

THE HIGH COURT

[2020] IEHC 607

Record No. [2019/267 EXT]**BETWEEN/****MINISTER FOR JUSTICE AND EQUALITY****APPLICANT****AND****MARIAN DICU****RESPONDENT****JUDGMENT of Mr. Justice Binchy delivered on the 16th day of November 2020**

1. By this application the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European arrest warrant dated 14th June 2018 ("the EAW"). The EAW was endorsed by the High Court on 29th July 2019 and the respondent was arrested and brought before this Court on 28th November 2019.
2. The EAW was issued by the Buftea Court – Criminal Division by a named judge. At the hearing of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW was issued, and no issue was raised in this regard in opposition to this application. I was further satisfied that the surrender of the respondent is not prohibited by reason of any of the matters referred to in ss. 21A, 22, 23 or 24 of the European Arrest Warrant Act 2003 (the "Act of 2003"), and the respondent raised no objections in relation to the matters to which these sections relate.
3. At para. (b) of the EAW it is stated that the warrant is based upon a judgment in a criminal case dated 15th February 2018, specifically an order of the Buftea Court – Criminal Division whereby the respondent was sentenced as follows:
 - (1) Four months' imprisonment for the commission of the offence "of driving on the public roads of a vehicle for which the law requires to hold a driving licence, by a person whose right to drive has been suspended." This is stated to be "based on" Article 335 of the Criminal Code, coupled with Article 396 of the Criminal Code.
 - (2) Eight months' imprisonment for the offence of "denial or avoiding the biological samples collection", "based on" Article 337 of the Criminal Code, coupled with Article 396 of the same and;
 - (3) Five months' sentence of imprisonment for the offence of taking away or destroying evidence or documents, also "based on" Article 275 of the Criminal Code, coupled with Article 396 of the same.
4. Further on within para. (b) of the EAW, it is stated under the heading "with appeal" and "final through the judicial decision dated 29th May 2018 rendered by the Court of Appeal Bucharest" that the Court of Appeal "abolishes partially" the appealed judgment, and then goes on to state that the respondent is sentenced to one year of imprisonment in respect of one of the offences, the offence that is contrary to Article 335 (which appears to be the offence of driving without a licence, while he was suspended from driving). In relation to

the offence that is contrary to Article 337 of the Criminal Code, he is sentenced to a period of one year and six months' imprisonment. Following considerably more narrative it is explained that the sentences are merged and a discount is applied, so that overall the respondent was sentenced to two years of imprisonment. At para. (c) of the EAW particulars of the custodial sentence that may be imposed in relation to the offences to which the EAW relates are provided. These range between three years and five years. In any case, minimum gravity is established by reference to the sentence actually imposed. It is also stated that the remaining sentence to be served is two years, i.e. the full sentence.

5. At para. (d) of the EAW it is stated that the respondent appeared at the trial resulting in the decision.
6. At para. (e) of the EAW, particulars of the offences are provided. It is stated that the EAW relates to three offences. The following particulars are provided:
 - (1) "On 30th December 2015 the convict Dicu Marian has driven on the public roads, National Road 7, the town of Chitila, the car with Dacia Logan trademark with licence plate B19ACX although his right to drive has been suspended on 3rd December 2015 for a period of thirty days";
 - (2) "At the same date, as driver on the public roads of the car with Dacia Logan trademark with licence plate B19ACX the convict has refused to take him biological samples needed to establish his blood alcohol level";
 - (3) "On 30th December 2015 the convict has taken away and destroyed documents drawn up by the police bodies in order to prevent the truth finding in a judicial procedure."
7. A request for additional information was sent to the Issuing Judicial Authority ("IJA") on 29th November 2019. The IJA was asked to clarify what was meant by the statement that "the convict refused to take him biological samples needed to establish his blood alcohol levels" and in particular was asked to clarify whether he refused to provide breath, blood or urine samples that could establish his blood alcohol level. Secondly, the IJA was asked to clarify a description of the documents or evidence allegedly interfered with or removed by the respondent.
8. The IJA responded to the request for additional information by letter dated 2nd December 2019. In its reply, it stated (and I paraphrase for convenience) that the respondent had driven his car in the town of Chitila while suspended from driving. It states that since he "emanated" halitosis, he was requested to provide a sample by way of breathalyser, and that he was accompanied to the hospital for the purpose of providing samples. However, he refused to provide samples and while at the hospital he tore from the hands of police representatives documents that had been drawn up when he was stopped, specifically the minutes regarding his detection in the traffic, and the declaration of a witness.

9. A copy of a hospital document was also attached to this letter at the end of which it is stated that:

“the patient refuses to take blood samples motivating that he has allergy against the [illegible] and he is afraid of the needle and he refuses to sign. In the presence of the police representatives, the patient affirms that he had drunk alcohol.”

