the 2003 Act.

Section 45 of the Act of 2003
9. The EAW seeks the respondent's surrender for prosecution and therefore point (d) of the EAW was not completed by the issuing judicial authority. In these circumstances, the Court is satisfied that his surrender is not prohibited under s. 45 of the Act of 2003 which deals with trials in absentia.

Section 38 of the Act of 2003
10. Point (e) of the EAW outlines that the respondent is sought for prosecution based on four domestic warrants of arrest for four offences in total; one of aiding and abetting in a murder, one of membership of a proscribed organisation, one of possession of an article suspected of being for the commission of an act of terrorism, and one of engaging in conduct in preparation for the commission of acts of terrorism.

11. Each of the four counts is linked to the respondent's alleged involvement on 1st November, 2012, in the murder of David Black, a prison officer at Maghaberry prison in Northern Ireland. The circumstances giving rise to the allegations are set out in the EAW and include an allegation that the respondent failed to sign for bail and bail was subsequently revoked.

12. At point (e) I of the EAW, the box entitled "terrorism" has been ticked by the issuing judicial authority. This indicates reliance upon Article 2, para. 2 of the 2002 Framework Decision in respect of each of the alleged offences. In those circumstances, double criminality (correspondence) with offences in this jurisdiction is not required to be established. The maximum penalties applicable to each of the four offences are ten years, 15 years and two penalties of life imprisonment. Therefore, the requirements of minimum gravity have been met. There is no manifest error apparent in these designations. The respondent's surrender is not prohibited by s. 38 of the Act of 2003.

Section 37 of the Act of 2003
13. Under the provisions of s. 37 of the Act of 2003, a person shall not be surrendered, *inter alia*, if surrender would be incompatible with the State's obligations under the ECHR and its Protocols, or if surrender would constitute a contravention of any provisions of the Constitution, or there are reasonable grounds for believing that he or she would be tortured or subject to other inhuman or degrading treatment. The respondent claims that his surrender is prohibited under this section as there are reasonable grounds for believing that he would be at real risk on surrender of being subjected to inhuman and degrading treatment at Maghaberry prison.

The evidence
14. In his affidavit dated 17th May, 2017, the respondent outlines his experience of detention in Maghaberry prison from 29th September, 2009 to 23rd December, 2011. He was detained in Roe House, where republican prisoners are accommodated. The respondent details a protest which began there amongst republican prisoners because the prisoners felt that they were being degraded during full-body searches. In the course of these strip-searches, they were told they had to wiggle their tongues when they had to open their mouths and that they had to wiggle their toes. He outlines how he felt they were being made into objects of ridicule and also stated his belief that there was no drug problem in Roe House and so in his view, the prevention of drugs entering the prison could not constitute a basis for the performance of the full-body searches.

15. The respondent describes how prisoners were locked alone in their cells for long periods of time and had no freedom of movement. If they were taken to another room, they were locked in that room. He outlines that there was a requirement to be escorted by prison officers at all times within Roe House and describes what he experienced as a prison within a prison.

16. The respondent describes the details of a protest by prisoners in April 2010 against forced full-body searches and the oppressive controlled movement regime, and which resulted in prisoners no longer being able to attend Mass on Sundays and in a loss of prison visits. He outlines that an agreement ("the August 2010 Agreement") was reached between the prisoners and the Northern Ireland Prison Service ("NIPS") that was facilitated by an independent joint facilitation group. The respondent says that he understood a term of the agreement was that in all but exceptional circumstances, sitting on a Body Orifice Security Scanner (BOSS) chair would replace full-body searches. The respondent says the prison service did not comply with this term. He claims that prisoners had no opportunity to obtain contraband and nothing untoward was ever found, therefore, there was no reason for forced full-body searches. Even when taken to court, he said that prisoners had no opportunity to interact with any other person.

17. The respondent goes on to outline a particular kind of forced body search conducted on him in September 2010. He says he adopted the position that he would not be complying with but would not resist the body search. The respondent says that he was taken by about 10 to 15 prison officers in full-body armour to a cell and asked to comply. He was given a period of reflection but when he did not agree to comply, he says that officers in riot gear burst in and he was hit full force with a shield. He outlines being pushed violently onto the floor. He says his arms were twisted and he was in unbelievable pain. His jumper was cut with scissors, as was the scapular he wore. His trousers and underwear were pulled off and he was scanned. His clothes were put on in such a manner that he was left with his penis and testicles hanging out and he was handcuffed behind his back and dragged in that condition to reception where the handcuffs were taken off and he was allowed fix himself.

18. On return from the courthouse where he was not in fact needed in court, he was subjected to the same ordeal again despite having been kept in a cell for seven hours. They were more aggressive the second time but did not use scissors, as they did not have to do so.

19. The respondent outlines other occasions of the forcing open of his mouth and the bringing of his wrists to breaking point by prison officers. He outlines an incident in November 2010 when his nose was hit by a shield, whereby the respondent was of the opinion that he had broken his nose. His understanding was that he was to receive an x-ray to this effect, but he received no x-ray at the time and the reasons for which were not explained to him.

20. The respondent avers that he was physically assaulted on numerous occasions in Maghaberry prison while undergoing forced full-body searches conducted on him before going to and on return from court appearances. He says he experienced his clothes being cut or ripped off and states that he was left black and blue with bruises and cuts while at no time resisting. He describes these strip-searches as forced, sadistic, humiliating and degrading. The respondent said that the forced strip-searches were video recorded. It appears that the videos are only kept for 6 years and that these (if they existed) are no longer available.

21. He believes that the treatment of prisoners in Maghaberry prison has since worsened and he believes that if he is returned there, he will be subjected to forced strip-searches for the duration of his trial. Counsel for the respondent submitted that when the respondent was on remand in Maghaberry prison from December 2012 to July 2014, he was searched once on entry and once on exit and it was the same type of forced body search. The respondent never made any complaint about these searches during his time in Maghaberry prison in the period from 2012 to 2014.

The Respondent's Medical Notes
22. Medical notes on the respondent from the medical attendant at Maghaberry prison were sent to the respondent's solicitor on 21st September, 2011 and are exhibited to the respondent's affidavit. There is a recorded entry of a complaint of assault on 29th September, 2010. On 30th September, 2010, the respondent is recorded as having pain for which paracetamol was given apparently in respect of his physical complaints following his complaint of assault.

23. The medical notes further record an incident of the respondent complaining of an alleged assault by a member of staff saying he is sore all over his body, he had a sore nose and a headache. He is recorded as refusing to make a statement of what happened. On 23rd November, 2010, bruises and swelling are noted to the bridge of his nose as well as a small grazed area to both knees; he was given paracetamol. On 26th November, 2010, some four days after the shield incident, the record suggests an x-ray of nasal bones. However, on 15th December, 2010, the reason why the x-ray was not completed is outlined as being because radiologist advised that nasal bones are not x-rayed. On 27th January, 2011, it is recorded that the respondent refused a search on going to court and claims he was assaulted during a forced strip-search, and complained of eye, neck and wrist pain. He was given medication to take.

