[2020] IEHC 618

THE HIGH COURT

[2019 No. 326 EXT]

BETWEEN

MINISTER FOR JUSTICE & EQUALITY

APPLICANT

AND

MIRCEA-IONEL GHEORGHE

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 30th 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 15th February 2018 ("the EAW"). The EAW was issued by the First District Court in Bucharest, as issuing judicial authority ("IJA").

2. On 8th October 2019 the High Court declined to endorse the EAW because it sets out details of just one offence of theft for which the surrender of the respondent is sought, but it is clear that the sentence to be served is a cumulative sentence, which includes a second offence of robbery in respect of which there are no details in the EAW. The High Court requested a new European arrest warrant to be sent with complete details of both offences for which the respondent is sought. By letter of 14th October 2019 the IJA provided supplemental information relating both to the offence of theft and the offence of robbery.

3. The EAW was thereafter endorsed by the High Court on 11th November 2019. The respondent was arrested and brought before the Court on 27th January 2020. The application was opened and substantially heard by the Court on 12th March 2020, and was then adjourned from time to time, following upon a direction by this Court pursuant to s. 20 of the European Arrest Warrant Act 2003 (as amended) (hereinafter "the Act of 2003"). The request for further information concerned the prison conditions in which the respondent is likely to be detained if surrendered. I address this issue in detail later in this judgment.

4. At the opening of the application, I was satisfied that the person before the Court is the person in respect of whom the EAW is issued. I was further satisfied that none of the matters referred to in ss. 21 A, 22, 23 and 24 of the Act of 2003 arise, and that the surrender of the respondent is not prohibited for any of the reasons set forth in any of those sections.

5. At para. B of the EAW, it is stated that the decision on which it is based is criminal judgment handed down by the First District Court in Bucharest on 21st December 2017, made "final by lack of appeal" on 16th January 2018.

6. At para. C it is stated that the EAW relates firstly to one offence of theft under Article 228 (1) of the Romanian Criminal Code "with the application of Article 5 of the Criminal Code", and was sentenced in respect of that offence by the First District Court in Bucharest on 21st December 2017 (the "theft offence"). Secondly, as became apparent from the reply

to the request for further information referred to in para. 2 above, the EAW relates also to an offence of aggravated robbery under Articles 233 and 234 (1)(d) of the Romanian Criminal Code, for which the respondent was sentenced by the Fourth District Court in Bucharest on 18th June 2015, which sentence was made final on 15th July 2015 (the "robbery offence"). The applicable provisions of the Romanian Criminal Code are set out in full.

7. Further on in para. C of the EAW, information regarding the sentence imposed is given. It is stated that the sentences for the offences of theft and robbery were merged, resulting in a sentence of imprisonment of three years and three months, with a deduction of 24 hours for a period of detention on 20th May 2014. It is stated that the remaining sentence to be served is three years, two months and twenty nine days. Accordingly, minimum gravity is established in relation to the offences for the purposes of s. 38 of the Act of 2003.

8. At para. D of the EAW in relation to the theft offence, it is stated that the respondent was not present in person at the trial resulting in the decision. At para. D 3.1a the IJA states that the respondent did not appear at any hearings during the trial phase and was not informed of the accusation and his procedural rights. It is stated that attempts were made to summons the respondent, with checks carried out to find the respondent's address, without success. At para. D 3.4 it is stated that the respondent was not personally served with the decision but will, on his surrender, be entitled to request a retrial or appeal in respect of the offences and, on his surrender, will be informed of this right to request a retrial or appeal within one month.

9. At para. D regarding the robbery offence it is also stated that the respondent was not present at the trial resulting in the decision. At para. D 3.1a it is explained that attempts were made to summons the respondent, receiving responses from family members that the respondent no longer resides at his home address and had travelled to this jurisdiction. At para. D 3.4 it is stated that the respondent was not personally served with the decision but will, within one month of his surrender, be informed of his right to request a re-trial or appeal.

10. At para. E of the EAW, it is stated that the warrant relates to two offences. The following particulars are provided in relation to the theft offence:

> "On 29/11/2013, around 10.30am, the defendant Gheorghe Mircea-Ionel stole a mobile phone, make Samsung Galaxy Note 3, …, from the Flanco store, located in Promenada Mall in Calea Floreasca, nr. 246B, Sector 1, Bucharest, while the phone was exposed for sale on a shelf, and replaced it with a broken phone Samsung Galaxy Note 3…."

