THE HIGH COURT

[2023] IEHC 249

[2021 No. 355 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

ADRIAN MIHALCEA

RESPONDENT

JUDGMENT of Ms. Justice Caroline Biggs delivered on the 6th day of March, 2023

1. By this application, the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European Arrest Warrant dated the 2nd of December 2013 ("the EAW"). The EAW was issued by Liliana Mirela Puşcaşu, Judge of the Oneşti Court of Law, as the issuing judicial authority.

2. The EAW seeks the surrender of the respondent in order to enforce a sentence of 3 years' imprisonment. An appeal filed by the respondent in relation to same was deemed unsuccessful on the 17th of October, 2013.

3. The respondent was arrested on the 15th of December, 2021 on foot of a Schengen Information System II alert, and brought before the High Court on that date. The EAW was produced to the High Court on the 21st of December, 2021.

4. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the EAW was issued. No issue was raised in that regard.

5. I am satisfied that none of the matters referred to in ss. 21A, and s. 22, 23 and 24 of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), arise for

consideration in this application and surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

6. I am satisfied that the minimum gravity requirements of the Act of 2003 have been met. The sentence in respect of which surrender is sought is in excess of four months' imprisonment.

7. A chronology of relevant events can be derived from a review of the EAW and the additional information received from the issuing judicial authority as follows:

- On the 13th of December 2007, in relation to Criminal sentence no. 1085, Oneşti Court of Law imposed a suspended sentence of 2 years and 4 months in respect of the offence of Aggravated Theft.
- On the 3rd of June 2013, in relation to criminal sentence no. 332, Oneşti Court of Law imposed a sentence of 8 months in respect of an offence of Aggravated Theft and revoked the conditional suspension of the 2 years and 4 months' sentence referred to above. This had the result that Mr. Mihalcea was required to serve a sentence of three years' imprisonment.
- On 17th October 2013, in relation to criminal decision no. 1041 of Bacău Court of Appeal, the appeal by Mr. Mihalcea against the criminal sentence no. 332 dated 3rd June 2013 of Oneşti Court of Law was denied as ungrounded. This had the result of requiring Mr. Mihalcea to serve the penalty of 8 months' imprisonment and the 2 years and four months' imprisonment which resulted in the defendant being required to serve a total penalty of three years' imprisonment, as referred to at paragraph C2 of the EAW.

8. On the 13th December 2007, the respondent was represented by a lawyer, and he received a 2 years and 4 months' suspended sentence. On the 3rd June 2013, the respondent was present. An 8-month prison sentence was imposed on that date, and the 2 years and 4

months' suspended sentence was activated. On the 17th October 2013, the respondent appealed the three-year sentence. The respondent was not present at the appeal hearing but his lawyer was. In all the circumstances, I am satisfied that the defence rights of the respondent were respected, and no issue arises under Section 45 of the Act of 2003.

9. It was clarified by additional information dated 29th December 2021 that the tick box was incorrectly ticked in the EAW. Thus, correspondence must be shown in the ordinary way:

(i) 'The 2011 offence': This offence corresponds with the offence of Burglary contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and/or Theft contrary to Section 4 of the Act of 2001 in this jurisdiction.

(ii) 'The 2007 offence': The details of the second offence are set out in the additional information dated 29th December 2021, and this offence corresponds with the offence of Burglary contrary to Section 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and/or Theft, contrary to Section 4 of the Act of 2001 in this jurisdiction.

Grounds of Objection

10. The respondent objected to surrender on a large number of grounds. In light of those objections, this Court sought additional information from the issuing judicial authority. As a consequence of the additional information received on foot of those requests, the respondent objected to surrender on the following remaining grounds:

(i) To order the surrender of the respondent would be a breach of, or a disproportionate interference with, his rights pursuant to Article 8 of the European Convention on Human Rights and Article 40.4.1 of the Constitution and/or his family's rights under Article 8 of the European Convention on Human Rights and/or Articles 40.3.1 and 41.1 of the Constitution and/or

Articles 6, 7 and 24 of the Charter of Fundamental Rights of the European Union and as a consequence surrender of the respondent would be in breach of Section 37 of the European Arrest Warrant Act, 2003.

(ii) Further, or in the alternative and without prejudice to the foregoing, to order the surrender of the respondent would expose the respondent to a real risk of a breach of his rights under Article 2 and/or 3 of the European Convention on Human Rights and/or his right to bodily integrity pursuant to Article 40.3.1 of the Constitution and/or Article 2 and Article 4 of the Charter of Fundamental Rights of the European Union and as a consequence surrender of the respondent would be in breach of Section 37 of the European Arrest Warrant Act, 2003 due to, *inter alia,* the conditions and regime of detention and the management of same in the issuing State.

11. Is surrender of the respondent prohibited by Section 37 of the Act of 2003 - Prison Conditions?

Relevant Country of Origin Material

The respondent opened a large volume of Country-of-Origin Material, however, the Report of most concern to this Court is the 'Report to the Romanian Government on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 19 February 2018 dated 19 March 2019'.

(i) In this visit, the CPT inspected:

1. Aiud Prison
2. Bacău Prison
3. Galati Prison
4. Gherla Prison
5. Iaşi Prison

(ii) The CPT was highly critical of the conditions of detention observed during the visit, stating:

"*Material conditions in all the prisons visited were generally poor (e.g. flaking walls, humid, poor access to natural light and inadequate ventilation; sanitary annexes often had mould on the ceilings and walls, rusting pipes and broken fixtures).*"

(iii) Several episodes of inter-prisoner violence are documented, notably in relation to young adult prisoners who have been severely ill-treated and sexually abused in their cells by other prisoners. The situation was particularly worrying at Bacău Prison, where the CPT's delegation had to intervene to have three vulnerable prisoners taken out of a cell where they were being severely abused.

(iv) The CPT was also critical of the provision of healthcare. The findings of the 2018 visit showed that the health care services in the prisons visited were in many instances not providing an adequate standard of care. Conflicts of interest of health care staff represented a major underlying problem which eroded the patients' trust in their clinicians.

(v) This CPT report raised concerns about issues of overcrowding and the consequences of same. The CPT noted that the Romanian Government was in the process of reform seeking to reduce prisoner numbers and improve conditions it stated:

"The Romanian prison system is in the midst of a major reform effort aimed at drastically reducing the number of persons held in prison and at improving the conditions of detention. This reform effort was initiated following the July 2012 judgment by the European Court of Human Rights in the case of Iacov Stanciu v. Romania, but has gathered greater momentum following the Court's pilot judgment Rezmiveş and Others v. Romania of 25 April 2017. This latter judgment required the Romanian authorities to produce an Action Plan to address the overcrowding and poor conditions of detention, including the introduction of compensatory remedies.

The Action Plan was adopted by the Romanian Government on 17 January (updated 17 March) 2018.

The reforms implemented include the adoption of new criminal legislation with the entry into force on 1 February 2014 of a new Criminal Code and new Criminal Procedure Code. The new legislation not only decriminalised hundreds of crimes but also introduced alternatives to pre-trial detention as well as alternative sanctions and measures to imprisonment. New laws on probation (No. 252/2013) and enforcement of custodial measures (No. 254/2013) have, through further amendments, provided for the possibility of conditional release to be extended and for an exponential growth in probation cases. In 2017, an estimated 100,000 probation cases were registered, which represents a five-fold increase from 2012.

The consequence of the various measures taken has been a reduction of the prison population from 32,428 inmates in June 2014 to 21,956 on 16 January 2018. This is a significant reduction representing a 30% drop in the prison population in less than four years, and the rate of imprisonment has dropped from around 160 to 118 per 100,000. These figures are fluctuating from month to month as prison buildings are renovated and capacities within individual prisons rise and fall. Nevertheless, overcrowding remains a feature of the Romanian prison system. As of 23 March 2018, it was operating at 122% of its official capacity which was 17,429 places for an inmate population of 21,342 persons (excluding the six hospitals and four young adult/juvenile institutions). As of 27 June 2018, the population had risen to 22,479 persons.