24. The medical report of Sean McGovern, Consultant in Accident and Emergency Medicine dated 7 January, 2015 was exhibited to

the respondent's affidavit. This report was obtained by the respondent for the purpose of a civil action in Northern Ireland over his treatment in prison. Apparently, this claim did not proceed as it was statute barred. Under the heading "summary and opinion", he states that the respondent:

> "[…] appears to have been the subject of repeat forcible body searches during his time in prison during 2009 and 2011. The clinical notes indicate he was forcibly searched. He was held down and likely to have sustained a straining type of injury to his neck and back. He is a young man without any antecedent history of neck or back complaints. It is reasonable after forcible strip-searching that he did sustain straining injury to the neck and back giving rise to intermittent symptoms after the last incident occurring. He does appear to have had repeat episodes of being held forcibly down with arms behind his back and twisting of his wrists giving rise to vulnerability to wrist pain after the incidents. The majority of such symptoms would be expected to settle within 6 months of the incidents. On one occasion he was struck by a shield and appears to have had bruising to the nose. This is described as minor swelling. There is no definite evidence of fracture. I consider it more likely he sustained undisplaced fracture or soft tissue injury with soft tissue injury being most likely. It is reasonable he would have had discomfort in the nose for a few weeks. He has no ongoing nasal symptoms arising from the same."

The Agreement of August 2010 and subsequent developments

25. In the August 2010 Agreement, which is exhibited to the respondent's affidavit, para. D.3. states that a new search facility using the latest technologies will "remove the requirement for routine full-body searching of separated prisoners within the prison." It is stated at para. D.4. that only in exceptional cases will a full-body search under the existing arrangements be carried out on a prisoner and para. D.5 states that in such cases, the full-body search must be: "authorised and observed by a supervisor and carried out in a manner which is both sensitive and dignified. The process of searching will be audited and monitored to ensure it complies with human rights standards."

26. Counsel for the respondent submitted that the last sentence referring to human rights standards had to be included as an acknowledgement that searches prior to the date of the agreement did not necessarily comply with human rights standards, otherwise there would be no need for giving that assurance. I am quite satisfied that this does not amount to an admission that previous searching (or strip-searching in general) was not compliant with human rights standards. This is an unsurprising inclusion in the agreement. Contrary to the respondent's submission, it confirms that the UK authorities will comply with human rights standards.

27. A further report called 'The Stocktake Report of the August 2010 Maghaberry Prison Agreement' is exhibited to the respondent's affidavit. The report was commissioned by the then Minister for Justice in Northern Ireland to consider whether progress could be made on the August 2010 Agreement. Outstanding issues regarding prisoners are outlined on p. 5 of the Stocktake Report as "concerns remain about the routine full-body searching exiting and entering the prison (NIPS state that this is non-negotiable)" and "the restrictions on controlled movement". Under the heading "state of compliance", it is stated that:

> "NIPS should continue to review the issue of full-body searching, taking into account any advances in technology systems or policy which might obviate or diminish the requirement for such searches such as the use of Multi-Mode Threat Detector."

28. The proceedings of the meeting of Oireachtas Joint Committee on the Implementation of the Good Friday Agreement on 3rd November, 2016 are also exhibited to the respondent's affidavit. The Committee was addressed by Peter Bunting, who at that time was involved with Irish Congress of Trade Unions and was the Assistant General Secretary and a member of the independent group that facilitated the negotiation of the August 2010 Agreement and the Stocktake Report 2014. Conal McFeely, a businessman who was also part of the independent assessment team and John Finucane, Solicitor, of Finucane Toner Solicitors, also addressed the Committee. The specific issue for debate and discussion by the Committee was the conditions in Maghaberry Prison.

29. Peter Bunting comments that in the August 2010 Agreement:

> "we included the right to conduct strip-searches if there was intelligence evidence to suggest a person was smuggling drugs, arms or parts of arms […] it was accepted by everyone in the agreement that there would be strip-searching in that context. However, it is actually done on the basis that it is part of everyday life as opposed to on the basis of intelligence."

Deputy Brendan Smith, former Minister for Justice and member of the Oireachtas Committee, commented that the contributors illustrated "a very depressing and worrying picture of the conditions and treatment meted out to prisoners in Maghaberry Prison". There was also mention in the Committee discussion of the spare BOSS chair in Portlaoise Prison being loaned to Maghaberry Prison, which would remove the need for routine strip-searching. John Finucane also outlines his experience of consultations with clients via video link, the client having been strip-searched on the way to the video link consultation.

The affidavit of Maureen O'Sullivan T.D.

30. Finally, the affidavit of Maureen O'Sullivan T.D., who is a member of the Joint Oireachtas Committee, has been placed before the Court. In her affidavit, she says that she and the Committee "have been very concerned with conditions for the prisoners in Maghaberry Prison, particularly the situation in Roe House. We have raised these matters on numerous occasions in the Dáil, mainly through parliamentary questions." She states that "the August 2010 Agreement and the Stocktake Report highlight the need for a safe and humane environment for staff and prisoners, an environment that respects the dignity of life".

31. Ms. O'Sullivan says that if the respondent is returned to Northern Ireland, he will undoubtedly be committed to custody in Maghaberry Prison and detained in Roe House. She says that on the basis of discussions she has had with prisoners, her own experience of visiting Maghaberry Prison, the more recent visit being 10th July, 2017, the lack of implementation of the August 2010 Agreement and the lack of progress in dealing with the matters raised in the Stocktake Report, it is her belief that conditions in Roe House are in breach of the ECHR and in breach of internationally accepted human rights for the treatment of prisoners. Particular unresolved issues she lists include the forced full-body searching of prisoners carried out with unwarranted force and in a humiliating and degrading manner, and the controlled movement of prisoners within the prison. Counsel submitted to the Court that the purpose of Ms. O'Sullivan's affidavit was to convey to the Court that issues with forced full-body searches remain in Maghaberry prison.

32. Counsel for the respondent accepted that the issue as to whether there will be a breach of the respondent's constitutional and ECHR rights is properly for the Court (and by implication not a matter to be contained in an affidavit of a witness). Counsel submitted that Ms. O'Sullivan was qualified to say that, in her experience of the Joint Oireachtas Committee and in visiting the prison and the people concerned, there is a concern that there are forced full-body searches of prisoners carried out with unwarranted force and in

a humiliating and degrading manner and that whether this reaches Article 3 or constitutional right threshold is a matter for the Court.

The submissions

The Respondent's Submissions
33. Counsel for the respondent relied on *O.O. v. Minister for Justice and Equality* [2004] 4 I.R. 426 where the constitutional right to be free from inhuman or degrading treatment was recognised by the Court. Counsel submitted that the constitutional right should be taken as co-extensive in terms of protection with the Article 3 ECHR right.