Respondent's Objections

10. Points of objection were filed on behalf of the respondent on 13th December 2019. Eight objections were made as follows:

- (1) The EAW was not issued by a judicial authority. This objection was not pursued.
- (2) While at para. (d) of the EAW it is stated that the respondent appeared in person at the trial resulting in the decision, it is unclear if this relates to the hearing of first instance or the hearing of the appeal. Accordingly, surrender should be refused pursuant to s. 45 of the Act of 2003.
- (3) At para. (e) of the EAW, where particulars of the nature and legal classification of the offences and the applicable statutory provisions are required to be inserted, it is simply stated “the old code of criminal procedure.” This is not in compliance with s. 11(1A)(d) of the Act of 2003.
- (4) There is uncertainty as to whether the EAW is based upon the judgment of the Buftea Court of 15th February 2018, or the Court of Appeal of Bucharest of 29th May 2018. This is contrary to s. 11(1) and/or s. 11(1A)(e) of the Act of 2003.
- (5) There is a lack of correspondence between the offences as described with any offences in this jurisdiction.
- (6) There are systemic or generalised deficiencies in the requesting state in relation to the detention of individuals surrendered to that country, so far as concerns the deduction of the period of detention served in the executing member state. Accordingly, surrender would be contrary to s. 37 of the Act of 2003.
- (7) Surrender would result in a disproportionate interference with the rights of the respondent under Article 8 of the European Convention on Human Rights (“the Convention”) and Articles 40.4.1, 40.3.1 and 41.1 of the Constitution as well as Articles 6, 7 and 24 of the Charter of Fundamental Rights of the European Union (the “Charter”) and as such is prohibited by s. 37 of the Act of 2003.
- (8) Surrender would result in a violation of the respondent's rights under Articles 2 and 3 of the Convention and/or his right to bodily integrity pursuant to Article 40.3.1 of the Constitution and Articles 2 and 4 of the Charter, as a result of which surrender is prohibited by s. 37 of the Act of 2003, all arising due to the conditions of detention in the issuing state.

11. The respondent swore an affidavit in opposition to this application dated 16th December 2019. He avers that he has spent time in custody on foot of the EAW, and he further avers that having regard to published criticism of the issuing state, he is concerned that the issuing state will not afford him the credit to which he is entitled for time spent in custody. This concerns objection no. 6 above. In this regard, he exhibits a report from the Defence of Human Rights in Romania – the Helsinki Committee (Apador-ch) (the “Apador report”) entitled *Influentation of the European Arrest Warrant: Dysfunctionalities and Bureaucracy - a case study on Romania of May 2018*. In this report, it is stated that:

“One of the most problematic aspects identified during this research is the fact that the persons who are transferred to Romania on the basis of a European arrest warrant do not have any documents on them which would attest the period they spent arrested. The penitentiary casefiles also do not contain this information. Most of the convicted persons interviewed did not know that they had the right to have the period spent arrested in the executing state deducted from the sentence or what the procedure was.”

12. The respondent avers as to the criticism of conditions of detention in the issuing state, and exhibits several documents which reflect that criticism. This includes the Apador report mentioned above, as well as the most recent report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“the CPT”). Other documents are also exhibited, and I will address these when addressing the submissions made on behalf of the respondent at the hearing of the application.

Further Information

13. In a reply dated 18th March 2020, in response to a request for additional information, the IJA provided the following information:
- (1) The respondent was present at the trial of first instance, and again before the Court of Appeal of Bucharest. On each occasion, he was also represented by his chosen lawyer. This disposes of any objection grounded on s. 45 of the Act of 2003 (objections 2 and 4, para. 10 above).
 - (2) On the occasion on which he was stopped by the police i.e. 30th December 2015, the respondent was driving on the public road at a time when his right to do so had been suspended. The suspension had been imposed on 3rd December 2015, for a period of 30 days.
 - (3) The respondent refused to give “biological samples” for establishing his blood alcohol level. The letter repeats that he took away and destroyed documents drawn up by the police authorities in connection with the investigation.
 - (4) When requested to do so by the police, he refused to do a breathalyser test, and for that reason he was taken by the police to the University Hospital, Bucharest, in order to provide “biological samples”, which is clearly a reference to the provision of a blood sample.

- (5) If surrendered, the respondent will have deducted from the sentence the period spent in custody in the State.
14. In a separate letter, of 4th March 2020, the Minister of Justice addresses questions about the prison regime to which the respondent will be subject, if surrendered. In its reply it is stated that, if surrendered, the respondent will initially be taken to Bucharest - Rahova prison, where he will be held for a period of 21 days in a room having a minimum personal space of 3 square metres. After that, he will be taken to a prison that is as close as possible to his place of residence (also having due regard to the necessary regime) to serve out the remainder of his sentence.
15. The letter goes on to state that taking into account the length of the sentence imposed upon the respondent, he will most probably serve his sentence in a semi-open regime, at the Bucharest - Jilava prison. In that event, the prison cell available to the respondent will have a minimum personal space, including bed and related furniture but excluding sanitary facilities, of 2 square metres.
16. Detailed information is then provided regarding the semi-open regime. Prison inmates subject to this regime are allowed to walk unsupervised in areas inside the prison facility on routes set by the prison administration. They are allowed to organise their own spare time, under supervision. Doors of the rooms are kept open throughout the day and prisoners have daily access to walking courtyards, as well as smoking areas.
17. Prisoners are allowed ten phone calls per day, with a maximum duration of 60 minutes. They may work and attend education, cultural, therapeutic and psychological counselling, and also religious activities, and school and vocational training outside the prison, under supervision. There are educational programmes and activities as well as psychological and social assistance. Prisoners have the possibility of participating in remunerative work, taking into account their qualifications, skills, age and health. There is an objective of improving the ability of prisoners to earn their living after release, as well as earning money while in prison. Prisoners must return to their rooms during the day only for meals and at the end of the day, before evening call. Generally speaking, prisoners in this category are free to spend their time outside the prison cell, as well as outdoors, and using the prison cell only for rest or administrative activities.
18. All prisoners have access to washing facilities, shared shower rooms, sanitary facilities and hot water is available for bathing daily. Prison cells have both natural light and ventilation (through windows) as well as artificial lighting. Prisoners also have access to clubs, a sports ground, gym, church, classrooms and other spaces.

