

THE HIGH COURT

[2020] IEHC 699
[2020 No. 024 EXT.]

BETWEEN

MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

AND

PITULAN ANGEL

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 15th day of December, 2020

1. In this application, the applicant seeks an order for the surrender of the respondent to Romania pursuant to a European arrest warrant dated 7th September, 2018 ("the EAW"). The EAW was issued by Judge Matyus Gabriela of the Local Law Court, Jibou, as the issuing judicial authority. The EAW seeks the surrender of the respondent to serve a sentence of 2 years and 6 months' imprisonment, imposed upon him on 18th July, 2018, in respect of one offence of driving a motor vehicle without a licence.
2. The EAW was endorsed by the High Court on 10th February, 2020 and the respondent was arrested and brought before the High Court on 6th May, 2020.
3. I am satisfied that the person before the Court is the person in respect of whom the EAW was issued. No issue was raised in this respect.
4. I am satisfied that the minimum gravity requirements of the European Arrest Warrant Act, 2003, as amended ("the Act of 2003"), have been met. The respondent is sought to serve a term of imprisonment of 2 years and 6 months.
5. I am satisfied that none of the matters referred to in ss. 21A, 22, 23 and 24 of the Act of 2003 arise and that the surrender of the respondent is not prohibited for the reasons set forth therein.
6. The respondent delivered points of objection dated 20th May, 2020 which may be summarised as follows:-
 - (a) the EAW does not contain sufficient detail as required by s. 11 of the Act of 2003;
 - (b) surrender is prohibited by virtue of s. 38 of the Act of 2003 as there is no correspondence between the offence alleged in the EAW and an offence under Irish law;
 - (c) the application constitutes an abuse of process and/or is otherwise estopped or precluded by virtue of the fact that the same EAW has already been the subject of an application for surrender before the courts of the United Kingdom of Great Britain and Northern Ireland ("the UK") and surrender was refused;
 - (d) surrender is prohibited by virtue of s. 37 of the Act of 2003 because it would be incompatible with the State's obligations under the European Convention on Human Rights ("the ECHR") and/or the Constitution:-

- (i) as it would violate the respondent's right to a family life under article 8 ECHR; and
 - (ii) as it would violate the respondent's right not to be subjected to inhuman or degrading treatment or punishment under article 3 ECHR, due to prison conditions in Romania; and
- (e) surrender is prohibited by virtue of s. 45 of the Act of 2003, as the respondent was tried and convicted in absentia in circumstances where the requirements of that section have not been met.

The EAW and Other Documentation before the Court

7. The EAW is dated 7th September, 2018 and requests the arrest and surrender of the respondent "*in view of executing a custodial sentence*".

8. At part B of the EAW, it is indicated that it is based on:-

"The warrant for executing an imprisonment sentence no.155/2018 of July, 18th, 2018, issued by the Local Law Court Jibou."

The enforceable judgment is described as:-

"Criminal sentence no. 132 of May, 30th, 2018 of the Local Law Court Jibou and the Closures for Correction of a Clerical Error of June, 27th, 2018 and July, 18th, 2018 of the Local Law Court Jibou, enforceable on July, 18th, 2018 by non-appeal."

The reference given is:-

"Criminal case file no. 1135/1752/2016 of the Local Law Court Jibou."

9. Part C of the EAW indicates that by the criminal sentence no. 132 of 30th May, 2018 (enforceable on 18th July, 2018 by non-appeal), a sentence of 1 year and 2 months' imprisonment was imposed upon the respondent for having committed the offence of driving a vehicle without holding a driving licence. It also indicates that that offence is concurrent with an offence for which the respondent was sentenced to 6 months' imprisonment by criminal sentence no. 66 of 9th March, 2016, case file number 886/224/2015 of the local Law Court Huedin, which in turn was committed during the probation period set by criminal sentence no. 1298 of 5th December, 2013, case file number 8025/211/2013 of the local Law Court Cluj-Napoca, where the respondent was sentenced to 1 year and 2 months' imprisonment. Part C of the EAW indicates that under various Romanian legislative provisions, the three sentences are calculated as a single sentence of 2 years and 6 months' imprisonment.
10. At part D of the EAW, the relevant boxes are ticked to indicate that the respondent did not appear in person at the trial resulting in the decision; that the respondent was summoned in person on 26th March, 2018; was informed of the scheduled date and place of the trial which resulted in the decision and was informed that the decision may be handed down if he did not appear for the trial. Box 3.4 was also ticked to indicate that the respondent was not personally served with the decision, but that he will be personally

served with the decision without delay after surrender and when served with the decision, he will be expressly informed of his right to a retrial or appeal, in which he has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed, and he will be informed of the timeframe within which he has to request a retrial or appeal, which is one month from the day he was informed by means of an official notification that a criminal trial was held against him.