Prison overcrowding is an issue of direct relevance to the Committee's mandate. An overcrowded prison entails several features: cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced opportunities in terms of employment, education

and other out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health care services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive.

At the time of the visit, the actual overcrowding was not spread evenly across the prison system nor within individual prisons. The CPT's delegation found the worst overcrowding in the closed regime, pre-trial and admission (quarantine) cells. As the prisoners in these cells were, in general, offered few activities it meant that the vast majority spent 21 hours or more confined to cells, which in many cases offered a mere 1.5 to 2m2 of living space per prisoner. While it is positive that prisoners are now entitled to receive a compensatory time remedy for being held in overcrowded conditions, this does not solve the overcrowding problem as such. Every effort must be made to end the current situation as soon as possible to ensure that the objectives of imprisonment can be fulfilled and the dignity of the prisoners is respected. The cramped and poor living conditions combined with little out-of-cell time and lack of activities not only might amount to inhuman and degrading treatment but will, in addition, not be conducive to assisting a prisoner prepare for reintegration into the community. Further, as the CPT's delegation observed, it will have negative repercussions on health care provision and on levels of tension and violence within prisons."

The respondent referred to a number of other reports which I have dealt with below, and subsequently furnished the Court with a second booklet of Country-of-Origin material which I have also dealt with below.

The First Set of Assurances

12. Having read the 2019 CPT report, I was satisfied that the respondent had raised

sufficient concerns in relation to prison conditions to warrant a request for further information as to the conditions in which the respondent was likely to serve his sentence if surrendered. In light of same, this Court sought assurances from the issuing judicial authority and a response was provided on the 1st February, 2022. Judge Teodora-Alexandra Balaban, described in the letter as the *"appointed judge"*, stated:

> *"With respect to points 8-12 of your address, we enclose the response provided by the National Administration of Penitentiaries in Romania, the national authority competent to provide such information, at the request of the Criminal Enforcement Department within Oneşti Court of Law".*

The letter with the relevant information was signed by Dr. Dan Halchin, General Director of the National Administration of Penitentiaries signing for Prison Police Chief Commissioner Marian ILIE, Deputy General Director. The letter is stamped with a seal from the Ministry of Justice. As the issue of the quality of those assurances is central to this Court's determination, I will append the response to this judgment.

13. As can be clearly seen from said response, this Court was provided with very specific information in relation to the respondent's proposed places of detention. He would be detained, initially, for 21 days in Rahova Prison. He then would be subject to a semi-open regime in Vaslui, and then to an open regime in Iaşi Prison. Dr. Halchin confirmed that in each prison the respondent would have:

(i) Appropriate sanitary and hygiene facilities

(ii) Appropriate food

(iii) Medical facilities

(iv) Access to fresh air and daylight

(v) Out of cell time

(vi) Wherever he is to be detained he would have a minimum of 3 sq. metres

(vii) The prisons have appropriate procedures to deal with any suspected threats to the respondent's personal safety.

14. The only matter of concern to this Court arising from the assurances provided, was the reference to the fact that if by reason of discipline or security issues the respondent needed to be transferred, as per regulation 108 of the Romanian Prison Code, then:

> *"The number of persons deprived of liberty kept in a detention room, for whom guarantees have been formulated, will be optimal for the observance of a minimum individual space of 3 sq.m during the entire period of the sentence service, including bed and related furniture".*

These words concerned the Court insofar as they did not amount to an unambiguous guarantee of 3 sq. metres, should the respondent be transferred.

Further Material of Limited Assistance

15. The respondent opened a number of other reports relating to prison conditions in Romania. This Court read and reviewed each and every one of them. As this Court was advised of the places of detention where the respondent would likely serve his sentence and in light of the quality of the CPT report of 2019, this Court found that some of the additional documentation added little to the extensive CPT report of 2019 referred to at paragraph 11, above. Nonetheless and for the sake of completeness, this Court will outline and deal with said reports:

(i) 'Defence of Human Rights in Romania-the Helsinki Committee (APADOR CH) in its report *Implementation of the European Arrest Warrant: dysfunctionalities and bureaucracy - A case study on Romania* of May 2018.'

In respect of 'T', it is noted that he was interviewed by APADOR-CH representatives on the 4th of October 2017 and at that stage, he had been incarcerated in Rahova Prison for a period of 5 days. In respect of 'PM', it is

noted that he was sent to Rahova Prison in March 2015. ‘DP’ was incarcerated in Rahova prison from the end of December 2016 until the 17th of January 2017, and the case of *“Daniel Nicolae Rusu”* related to detention conditions in August 2016.

(ii) ‘Report to the Romanian Government on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10th – 21st May 2021, dated 14th April 2022.’

This report relates to visits by the CPT to four Romanian prisons as follows: Craiova Prison, Galati Prison, Giurgiu Prison and Margineni Prison. The prisons that Dr. Halchin makes specific reference to in relation to the case of this respondent are Rahova Prison, Vaslui Prison and Işai Prison. While this Court of course notes the generalised nature of the issues in that report, none of the prisons relevant to this respondent are referenced therein.

(iii) ‘Balkan Insight, 4th December 2019, *Romania Scraps Former Govt’s Controversial Parole Law.*’

This article relates to the repeal of a controversial 2017 parole law, which was deemed *“aberrant”.* The relevance of this article to prison conditions in 2023 is not entirely clear.

(iv) ‘EU Reporter dated 6th March 2018, *Fresh concerns raised about deteriorating conditions in Romanian Penal System.*’

This article is dated the 6th of March 2018, and therefore its application to current conditions in Romanian prisons is limited.

(v) ‘EU Political Report, dated 14th April 2020, *Deaths in Jail bring Romanian Prison Conditions back into the Spotlight.*’

The respondent appears to place significant weight on comments made by Denis Darie, the manager of Rahova Prison, to the effect that none of the buildings at his prison meet the required standards. Unfortunately, there is no indication as to when the comments were made by Mr. Darie. It is noted that the article by James Wilson is captioned *"2 years ago"*.

(vi) 'European Union Agency for Fundamental Rights 2019 report *Criminal Detention Conditions in the European Union Rules and Reality.*'

This report analyses some of the relevant European case law. The report also focuses on prison overcrowding in a general European context including overcrowding in Irish prisons. Whilst overcrowding in Romanian prisons is addressed, no specific institutions are singled out.

(vii) 'Fair Trials Case Study, Adrian Lupa, 31st October 2018.'

The respondent places reliance on this case study as an example of where assurances provided by Romania in the context of EAW proceedings were not adhered to. Without any details as to exactly what assurances were provided or as to the parameters of said assurances, the case study is not persuasive, and in any case is dated October 2018, over 4 years ago.

(viii) 'United States, State Department, 2019 Country Report on Human Rights Practices: Romania.'

This report is dated 2019. It is noted furthermore that the report references prisons in Romania in a generalised sense, with no specific institutions mentioned.

(ix) 'Romania 2020 Human Rights Report.'

Like the 2019 report addressed above, this report also references conditions in prisons in Romania in a generalised sense, and does not focus on any specific institutions.

(x) 'United States, State Department, 2021 Country Report on Human Rights Practices: Romania.'

Akin to the 2019 and 2020 reports addressed above, the 2021 report, although more up-to-date, references Romanian prisons in a generalised context.

(xi) 'Fair Trials, International *Beyond Surrender Putting Human Rights at the heart of the European Arrest Warrant*.'

The case study of *'Jozef'* (page 319 of the respondent's Country-of-Origin Material) does not indicate where he was held following surrender, when he was held, or for how long. The case study of *'Dan'* (page 322 of the respondent's Country-of-Origin Material) is similarly scant on detail.