34. Counsel referred to *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783 as representing the standard of proof that is required in Article 3 ECHR cases and in which the respondent bears the evidential burden of producing cogent evidence capable of establishing reasonable or substantial grounds for believing that if the respondent is surrendered to the issuing state, he would be exposed to a real risk of exposure to treatment contrary to Article 3. Counsel submitted that it is not necessary to prove probability, that it is enough to establish that there is a real risk. Counsel submitted that the respondent has put before the Court evidence of sufficient substance which was uncontradicted and which if it remains uncontradicted, the Court would be obliged to refuse the surrender of the respondent.

35. Counsel submitted that there is no contrary evidence before the Court challenging the respondent's evidence. Counsel submitted there was no evidence of any legitimate justification for strip-searches relating to a particular concern regarding the respondent having something on his person; that there is no evidence that the respondent's behaviour was anything other than peaceful; that there is no evidence of a drug problem necessitating the strip full-body searching. Counsel referred the Court to the respondent's averment that during his time in Maghaberry, there was not a single indication that objects were found that could compromise security in prison and so there was no evidence to show that forced full-body and strip-searches were necessary and just by reasons of security in light of respondent's individual circumstances as opposed by reference to any general circumstances.

36. Counsel also referred the Court to two judgments of the European Court of Human Rights ("ECtHR"). In the first case, *Van der Ven v. The Netherlands* (App. No. 50901/99, ECHR 2003-II), the applicant was serving a sentence in the Netherlands and was transferred to maximum security institution because the authorities were in receipt of intelligence informing them that he planned to escape. The applicant was subjected to a particular regime, treatment which was:

> "premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering, and also "degrading" because it was such to arouse in the victims feeling of fear, anguish and inferiority capable of humiliating and debasing them" (p. 24, para. 48).

37. In *Frérot v. France* (App. No. 70204/01, 12th June 2007), the applicant was required to open his mouth whilst being searched and was sent to the punishment block when he refused to obey. He was also required to bend over and cough during a full-body search. At para. 35 of the judgment, the ECtHR distinguishes between "inhuman" and "degrading".

38. Counsel submitted that when this Court is assessing whether the present searches amounted to inhuman or degrading treatment, the Court must assess and take into account the cumulative effects of the implication of control in Maghaberry prison. At para. 38 of the judgment, it is stated that:

> "[…] while strip-searches may be 'necessary' […], they must also be conducted in an "appropriate manner" […] so that the prisoner's suffering or humiliation does not go beyond the inevitable element of suffering or humiliation connected with this form of legitimate treatment. Otherwise, they will infringe Article 3 of the Convention".

At para. 43 of the judgment, the ECtHR notes that no precise information regarding the frequency of the searches is available. At paras. 44 and 45 the ECtHR notes, the applicant was often required to undergo full-body searches in the context of events, such as prior to placement in a punishment cell. Some justification for searches in that case are outlined at para. 46 and para. 47, *e.g.* "concealing objects or substances". Counsel submitted that the test for this Court is whether full-body searches resulting in a degree of humiliation exceeding unavoidable and reaching an intense or tolerable level that searches inevitably involve. The searches complained of by the respondent and his fears reach that threshold of having a degree of humiliation exceeding that which is unavoidable and intensely tolerable.

The Minister's Submissions
39. Counsel for the minister submitted that the Court should approach the case on the basis of the principles set out in *Rettinger*. Counsel submits that a similar approach was adopted by the Court of Justice of the European Union ("CJEU") in the cases of *Aranyosi and Caldararu (Joined Cases C-404/15 and C-659/15*) [2016] E.C.L.I. 198. The CJEU outlined how those Articles of the 2002 Framework Decision dealing with fundamental human rights must be interpreted. If a point is reached where the national court is satisfied that there are substantial grounds for believing that the requested person is at a real risk of being subjected to inhuman and degrading treatment on surrender, then the national court must request additional information from the issuing judicial authority as to the conditions in which the requested person will be detained.

40. Counsel submitted that there is no evidence before the Court of such a status as to bring the Court to a point where the Court should believe there are substantial grounds for believing that this respondent will be exposed to a real risk of being subjected to treatment contrary to Article 3. In looking at the evidence before the Court, with reference to the affidavit of respondent, counsel for the minister notes in passing that it contains matters that are clearly hearsay or comment, in particular where the respondent makes reference to the need for controlled movement in para. 4, the reference to the prison service at para. 8, his understanding of the BOSS chair, and at para. 14 regarding the current position at Maghaberry prison. Counsel submitted that it is clear that the frequency of those searches has lessened and that the account given by the respondent is historical and dates back to at its latest 2011. It was submitted that there was an absence of evidence regarding the two full-body searches conducted in Maghaberry prison from 2012 to 2014 in respect of the respondent.

41. In relation to the August 2010 Agreement and the medical report, counsel indicated that she cannot dispute what is in them in terms of complaints made and injuries recorded. Regarding the Stocktake Report and the view of the assessment team, counsel submitted that it was outdated as it dates from September 2014. As to the Oireachtas matters including comments of deputies/senators, these are not a statement of fact, that as well as the law is a matter for the Court to decide. Concerning the affidavit of Ms. O'Sullivan T.D., there is no evidence of Ms. O'Sullivan witnessing anything, that she is not a prison officer, and that her affidavit reflects her view on things that she has been told, and so constitute hearsay. Therefore, it was submitted that her affidavit was of limited, if any, significance.

42. Counsel drew the Court's attention to the reports on the prison, two of which were handed in to the Court. The first report, the 'Prisoner Ombudsman for Northern Ireland Annual Report 2016/17' sets out the background to the Prisoner Ombudsman, its independence and its mission statement. It conveys details regarding staffing and general details in relation to statutory footing and complaints and investigations carried out. It was submitted that most of the complaints are not serious complaints and are procedural in nature. The report makes no findings as regards full-body searches not being warranted or being in breach of rights. The only real reference in this regard was a complaint made by a Mr. C. about a back injury during a full-body search. This complaint was not upheld.

43. Counsel submitted that there is no finding in the Prisoner Ombudsman Annual Report concerning full-body searches or full-body searches not being warranted or being of an inhuman or degrading nature. However, counsel for the minister stated that she is not submitting that there is no evidence that there is routine full-body searching being carried out on entry to and exit from the prison.

44. The second report is that of the 'Unannounced Inspection of Maghaberry Prison' in May 2015, the report itself dated November 2015. Under the heading "security", management of the DST (search team) had improved: "Security information reports (SIR) have trebled since the previous inspection but we found that some important elements of dynamic security remained weak." The use of force is also outlined in the report at p. 36 but it is the use of force in a different context and not in the context of full-body searching. Details regarding separated units are also set out at p. 41 from paras. 2.11- 2.13 and family searches have been done away with, as outlined at p. 65.