Regarding the robbery offence the IJA sets out that:

> "On May 20, 2014, around 02.30 am, while he was on Soseaua Oltenitei no. 140 in Bucharest, District 4, the defendant Gheorghe Mircea Ionel stole from the store

owned by SC Ravi Central Store SRL several goods and exercised acts of violence against the injured person Stanciu Gheorghe, the seller of the store, to keep the stolen goods and to ensure his escape, and then to prevent the injured person to call the police, he stripped him by violence of the Nokia CI mobile phone."

11. No box is ticked at para. E.I, accordingly correspondence must be shown between the offences outlined in the EAW and offences in this jurisdiction. No objection was raised to the effect that the offences described in the EAW do not correspond to offences in this jurisdiction. It is clear that the offences of theft and robbery correspond with offences under ss. 4 and 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

12. Points of objection were delivered by the respondent on 11th March 2020 as follows:

    1. "The respondent does not consent to surrender to the issuing state.

    2. The respondent requires proof, from the applicant, of the European arrest warrant herein and all facts or matters rendering his surrender lawful.

    3. The request for the respondent's surrender is prohibited by the provisions of section 37 of the European Arrest Warrant 2003 [sic] in that it would violate the enjoyment of his fundamental rights to his family guaranteed by Article 41 of Bunreacht na hÉireann and/or Article 8 of the European Convention on Human Rights.

    4. The respondent objects to his surrender and disputes the content of the European arrest warrant herein in that he was informed by police in the issuing state that matters would not proceed to criminal prosecution, and in any event, he was not made aware either of such proceedings or the subsequent conviction, despite having given a statement and provided police with an address and contact details.

    5. The said warrant does not comply with the provisions of section 45 of the European Arrest Warrant Act 2003 (as amended).

    6. The surrender of the respondent, in all the circumstances, would be disproportionate, having regard to the nature of the offence referred to in paragraph E.2 of the said warrant, the circumstances of the respondent's departure from the issuing state, and the length of time that has passed since the events described in the said warrant.

    7. Without prejudice to the foregoing Points of Objection, the respondent reserves his right, in the context of a decision from this honourable court to surrender him to the issuing state under section 16 of the European Arrest Warrant Act 2003, to apply for an order under section 18 of the said Act of 2003, for a postponement of his surrender to the issuing state on such terms as this honourable court shall deem just and mete.

    8. The respondent reserves his position in terms of the right to furnish further points of objection as may be permitted by this honourable Court".

13. The respondent swore an affidavit dated 14th February 2020, in support of his application for bail, on which he also relies for his objection based upon Article 8 European Convention on Human Rights (the "Convention"). In this affidavit, the respondent briefly outlines his family situation in this jurisdiction.

Submissions of the parties
Submissions of the Applicant

14. Firstly, it is submitted that it is clear that the respondent can avail of a retrial or appeal of the sentences of both offences to which the EAW relates and therefore surrender should not be refused under s. 45 of the Act of 2003.

15. In response to the respondent's objection under Article 8 of the Convention it is it is submitted that there is no evidence provided by the respondent such as to engage Article 8 in this application.

16. It was submitted that none of the objections made on behalf of the respondent withstand scrutiny, and that the requirements for surrender have been satisfied, and accordingly the Court should make an order for surrender pursuant to s. 16 of the Act of 2003.

Submissions on behalf of the Respondent

17. On behalf of the respondent it is submitted that the respondent provided an address in Ireland to the Romanian authorities on two occasions, when applying for a passport for his child and in communications regarding child benefit in Romania. It is submitted that this was disregarded by the Romanian authorities in the supplemental information relating to the attempts to contact the respondent. It is submitted that the respondent left Romania in good faith but is likely to be imprisoned pending the hearing and determination of any appeal taken following surrender which would result in a fundamental unfairness.

18. The respondent submits that his surrender is prohibited by s. 37 of the Act of 2003 as there would be a significant impact to the respondent's family should he be surrendered under the EAW contrary to Article 8 of the Convention. It is submitted that the respondent's partner and daughter have been living in this jurisdiction since 2014 and as a family have developed significant community ties through their employment and education.