Further Material of Concern to This Court

16. The respondent did, however, open further material that concerned this Court, specifically:

(i) The respondent relies on the Minutes from the 1398th meeting of the Committee of Ministers of the Council of Europe on 9th to the 11th March 2021 entitled 'H46-21 *Rezmiveș and Others* and *Bragadireanu group v. Romania* (Applications Nos. 61467/12 and 22088/04): Supervision of the execution of the European Court's judgments.'

The respondent referred to page 5 of the Minutes of the Committee's meeting and the following is noted:

"It is first noted that prison population inflation has again become a serious concern. It is now established that after a significant and steady downward trend

between 2014 and 2020, the situation has worsened since last June, with an increase in the number of prisoners and in the overall prison occupancy rate of about 8% up to December 2020. Based on the explanation provided by the authorities, it cannot be excluded that this upward trend will continue. The data provided further shows that, although the authorities are making efforts to balance the distribution of prisoners, some prisons not only operate well above their official capacity but have in fact overcrowding levels far exceeding the national average reported (119.2 % in December 2020).”

(ii) The respondent also relies upon a Letter of the ECtHR Registrar to the Department for the Execution of Judgments of the European Court of Human Rights, Directorate General Human Rights and Rule of Law, dated 13th February 2020. The letter confirms that as of the 12th of February 2020, there were 6,625 applications pending before the European Court of Human Rights regarding conditions of detention in Romanian prisons. Unfortunately, there is no detail relating to the time-period of incarceration to which these applications relate, nor, indeed, as to what prisons are being impugned.

(iii) The respondent also provided this Court with 70 European Court of Human Rights cases, comprising of, in total, 680 additional applicants. This Court read the cases and noted that the majority of these cases relate to periods of incarceration pre-2017, and ultimately, pre-Rezmives. It is necessary at this juncture to refer to the words of Dr. Halchin when he confirmed that the Romanian Government engaged in a positive action plan for the period 2020-2025. This plan was drawn up with a view to implementing the findings made by the Court in *Rezmiveş and others v. Romania* (Application nos. 6147/12, 39516/13, 48231/13 and 68191/13), as well as the judgments delivered in the case group: *Bragadireanu v. Romania*

(Application no. 22088/04). It is logical that any action plan will take time to effectuate positive change, and for that reason, this Court is concerned with the effect of that action plan, and whether it has made any meaningful difference in relation to Romanian Prison Conditions, in more recent times. Thus, cases relating to the more updated and recent period 2020-2023, are what are of concern to this Court. In that regard, of the 70 cases and 680 applicants contained therein, there have been 16 decisions/applications since 2020 where applicants were detained in Rahova Penitentiary, Vaslui Penitentiary, Iaşi Penitentiary and where the ECtHR found there to be specific breaches of Article 3 of the ECHR in the last three years. Many of those 16 applications also refer to other prisons, and in fact, only 50% (8) of them refer solely to Rahova Penitentiary, Vaslui Penitentiary or Iaşi Penitentiary. As will be seen below, a Section 20 letter was sent to the issuing judicial authority in relation to these 16 applications/decisions on the 30th January 2023. After that letter was sent, the respondent furnished this Court with a further 5 ECtHR decisions on the 6th March 2023, relating to the period January-March 2023. Within those 5 decisions, and 66 applications, only 3 relate to periods of detention in Rahova, Vaslui or Iaşi Penitentiary from 2020 onwards.

Further Assurances

17. In light of this additional material, and notwithstanding the extensive assurances, provided by the Romanian authorities, there were three matters that concerned this Court:

(i) An ambiguous answer in relation to the space of 3 sq. metres to be provided to the respondent in the event of a transfer, from the three main prisons referred to.

(ii) The Council of Europe, Committee of Ministers, 1398th meeting, 9th-11th March 2022 and the issue of recent overcrowding in Prisons.

(iii) The ECtHR caselaw from 2020, 2021, 2022.

18. As a consequence, this Court took the unusual step of again writing to the issuing judicial authority setting out the Court's concerns and, sought further assurances in respect of same. The full nature and extent of this communication is appended to this judgment. In essence, on the 30th January 2023, a Section 20 was issued by this Court to the issuing judicial authority. This Court outlined its concerns as per para. 17 herein and provided in full, the details of each of the relevant ECtHR decisions from 2020-2022, inclusive. This Court asked if the issuing judicial authority endorsed or stood over the assurances previously provided in light of this additional material. This Court sought confirmation that the respondent would be given all the rights set out in the letter of the 1st of February 2022 and further sought confirmation that at all times he would be afforded a guarantee of the provision of a minimum personal space of 3 sq. metres throughout the entire execution of his sentence. This Court also indicated a willingness to receive any further comments from Judge Puşcaşu.

19. This Court received a response dated 2nd February 2023 (appended hereto) which was less than helpful and, indicated that the judge appointed for the enforcement of criminal decisions within Oneşti Court of Law does not directly supervise the deprivation of liberty of convicted persons who are detained in penitentiaries.

20. In light of this unhelpful response, this Court sent a further Section 20 request dated 13th February 2023 which asked whether the responding judge would furnish this Court's letter dated 30th January 2023 to Dr. Dan Halchin, General Director of the National Administration of Penitentiaries and ask that he might answer Questions 2 and 3 therein.

21. A response dated 17th February, 2023 was received from Judge Radu-Ionuţ Şotropa in the following terms:

"[W]e hereby communicate below the response formulated by the National Administration of Penitentiaries through the letter number 23883/DSDRP/17.02.2023, as a result of your express request. through the correspondence with the reference number 191/212/21 dated 13.02.2023, as follows:

"The guarantees assumed by the National Administration of Penitentiaries represent firm obligations for the subordinate prison units, therefore Mr. Mihalcea Adrian will be afforded all the rights referred to in the letter of the National Administration of Penitentiaries number 22883/DSDRP/01.02.2022.

The National Administration of Penitentiaries guarantees the provision of a minimum personal space of 3 square meters throughout the entire execution of his sentence, inclusively in the quarantine and observation period, including a bed and furniture, but excluding sanitary facilities, in Bucharest Rahova Penitentiary, Vaslui Penitentiary and Iaşi Penitentiary, or any other prison that Mr. Mihalcea Adrian may be detained in.

The National Administration of Penitentiaries guarantees the execution of the custodial sentence throughout its period, inclusively in the quarantine and observation period, in decent conditions that ensure the respect of human dignity."

22. A final request for additional information dated 23rd February, 2023 was sent by this Court in the following terms:

> *"We do not appear to have received a response to question (b) as set out in our letter dated 13th February 2023, namely:*
>
> *(b) Can the Issuing Judicial Authority please confirm that it is in order for the High Court to place trust in the assurances provided by the National Administration of Penitentiaries. A yes or no answer is sufficient."*

23. A response dated 24th February, 2023 was received by way of email from Court Clerk Ionut Balanaru in the following terms:

> *"Reply to your address with no. reference 191/212/21 of 24.02.2023 regarding Mihalcea Adrian, according to the visa of the judge delegated with the execution, we inform you that YES, it is in order for the High Court to trust in the assurances."*

24. This Court is satisfied that although the email is sent by a Clerk to Judge Puşcaşu, it could only have been sent with the knowledge and imprimatur of the issuing judicial authority.

The Expert Report

25. The respondent also provided this Court with a report from a Romanian Attorney-at-Law, Adrian Tapu. He swore an Affidavit dated 5th March 2023, wherein he averred to the following:

"I write further to the instruction letter dated 21 February 2023 by which Tracy Horan & Co. Solicitors requested that I provide a legal opinion regarding the case referenced above and the assurances that the Member State can give in relation to detention conditions in Romania.

1. *As a matter of Romanian law, can the issuing judicial authority (IJA) actually give any assurances in line with the CJEU decision in ML?*

   Yes, it is my professional opinion that the Issuing Judicial Authority can give the assurances required by the decision the CJEU in ML.