45. Counsel indicated that this 2015 report was at the centre of an Article 40 habeas corpus application that was brought following the decision of the High Court in *Minister for Justice and Equality v. Lanigan* [2015] IEHC 677 where an order of surrender was made by Murphy J., and various appeals and other matters flowed therefrom. Counsel also referred to the acceptance by Conal McFeely in the Oireachtas Committee meeting of some improvement of prison facilities.

46. It is submitted on behalf of the minister that what is set out in the Committee meeting discussion is that matters are on a path of improvement. It was submitted that the minister cannot dispute that full-body searching is in place at present on entry and exit to prison, but fundamentally it was submitted that there was no cogent evidence for believing that there is real risk that the respondent would be exposed to inhuman or degrading treatment contrary to Article 3 in circumstances where that is not something being performed in a manner contrary to Article 3. Counsel submitted that there is evidence of one particular search of the respondent but as regards the manner in which searches that are currently carried out now, there has been no evidence put before the Court by the respondent in this regard.

47. As regards whether full-body searching on being moved back and forth to court each day is a breach of Article 3, counsel for the minister submitted there was no breach. It was not just frequency that was relevant in this regard but the reason for the searches; the reason for the searches is that the respondent has been out of the prison and is coming back in and this is a security concern in and of itself.

48. Concerning controlled movement, counsel submitted that it is apparent that the prison officials are of the view that it is appropriate because of concerns about the particular prisoners housed therein. Counsel submitted that comments have been made as to the views of certain parties as to why those security concerns are there; that they are historical does not prove the reasons for those concerns. What is apparent, according to counsel for the minister, is that there are concerns, a security issue, which the prison is taking the decision to deal with it in a particular way.

49. According to counsel for the minister, when there are references by the respondent to the lack of a need for controlled movement because there are no assaults, she submitted that this does not make sense in that these two results do not sit beside each other, and it results in the question of which came first, the controlled movement or the lack of assaults. Counsel submitted that the respondent's only experience of prison involved controlled movement and no assaults in those circumstances. It is submitted that it is clear from everything presented before the Court that there is a security concern in that regard, and that is why controlled movement is in place.

50. Counsel referred the court to the CJEU decision in *Aranyosi* in submitting that specific additional information should be sought where a substantial risk is demonstrated to the Court on the basis of objective reliable specific and updated information. Counsel submitted that that stage had not been reached.

Respondent's reply

51. While the Oireachtas meeting outlines some improvements in prison conditions in Northern Ireland, counsel for the respondent indicated that this only extends to a prison in Belfast for women and young offenders, which would be of no significance to the respondent. In addition, counsel referred to the fact that Conal McFeely complained about attempts made to fix complaints regarding Maghaberry.

52. Regarding the number of searches, counsel for the respondent submitted there was not just evidence of one search but that the respondent's affidavit referred to a pattern of searches, of a sadistic, forced, and humiliating nature and which were corroborated by the medical records. Counsel submitted that there was no evidence of security justification warranting forced body search before and after court and that this is implicit within if not explicit within much of what the respondent himself has put forward in evidence, including the Stocktake and Oireachtas Report. It was submitted that no specific evidence of justification that a policy of forced searches on entry and exit is justified and even if there is a justification, the caselaw of CJEU is such that the searches must be carried out in an appropriate manner.

53. Counsel for the respondent submitted that the strip-searches the respondent would undergo in Maghaberry Prison would be forced strip-searches due to the respondent's unwillingness to consent to them. Even though he submits that he is not going to resist, the force used would be unnecessary and disproportionate and the circumstances humiliating. In terms of what is deemed to be humiliating circumstances, counsel submitted that in the *Frérot v. France* case – the opening of that particular applicant's mouth was humiliating in that case. However, in this Court's view, the ECtHR in *Frérot* did not make that finding. Instead, there were a number of aspects in that case that all fed into the amount and degree of humiliation involved; in particular, the anal inspections as well as the arbitrary extent of the strip-searches, which depended on the prison in which that applicant was held.

54. Concerning Ms. O'Sullivan's reference to forced full-body searches, and whether this reference was made in a general sense or in response to a situation with no compliance, counsel for the respondent submitted that forced full-body searches will only take place with the use of force where there is no compliance by the prisoner. Prior to April 2010, the respondent and others in Roe House were complying with strip-searches, but found them to be degrading and began their protest in April 2010 and no longer complied but would not resist them. The use of force where the respondent is not resisting should be, in the respondent's submission, minimal and not

such that would cause injury. However, according to counsel for the respondent, what was happening went beyond opening one's mouth and wiggling one's toes and that whether the prisoners were justified in no longer complying with full-body searches is not the issue in this case. It is submitted that what is relevant is whether the prison authorities were justified in carrying out the forced searches in the manner in which they are carried out.

55. Counsel submitted that as a matter of law, the Court could make a finding that the decision not to cooperate with strip-searches is unjustified, such that the respondent is the author of his own misfortune when it comes to the use of force to perform the full-body search and therefore, Article 3 could not be breached. The respondent has set out on affidavit instances of excessive use of force. However, counsel referred to the fact that this respondent was a protected prisoner with just one other prisoner in his environs and submitted there was no legitimate reason for searching him and that this was relevant to the Court's assessment as to whether the treatment amounts to degrading treatment under Article 3.

The Court's Analysis and Determination

56. The Court is satisfied that both the Constitution and Article 3 ECHR prohibit surrender where there is a real risk based on substantial or reasonable grounds that the surrendered person will be subjected to inhuman and degrading treatment. If treatment would be permitted under the ECHR that would nonetheless be prohibited as inhuman and degrading under the Constitution, then surrender must be refused in order to protect the constitutional rights of the requested person to bodily integrity and respect for human dignity (see *Attorney General v. Damache* [2015] IEHC 339). The principles in *Rettinger* refer explicitly to a real risk of being subjected to treatment contrary to Article 3 of the ECHR, but the approach has been adopted when considering the real risk of being subjected to treatment contrary to similar constitutional rights.