11. At part E of the EAW, it is stated that it relates to one offence which is described as follows:-

"On February, 28th, 2015, around time 22:00, the defendant drove the motor vehicle with registration number HD-08-UPS on DN 1 G, in the village Almaşu, County of Sălaj, without holding a driving license.

The letter no. 71350/April, 27th, 2015 sent by the Prefect's Institution Cluj – SPCRPCÎV reveals the fact that Angel Pitulan is not registered as holder of a driving license."

12. By letter dated 28th January, 2020, the High Court sought additional information as to whether the sentence of 2 years and 6 months' imprisonment related to more than one offence, and if so what were the other offences and what sentences were imposed in respect of each offence. The letter also requested the issuing judicial authority to complete a table D in respect of each sentence and to provide further detail as to how the respondent was summoned in person in relation to criminal sentence no. 132 of 30th May, 2018. By letter dated 31st January, 2020, the issuing judicial authority confirmed that the sentence of 2 years and 6 months' imprisonment included three separate sentences, viz. a sentence of 1 year and 2 months' imprisonment imposed on 30th May, 2018; a sentence of 6 months' imprisonment imposed on 30th June, 2016 following an appeal; a sentence of 1 year and 2 months' imprisonment imposed on 10th February 2014, but suspended, with the suspension being lifted by virtue of a 2016 conviction. As regards the request for a separate table D for each offence, the issuing judicial authority set out a table D abstract for the 2018 sentence confirming that the respondent was not present and would be given the opportunity of an appeal or re-hearing upon surrender. In relation to the 2016 sentence, no table D was completed and it was indicated that the respondent had not appeared in person but was represented by an attorney whom he had hired personally. In relation to the 2014 sentence, no table D was completed and it was indicated that the respondent did not appear in person having been summoned by posting at the local council and that the decision had not been received by the respondent but that notification of same was posted at the local council and on the door of his address.
13. The respondent's solicitor, Mr. Tony Hughes, swore an affidavit herein dated 8th May, 2020, in respect of an application for bail in which he exhibited an order for discharge of an extradition matter dated 15th February, 2019 from a court in Northern Ireland concerning a European arrest warrant seeking the surrender of the respondent.

14. By letter dated 9th June, 2020, the Court sought additional information from the issuing judicial authority seeking details in relation to each of the offences giving rise to the 2014 and 2016 sentences. The Court also sought confirmation that the guarantee of a retrial or rehearing related to the cumulative sentence of 2 years and 6 months' imprisonment, as well as each of the separate convictions and sentences constituting the said cumulative sentence. The issuing judicial authority was asked to provide the name of the prison or prisons where the respondent would be detained and for precise information in relation to the conditions in the said prisons. The issuing judicial authority was also asked to confirm if the EAW which was currently before the High Court was the same warrant that was the subject of a refusal by the Northern Irish court to surrender the respondent to Romania, and if not, to furnish a copy of the warrant which had been before the Northern Irish court.
15. In answer to the said request, the issuing judicial authority sent two separate replies dated 16th June, 2020 and 17th June, 2020, respectively. The reply of 16th June, 2020 dealt with the issue of prison conditions. It indicated that if surrendered, the respondent would initially spend a period in quarantine of 21 days in the Bucharest Rahova penitentiary where he would have a minimum space of 3m². Further, it indicated that subsequent to the quarantine period, the respondent would most probably be detained under a semi-open regime at the Bistrița penitentiary where rooms had appropriate natural ventilation and lighting, heating and permanent access to water and sanitary items, while inmates had an individual bed comprising a mattress and bedding, as well as furniture for storing personal items and eating. Details were provided of regular disinfection, pest control and lighting conditions. Under the semi-open regime, inmates are able to walk unaccompanied in areas within the detention area and manage their own leisure time under supervision, while the doors of the rooms remain open during the entire day. Details were given in relation to access to telephone calls and information points in relation to prisoners' detention status. Inmates could perform work and attend educational and cultural events and therapeutic and psychological counselling, as well as social support and moral/religious activities in schools or professional training outside of the penitentiary under supervision. It was stated:-

"Hence, the prisoners executing the sentences under the semi-open regime have the possibility to spend their leisure time outside of their detention room during the entire day. They are put in their rooms only for having their meals and half an hour before making the evening call. In conclusion, apart from the time assigned for attending activities and programmes, as well as for enforcing their rights, this category of prisoners can spend leisure time outside of their detention room, in open air, practically using their detention room only to rest or for various administrative and individual hygiene activities."

Having served a fifth of the sentence, the convicted person will be reassessed in terms of the regime and, subject to the person's behaviour, could be assigned to serve the remainder of the sentence in the same penitentiary, but under an open regime which was more liberal than the semi-open regime, and the details of same were set out. A

guarantee was given that during the entire period of his detention, the respondent would be afforded a minimum individual space, including his bed and related furniture but excluding the designated bathroom area, of 2m² under the semi-open regime and 3m² under the open regime.