   While the IJA does not directly control detention in a Romanian penitentiary (detention is enforced by the National Administration of Penitentiaries), Romanian courts of law are call to supervise detention as per the provisions of Law no. 254/2013.

On the basis of Law no. 254/2013, a detained person can petition the domestic courts of law, for any incidents regarding the execution of detention, including but not limited to the conditions of detention.

2. *Furthermore, can authorities other than the IJA (such as the National Administration of Penitentiaries in this case) give such assurances?*

   Yes, I believe that the assurances given by the National Administration of Penitentiaries are bring as per the CJUE [sic] ruling in ML.

   Because the National Administration of Penitentiaries is the authority that directly enforces detention and organizes detention conditions, I believe that this authority is the one that can directly provide assurances.

   Furthermore, as per the provisions of Law no. 554/2013, a failure to give effect to such assurances is legally binding for the National Administration of Penitentiaries before the Romanian courts, which have the possibility to supervise and rule upon any incidents that may occur in the execution of detention.

3. *Can any assurances that are given be binding on the Issuing State that gave it?*

   Yes, the assurances given by a Member State in regards to detention conditions are subject to ECHR and a failure to provide adequate conditions may result in a ruling against the Member State.

4. *If so, under Romanian law can the assurances be relied upon by the Requested person before the domestic Courts in Romania?*

   Yes, as mentioned in the answer to question a), the Requested person can petition the domestic Courts in Romania for any incidents that may occur in the execution of detention in a Romanian penitentiary.

   The legal basis of this would be Law no. 254/2013 which provisions the right of

any person detained in Romania to petition the courts, as we11 as the right of the courts to rule in any such matters."

26. This report does little to advance the respondent's case.

Legal Principles

27. Article 3 of the ECHR states:

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

28. The relevant principles applicable to the Court's consideration of the issue of prison conditions are well established and are set out in Case C-220/18 *ML v. Generalstaatsanwaltschaft Bremen*, by the Court of Justice of the European Union. The principles are set out clearly and unambiguously at paras. 49, 50, 59, 60, 61,65, 66, 78, 87, therein. Specifically, the CJEU confirmed at 110; -

"[110] In accordance with those provisions, the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State.

[111] The assurance provided by the competent authorities of the issuing Member State that the person concerned, irrespective of the prison he is detained in in the issuing Member State, will not suffer inhuman or degrading treatment on account of the actual and precise conditions of his detention is a factor which the executing judicial authority cannot disregard. As the Advocate General has noted in point 64 of his Opinion, a failure to give effect to such an assurance, in so far as it may bind the entity that has given it, may be relied on as against that entity before the courts of the issuing Member State.

[112] When that assurance has been given, or at least endorsed, by the issuing judicial authority, if need be after requesting the assistance of the central authority, or one of the central authorities, of the issuing Member State, as referred to in Article 7 of the Framework Decision, the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the Member States and on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 of the Charter."

In circumstances where the assurance has not been given or endorsed by the issuing judicial authority but comes from another source the CJEU stated; -

"*[114] As the guarantee that such an assurance represents is not given by a judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority."*

29. The concept of conducting an overall assessment based on all the information available to the Court (as per para. 114 of ML, above) was considered by Ms. Justice Donnelly in *Minister for Justice and Equality v. Harrison* [2020] IECA 159 wherein she stated at para. 72; -

"[72] The M.L. case specifically dealt with the provision of information by the executive branch of the Member State as distinct from the issuing judicial authority (or any judicial authority). The relevant portions of the judgment have been set out above. The appellant also relied upon para. 104 to demonstrate that the process of obtaining additional information is a dialogue between the issuing and executing Member States. In my view, the manner in which the CJEU ruled in M.L. makes clear that information may be provided by the issuing State and is not required to only be provided by the issuing judicial authority: "the executing judicial authority may take

into account information provided by authorities of the issuing Member State other than the issuing judicial authority, such as, in particular, an assurance that the individual concerned will not be subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter." Thus, the CJEU was satisfied that there was no general restriction on the provision of information by a non-judicial authority of the issuing Member State."

Donnelly J. continued at para. 81; -

"[81] It is of course the position that the CJEU in M.L. specifically referred to mutual trust in the context of information coming from the issuing judicial authority and stated that it must be relied upon. In the context of an assurance coming from another source, the executing judicial authority had to carry out its assessment in light of all the information presented to it. That is not a statement by the CJEU that mutual trust does not apply between Member States. On the contrary, the difference in the approach between the judicial assurance and the assurance by a State organ reflects the uniqueness of the mutual recognition system which operates at a high level of mutual trust between judicial authorities. There is always a level of mutual trust between Member States, but an executing judicial authority is bound to give information provided by a non-judicial authority greater scrutiny than information provided by another judicial authority."

30. The law in this area was recently reviewed by McDermott J. in *Minister for Justice and Equality v. Pal* [2020] IEHC 143. Therein, the surrender of the respondent was sought by Romania for the purpose of prosecuting him in relation to a number of criminal offences. The respondent objected to his surrender on a number of grounds, including the ground that his surrender was prohibited by Section 37 of the Act of 2003. In this regard, the respondent submitted that his surrender would constitute a breach of Article 3 of the ECHR because there

was a real or substantial risk that he would be subjected to inhuman or degrading treatment due to the poor conditions in which prisoners are confined in Romania. The respondent filed a number of affidavits and a report from Mr. Dănuţ-Ioan in relation to prison conditions in Romania. McDermott J. reaffirmed that the applicable principles had been set out by Denham J. in the Supreme Court judgment of *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45. McDermott J. referred to the decision of the Supreme Court in *Attorney-General v. Davis* [2018] IESC 27, and the judgments of the CJEU in Joined Cases C-404 and C-659/15 PPU *Aranyosi and Căldăraru*, Case C-220/18 *ML v. Generalstaatwaltschaft Bremen* and Case C-128/18 *Dumutriu-Tudor Dorobantu.* McDermott J. also referred to the decision of the ECtHR in *Rezmiveş and others v. Romania* (Application nos. 6147/12, 39516/13, 48231/13 and 68191/13) which concerned conditions of detention in Romanian prisons and detention facilities attached to police stations. He noted the history of issues concerning prison conditions in Romania and the lengthy history of the Court's engagement with the Romanian prison system recorded in that decision. He noted that the Court had made a number of recommendations as to the measures to be taken to reduce overcrowding and improve the material conditions of detention in Romanian centres of detention and post-conviction imprisonment. The European Court of Human Rights noted the Romanian government's submissions concerning steps taken to remedy prison conditions including legislative steps. Mr. Justice McDermott noted that in *Muršić v. Croatia* (Application no. 7334/13), a strong presumption of a violation of Article 3 arose when the personal space available to a detainee fell below 3 sq. m of floor space in multi-occupancy accommodation, but this was capable of being rebutted if one of the following factors were cumulatively met:

(1) The reductions in the required minimum personal space of 3 sq. m are short, occasional and minor;

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

(3) The applicant is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention. He further noted that in Muršić, the 3 sq. m space excludes sanitary-area space and that, even where a detainee had 4 sq. m or more of personal space in multi-occupancy accommodation in prison, other aspects of the physical conditions of detention remain relevant. McDermott J. also reviewed the Irish authorities in this area including *Minister for Justice and Equality v. Tache* [2019] IEHC 68 and *Minister for Justice and Equality v. Iacobuta* [2019] IEHC 250.

31. The decision in Pal was further considered by Mr. Justice Burns in *Minister for Justice and Equality v. Angel* [2020] IEHC 699, wherein he states at para. 45; -

"From the review of the relevant authorities carried out by McDermott J. in Minister for Justice and Equality v. Pal [2020] IEHC 143, the following non-exhaustive list of principles emerges:-

(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. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;

(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 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 is at the time of the hearing;

(j) when the personal space available to a detainee falls below 3m2 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 3m2 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."