Respondent's Objections Considered

19. Returning then to the objections of the respondent to this application. As mentioned already, objection no. 1 was not pursued. Also, as mentioned above, objections 2 and 4 fall away in the light of the information provided by the IJA in its letter of 18th March 2020.

20. As regards objection no. 3, the EAW, at para. (b), identifies the statutory provisions pursuant to which the respondent was convicted. It does so both when addressing the trial of first instance and the appeal. It is true to say that the EAW does not set forth the text of the statutory provisions themselves, and it was submitted that all that has been provided are the statutory provisions that deal with the penalties applicable to the offences, and not the statutory provisions that create the offences themselves. The respondent relies on a number of authorities as regards the need for a European arrest warrant to provide clarity as to the offences for which surrender is sought. Included amongst the authorities referred to are *Minister for Justice Equality and Law Reform v. Ferenca* [2008] 4 I.R. 480, *Minister for Justice and Equality v. Connolly* [2014] 1 I.R. 720 and *Minister for Justice and Equality v. Herman* [2015] IESC 49. These authorities clearly affirm the requirement that a European arrest warrant should state, unambiguously, the number and nature of the offences for which the surrender of the person is sought. In this case there is no doubt about the number of offences - it is clearly stated to be three. Clear and detailed particulars of the actions giving rise to the offences have been provided (see para. 6 above). Statutory provisions relating to these offences have also been identified.
21. While I agree that there is some uncertainty as to whether or not the statutory provisions identified relate to penalty only, as distinct from the creation of the offence, read as a whole, I do not think that this respondent could be in any doubt about the offences for which his surrender is sought. Moreover, it should be borne in mind that this is a conviction warrant i.e. the surrender of the respondent is sought to serve a sentence for offences of which he has already been convicted (after participating fully in the trial resulting in the decision). Accordingly, while there is some validity in the objection, and it would have been better if the statutory provisions had been set forth in full, nonetheless I think it would be absurd in the circumstances of this case to refuse surrender on the basis of this objection, which I reject.
22. Objection no. 5 relates to correspondence with offences in this jurisdiction. It is submitted on behalf of the respondent that, as regards the offence of failing to provide a "biological sample", that this offence most likely relates to the refusal by the respondent to provide a blood sample in the hospital rather than a refusal to provide a breath sample at the roadside. I agree with counsel for the respondent that this is almost certainly the case. However, it also appears to be the case that the respondent was brought to the hospital by the police because he refused to provide a breath sample at the roadside. Although this is not expressly stated, I think it is a reasonable inference to draw from the information provided by the IJA in its letter of 18th March 2020. However, it is submitted on behalf of the respondent that the offence of failing to permit a doctor at a hospital to take a specimen of blood only arises when a person has been arrested under one of the various legislative provisions referred to in s. 12 (1) of the Road Traffic Act 2010 (the "Act of 2010"), and there is no evidence in this case that the respondent was arrested by the police before being brought to the hospital. It is true that this is not expressly stated in the information provided, but here again I think that this is a reasonable inference to

draw in circumstances where the respondent had already refused to provide a breath sample and was being required by the police to go to the hospital for the purpose of providing a blood sample. Furthermore, as has been stated by the Supreme Court in *Minister for Justice and Equality v. Dolny* [2009] IESC 48, when considering the issue of correspondence pursuant to s. 5 of the Act of 2003 the focus of the Court should be on the acts alleged to have been committed by the respondent/requested person, and that it is not helpful to consider the matter in terms of an indictment. It is in my view not necessary for the Court to be satisfied that every element of the alleged offence has been made out, but rather the Court needs to be satisfied that the acts of the requested person in this case refusing to provide a blood sample to a doctor in a hospital having been asked to do so by the police would, if committed in this jurisdiction, constitute an offence.

23. It could not be more clear from the EAW and the additional information that the respondent was asked to provide a blood sample in the hospital, and that he declined. Having been brought to the hospital by the police in the light of what was quite clearly a suspicion that he was driving a mechanically propelled vehicle, having consumed alcohol, in my opinion it could hardly be doubted that those facts, if established in this jurisdiction, would constitute an offence under s. 12 of the Act of 2010 which authorises a member of an Garda Síochána to require a person to permit a designated doctor or nurse to take from the person concerned a specimen of his or her blood. Section 12(2) creates an offence of failing to comply with that requirement.
24. Other arguments advanced by the respondent in relation to the ingredients of the offence of failing to provide a sample of breath at the roadside, contrary to s. 9 of the Act of 2010 do not require consideration, because I agree with the submissions of the respondent that the offence of which the respondent was convicted was that relating to the failure to provide a blood sample of the hospital, and not the failure to provide a breath sample.
25. It was further submitted on behalf of the respondent that under s. 9(2)(b) of the Act of 2010, a person may only be required to accompany a Garda to a hospital in the *vicinity* of the public place where he or she was found to be in charge of the vehicle. It is submitted that it is not clear from the EAW that the hospital concerned was in the vicinity. This argument, which might have a prospect of success in the defence of a prosecution here (and by this I do not mean to say it would actually succeed) has no place in an application such as this, in which, as I said above, the focus of the Court for the purposes of the application, in the context of correspondence within the meaning of s. 5 of the Act of 2003, is on the acts of the respondent. In any case, there is nothing at all to suggest that the hospital concerned was not in the vicinity of where the respondent was stopped, when driving, and it is reasonable to assume that a police officer who requires a person to attend a hospital to provide a blood sample for the purpose of investigating an offence involving driving while under the influence of alcohol, will bring that person to a hospital in the vicinity (although not necessarily the nearest hospital) so as to have the sample taken sooner rather than later.