16. In the letter of reply dated 17th June, 2020, the issuing judicial authority provided further details of the offence resulting in the 2014 sentence, indicating that the offence was one of driving a motor vehicle without a licence, which had occurred on 15th December, 2010, in the village of Gilau in a public place. It was set out that the respondent drove an Audi motor vehicle while holding a driving licence issued by the Irish authorities which he could only use for driving on the territory of Ireland and only for the purpose of learning to drive motor vehicles. In relation to the offence resulting in the 2016 sentence, details were provided confirming that the offence had occurred on 6th February, 2015 within the township of Manastireni in a public place. The respondent had been driving a BMW motor vehicle while holding a driving licence issued by the Irish authorities but the respondent's right to drive had been suspended for a period of 90 days starting on 5th February, 2015. The respondent had been notified of the suspension and had acknowledged receipt of same in writing. He had appealed his conviction but his appeal was denied. The issuing judicial authority indicated that as regards the 2014 and 2018 sentences, the respondent was entitled to an appeal or rehearing but was not entitled to such appeal or rehearing in respect of the 2016 sentence as he had been represented by an attorney whom he had hired personally. It was confirmed that the EAW before the High Court was the same warrant as had been before the Northern Irish court.
17. The solicitor for the respondent, Mr. Tony Hughes, swore a supplemental affidavit herein dated 14th July, 2020 exhibiting a report from Mr. Sean Devine B.L., who had represented the respondent in respect of the European arrest warrant before the Northern Irish courts in 2019. Mr. Devine reported that the respondent had been arrested on 29th December, 2017 in Northern Ireland on foot of a European arrest warrant issued by Romania. He was remanded in custody. At that stage, the respondent was in custody for other domestic matters in Northern Ireland. On 12th September, 2018 the European arrest warrant was withdrawn but the respondent was immediately arrested in respect of a fresh European arrest warrant issued by Romania. The fresh European arrest warrant had been issued because there had been a recalculation of the original sentences imposed on the respondent. On 13th September, 2018 the respondent was remanded in custody. On 30th November, 2018 the respondent was arrested and detained on a Belgian European arrest warrant. On 15th February, 2019 the Romanian European arrest warrant was heard before HHJ Miller QC and the respondent was discharged due to the inhumane conditions that pertained in Romanian prisons and the inadequacy of the assurances which had been provided in respect of same. Following 15th February, 2019, the respondent remained in detention in Northern Ireland on foot of the Belgian European arrest warrant only. On 11th June, 2019, the Belgian authorities withdrew the European arrest warrant, apparently on the basis of the amount of time the respondent had already served in custody in Northern Ireland on foot of same. As regards the Northern Ireland domestic proceedings, the respondent had been given a suspended sentence of 2 years'

imprisonment on 25th July, 2018. Mr. Devine was of the opinion that the respondent had spent from 27th December, 2017 until 15th February, 2019 in custody in Northern Ireland on foot of the two European arrest warrants issued by Romania.

18. Mr. Hughes swore a further affidavit, dated 21st October, 2020 exhibiting the submissions of Mr. Devine B.L. before the court in Northern Ireland.

Section 11 of the Act of 2003

19. I am satisfied from reading the EAW and the additional information furnished by the issuing judicial authority as a whole that sufficient detail has been furnished so as to satisfy the requirements of s. 11 of the Act of 2003. In particular, the following has been adequately specified:-

- (a) the name and nationality of the person in respect of whom the EAW was issued;
- (b) the name of the judicial authority that issued the EAW and the address of its principal office;
- (c) the telephone number, fax number and email address of the issuing judicial authority;
- (d) the offences to which the EAW relates, including the nature and classification of the offences concerned under the law of the issuing state;
- (e) that a conviction, sentence or detention order is immediately enforceable against the respondent;
- (f) the circumstances in which the offences were committed, including the time and place of their commission and the degree of involvement of the respondent in the commission of the offences; and
- (g) the penalties of which the sentence imposed on the respondent consists.

Correspondence

20. Counsel on behalf of the respondent submitted that there was no correspondence between the offences set out in the EAW and any offence under Irish law. He submitted that, in particular, as regards the 2014 and 2016 sentences, the additional information of 17th June, 2020 indicated that the respondent had been driving in Romania with an Irish driving licence and that if one reversed the facts to test whether correspondence existed, it was not an offence under Irish law to drive in Ireland with a Romanian driving licence. When challenged to set out for the Court the legal basis for his submission that a person was entitled to drive in Ireland on a Romanian driving licence, counsel for the respondent was unable to point the Court to any particular legislative provision, domestic or European, other than a printout from a European Union ("the EU") website to the effect that if a person holds a driving licence for life (i.e. one that remains administratively valid for an unlimited period) that was issued by another EU country, he will not have to renew the licence after changing his usual place of residence. No evidence was adduced by the respondent as to whether, at the time of the offences referred to in the EAW, he held a

driving licence which was valid for life. He did not address the fact that as regards the 2014 sentence, the respondent had apparently been driving on a learner's permit, and that as regards the 2016 sentence, he had been driving when his right to drive had been suspended.