Discussion

32. Having reviewed and considered all of the relevant documentation and legal principles, this Court reiterates that in ML, the CJEU determined that if there is a finding of real risk of inhuman or degrading treatment by virtue of the general conditions of detention in the issuing Member State, such a finding cannot, in itself, lead to a refusal to execute a European Arrest Warrant. The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, with respect to detention conditions in the issuing Member State, does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State.

33. This Court, having considered the Country-of-Origin material, received evidence of the existence of deficiencies that were objective, reliable, specific and properly updated. In line with the ML two-step test, this Court is then bound to determine, specifically and precisely, whether, in the particular circumstances of this case, there are substantial grounds for believing that, following the surrender of a person to the issuing Member State, that person will run a real risk of being subject, in that Member State, to inhuman or degrading treatment. To that end, this Court requested of the judicial authority of Romania that it be provided, as a matter of urgency, with all necessary supplementary information on the conditions in which it is envisaged that the respondent will be detained in that Member State.

34. Save for one ambiguous issue (which was later clarified), this Court was subsequently furnished with specific and clear assurances by the issuing state, as set out above, in relation to the prospective conditions of detention of the respondent.

35. This Court has considered the numerous and significant criticisms of the prison conditions in Romania, as evidenced in the CPT report of 2019. This Court notes, however, that the response from the Romanian government indicated an awareness of said problems,

and a desire to effect change. In this context, subsequent reports indicated continued problems, but also significant improvements.

36. Further, there is no doubt that there has been a very large number of cases before the ECtHR that resulted in findings against Romania for breaches of Article 3 of the Convention as a consequence of very poor prison conditions. However, most of the judgments being relied upon, relate to periods of incarceration pre-dating 2020. Furthermore, a large number of the decisions relate to periods of detention pre-dating the judgment of the ECtHR in *Rezmiveş and others v. Romania* (Application nos. 6147/12, 39516/13, 48231/13 and 68191/13) in April 2017. Improvement of conditions of detention in Romanian prisons is an ongoing process and, is underway. Thus, reliance on judgments referencing periods of detention dating back several years is of very limited assistance to this Court.

37. As noted above, the respondent relies on the Minutes from the 1398th meeting of the Committee of Ministers of the Council of Europe on 9th-11th March 2021 entitled 'H46 – 21 *Rezmives and Others* and *Bragadireanu Group v. Romania* (Application nos. 61467/12 and 22088/04): Supervision of the execution of the European Court's judgments.' The respondent has referred to page 5 of the Minutes of the Committee, as referred to in the Section 20 letter dated 1st February 2022. However, in relation to the issue of ongoing improvements to the prison system, the following is also recorded in the Minutes of said meeting and is of note:

> *"In the pilot judgment Rezmiveş and Others delivered on 25 April 2017 the European Court found that the persisting structural problems of overcrowding and poor conditions of detention amounted to a practice incompatible with the Convention. It indicated that two categories of general measures had to be implemented: (i) measures aimed at reducing overcrowding and improving material conditions of detention, and (ii) a specific compensatory remedy, capable of affording adequate compensation. As regards the preventive remedy already in place, the Court noted that it was difficult to*

envisage a genuine prospect for detainees to obtain redress for their situation unless there was a general improvement in conditions of detention in prisons (§ 123).”

The document goes on to detail the progress of the said action plan (as revised) under various headings, and proceeds to outline the measures that are being employed to combat the problem, as follows:

“Measures to address overcrowding: The action plan sets out a combination of measures consisting of (i) investments to expand the capacity of the prison system, by creating 7,849 new accommodation places, including two new prisons, by the end of 2025 and further 600 new accommodation places to offset the recent increase in the prison population; (ii) action to reinforce the Probation Service, notably by recruiting 611 new staff by the end of 2022 (with recruitment now ongoing to fill in 163 positions); and (iii) a new government-endorsed strategy for 2020-2024 aimed at tackling reoffending by strengthening the domestic capacities for the social reintegration of prisoners.

Meanwhile, as advised by the Committee, the National Prison Administration (“NPA”) is monitoring the occupancy rate across the prison system on a weekly basis and is taking action to correct imbalances in the distribution of prisoners, including transfers, when the sanitary situation created by the COVID-19 pandemic allows it. In January 2021, for instance, the NPA organised transfers from seven prisons which had an overall occupancy rate well above the national average (from 136% to 164%), and even higher rates in some sections (from about 166% to 202%).”

Thus, although the document details the fact that the prison population is on the rise and that there is a very serious level of overcrowding in *“some prisons”*, the Committee of Ministers reports that the revised action plan is supported at a high political level and that there is strong commitment to achieving its goals:

> *"The November 2020 revised action plan includes measures which appear to adequately address many of the deficiencies which gave rise to violations of Article 3 of the Convention in these cases. In preparing it, the authorities have also paid heed to the guidance provided by the Committee of Ministers in the earlier stages of the execution process on some aspects requiring priority action on their part (such as reinforcing the Probation Service). This action plan benefits from support at a high political level, as it was endorsed by the government, which attests to the authorities' strong commitment to ensuring full compliance with the obligations under Article 46 § 1 of the Convention and creates the requisite conditions for the effective and timely implementation of the measures put forward."*

38. As noted above at para. 11, the 'Report to the Romanian Government on the visit to Romania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 -19 February 2018', the CPT notes the very severe issues that arose as a result of overcrowding in Romanian Prisons. However, the CPT also acknowledged the fact that the Romanian prison system was in the midst of a major reform effort aimed at drastically reducing the number of persons held in prison and at improving the conditions of detention. The CPT referred to the Action Plan which was adopted by the Romanian Government on 17th January (updated 17th March) 2018, and the various reforms implemented and proposed as a consequence of same.

39. Again, as noted above at para. 11, the Report expresses many criticisms in relation to Iaşi Prison, however this Court notes that at the time of writing the Report (i.e. March 2019), it is stated:

> *"Iaşi Prison, located close to the city centre, was accommodating 1,087 inmates at the time of the visit for an official capacity of 693 places (i.e. an occupancy level of 156%). The prison was holding 967 sentenced adult males, of whom 167 were in the*

maximum security regime and 592 in the closed regime. There were also 106 inmates in pre-trial detention, 15 in admission and 7 in transit (including two women and a juvenile). These prisoners were held in two large accommodation blocks within an inner secure perimeter. The delegation did not examine in detail the situation in the recently renovated adult male semi-open and open unit, which was holding some 200 inmates." (Emphasis added).

The Report further states at page 127; -

"In respect of Iaşi Prison, the CPT has received confirmation since the visit that Block A, which was accommodating some 600 prisoners at the time of the visit in large, mostly severely overcrowded dormitories, has been closed down and will be razed [sic] *to the ground. A new accommodation block should be constructed. This is positive news given the state of Block A."* (Emphasis added).

40. What is critical to the present case, is the situation in the issuing state in 2023. In this regard, this Court has been given specific assurances, which were sought in light of the ambiguity in relation to one aspect of the first set of assurances, the ECHR cases dating from 2020, 2021, 2022 or, and in light of the increase in prison population (Council of Europe, Committee of Ministers, 1398th meeting, 9-11 March 2021 (DH), CM/Notes/1398/H46-21 *Rezmiveș and Others and Bragadireanu group v. Romani*a (Application Nos. 61467/12 and 22088/04).