57. The principles set out in *Rettinger* are well known, but in light of the subsequent judgment of the CJEU in *Aranyosi and Caldararu* it is appropriate to Denham J. (as she then was) stated as follows:

> "(i) a court should consider all the material before it, and if necessary material obtained of its own motion;
>
> (ii) a court should examine whether there is a real risk, in a rigorous examination;
>
> (iii) the burden rests upon a respondent, such as the respondent in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention;
>
> (iv) it is open to a requesting state to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting state with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting state may present evidence which would, or would not, dispel the view of the court;
>
> (v) the court should examine the foreseeable consequences of sending a person to the requesting state;
>
> (vi) the court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America.
>
> (vii) the mere possibility of ill-treatment is not sufficient to establish a respondent's case;
>
> (viii) the relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary;"

58. It is apparent from the judgment of Denham J. that the above principles owe much to the jurisprudence of the ECtHR concerning Article 3 claims including those concerning extradition and deportation. The decision of the CJEU is based upon Article 4 of the Charter of Fundamental Freedoms of the European Union ("The Charter"). Article 4 of the Charter prohibits torture and inhuman and degrading treatment in precisely the same terms as Article 3 of the European Convention on Human Rights. The CJEU acknowledged that freedom from such treatment is an absolute right. The CJEU referred to case law from the ECtHR, which held that irrespective of the conduct of the person concerned, torture and inhuman and degrading treatment was absolutely prohibited. The language used by the CJEU in terms of the standard to be utilised in assessing whether surrender should be refused i.e. "substantial grounds to believe, that following the surrender of that person to the issuing member State, he will run a real risk of being subject in that Member State to inhuman or degrading treatment" mirrors the language to be found in the case law of the ECtHR and of course in *Rettinger*.

59. It is also appropriate to note that the CJEU referred to the principle of mutual recognition on which the EAW system is based as being founded upon the mutual confidence between member states that their national legal systems are capable of providing equivalent and effective protection of fundamental rights recognised at EU level. The CJEU recognised that limitations of the principles of mutual recognition and mutual trust can be made in exceptional circumstances. In consequence thereof the CJEU set out the principles referred to above. Under the Act of 2003, there is a presumption that an issuing state will comply with its obligations under the Framework Decision, which of course includes respect for fundamental rights. The burden of adducing evidence capable of providing that there is a real risk on substantial grounds of exposure to inhuman and degrading treatment under the *Rettinger* principles is recognition of the presumption and of the mechanism for rebuttal.

60. The CJEU does not refer explicitly to a burden on the respondent but refers to the executing judicial authority being in possession of evidence of a real risk. If there is a difference between the judgments, and the Court is not convinced there is, it may reflect a difference in procedure between common law systems and some civil law systems where in the former the parties to proceedings place evidence before the Court. However, it is also clear in *Rettinger* that the executing judicial authority is entitled to obtain material of its own motion if necessary.

61. The *Rettinger* principles state that the Court may attach importance to independent reports from certain non-governmental, international or governmental sources. The CJEU at paragraph 89 of its judgment requires the executing judicial authority to rely on information that is:

> "objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups

> of people or which may affect certain places of detention."

The CJEU goes on to say that this information:

> "may be obtained from, *inter alia*, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN."

62. The possibility of a divergence in the principles set out in *Rettinger* and those in *Aranyosi and Caldararu* may arise in the sequence in which the High Court, as executing judicial authority, must make its decision. The CJEU judgment sets out that the executing judicial authority must first decide on objective, reliable, specific and properly updated information if there is a general deficiency in the conditions of detention. If there is such deficiency the executing judicial authority must decide if this individual is at risk of being exposed to such deficiencies. To that end, the executing judicial authority must, pursuant to Article 15(2) of the 2002 Framework Decision, request of the issuing judicial authority that all necessary supplementary information on the conditions in which it is envisaged that the requested person will be detained is provided as a matter of urgency. In *Rettinger*, the principles make clear that the issue is whether this particular individual is at real risk of the prohibited treatment. The Supreme Court envisaged that enquiry taking place at the hearing of the case in circumstances where the requesting state was at liberty to present evidence.

63. This Court is aware that since the judgment in *Aranyosi and Caldararu*, the Minister for Justice, Equality and Law Reform has taken the position that the minister will not seek information from an issuing judicial authority or issuing state pursuant to its powers under s. 20 of the EAW Act, 2003. Instead the minister views it as the High Court's prerogative (and duty) to seek out that information only when the High Court is satisfied that there is objective, reliable, specific and updated information that there are general deficiencies in the conditions of detention in the member state which give rise to a real risk of inhuman or degrading treatment.

64. This Court has been faced with this issue before but did not have to make a determination on it (see *Minister for Justice and Equality v. Kinsella* [2017] IEHC 519). In light of the repeated number of cases coming before the High Court where the minister's position has a relevance to how the case may proceed, the Court believes it is necessary to rule on whether the minister's new approach to seeking information is correct.

65. The *Rettinger* principles set down by the Supreme Court, in the ordinary course, are binding on this Court when assessing whether surrender is prohibited because of the risk of a requested person being subjected to inhuman and degrading treatment. The Supreme Court principles certainly envisage that the High Court may act of its own motion in seeking further information (which could of course be requested from the issuing judicial authority pursuant to s. 20 of the Act of 2003). The precise issue of when this should be done was not specifically addressed. The role of the minister (central authority) in seeking information was also not specifically addressed in the principles nor, it seems, was it addressed in the submissions before the Supreme Court.

66. Turning to the provisions of s. 20 of the Act of 2003; this section permits either the central authority (the minister) or the High Court, if of the opinion that the documentation or information provided to it is not sufficient to enable the High Court or the central authority to perform functions under the Act, to require the issuing judicial authority or the issuing state, as may be appropriate, to provide it with such additional documentation or information as it may specify within a specified period. In the case of *Minister for Justice, Equality and law Reform v Rodnov*, (Unreported, 1st June 2006) the Supreme Court stated that:

> "there is nonetheless a duty on the [minister] in these proceedings to examine request for surrender and all documents which may be associated with a request in order to ensure that they are complete and correct. It would be wholly unsatisfactory if such an obligation on an applicant was disregarded on the basis that the Court could be asked to look for further information pursuant to s. 20 of the Act. That is not the purpose of s.20 outlined in the judgment which I gave in the *Altaravicius* case …"

67. Although the *Rodnov* case referred to the duty to take steps to ensure that there were no delay arising from ambiguous or unclear language, the decision clearly envisages that the minister will seek to put before the Court all documentation which will assist the decision making process of the Court. Indeed, up until the *Aranyosi* decision, the minister operated on the basis that where there was some objective evidence as to inadequate prison conditions, information would be sought under s. 20 of the Act of 2017. The benefit of that approach was that at the time of the hearing in the High Court, the High Court could assess the response in making its decision (without affecting the burden). This saved time and of course it did not prohibit the Court from seeking further information, if not satisfied with the information provided to date (see *Kinsella* above).

68. It is also appropriate to consider the nature of European arrest warrant proceedings. Prior to the European Arrest Warrant Act 2003, extradition was covered by the Extradition Act, 1965. Two types of extradition proceedings were catered for under that Act: Part II extraditions concerning countries other than the UK and Part III extraditions to and from the United Kingdom. The latter extraditions, involving the backing of warrants more closely resemble the surrender procedures set out in the European Arrest Warrant Act, 2003. Denham J. (as she then was) in her Supreme Court judgment in *Attorney General v. Parke* [2004] IESC 100, concerning extradition to the UK, stated that:

> "The role of the trial judge in an application for an order of extradition is unique. The hearing is not a criminal trial, in the adversarial sense where the State must prove the guilt of the accused beyond all reasonable doubt. Nor is it a civil case between two parties. It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act 1965, as amended, has been met. Further, this law has been established against the back drop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States. Thus these cases are founded on the comity of nations and the comity of courts."