26. No correspondence argument was advanced in relation to the third offence i.e. the destruction of evidence, which in this jurisdiction is an offence contrary to s. 19(3) of the Criminal Justice and Public Order Act, 1994 (s. 19). For all of these reasons, I am satisfied that the offences the subject of the EAW corresponded to offences in this jurisdiction.
27. In relation to objection no. 6, that the respondent will not be credited with time spent in custody in this jurisdiction, it has been clearly stated by the IJA that time spent in custody will be deducted from the respondent's sentence. The information on which this objection is grounded, namely the Apador report, identifies a concern that there is no systematic way of ensuring that such credits are applied, or even of ensuring that prisoners are aware of their entitlements in this regard. In this case, it is not disputed that the respondent is fully aware of his entitlements, and the Court has the benefit of the assurances provided by the IJA, which this Court is bound to accept in accordance with the trust and confidence that it is bound to accord to the requesting state.
28. In relation to his objection grounded on Article 8 of the Convention, Article 40.4.1 of the Constitution and Articles 6, 7 and 24 of the Charter, no evidence at all has been adduced as how it is claimed that the respondent's family rights will be violated by reason of his surrender. Nor were any oral submissions made in support of this objection and accordingly it must be rejected.
29. This brings me to the final point of objection which is that there is a real risk that the rights of the respondent pursuant to Articles 2 and 3 of the Convention 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 will be violated, if he is surrendered, by reason of the conditions of detention to which he will be subjected in prisons in Romania, as described below. In the first place the respondent relies on the pilot decision of the ECtHR in *Rezmives and others v. Romania* (Nos. 61467/12, 39516/13, 48231/13 and 68191/13) of 25th April 2017. In that case, the ECtHR found a violation of Article 3 of the Convention in a number of prisons in Romania, including Rahova. At para. 106 of its judgment, the ECtHR stated:
- "The Court notes that the first findings of a violation of Article 3 of the Convention on account of inadequate detention conditions in certain prisons in Romania date back to 2007 and 2008 ... and that, since the adoption of the judgments in question, there have been increasing numbers of such findings. Between 2007 and 2012 there were ninety-three judgments finding a violation. Most of these cases, like the present ones, concerned overcrowding and various other recurrent aspects linked to material conditions of detention (lack of hygiene, insufficient ventilation and lighting, sanitary facilities not in working order, insufficient or inadequate food, restricted access to showers, presence of rats, cockroaches and lice, and so on)."
30. The respondent also relies upon the more recent decisions of *Simulescu and others v. Romania* (No. 17090/15 and 8 others) and *Calin and others v. Romania* (No. 55593/15 and 8 others), both of which were handed down by the ECtHR on 6th June 2019. In each of these cases, the court found violations of Article 3 of the Convention. At paras. 8-11 of

its judgment in *Calin* (which also appear in identical terms at paras. 7-10 of its judgment in *Simulescu*), the court stated:

- “8. The court notes that the applicants were kept in detention in poor conditions. The details of the applicants’ detention are indicated in the appended table. The court refers to the principles established in its case-law regarding inadequate conditions of detention (see, for instance, *Muršić v. Croatia* [GC], no. 7334/13, §§ 96–101, ECHR 2016.) It reiterates in particular that a serious lack of space in a prison cell weighs heavily as a factor to be taken into account for the purpose of establishing whether the detention conditions are ‘degrading’ from the point of view of Article 3 and may disclose a violation, both alone or taken together with other shortcomings (see *Muršić*, cited above, §§ 122 –141, and *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 149–159, 10 January 2012).
 9. In the leading case of *Rezmiveş and Others v. Romania*, nos. 61467/12 and 3 others, 25 April 2017, the court already found a violation in respect of issues similar to those in the present case.
 10. Having examined all the material submitted to it, the court has not found any fact or argument capable of persuading it to reach a different conclusion on the admissibility and merits of these complaints. Having regard to its case-law on the subject, the court considers that in the instant case the applicants’ conditions of detention were inadequate.
 11. These applications are therefore admissible and disclose a breach of Article 3 of the convention.”
31. In the table appended to the *Calin* decision, there is a specific reference in two of the cases to Rahova prison, with the grievances identified in each case including overcrowding, lack of or inadequate hygienic facilities, infestation of cell with insects/rodents and inadequate temperature. In the table appended to the *Simulescu* decision, Rahova again features with findings of similar grievances, and Jilava prison is also identified in this decision with the following grievances found in relation to that prison: overcrowding, no or restricted access to toilet, no or restricted access to shower, lack of or poor quality of bedding and bed linen, infestation of cells with insects/rodents, lack of or insufficient physical exercise and fresh air, no or restricted access to potable water, inadequate temperature, lack or insufficient quality of food. It appears from the tables appended to each of these decisions that some of these complaints predate the decision of the ECtHR in *Rezmives*, and that some even stretch as far back in time as 2006. Cases of such antiquity are clearly not relevant for present purposes. Nonetheless, in the case of Rahova some complaints appear to be established as recently as 2018 (as recorded in the *Calin* decision) and in the case of Jilava, the most recent appear to be 2016 (as recorded in *Simulescu*).