41. At this juncture, I repeat the following from the 2019 CPT report:

"Prison overcrowding was not evenly spread among or within prisons, and the most serious levels were observed in closed regime, pre-trial and admission (quarantine) cells" and *"At the time of the visit, the actual overcrowding was not spread evenly across the prison system nor within individual prisons".*

In addition, I repeat the following from the Minutes from the 1398th meeting of the Committee of Ministers of the Council of Europe on 9th-11th March 2021 entitled 'H46 – 21 *Rezmives and Others* and *Bragadireanu Group v. Romania* (Application nos. 61467/12 and 22088/04)':

> *"The National Prison Administration ("NPA") is monitoring the occupancy rate across the prison system on a weekly basis and is taking action to correct imbalances in the distribution of prisoners, including transfers"*

42. Thus, prison overcrowding, though an issue, is a prison-specific issue. In this regard, overcrowding may be present in one area of a prison, but not in another, and the Prison Authorities have a system of monitoring the issue of overcrowding and a mechanism, by way of transfer, to address same. In respect of the present case, after his period of time spent in quarantine, the respondent will be admitted to an open or semi-open regime, with overcrowding being less prevalent in the latter two.

43. Whilst, of course, each case has to be considered on its own merits, it is noteworthy that objections to surrender based on the conditions in Romanian prisons have repeatedly been rejected by the High Court in recent years on the basis of assurances which were similar in substance to the assurances provided in this case. The findings made in those judgments might not be binding on this Court, but they are, of interest and I therefore list them thus:

- *Minister v. Tache* [2019] IEHC 68 – surrender ordered.
- *Minister v. Pal* [2020] IEHC 143 – surrender ordered.
- *Minister v. Dicu* [2020] IEHC 607 – surrender refused.
- *Minister v. Gheorghe* [2020] IEHC 618 – surrender refused.
- *Minister v. Angel* [2020] IEHC 699 – surrender refused.

- *Minister v. Iancu* [2020] IEHC 136 – surrender ordered, notwithstanding an expert report from a criminal lawyer in Romanian attesting to the poor conditions in the prisons where the respondent would serve his sentence.
- *Minister v. Kis* [2020] IEHC 396 – surrender ordered.
- *Minister v. Ragabeje* [2021] IEHC 271– surrender ordered. The proposed prisons where the respondent was to be detained included Rahova. The Court considered the 2019 CPT report therein, and received a report from a Romanian lawyer, Mr. Bugnariu Dănuţ-Ioan.
- *Minister v. Tulbure* [2021] IEHC 305 – surrender ordered. The proposed place of detention was Rahova Prison. Again, the 2019 CPT report was opened together with a report from the United States State Department on human rights practices in Romania, dated 2019.
- *Minister v. Raduta* [2021] IEHC 374 – surrender ordered. In this case, the Court had before it an expert report of the 8th February 2021, the 2019 CPT Report, the Council of Europe Report, and specific ECtHR caselaw.
- *Minister v. Purcariu* [2021] IEHC 584 – surrender ordered. In this case, the Court had before it the 2019 CPT report, the Helsinski Committee report, and the fact that the respondent claimed to have personal experience of Romanian Prisons. The prospective prisons were identified as Rahova, Vaslui and Iaşi Prisons.
- *Minister v. N. Hoamea* [2021] IEHC 590 – surrender ordered. In this case, the Court considered the CPT reports, and the prospective prisons included Rahova, Vaslui and Iaşi Prisons.
- *Minister v. R. Hoamea* [2021] IEHC 644 – surrender ordered. In this case, the CPT and the US State Department reports were opened. The respondent in this case had

personal experience of Romanian Prisons and the prospective prisons included Rahova Prison.

44. There were three cases identified by this Court where surrender was refused. In Dicu, the respondent was to be detained in a cell with less than 3 sq. metres of space for a period of 13 months. In Angel, the respondent was to be detained in a cell less than 3 sq. metres for 3-4 months. In Gheorghe, it was unclear where the respondent would go after his initial period of detention, but if he was sent to a semi-open regime (this was a possible option presented to the court) that would have involved him being detained in an area with a personal space of 2 sq. metres. Obviously, these cases are distinguishable, on the facts, from the instant case.

45. In his oral and written submissions, the respondent places considerable reliance on the judgment of the ECtHR in *Bivolaru and Moldovan v. France* (Application nos. 40324/16 & 12623/17). In Moldovan, the applicant was sentenced in Romania to seven years and six months' imprisonment for human trafficking offences committed in both Romania and France in 2010. On the 29th of April 2016, the Romanian authorities issued a European Arrest Warrant in respect of the applicant in order to enforce the sentence of imprisonment imposed. The applicant was arrested on the 7th of June 2016, and on the 10th of June 2016 he appeared before the Investigating Chamber of the Court of Appeal of Riom for a surrender hearing. During his hearing, the applicant outlined his objection to surrender, and presented the Investigating Chamber with evidence demonstrating generalised and systemic deficiencies in respect of prison conditions in Romania. The Investigating Chamber, being satisfied with the evidence presented, invited the Romanian authorities to provide information in relation to the actual detention conditions to which the applicant would be subject in the event of surrender. On the 28th of June 2016, the information requested was furnished. Para. 10 of the judgment summarises the response received from the Romanian authorities, as follows:

"For the enforcement of a twenty-one-day quarantine period, it is planned that the Applicant will first be detained in Bucharest Rahova prison which has twenty-four cells with an individual space of 'minimum 2-3m^2'.

[...]

The Romanian authorities conclude as follows:

'Therefore, the National Penitentiary Administration guarantees that the person concerned will serve the sentence at Gherla establishment or in another subordinate prison which will ensure he gets between 2 and 3m^2 as personal space, including the bed and furniture necessary [...].'"

46. On the 5th of July 2016, the Investigating Chamber decided that the detention conditions the applicant would be exposed to did not present a real risk of inhuman or degrading treatment and it ordered his surrender. On the 6th of July 2016, the applicant filed an appeal; however, on the 10th of August 2016 the Court of Cassation rejected the appeal. On the 26th of August 2016, the applicant was surrendered to Romania. The applicant brought his case before the ECtHR and argued, *inter alia*, that the implementation of the EAW was tainted by a manifest lack of protection of the rights guaranteed under the Convention as the executing authority did not adequately check the information provided by the issuing state and did not seriously assess the specific grounds for a risk of violation of Article 3. Ultimately, the ECtHR reached the conclusion that France erred in its decision to execute the EAW because the evidence established that there was, indeed, a real risk that the applicant would be subjected to inhuman and degrading treatment if he was detained in Romania.

47. In its judgment, the ECtHR reiterated and endorsed the test set out by the CJEU in the decision of Aranyosi and Caldăraru. At paragraph 113, the ECtHR stated the following; -

"[113][...][T]he Court notes that the legal obligation on the judicial authority executing the EAW results from the relevant provisions of the Framework Decision as

interpreted by the CJEU since the judgment (paragraph 50 above). As the case-law of the Court of Justice stands, the executing judicial authority was authorised to derogate, in exceptional circumstances, from the principles of mutual trust and recognition between Member States by postponing, or even if applicable, refusing the execution of the EAW. As the objection for the execution of the EAW on the ground that it would expose the Applicant to the risk of being detained in Romania in conditions contrary to Article 4 of the Charter of Fundamental Rights was brought before the Court, it was its responsibility to assess the reality of the systemic deficiencies in the issuing Member State alleged by the Applicant, and then, if applicable, to specifically and precisely review the individual risk of inhuman and degrading treatment to which he would be exposed if he was surrendered."

The Court further stated at para. 114; -

"[114]The Court points out the convergence, regarding the determination of a real individual risk, between the requirements of the CJEU which requires the executing judicial authority to check in two successive steps whether there are, in the issuing State, systemic or generalised deficiencies and then to assess specifically and precisely whether there are serious and proven grounds to believe that the person concerned will be really at risk of being exposed, due to the conditions of his detention in the issuing State, to a treatment contrary to Article 4 of the Charter of Fundamental Rights (paragraphs 50 and 52 above) and the requirements resulting from its case-law which imposes on national authorities the obligation to check whether there is a real and individual risk, specifically assessed, that this person, due to the same circumstances, be subjected to a treatment contrary to Article 3 (paragraph 106 above). It follows that the Investigating Chamber should have refused the execution of the EAW if, after the check described above, it had

considered that there were serious and proven grounds to believe that the Applicant, if he was surrendered, would be exposed to a real risk of being subjected to an inhuman and degrading treatment due to his conditions of detention. Nevertheless, this power to assess facts and circumstances, as well as the legal consequences related to it at the disposal of the judicial authority, is exercised within the framework strictly established by the CJEU case-law and to ensure the fulfilment of a legal obligation in full compliance with EU law, namely Article 4 of the Charter of Fundamental Rights which guarantees a protection equivalent to that resulting from Article 3 of the Convention. Under these conditions, the executing judicial authority cannot be considered as having, to ensure or refuse the execution of the EAW, an autonomous margin of manoeuvre likely to result in the non-application of the presumption of equivalent protection (Avotiņš, abovementioned, § 107).”