69. Although the Act of 2003 is this State's implementation of an EU Framework Decision, the observations of Denham J. in *Parke* have relevance to surrender proceedings under the Act. Murray C.J. in *Parke* described the extradition proceedings as *sui generis* and that characterisation continues to be appropriate in the context of EAW proceedings. Strictly speaking there are no parties to the case, nonetheless the procedures provide for each side to be enabled to present evidence and make submissions to the court in order to assist the court in making its decision. Where certain presumptions operate, there may be a practical necessity for a requested person to place before the court some material which would rebut the presumption or at least put the court on further enquiry. On the other hand, the provisions of s. 20 of the Act of 2003 place an onus on the minister (as central authority) to ensure that all documentation before the court is complete and correct. The manner in which hearings take place reflects our common law traditions of party lead proceedings. It is within the *sui generis* procedural setting that the High Court makes its decision on surrender.

70. The provisions of s. 20 of the Act of 2003, in so far as they concern the power of the High Court to request further information, implement the provisions of Article 15(2) of the Framework Decision. There is no equivalent of s. 20(2) regarding the power of the central authority to seek further information from an issuing judicial authority or state. The granting of such power to the central authority can be viewed as recognition of the role that the minister plays in surrender proceedings as both the conduit for transmission of information and as an active participant in the application for surrender.

71. The minister has taken the view that the decision in *Aranyosi and Caldararu* absolves him of taking responsibility for the presentation of complete documentation under s. 20 of the Act 2003. In the view of the Court, that is a mistaken view. If s. 20(2) is in conflict with the Framework Decision, it must nonetheless be applied in Irish law. That is in accordance with the principle of conforming interpretation of Framework Decisions as set out by the ECJ in *Criminal proceedings against Pupino (Case C-105/03)* [2005] E.C.R. I-05285 and quoted with approval in *Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23. The method of implementation of the Framework Decision was left to members states. It can be understood that s. 20(2) was deliberately inserted into the Act of 2003 as a recognition of the manner in which Irish extradition proceedings had been conducted up to that point and how they should be conducted in the future i.e. the minister would play an active role in seeking to ensure that all appropriate documentation would be before the High Court at the time of the hearing of the action. The decision in Rodnov is an important indicator of the minister's responsibility and this Court does not consider that the CJEU judgment sets at nought those clear statutory responsibilities. Furthermore, the principles in *Rettinger*, although not directly addressing the sequencing of the High Court's decision, envisage that the issuing state response would be before the High Court at the time of the hearing.

72. There is considerable merit in having the minister seek out documentation in advance of a hearing. Subject to a requirement that the High Court may have to make a final request of the issuing judicial authority if a certain position is reached, it is most likely that many more cases can be dealt with at a single hearing than would otherwise be the case. That is a saving of court time and of costs where one hearing may suffice rather than two. Finally, it is also noted that s. 20 provides that the request may be made of the issuing judicial authority or of the issuing state whereas the CJEU only referred to requests of the issuing judicial authority. There may be merit in seeking a response from the issuing state as distinct from the issuing judicial authority, as the executive authority rather than the judicial authority may more easily obtain the relevant information.

73. In the view of this Court, the CJEU judgment that the executing judicial authority must rely upon information that is objective, reliable, specific and properly updated is entirely consistent with the requirements for evidence as set out in *Rettinger*. Furthermore, the references in both the decision of the Supreme Court and of the CJEU to information from reputable sources are not inconsistent. The decision of the CJEU focuses more on judgments or reports of transnational bodies of the Council of Europe or the UN, while the Supreme Court referred to independent human rights organisations or governmental sources. Both decisions clarify that these are not exclusive sources of information, they are simply examples of the type of sources of information that may be possible. It is also noteworthy that the CJEU makes specific reference at paragraph 96 to national or international procedures and mechanism for monitoring detention conditions. This would include European Committee for the Prevention of Torture (CPT) reports as well as national preventive mechanisms established in compliance with the Optional Protocol to the U.N. Convention Against Torture.

The present case

74. In the present case, the minister did not seek any further information from the UK authorities. I am approaching my decision on the basis that the *Rettinger* principles envisage the possibility of the court of its own motion seeking further information if necessary. The CJEU decision now outlines the criteria for deciding when such information is necessary. If I reach a conclusion that the general conditions are such that there is a real risk of exposure to inhuman and degrading treatment then, under the *Aranyosi and Caldararu* judgment, I am obliged to seek further information about the specific risk to this respondent should he be surrendered.

75. The respondent makes two separate but interlinked complaints. He complains of being subjected to unnecessary strip-searching combined with use of excessive force when he refused to comply but did not actively resist. His second complaint refers to controlled movement restrictions in the prison.

Full-body searches (Strip-searching)

76. The respondent does not argue that "strip-searching" of detainees automatically amounts to inhuman and degrading treatment. This Court accepts the following *dictum* of the ECtHR at para. 38 of *Frérot v. France*, as clarification of how to assess strip-searching and the issue of whether it amounts to a violation of Article 3 of the Convention and by analogy a violation of the Constitution:

> "With regard to the specific issue of strip-searches of prisoners, the Court has no difficulty in accepting that a person obliged to submit to treatment of this nature might view that procedure in itself as undermining his privacy and dignity, particularly where the measure involves undressing in front of others, and even more so where he has to place himself in embarrassing positions.
>
> Such treatment, however, is not in itself illegal: strip-searches, and even full-body searches, may be necessary on occasion to ensure prison security – including the prisoner's own safety – or to prevent disorder or crime (see *Valasinas, Iwanczuk, Van der Ven* and *Lorse*).
>
> Nevertheless, while strip-searches may be "necessary" to achieve one of those aims (see *Ramirez Sanchez*), they must also be conducted in an "appropriate manner" (see *Valasinas, Iwanczuk, Van der Ven* and *Lorse*), so that the prisoner's suffering or humiliation does not go beyond the inevitable element of suffering or humiliation connected with this form of legitimate treatment. Otherwise, they will infringe Article 3 of the Convention.
>
> It is also self-evident that the greater the invasion of the privacy of a prisoner being strip-searched (particular where the procedure involves having to undress in front of others, and even more so where the prisoner has to adopt embarrassing positions), the greater the caution required."

77. In the case of *Van der Ven*, the ECtHR held that the combination of routine strip-searching (including on weekly cell inspection) and the other stringent security measures in the institution had amounted to "inhuman or degrading" treatment in breach of Article 3 of the Convention.