19. Following the receipt of the additional information referred to above (regarding prison conditions in which the respondent is likely to be detained) counsel for the respondent submitted that there is a possibility that the respondent will be placed in a semi-open regime following a review of his sentence, considering that a portion of the respondent's sentence has already been served in this jurisdiction. Therefore, surrender should be refused on the basis that the conditions of detention in the semi-open regime are in breach of the respondent's rights under Article 3 of the Convention, because the personal space available to him will be restricted to 2 m^2, while the European Court of Human Rights (the ECtHR) has determined in the case of *Mursic v. Croatia* (App. 7334/13) that

the minimum personal space available prisoners, to satisfy Article 3 of the Convention, is 3 m².

Decision on s. 45 and Article 8 objections

20. While it is clear from the EAW that the respondent was not served with the proceedings and the trial resulting in the decision for each offence was held *in absentia*, it is also clear that the respondent will have available to him an appeal or retrial on his surrender, and this disposes of the objection grounded on s. 45 of the Act of 2003.

21. The respondent also objects to surrender on the basis of an interference with his Article 8 family rights. No circumstances have been raised by the respondent that would elevate such interference beyond that which inevitably flows from surrender. I think it is probably fair to say that this objection was not pursued with any seriousness, and correctly so because the respondent has not provided any grounds such as to establish even a *prima facie* case that his surrender would give rise to a violation of his rights under Article 8 of the Convention.

Prison Conditions - Article 3 of the Convention

22. At around the time that this application proceeded, I received extensive submissions in another application, that of *Minister for Justice and Equality v. Marian Dicu* [2020] IEHC 607, concerning prison conditions in Romania. As a result, I considered that the question of prison conditions in which the respondent would be detained, should he be surrendered, also requires consideration on this application. Accordingly, further information was sought by the Court, pursuant to s. 20 of the Act of 2003, by letter of 16th April 2020. The following questions were asked:

    1. What prison or detention centre would the respondent be sent to if he is surrendered?

    2. What prison will he serve his sentence in if surrendered?

    3. Will the IJA guarantee that the respondent will be held in conditions of detention/custody of at least 3m2 floorspace (as understood by the European Court of Human Rights in *Mursic v. Croatia* (App. 7334/13, decision of 20th October 2016)?

    4. If the respondent is to be held in conditions of detention between 3m2 and 4m2 floorspace, can the IJA give guarantees in relation to the provision of in-cell sanitation and toilet facilities, clean bedding, satisfactory food, ventilation, adequate room temperature, basic hygiene products, out of cell exercise, recreation and access to fresh air?

    5. What measures has the IJA taken to protect its prison population from the spread of the Coronavirus?

6. Can the IJA guarantee that the respondent would not be exposed to any or any increased risk of contracting the Coronavirus if he is surrendered and detained in custody in a Romanian prison or detention centre?

23. In its reply dated 5th May 2020, the IJA stated that the respondent will initially be held in Bucharest Rahova prison for 21 days, in a room with a minimum of 3m2 floorspace. It is then stated that the respondent will most likely continue to serve his sentence in a closed regime in Bucharest Rahova prison. In that regime, he would also have a minimum of personal space of 3 m^2. The IJA provides detail of the conditions in Rahova prison, stating that there is adequate ventilation, lighting, heating, sanitary facilities and disinfection and pest control are carried out at scheduled intervals. It is also stated that there are adequate food facilities and inmates can walk outdoors.

24. The IJA states that after serving one fifth of their sentence, inmates are subject to a review of their conditions of detention and, while it cannot be predicted whether the respondent will be transferred, it is stated that if the respondent were transferred to a semi-open regime, then he would most probably be transferred to serve the balance of his sentence in Bucharest Jilava prison. Detailed information is then provided of that regime. In that prison inmates may 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.

25. 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.

26. 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. 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.

27. The IJA then states that if the respondent were transferred to an open regime he would most likely continue to be held in Bucharest Rahova. It is explained that in the open regime cell doors are open permanently, except for dining and administrative activities. Inmates have unlimited access to walking yards and smoking areas. Inmates may move unaccompanied in order to work, attend education, cultural, therapeutic, psychological counselling and social assistance, religious activities and training outside the prison.

28. The IJA provided information regarding its response to the Covid-19 pandemic including, *inter alia*, prevention measures, intervention for detainees extradited from risk areas and intervention measures for positive cases. Finally, it is stated that the respondent would have minimum personal space of 3m2 in both the closed and open regimes, but only 2m2 in the semi-open regime.