At paragraphs 122-125 of the judgment, the ECtHR explained why it reached its conclusion, stating; -

“[122] First, the Court believes that the information provided by the issuing State was not sufficiently put into perspective with its case-law, in particular regarding the situation of the Gherla prison presented as the prison in which the Applicant was to be incarcerated. In the abovementioned judgement Axinte (paragraph 111 above), cited by the Applicant before the executing judicial authority, it is pointed out that this establishment has an endemic rate of prison overcrowding and that, in such a situation, the lack of personal space is the key factor to be taken into consideration in the assessment of the non-conflicting situation provided in Article 3 of the Convention. Yet, the Court notes that this aspect of the future detention conditions of the Applicant was not seriously taken into consideration, as the Investigating Chamber withheld the prospect of a “minimum space of 2 to 3 m2” (paragraph 12

above) while the Romanian authorities had stated that the Applicant would have a "space between 2 and 3 m2"in the Gherla prison (paragraph 10 above). It was also indicated that the area reserved to the sanitary facilities was included in the area of that personal space. Finally, the Court notes that it is clear from the other judgements cited by the Applicant (paragraphs 8 and 111 above), that the detention conditions at the Rahova prison presented as the establishment in which the Applicant was to be put in quarantine upon his arrival in Romania does not provide persons detained there with satisfactory personal space (Voicu, abovementioned, § 51 and Constantin Aurelian Burlacu, abovementioned, § 27).

[123] The Court recalls, in its case-law, that an area of 3 m² of floor space per detainee is the minimum standard applicable in view of the requirements of Article 3 of the Convention (see for the confirmation of this standard, Muršić v. Croatia [GC], No 7334/13, § 137, 20 October 2016). It considers in view of all the evidence before it, in particular the evidence provided by the Romanian authorities at its request, that the executing judicial authority had information on the personal space reserved for the Applicant, which gave rise to a high presumption of violation of Article 3.

[124] Secondly, the Court notes that the commitments of the Romanian authorities regarding other aspects of the detention conditions within the establishment of Gherla, such as the freedom of movement and the activities outside the cell, which would have made it possible to dismiss the existence of a real risk of violation of Article 3 (idem, §§ 135 and 138), were expressed in a stereotypical way and were not considered by the executing judicial authority in its risk assessment.

[125] Thirdly, the Court considers that, if the Romanian authorities did not rule out that the Applicant may be detained in another prison than Gherla, the precaution taken in this respect by the executing judicial authority, namely the recommendation

that the Applicant be detained in an establishment offering identical conditions, if not better, is not sufficient to dismiss a real risk of inhuman and degrading treatment since, on the one hand, that it would not be possible to assess such a risk regarding a determined establishment and, on the other hand, that the evidence showing the existence of systemic deficiencies of the prison system of the issuing State at its disposal demonstrated that numerous prisons did not offer detention conditions compliant with the standards established by the Court."

At paragraph 126 the ECtHR concluded as follows; -

"[126] In view of all of the above, the Court considers that the executing judicial authority had sufficiently strong factual bases, in particular from its own case-law (paragraphs 111, 122 and 123 above), to determine whether there was a real risk that the Applicant be exposed to inhuman and degrading treatments due to his detention conditions in Romania and could not therefore exclusively rely on the statement of the Romanian authorities (paragraph 10 above). It concludes, in the specific circumstances of the case, that there is a manifest lack of protection of fundamental rights capable of reversing the presumption of equivalent protection. Therefore, the Court finds that there was a violation of Article 3 of the Convention"

48. While the ECtHR's ruling in Moldovan, to the effect that a breach of Article 3 occurred (as set out above) is noted, the applicant in this case has submitted, and this Court agrees, that the facts underlying Moldovan, and specifically, the nature of the guarantees provided by the Romanian authorities upon a request for additional information from France, set it apart from the current case to such an extent that the cases can be readily distinguished. Significantly, the Romanian authorities were unable to guarantee that the applicant would be afforded a minimum personal living space of at least 3 sq. metres during his period of

detention, instead ensuring only that he would be provided with between 2 and 3 sq. metres of personal space.

49. The most recent CPT Report on Romania was published in April 2022. The report highlights ongoing concerns about overcrowding, but it does not contain any specific concerns about a reduction below the minimum guarantee of 3 sq. metres in any of the three prisons where the respondent is likely to be held. In addition, and in a general sense, it is important to bear in mind that the CPT's views on overcrowding are framed by reference to the 4 sq. metre-standard for which it advocates. Whilst, optimally, all prisons across the European Union would be in a position to offer that standard, it is an aspirational one, and the failure of a particular prison to achieve that standard does not establish a real risk of a breach of Article 3 of the European Convention on Human Rights or Article 4 of the Charter of Fundamental Rights of the European Union.

50. This Court repeats the contents of the letter dated 1st February 2022, from Judge Balaban which stated:

> *"[...] With respect to points 8-12 of your address, we enclose the response provided by the National Administration of Penitentiaries in Romania, the national authority competent to provide such information, at the request of the Criminal Enforcement Department within Oneşti Court of Law."*

The response furnished provided extensive information and assurances in relation to the prospective conditions of detention that would apply to the respondent. In the letter dated 24th February 2023, the issuing judicial authority specifically indicated that it is in order for this Court to trust the assurances given and thus, in this Court's view, endorsed same.

51. It is in order, at this point, for this Court to reiterate the test set out in ML, namely.

that where an assurance is 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, this is something which the executing state cannot disregard. Rather, it is something that 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, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 3 of the ECHR or Article 4 of the Charter of Fundamental Rights of the European Union.

52. In the event that this Court is incorrect in this regard, and the assurances are not in fact endorsed by the issuing judicial authority, this Court notes that the assurances derive from Dr. Dan Halchin, General Director of the National Administration of Penitentiaries. This Court considers same in the context of the *dicta* provided by the Courts at para. 114 of in ML and in *Minister for Justice and Equality v. Henn* [2019] IEHC 378, in relation to the manner in which this Court must look at assurances which do not emanate from the issuing judicial authority. This Court is bound to give information provided by a non-judicial authority greater scrutiny than information provided by another judicial authority. It should be noted at this point that the respondent has not provided this Court with any material by way of expert report which would directly challenge the *bona fides* of these assurances which clearly derive from an emanation of the Romanian State.

53. I have carefully considered all of the material put before this Court and have paid particular attention to the ECtHR cases. These cases must be looked out in the context of the fact that the improvement of prison conditions in Romania is a work in progress. For reasons I have outlined above, I am primarily concerned with cases from within the last 36 months, and within this category, there are 19. These cases, together with the other concerns as outlined at para. 17 above, were brought to the attention of the issuing judicial authority and,

subsequently, to Dr. Dan Halchin. The response to same was an emphatic and unambiguous assurance that all necessary rights and protections will be afforded to the respondent in the event of his surrender.

54. As I have already noted at para. 42 above, the Country-of-Origin material provided by the respondent demonstrates that poor conditions are a prison-specific issue, and even within prisons, there are clearly certain areas that are better equipped and have better conditions that others.