78. The Court must assess two central issues with regard to strip-searching: is there a real risk that he will be subjected to inhuman and degrading treatment by virtue of the manner in which strip-searching will be carried out, and whether there is a real risk of inhuman and degrading treatment because there is no necessity for strip-searching in the circumstances.

79. It must also be stated that it was no part of the respondent's case that the videotaping of the strip-searching amounted to

inhuman or degrading treatment. On the contrary, the respondent invited this Court to have regard to the videos of the strip-searches he was subjected to in 2010 (but these appear not to exist at present as they fall outside the 6 year retention period).

Internal Controlled Movement
80. The respondent did not present any legal authority or other report to the Court on the issue of controlled movement. Undoubtedly, deprivation of liberty involves restrictions on movement and such restriction does not, of itself, amount to inhuman and degrading treatment. The question of whether controlled movement reaches a level where it can be said to be inhuman and degrading is relative and depends on all the circumstances of the case. It is however striking that, although the respondent has relied upon the Stocktake of the August 2010 Maghaberry Prison Agreement which encourages consideration of increased access to landings by prisoners, the respondent did not rely on any report or judgment of any national or international organisation or court finding similar restrictions to be inhuman or degrading. In light of the ability to move from place to place in the prison, albeit in a restricted fashion, and the ability to interact with other prisoners, this Court rejects the contention that such restrictions on movement as have been put forward in this case amount to inhuman or degrading treatment.

81. The respondent also sought to argue that the restriction of movement must be considered together with the strip-searches when assessing whether conditions of detention will be inhuman and degrading. The Court will have regard to the context in which the strip-searching takes place, which includes the internal restriction of movement on prisoners in Roe House.

The evidence

The Respondent's evidence
82. Much of the evidence relied upon by the respondent is his own affidavit detailing his own experiences of detention in Maghaberry. This is not objective evidence. It is his subjective version of conditions in Maghaberry. Nonetheless, there may be a place for some evidence from a respondent in Article 3 cases. A respondent's evidence can, *inter alia*, place him or her in a category of "vulnerable" prisoners. In the present case his evidence establishes that he will be held as a republican prisoner in Maghaberry prison, in particular, Roe House. He would be liable to be treated in the manner in which republican prisoners in Maghaberry are treated. In certain situations a respondent's own evidence may attain a level of objectivity; such as where it is supported by other evidence. In this case, there are medical notes which give some support to the fact that he has made claims of assault previously and to a certain extent the medical notes support findings of physical trauma to his body.

83. It is significant, however, that, on at least two occasions the respondent is recorded as having refused to make statements at the time of his complaints to the nursing staff. He is recorded on one occasion as saying he will make it to his solicitor. Despite being alert to the fact of contacting his solicitor, it is noteworthy that he did not bring a civil action within the statutory limitation period. His own medical report does not add any weight to his complaints as the report is based upon the respondent's recital of his complaints.

84. In general, it can be seen that the respondent's specific complaints about the precise details of his treatment at the time are not objective and in my view are of questionable reliability given his failure to make a complaint to any relevant authority within a reasonable time. There is some evidence of physical trauma to the respondent which is reasonably concluded to have occurred during the strip-searches. In the context where a full-body search is deemed a necessity but there is a refusal to cooperate with that search, some element of deliberate force may be necessary to ensure that the search can be carried out. It is important that any such force is kept to an absolute minimum. Gratuitous violence or humiliation would convert an otherwise lawful strip-search into conduct which violates the right to be free from inhuman and degrading treatment. Most importantly, those complaints relate to periods of some antiquity. This Court must be forward looking in its assessment of whether there is a real risk of being exposed to conditions that violate fundamental guarantees should he be surrendered.

85. It is of considerable importance that the respondent does not detail in his affidavit any particular ill-treatment he received on either of the two searches that he underwent between December 2012 and his release in July 2014. It is also clear that he made no complaint to anyone in authority about them, and in light of the fact that he attended a Consultant in 2015 for the purpose of a medico-legal report on his complaints of forcible strip-searching, it is striking that this report only refers to alleged forcible body searches during his time in prison during 2009 and 2011. While perhaps it may be explicable that he had no faith in an internal complaints mechanism within the prison, this does not explain why he made no civil complaint about violation of rights, if indeed he was of the view that this had occurred.

86. It is also a matter of considerable significance that there were only two strip-searches carried out on the respondent during this period. This establishes that strip-searches are not routine, regular or commonplace as was the situation in Van der Ven. It is also extremely significant that at the time of those searches, he was facing charges in respect of his alleged involvement in the murder of a prison officer. Despite this fact, it does not appear that he was singled out for particular ill-treatment.

87. For the avoidance of doubt, I also observe that the specific complaint that the respondent had concerning the manner in which the strip-search was carried out i.e. told to wiggle tongue and wiggle toes, does not appear inconsistent with the strip-search procedure outlined in detail in the ECtHR judgment in *Frérot v. France*, where lifting of the tongue and examination of toes was required. These appear part and parcel of a strip-search, and while undoubtedly unpleasantly experienced by prisoners, are not in themselves either inhuman or degrading.

88. In light of all the above I am not satisfied that the respondent's evidence is either objective, specific, reliable or properly updated about the fact that he may face particular ill-treatment of either a physical or humiliating nature during the course of any strip-search (or failure to comply with it) if he is surrendered. The Court will now consider whether the available reports show that the strip-searching requirements for those in Roe House are inhuman and degrading by virtue of the manner in which they are allegedly carried out or are unnecessary in light of the alternative means of search available.

The available reports
89. The respondent relies upon the August 2010 Agreement on the dispute at Roe House in Maghaberry prison. The agreement envisages a new search facility and revised search policy for separated prisoners. With particular relevance to the issue here, it provided for the use of a BOSS chair. The agreement reserved the right, in exceptional cases, to require any prisoner to undergo a full-body search – under existing arrangements if a) there was a positive indication by the technology with no identifiable cause b) if there was reason through intelligence or suspicion that a prisoner may be concealing prohibited items on their person. The agreement requires such a search to be authorised and carried out in a sensitive and dignified manner.

90. This Court is not the arbiter of compliance with an agreement between the Northern Ireland prison authorities and prisoners. Therefore, even if the evidence establishes that this agreement has been breached, this does not of itself prevent surrender. The

only issue before this Court is whether there are substantive grounds for believing there is a real risk of inhuman and degrading treatment arising from the conditions in the prison and not whether there is a breach of an agreement.

91. The Stocktake Report states that the Northern Ireland Prison Service should continue to review the issue of full-body searching, taking into account any advances in technology systems or policy which might obviate or diminish the requirement for such searches such as the use of a Multi-Mode Threat Detector. The report does not purport to be, nor is it a definitive legal view on whether the procedures amount to inhuman and degrading treatment. Rather it is an attempt to resolve outstanding issues between the prison authorities and an identifiable group of prisoners through communication and compliance with principles on both sides.