29. A second request for additional information was made by the Court on 29th October 2020. This was sent because of matters brought to my attention in the case of *Dicu*, referred to above, and in particular the decisions of the ECtHR in *Simulescu v. Romania* (App. 17090/15) and *Calin v. Romania* (App. 20049/15). This letter was in identical terms to a letter sent on the same date, regarding the same prisons, in the case of *Dicu*. Accordingly, each letter resulted in an identical response dated 3rd November 2020. In the letter to the IJA, it was asked, inter alia, to provide specific information as to the measures taken to address the shortcomings in Rahova and Jilava prisons, being the shortcomings identified in the decisions of the ECtHR in *Simulescu* and *Calin*, particularly in relation to the minimum personal space provided in the semi-open regime, but also regarding deficiencies in conditions of detention generally.

30. In response to a question regarding the personal space that would be provided to the respondent in the semi-open regime of Jilava prison (2 m2) the IJA stated:

> "considering the fluctuation of the number of detainees as well as all the measures taken by the Romanian state in order to improve detention conditions and create a prison environment conducive to achieving the goal pursued by applying the custodial sentence, there is the possibility for the persons detained in Bucharest-Rahova and Bucharest-Jilava Prisons to benefit from a more generous space, a space from which the person in question will also benefit."

31. The IJA then provided detailed information in response to questions of the Court regarding pest control, potable water, hygiene facilities, bedding, heating and food quality. Also included were schedules of hot water access and daily food menus. However, as will become apparent from the decision in *Dicu*, from which I quote below, no information was provided about measures taken to address the shortcomings in the prisons, as identified by the ECtHR in *Simulescu* and *Calin*.

32. While not all of the arguments raised in the case of *Dicu* were raised on this application, the circumstances of each case as regards prison conditions and the likelihood of surrender giving rise to a violation of Article 3 of the Convention are almost identical. The only difference appears to be that it is more than likely in *Dicu* that the respondent in that case will be required to serve most of his sentence in the semi-open regime, with 2 m² of personal space, whereas in this case, the precise regime to which the respondent would be transferred after the review referred to at para. 24 above remains uncertain. However, because of the very substantial overlap between the two applications it is expedient at this juncture to set out in full the discussion and conclusion in the case of *Dicu*, to be found at paras. 40-60 of that judgment.

Discussion and Conclusion in *Dicu*

"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 *Aranoysi* 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 is 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."

Conclusion

33. As I said above, at paras. 23 and 24 if surrendered, the respondent is likely to be detained initially in Rahova prison for a period of 21 days, and to remain in that prison thereafter, until he has served one fifth of his sentence, at which point the execution of the remainder of his sentence is reviewed. So it is unclear what may happen from that point onwards: if he is sent to a semi-open regime this will involve him being detained in an area with a personal space of 2 m².

34. However, if he continues to be detained in the closed regime or if he is detained in an open regime, he will have personal space of 3 m². Given that these are the options, while it cannot be said that he will probably be detained in an area with a personal space of 2 m² rather than 3 m², it can hardly be doubted that there are substantial grounds for believing that there is a real risk that he would be detained in an area with a personal space of 2 m², for a substantial period of time (It will be recalled that in *Minister for Justice and Equality v. Rettinger* [2010] IESC 45, Fennelly J. held: "It is equally clear that it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a "*real risk*."). If the respondent were detained, even in a semi-open regime, in an area with a personal space of 2 m² for a substantial period of time, such detention would be a contravention, in its own right, of

Article 3 of the Convention, for the reasons stated above in *Dicu*. Accordingly, for this reason, it follows that there are substantial grounds for believing that, if surrendered, there is a real risk that the respondent will be detained in conditions that violate the respondent's rights under Article 3 of the Convention.

35. Moreover, it is apparent from my conclusions in *Dicu*, that the general conditions in Rahova and Jilava, where the respondent will be detained (be it in just one or both of those institutions) are such as to have given rise to several adverse decisions of the ECtHR in recent years to the effect that they contravene rights guaranteed by Article 3 of the Convention. For the reasons also stated in *Dicu*, it is my belief that the conditions that gave rise to these adverse decisions of the ECtHR are unlikely to have been addressed and eliminated. The IJA has been given three opportunities to identify remedial measures taken, two in *Dicu* and one in this case, and has not identified any. In my opinion therefore, when all of these matters are taken into account, there are substantial grounds for believing that the surrender of the respondent will give rise to a violation of his rights guaranteed under Article 3 of the Convention. While I have been satisfied that in every other respect this application meets the requirements of s. 16 of the Act of 2003, I consider that for the foregoing reasons surrender is prohibited by s. 37(1)(a)(i) of that Act because such surrender would be incompatible with the State's obligations under the Convention.