55. Thus, having reviewed and evaluated all of the information before the Court, whether employing the *dicta* as per para. 112 or 114 of ML, I am not satisfied that there are substantial grounds for believing that, if surrendered, the respondent is at a real risk of being subjected to inhuman or degrading treatment contrary to Article 3 ECHR or Article 4 of the Charter of Fundamental Rights of the European Union by virtue of the likely conditions of his detention. On foot of the additional information furnished by the Romanian authorities, I am satisfied that, if surrendered, adequate provisions will be made for the respondent's medical and other needs while in detention. It should be noted at this juncture that Section 4A of the Act of 2003 provides for a presumption that Member States will comply with the requirements of the Framework Decision unless the contrary is shown. The Framework Decision incorporates respect for fundamental rights, in this regard.

56. On consideration of all of the evidence before the Court, I am satisfied that the presumption in Section 4A of the Act of 2003 has not been rebutted. Bearing in mind the terms of Section 37 of the Act of 2003, this Court must determine if surrender of the respondent would be incompatible with the obligations of the State under the ECHR, the protocols thereto, or the Constitution. I am satisfied that surrender of the respondent would not be incompatible with such obligations. This ground of objection is, therefore, dismissed.

57. **Is surrender of the respondent prohibited by Article 8 ECHR?**

In this regard, the respondent submits that the offences the subject of the EAW date from 2007 and 2011, and the convictions date from 2007 and 2013, respectively. The EAW was issued in 2013. In addition, he submits that he has put down roots in this jurisdiction and his family reside here. The respondent swore an Affidavit dated 25th February 2022 wherein he averred to the following:

- He says that he is a Romanian National. He is married to his wife Adelina and he has two children, both of whom are attending school.
- He says that his wife has a full-time job as a restaurant supervisor in a hotel in County Mayo and he has started a business – a car valet. As someone who is self-employed, his work hours are more flexible and so he is responsible for bringing the children to school in the morning and picking them up after school at 2pm.
- He says that he, his wife, and their children came here together for a better life and better jobs that would help them to support their family, and to give them the possibility of buying a house.

58. The Supreme Court set out the test which must be applied where an application for surrender is opposed on the grounds of Article 8 of the ECHR. In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12 MacMenamin J. stated at para 89; -

> *"[89] Though a matter of legitimate concern, in this case the delay is to be viewed against the respondent's private and family circumstances. Unless truly exceptional or egregious, delay will not alter the public interest, although 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. The High Court judgment holds that there had been a significant dilution of the public interest which would ordinarily apply (para. 37). It posed what was characterised there as a modified and weakened public interest in surrender, evidenced by the elapses of time and other factors. Against this,*

it posed the private and family factors in the case (para. 38). But for the reasons set out above, there was a misapprehension as to the nature of the assessment. This is not a balancing exercise where public and private interests are placed equally on the scales. It is nonetheless necessary to have regard to the circumstances."

MacMenamin J. went on to state at para 94; -

"[94] The contrast with the exceptional facts in J.A.T. is plain. For an Article 8 defence to succeed, it can only be on clear facts based and cogent evidence. The evidence must be sufficient to rebut the presumption contained in s.4A of the Act (see, para. 41 above). The circumstances must be shown to be well outside the norm; that is, truly exceptional. In the words of s.37(1), they must be such as would render an order for surrender —incompatible with the State's obligations under Article 8 of the ECHR. This would necessitate that the incursion into the private and family rights referred to in Article 8(1) was such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself."

59. In *Minister for Justice and Equality v. D.E.* [2021] IECA 188, the Court of Appeal stated at para. 67; -

"[67] The questions certified by the High Court were as follows: "In the context of proceedings under the European Arrest Warrant Act 2003 as amended, where a respondent objects to surrender on the basis that same is precluded by s. 37 of the said Act as it would be in breach of the respondent's rights under art. 8 ECHR and having particular regard to the provisions of art. 8(2) ECHR:

1. Can personal or family circumstances, in and of themselves, provide a basis upon which surrender might be precluded by s. 37 of the Act of 2003?

2. What is the appropriate test to be applied by the Court in determining whether such an objection is sustained and that surrender should be refused?

3. In so far as exceptionality may be a relevant factor in determining such an objection, what is the appropriate test to be applied by the Court in determining whether the circumstances found to exist are so exceptional as to justify refusal of surrender"

For the reasons set out in this judgment, it is appropriate to answer all three questions by repeating the principles set out at para 59 above:

(i) In an application for surrender, the court is not carrying out a general proportionality test on the merits of the application. The court should apply the specific terms of the 2003 Act, albeit subject to a careful consideration of whether, if necessary, applying a proportionality test to Article 8 Convention rights, to order surrender would involve a violation of that ECHR right to the extent of being incompatible with the State's obligations under the Convention. (Vestartas).

(ii) Surrender (or extradition) presupposes an impact on the personal or family life of a requested person. Having regard to Article 8(2), surrender (or extradition) carried out pursuant to legislation is in principle an acceptable interference with the right to respect for those rights. (Ostrowski, JAT (No. 2), Vestartas).

(iii) When faced with an Article 8 objection to surrender, the function of the Court is to decide if the surrender is incompatible with the State's obligation under the European Convention on Human Rights. That requires a very high threshold. Any inquiry must bear in mind that s. 10 requires a court to surrender in accordance with the provisions of the 2003 Act and s. 4A of that Act obliges the court to presume that the issuing state has complied and will comply with its fundamental rights obligations. (Vestartas).

(iv) The evidential burden of proving incompatibility lies on the requested person. (Rettinger and Vestartas).

(v) *The assessment of the claimed impact of surrender on personal and family rights must be a rigorous one. (Rettinger and JAT (No. 2)).*

(vi) *The evidence must be cogent and must reach the level of incompatibility (Vestartas).*

(vii) *Exceptionality is not the test for incompatibility, but it will only be in a truly exceptional case that surrender will be found to be incompatible with the State's obligations under Article 8 of the Convention. (JAT No. 2 and Vestartas).*

(viii) *For an Article 8 objection to succeed, there must be clear cogent evidence sufficient to rebut the presumption in s. 4A of the 2003 Act. (Vestartas).*

(ix) *No elaborate factual analysis or weighing of matters is necessary unless it is clear that the facts come close to a case which would be truly exceptional in nature thereby engaging the possibility that surrender may be incompatible with the State's obligations under the Convention. (JAT (No.2)).*

(x) *The requirement that the circumstances must be shown to render the order for surrender incompatible with the State's obligations under Article 8 necessitates that the incursion into the private and family rights referred to in Article 8(1) is such as to supervene the limitations on the right contained in Article 8(2), and over the significant public interest thresholds set by the 2003 Act itself. (Vestartas).*

(xi) *Where the facts, assessed as set out above, come close to being truly exceptional in nature thereby engaging the possibility that surrender might be incompatible with the State's obligations, the Court will engage in a proportionality test of whether the high public interest in the prevention of disorder and crime (and the protection of the rights of others) is overridden by the personal and family circumstances (taken where appropriate with all the cumulative circumstances)*

of the requested person. That is a case-specific analysis which will be required in very few cases."

60. Bearing in mind the above principles, and the chronology of events in respect of this matter, in this Court's view and in light of all of the circumstances, it cannot be said that this is a case which involves significant, much less egregious, delay. I have carefully considered the personal circumstances of the respondent and find that there are no circumstances which put his case beyond the norm. The fact that the Irish Government has failed to transpose EU directive Council Framework Decision 2008/909/JHA of the 27th November 2008 into Irish law is not in and of itself a reason to refuse surrender. Nor can it be said (coupled with the other factors in this case) that the fact that the respondent cannot serve his sentence in this country amounts in any way to exceptional circumstances which would prohibit this Court in ordering surrender.

61. It, therefore, follows that this Court will make an order pursuant to Section 16 of the Act of 2003 for the surrender of the respondent to Romania.