32. The respondent also relied on the recent decision of the Grand Chamber of the Court of Justice of the European Union (the "CJEU") in the case of *Dumitru-Tudor Dorobantu* (C-128/18), dated 15th October 2019. That case concerned a request for a preliminary ruling made by the higher regional Court of Hamburg, Germany, concerning the interpretation of Article 4 of the Charter in the context of the Council Framework Decision 2002/58/JHA of 13th June 2002 of the European arrest warrant and surrender procedures between member states (as amended), and which case also concerned a request for the surrender of the respondent in that case to Romania. The CJEU ruled:

"Article 1 (3) of the Council Framework Decision 2002/58/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between member states, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, read in conjunction with Article 4 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing member state, it must for the purpose of assessing whether there are substantial grounds for believing that, following the surrender of the issuing member state of the person subject to European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, take account of all relevant physical aspects of the conditions of detention in the prison in which it is actually intended that the person will be detained, such as the personal space available to each detainee in a cell in the prison, sanitary conditions and the extent of the detainees' freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 of the Charter of Fundamental Rights.

As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the Convention for the protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell."

33. The respondent also placed reliance upon the report of 19th March 2019 of the CPT relating to the period 7th – 19th February 2018. This report states that the material conditions in all prisons visited could be considered as generally poor (para. 88).

However, this report is of limited value because the prisons visited did not include the prisons in which it has been indicated that the respondent will be detained. The report also referred to the decision of the ECtHR in *Rezmives*, and noted that the Romanian government had adopted the action plan required by that decision on 17th January 2018 and was in the course of implementing that plan. It states, at para. 49, that the consequence of the various measures taken has been a reduction of the prison population of 30% in less than 4 years. It also states, however, that overcrowding remains a feature of the Romanian prison system.

34. Counsel for the respondent referred to recent decisions of this Court (Donnelly J.) in the cases of *Minister for Justice and Equality v. Jacobuta* [2019] IEHC 250, and *Minister for Justice and Equality v. Tache* [2019] IEHC 68, in which cases the Court made orders for surrender of each of those respondents, having carried out a detailed analysis of the conditions of detention to which each of those respondents was likely to be subjected on surrender, and having also requested, and considered assurances in relation to those conditions. However, counsel for the respondent submits that these decisions predate the CPT report, the Apador report and the decision in *Dorobantu*. They also predate the decisions of the ECtHR in *Simulescu* and *Calin*.
35. In so far as the assurances provided by the IJA and the Ministry of Justice of Romania is concerned, it is submitted that, notwithstanding the general obligation on member states to accept the assurances provided by other member states in this sphere, the authorities in the requesting state in this case have a track record of not complying with such assurances. In this regard, the Court was referred to an article appearing in fairtrials.org in relation to the decision of the Westminster Magistrates Court of August 2016 concerning a case brought by Romania seeking the surrender of a Daniel Rusu. In that case, the article reports, the court heard evidence from eleven people who had served prison sentences in Romania after being extradited from the United Kingdom. According to the article, all of them told harrowing stories of inhumane prison conditions and said that assurances made by Romania had not been respected. As a result, the court refused extradition in that case.
36. The respondent also relies on an admission, in 2016, on the part of the Romanian Minister for Justice that she had lied to the ECtHR regarding the budgeting of almost €1 billion for the construction of seven new penitentiaries in Romania. Counsel for the respondent referred this Court to an article in an online publication called "Global Risk Insights" in which this matter is reported. While this Court has no other information to support the provenance of the story, the applicant did not at the hearing of this application, dispute its authenticity. It is reported that the Minister explained, to a meeting of the Romanian Magistrate's Council, that she had felt obliged to lie, on behalf of the government, fully knowing that while there were a lot of good intentions, nothing was allocated from the state budget for that specific purpose.
37. It is further submitted on behalf of the respondent that the IJA did not respond to the questions of the Court as regards sanitary conditions in Rahova prison, and nor is it clear

if the available personal space for prisoners of 3 m² excludes sanitary areas. The respondent places particular emphasis on the decision of the ECtHR in *Muršić v. Croatia* (No. 7334/13), in which the court held there is a strong presumption of a violation of Article 3 of the Convention where the personal space available to a detainee falls below 3 m² in multi occupancy accommodation.

38. In reply to these arguments, at the initial hearing of this application, counsel for the applicant relied upon the decision of Donnelly J. in *Tache*, pointing out that in that case Donnelly J. specifically considered and applied the decision of the CJEU in the joined cases of *Aranyosi* (C-404/15) and *Caldararu* (C-659/15 PPU), in which decision, at paras. 91-94, the CJEU determined:

“91. Nonetheless, a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the issuing Member State cannot lead, in itself, the refusal to execute a European arrest warrant.

92. Whenever the existence of such a risk is identified, it is then necessary that the executing judicial authority 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 because of the conditions for his detention envisaged in the issuing Member State.

93. The mere existence of evidence that there are deficiencies, which may be systemic or generalised, or it may affect certain groups of people, or which may affect 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 subject to inhuman or degrading treatment in the event that he surrendered to the authorities of that Member State.

94. Consequently, in order to ensure respect for Article 4 of the Charter in the individual circumstances of the person who is the subject of the European arrest warrant, the executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine whether, in the particular circumstances of the case, there are 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, within the meaning of Article 4.”