92. The transcript provided from the Discussion of the Oireachtas Joint Committee on the Implementation of the Good Friday Agreement Debate on Maghaberry prison records the views expressed by those called before that Committee and of members of the Committee itself. Neither those persons nor indeed Ms. Maureen O'Sullivan TD in her affidavit, were, or are, expressing legal findings on whether the practices in Maghaberry prison amount to inhuman and degrading treatment. The Court accords the greatest respect to members of the legislature, a co-equal branch of government with the judiciary and the executive. It is solely the preserve of the Court to rule on the basis of the evidence in this case whether there is a real risk of exposure of the respondent to inhuman and degrading treatment if he is surrendered. The Court is however bound to give due consideration to the fact that the Oireachtas Joint Committee called relevant witnesses before it in relation to an issue about which there appears to be concern among members of the Oireachtas.

93. It is also noteworthy that the Report of an unannounced inspection of Magahaberry prison from 11-22 May 2015 by four inspection authorities (comprising the UK national preventive mechanism), while critical of safety issues for prisoners, reported that much of the unnecessary security procedures that were criticised in the previous inspection had been relaxed. Random full-body searches on the way to domestic and legal visits and video links now took place infrequently and were subject to risk assessment. Random full-body searches on the way to and from other areas of the prison had ceased and there were no routine rubdown searches of prisoners in their units.

94. The Prisoner Ombudsman for Northern Ireland in its Annual Report 2016-2017 referred to the large amount of complaints from prisoners in Roe House concerning controlled movement and full-body searches. There is nothing in that report which corroborates complaints about the use of excessive force in the course of searches.

95. The Court finds that there is no objective evidence to show that excessive force or particular humiliation is used during the course of the full-body searches that are being carried out on Republic prisoners in Roe House Maghaberry prison. Therefore, the Court rejects the respondent's claim that he will be at real risk of being exposed to inhuman and degrading treatment because of the manner in which the strip-searches (even where there is no cooperation with the search) will be carried out. The Court has also considered whether the issue of controlled or restricted movement in the prison has any bearing on how the Court should assess the issue of strip-searching. The Court is of the view that the restricted or controlled movement has no bearing on the question of whether the strip-searching on entry to or exit from the prison is relevant. The strip-searching is a contained procedure, which, from the evidence, is only carried out on a limited basis. There are no substantial grounds for believing that it is being carried out in conjunction with the strip-searching in a manner which humiliates or degrades or dehumanises the prisoners. The Court rejects the respondent's objection to his surrender on this basis.

96. It has been urged upon the Court by the respondent that there is no evidence of any necessity for full-body searches of this respondent or any of the prisoners in Roe House. With respect to that submission, the Court is entitled to take into account the obvious reality that prisoners charged with or convicted of terrorism offences will be subjected to a higher degree of security than most other prisoners. Indeed, it was somewhat disingenuous of the respondent to advance the lack of a drug problem among republican prisoners as indicating a lack of justification for these searches, while failing to address the fact that it related to prisoners accused of, or convicted of, terrorist offences.

97. The Court cannot be blinkered in respect of the nature of the alleged offending of this respondent and those who are prisoners in Roe House. The respondent's own case is that as a republican prisoner he will go there. There is a presumption that the UK will comply with its obligations under the Framework Decision. The necessity for extra security measures for particular types of prisoners is a reality that the Court cannot ignore. There is simply no requirement for this Court to ask the UK for the type of information which this respondent himself has put before the Court; the August 2010 Agreement and the Stocktake Report explicitly accept that security of the establishment should not be diluted and that full-body searches (subject to a review of technology) on exiting and entering the prisoner were not generally unacceptable. The Stocktake Report did raise issues around the necessity for searching prisoners on home leave or who are sick or who are discharged from the prison being searched on exit. There is a burden on a respondent to adduce evidence that demonstrates a real risk of being subject to inhuman and degrading treatment. In light of the presumption that the UK will comply with its obligations under the Framework Decision and only carry out these types of searches where necessary, I am satisfied that the respondent has failed to establish that that there is a real risk that the full-body search (or a search which is as effective) is an unnecessary security measure for those prisoners held in Roe House on entering or exiting Maghaberry prison.

98. The question of whether there is a necessity for a full-body search i.e. a strip-search in light of improvements in technology is a separate issue. The main evidence before me as to a lack of justification for these strip-searches is that technology exists to resolve the necessity for full-body searches. This was part of the August 2010 Agreement i.e. the use of a BOSS chair. However, the Court also has credible information before it, in the form of information provided to the Joint Oireachtas Committee from highly respected persons (Mr. Peter Bunting and Mr. Conal McFeely to the Oireachtas Joint Committee who were part of the Independent Assessment Team involved in the Stocktake of the August 2010 Agreement appointed by the Northern Ireland Minister for Justice) that Portlaoise Prison operated technology which meant full-body searches were no longer required. This information questions whether full-body searches i.e. strip-searches are necessary in the absence of an indication by the technology.

99. The *Frérot* and *Van der Ven* decisions were given a significant time ago in the context of technological developments. It is not surprising that they do not address this issues. The issue of strip-searching does not appear to have been directly at issue in the case of *Lanigan v The Governor of Cloverhill* [2017] IEHC 23 in which Humphreys J ruled that the Maghaberry Prison Report of 2015 falls significantly short of the level of real risk to the life or human rights of the applicant that would render unlawful his detention for the purposes of surrender to the United Kingdom. The precise evidence before Humphreys J and the submissions made to him are not apparent. It is also unclear if *Aranyosi* was opened to the High Court in the course of the *Lanigan* case and if the importance of a report from a national preventive mechanism was highlighted. In light of the lack of reference to the issue of strip-searching in *Lanigan* and in particular to the question of necessity for same arising out of the possibility of new technologies, I am of the view that *Lanigan* is not relevant to the decision I have to make.

Conclusion
100. I am satisfied that the evidence presented to the Oireachtas Committee, which I am entitled to rely upon as a credible source of information for the purposes of assessing general conditions in which republican prisoners are held in Magahberry, amounts to objective, reliable, specific and updated (November 2016) information that rebuts the presumption that full-body searches are necessary on entry and exit to Maghaberry (in the absence of specific indications of the need for such a search) due to available technology. This means that the general conditions in Roe House in so far as they relate to strip-searching raise a real risk that this respondent could be subjected to inhuman and degrading conditions on surrender.

101. It may be that further information can be obtained both in this jurisdiction and from Northern Ireland to show that this technology is limited or that there are specific reasons why strip-searching on entering and leaving the prison are necessary, or that this particular respondent will not be subject to such strip-searching save in the absence of a specific indication that there is a necessity to strip-search him on each individual occasion he enters and leaves the prison. From the Court's own motion, the Court requests the minister to provide any relevant information about the technology in use in this jurisdiction. Pursuant to s. 20 I will seek further information from the United Kingdom. I will finalise the wording of this request after discussion with counsel.