39. At the initial hearing of this application, counsel for the applicant submitted that the respondent has placed no evidence before the Court, whether by way of his own affidavit or otherwise, as to which prison(s) he is likely to be detained or that he will be subjected to inhuman or degrading treatment wherever he may be detained. This, it is submitted is a pre-requisite to succeed with an objection of this kind. If the Court requires further information or assurances in order to consider this objection, then it is obliged to request the same of the IJA in accordance with the decision of the CJEU in *M.L.* As is apparent

from other parts of this judgment, I requested such information following upon the initial hearing of the application.

Section 37 Objection - Discussion and Conclusion

40. In the further information provided by the IJA in its letter of 4th March 2020, it was stated that the respondent would, in the first instance (most likely) be brought to Bucharest-Rahova prison, for a period of 21 days, and thereafter he would most likely be brought to Bucharest-Jilava prison, to serve the remainder of his sentence. At paras.14-18 above, I have summarised the description of the semi-open regime at that institution as provided by the IJA in its letter of 4th March 2020. As described in that letter, and without reference to the background of many adverse decisions of the ECtHR, the semi-open regime appears exemplary in all respects except one, and that is that the personal space for prisoners in this regime is 2 m², including the bed and related furniture, but excluding sanitary facilities. However, as mentioned above, the letter emphasises that, apart from time spent in attending activities and programmes, prisoners in the semi-open regime are allowed to spend their free time outside the prison room, including outdoors, using the prison room only to rest.
41. While the information provided about the conditions of detention at Bucharest-Jilava prison was, taken by itself, largely positive (except for the size of the prison cell), nonetheless, in light of the specific conclusions of the ECtHR in *Simulescu* and *Calin* as regards Rahova and Jilava prisons, I considered it necessary to revert to the IJA, pursuant to s. 20 of the Act of 2003, with further queries regarding the sanitary conditions in those prisons.
42. Accordingly, by letter dated 28th July 2020, the central authority here posed the following questions to the IJA:
- "1. Please confirm if the 3 m² minimum personal space available in Rahova includes sanitation facilities.
 2. Please indicate what measures have been taken to address the deficiencies identified by the European Court of Human Rights in the cases of *Calin v. Romania* and *Simulescu v. Romania*, in so far as the conclusions in those cases relate to Rahova and Jilava prisons. In particular:
 - i. Please identify the measures taken to address hygienic facilities, insect infestation and rodent infestation in each prison.
 - ii. Please identify what measures have been taken to address the conclusions of the European Court of Human Rights in the case of *Simulescu* that in these prisons there was inadequate access to toilets, showers, potable water as well as poor quality bedding and bed linen, inadequate temperature and lack of or insufficient quantities of food.
 - iii. By reference to the capacity of each prison, please give an indication as to current levels of occupancy in percentage terms.

- iv. As regards Jilava prison, it is noted that, if surrendered, Mr. Dicu will be placed in the semi open regime, and that his available cell space will be 2 m². It is also noted that it is stated that the furniture in each prison room includes bunk beds. Does this mean that Mr. Dicu will be placed in a room measuring 2 m², with a bunk bed occupied by another prisoner within the same space? Or does it mean that each prisoner has 2 m² at his disposal?

Please note that these questions are being asked by the Court as part of its duty to enquire into the specific conditions in which Mr. Dicu it is likely to be detained, if surrendered. Accordingly, it is necessary for the Court to have specific answers to each of these questions, and not generalised or standardised answers.”

43. The IJA replied by letter of 15th August. It confirmed that the room of 3 m² in which the respondent will be accommodated in Rahova prison measures 3 m², excluding sanitation facilities. While the letter provides a general and positive description about the facilities in respect of which queries were raised, regrettably, it does not address at all the decisions of the ECtHR in the cases of *Simulescu* and *Calin*, and as a consequence, there is no information provided as to what measures, if any, were taken to address the conclusions of the ECtHR in those cases, and specifically as regards the matters which the ECtHR considered as constituting a violation of Article 3 of the Convention. These are the matters referred to in the questions in the last preceding paragraph. General information regarding hygiene and sanitary conditions in the prison is provided, but the IJA was asked to provide specific information in relation to measures taken in the light of the decision of the ECtHR in *Simulescu* and *Calin*, and did not do so.
44. As regards occupancy rates in the prisons, the occupancy rate in Rahova prison, calculated on the basis of 4 m² per prisoner is stated to be 138.35%, while the corresponding rate of occupancy in Jilava is 112.19%. It is again stated that, at Jilava, the respondent will serve his sentence in the semi-open regime and will be accommodated in a room comprising 2 m², which includes bed and other furniture, but excludes sanitation. General information as regards hygiene and sanitary facilities at Jilava is also provided.
45. Having regard to the importance of the issue to the determination of this application, I decided to afford the IJA one further opportunity to address the decisions of the ECtHR in *Simulescu* and *Calin*. In order to minimise any possibility of misunderstanding, I ordered, pursuant to s. 20 of the Act of 2003 that a further letter should be sent asking specific questions by reference to the specific shortcomings identified in those cases. I asked the IJA to identify what measures had been taken to address those shortcomings. I also sought confirmation that the respondent would not be detained in a cell with a personal space of less than 3 m² for protracted periods.
46. Unfortunately, the reply received failed to provide any information as to measures taken to address specifically the problems identified in the decisions of the ECtHR in *Simulescu* and *Calin*. The letter does provide general information about each heading of concern

raised in the letter and, taken by itself that information would be very reassuring as to conditions in the prison. However, it is not possible to view the letter in isolation from the specific queries raised and the background to those queries. Details of conditions and of some works of improvement are provided but with two exceptions (concerning works carried out in a common space for bathing in January of this year, and also the provision of 300 new mattresses in 2020) the works referred to predate the decisions in *Simulescu* and *Calin*. The failure to address these decisions specifically as requested on two occasions, can only lead the Court to conclude that conditions in the prisons are not materially different than those that give rise to those decisions. Moreover, no reassurance was forthcoming that the respondent would not be kept in a cell with personal space of less than 3 m² for protracted periods.

47. I mentioned at para. 38 above the decision of the CJEU in the joined cases of *Aranyosi* and *Caldararu* (a case which also involved a request for the surrender of a Romanian national to Romania) and I quoted in full the principles enunciated at paras. 91-94 thereof. The judgment in *Aranyosi* goes on to say that in such circumstances, the executing judicial authority should seek such information as it requires as regards the conditions in which the requested person will be detained in the requesting state. It is apparent from the above that this Court has made three requests for information of the IJA in order to conduct a specific and precise assessment as to the likely conditions in which the respondent will be detained, if surrendered.
48. The *Aranyosi* test was further developed in the case of *Dorobantu* relied upon by the respondent, and from which I have quoted extensively above. In a nutshell, the objections of the respondent to his surrender, insofar as they are grounded on Article 3 of the Convention or Article 4 of the Charter are twofold: the respondent claims that he is likely to serve a substantial portion of his custodial sentence in the semi-open regime in Jilava prison where he will have no more than 2 m² personal space, contrary to the decision of the ECtHR in *Muršić v. Croatia*. Secondly, the recent decisions of the ECtHR in *Simulescu* and *Calin* constitute up to date evidence of other significant violations of Article 3 of the Convention. Moreover, the Court should not have regard to the assurances received from the Ministry of Justice having regard to the fact that the then Minister for Justice in Romania in 2016 admitted lying to the ECtHR. This Court should also have regard to the decision of the Westminster Magistrates Court, which, having conducted an extensive analysis, concluded in the case of *Daniel Rusu* referred to above, that such assurances could not be relied upon in the case of Romania, because it had evidence from eleven former prisoners as to breaches of undertakings given to British courts. Counsel for the respondent also placed some reliance on a recent decision of the Supreme Court of Finland in which it refused to surrender a requested person on account of the inadequacy of prison conditions, which the respondent claims were very similar to those in which it is intended to detain the respondent in this case, in Romania.
49. Counsel for the respondent places particular emphasis and reliance upon the following passages from the decision of the ECtHR in *Muršić v. Croatia*, at paras. 137 and 138:

“137. When the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government which could, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space

138. The strong presumption of a violation of Article 3 will normally be capable of being rebutted only if the following factors are cumulatively met:

- (1) the reductions in the required minimum personal space of 3 sq. m are short, occasional and minor ...;
- (2) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities ...;
- (3) the applicant is confined in what is, when viewed generally, an appropriate detention facility, and there are no other aggravating aspects of the conditions of his or her detention”

50. It is submitted that this is a cumulative test which is not satisfied in this case, because it is quite clear that the respondent still has a considerable period of a sentence yet to serve (of the order of fourteen months).

51. Of course the respondent is also relying upon the decisions of the ECtHR in *Simulescu* and *Calin*. Each of these cases related to numerous applicants detained over different periods of time in different penitential institutions in Romania, whose grievances also varied, although many of the grievances were common to all institutions. Attached to each decision of the ECtHR is an appendix identifying persons whose complaints of a violation of Article 3 of the Convention were upheld. The appendix identifies the name of each complainant, the facilities where they were held, when they were held in those facilities, and the specific grievances. In the case of *Dumitru Baroga*, who was held in Rahova, Giurgiu and Jilava prisons between 17th September 2010 and 4th January 2017, complaints regarding “overcrowding, lack of privacy for toilet, lack of or insufficient electric light, lack of or poor quality of bedding and bed linen, infestation of cell with insects/rodents, poor quality of food, no or restricted access to shower, lack of or insufficient physical exercise, no or restricted access to warm water, no or restricted access to potable water and inadequate temperatures” were upheld.

52. In another case, involving a complainant of the name *Vasile-Alexandru Brateanu*, who was detained in five different institutions over a period of time, including Jilava, ending on 31st January 2019, complaints regarding overcrowding, lack of hygiene, poor quality of food, restricted access to showers and toilets and insufficient number of sleeping places were upheld. In the *Simulescu* decision, in the case of a *Constantin Nastase*, who was detained in four different institutions, including Rahova and Jilava, between 15th February 2008 and 13th January 2016, complaints identical to those in the case of Mr. Baroga, described above, were upheld.

53. Insofar as it may be argued that this information is not sufficiently up to date, it was for this reason that the Court asked the IJA to identify any measures taken in Rahova and/or Jilava to address the problems identified by the *Simulescu* and *Calin* decisions. The IJA was asked to do so specifically and not in a general way. It is not unreasonable to surmise therefore that insofar as it has failed to provide any specific response to these queries, that no specific measures have been taken to remedy these problems, and, as I have said earlier, it is reasonable in these circumstances for this Court to infer that those problems persist in the institutions where the respondent is likely to be detained.
54. Counsel on behalf of the applicant submits that the judgment of the Supreme Court of Finland relied upon by the respondent is of limited value, insofar as it amounts to an application by the Supreme Court of Finland of the judgment of the ECtHR in *Muršić v. Croatia*, in a specific case. It is submitted that it is clear from *Muršić* that the presumption of a violation of Article 3 of the Convention where the space available to a detainee falls below 3 m² may be rebutted. Counsel relied upon the recent decision of Burns J. in this Court in the case of *Minister for Justice and Equality v. Iancu* [2020] IEHC 316 in which case Burns J. ordered the surrender of the respondent, being satisfied that the presumption of a violation of Article 3 was rebutted on the basis of the information provided by the issuing judicial authority in that case as to freedom of movement outside the cell and activities outside the cell. It is submitted that it is clear that the same conditions of detention and opportunities for exercise and other activities outside of the cell in which he will be detained will be available to the respondent in this case, and that accordingly the presumption of a violation of Article 3 of the Convention is also rebutted in this case.
55. Counsel for the applicant also relies upon the decisions of Donnelly J. in *Minister for Justice and Equality v. Iacobuta* [2019] IEHC 250 and *Minister for Justice and Equality v. Tache* [2019] IEHC 68. In each of these cases, Donnelly J. was required to consider arguments against surrender grounded upon a likely violation of Article 3 of the Convention. Having considered the decision of the ECtHR in *Rezmives & ors v. Romania*, and having requested further information as to the conditions under which the respondent in each of those cases would be held, if surrendered, Donnelly J. concluded, in each case, having regard to assurances received from the issuing judicial authorities in those cases, that there was not cogent evidence such as to establish reasonable grounds for believing that the respondents in each of those cases were at risk of being subjected to inhuman and degrading conditions in the prisons in which those respondents were most likely to be detained. While in each of those cases, the respondents were likely to be detained initially at Rahova, as in this case, neither of the respondents were likely to be sent thereafter to Jilava. Very significantly, as far as this case is concerned, in both cases, Donnelly J. was satisfied that throughout their respective periods of detention, the respondents in those cases would at all times have available to them minimum cell space of 3 m² (see para. 68 in *Tache* and para. 71 in *Iacobuta*).

56. So far as the decision of Burns J. in *Iancu* is concerned the respondent in that case was to be detained, as in this case, in Rahova penitentiary for 21 days, and thereafter was likely to be detained in a semi-open regime at Focsani penitentiary. The semi-open regime was described in similar terms to the regime in Jilava prison, and the individual cell space available to the respondent was, as in this case, 2 m² excluding sanitation. However, in that case, the respondent had approximately six months of a sentence remaining to be served, as distinct from approximately fourteen months remaining to be served at this point in time as far as the respondent in these proceedings is concerned.
57. The above are significant distinguishing features between the cases of *Iacobuta*, *Tache* and *Iancu* and these proceedings. Moreover, the decisions in *Simulescu* and *Calin* were handed down by the ECtHR after the decisions of Donnelly J. in *Iacobuta*, and *Tache*, and do not appear to have been drawn to the attention of the court in *Iancu*.
58. It is clear from the decision of the ECtHR in *Muršić* that the minimum floor surface space per detainee in multi occupancy accommodation, for the purposes of Article 3 of the Convention, is 3 m². While this is not absolute, where the space available to a detainee falls below 3 m², this raises a strong presumption of a violation of Article 3, which may be rebutted if the three factors identified at para. 138 of the judgment of the ECtHR are met, cumulatively (my emphasis). One of those factors is that the reductions in the required minimum personal space of 3 m² are short, occasional and minor. It is beyond doubt that that is not so in this case. The reduction in personal space will be for the duration of the respondent's sentence, if surrendered, and if that were to occur now that would be of the order of thirteen months (taking account of a three-week period spent in Rahova where the respondent would have 3 m² at his disposal).
59. The second factor to be taken into account is the freedom of movement outside the cell and out of cell activities. I am satisfied from the information provided that the respondent would have more than sufficient freedom of movement outside of his cell during the course of the day, as well as adequate access to out of cell activities. However, the third factor to be taken into account is general in nature i.e. that there are no other aggravating aspects of the conditions of detention to be taken into account. On the basis of the decisions of the ECtHR in *Simulescu* and *Calin*, in so far as they are concerned with Bucharest-Jilava prison, I consider that there are significant other aggravating aspects of detention in that institution. While it may be argued that the information to be gleaned in the reports of the ECtHR in *Simulescu* and *Calin* is insufficiently up to date or precise, I afforded the IJA two opportunities to address those decisions and to let the Court know if the grievances that gave rise to the decisions in those cases as to violations of Article 3 of the Convention in Jilava, had been addressed since those decisions were handed down. As I have mentioned above, the IJA did not respond to these questions with any degree of specificity, and accordingly I think it is reasonable to rely on the decisions in those cases insofar as the ECtHR reached conclusions that conditions of detention in both Rahova and Jilava prisons constitute a violation of Article 3 of the Convention. It is no understatement to say that the

grievances identified relate to some of the most fundamental of human needs, including (but not limited to) access to potable water, quality of food, inadequate temperatures and lack of privacy for toilet use.

60. Accordingly, it is my view that the combination of inadequate personal space (2 m²) for an extended period in Jilava prison, coupled with those other aggravating aspects of conditions of detention that have already been found as a fact by the ECtHR to be present in both Rahova and Jilava prisons, all taken together constitute substantial grounds for believing that there is a real risk that the respondent, if surrendered, will be exposed to conditions of detention that would violate the respondent's rights as guaranteed by Article 3 of the Convention. While I have been satisfied that all of the respondent's other objections to surrender must be rejected, I am satisfied that his objections under s. 37 of the Act of 2003 have been proven, and that his surrender is therefore prohibited by that section. This application must therefore be refused.