21. There is a clear offence under Irish law of driving without a valid licence which has effect. In this jurisdiction, s. 38(1) of the Road Traffic Act, 1961, as amended ("the Act of 1961"), provides:-

"A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle."

This is precisely what is alleged to have constituted the offences set out in the EAW. I am satisfied that the driving was in a public place as expressly stated in the additional information, and where not so expressly stated, I am satisfied to infer same from the description of the circumstances of the offences. The respondent's submission of a lack of correspondence due to him holding an Irish driving licence at the time of the offence is not supported by the evidence adduced before the Court. I do not believe the approach adopted by the respondent to be correct as regards the applicable test for correspondence when dealing with a breach of regulatory regimes in different jurisdictions.

22. Section 38(1) of the Act of 2003 sets out as follows:-

"Subject to subsection (2), a person shall not be surrendered to an issuing state under this Act in respect of an offence unless—

(a) the offence corresponds to an offence under the law of the State, and—

(i) under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months, or

(ii) a term of imprisonment or detention of not less than 4 months has been imposed on the person in respect of the offence in the issuing state, and the person is required under the law of the issuing state to serve all or part of that term of imprisonment,

or

(b) the offence is an offence to which paragraph 2 of Article 2 of the Framework Decision applies, and under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years."

23. Section 5 of the Act of 2003 provides as follows:-

"For the purposes of this Act, an offence specified in a European arrest warrant corresponds to an offence under the law of the State, where the act or omission that constitutes the offence so specified would, if committed in the State on the

date on which the European arrest warrant is issued, constitute an offence under the law of the State."

24. In order to establish correspondence pursuant to s. 5 of the Act of 2003, the Court is required to determine whether the act or omission that constitutes the offence specified in the EAW would, if committed in the State, constitute an offence under the law of the State. In the present case, the offences referred to in the EAW are offences of driving without a valid driving licence to cover the driving in question, and in one case driving when the right to drive was suspended. As already stated herein, s. 38(1) of the Act of 1961 provides:-

"A person shall not drive a mechanically propelled vehicle in a public place unless he holds a driving licence for the time being having effect and licensing him to drive the vehicle."

25. In the present case, the respondent was convicted in respect of each of the offences of driving without holding a driving licence to cover his driving on the occasion in question. I am satisfied that correspondence exists between the acts or omissions constituting the offences referred to in the EAW and the offence of driving without a licence as provided for under s. 38 of the Act of 1961.
26. Furthermore, I am satisfied that the offences referred to in the EAW involve acts or omissions by reference to a regulatory regime in Romania in circumstances where there is a sufficient similarity between the respective regulatory regimes in Romania and Ireland to justify the conclusion that the substance of the acts or omissions is the same, even though the specific relevant regimes necessarily differ as they emanate from the legal systems of two separate jurisdictions. I find that the regime under Romanian law and the regime under Irish law are, as a matter of substance, sufficiently similar so that it can properly be said that the acts or omissions rendered criminally unlawful, in this case driving a motor vehicle without a valid driving licence, must in themselves be regarded as corresponding wrongdoing. Both involve a breach of the regime put in place by domestic legislation to criminalise driving a motor vehicle without a valid licence.
27. I dismiss the respondent's objections as to lack of correspondence between the offences referred to in the EAW and any offence under Irish law.

Previous Execution of the EAW in Northern Ireland

28. It is accepted by both parties that the EAW before this Court is the same European arrest warrant that was before the court in Northern Ireland and in respect of which surrender was refused on 15th February, 2019, pursuant to a finding by the Northern Irish court that *"extradition to Romania would be against the human rights of the requested person"*. It is accepted by both parties that this finding related to the prison conditions in which the respondent would be detained in Romania at that time.
29. It is accepted by both parties that following an order refusing surrender, there is no automatic bar to a further application being made on foot of a fresh European arrest

warrant for the surrender of the requested person in respect of the same offences or sentences. It was submitted on behalf of the respondent that, arising from the mutual trust and confidence underpinning the European arrest warrant system, the courts of each member state were obliged to recognise and give effect to the final decision of the courts of another member state to refuse the surrender of a requested person in respect of the same European arrest warrant. Counsel for the respondent was unable to refer the Court to any authority to that effect and as a matter of first principles, I do not see how same should be so. For instance, a refusal to surrender may be based on a lack of correspondence between the offence referred to in the European arrest warrant and an offence under the law of the member state in which the order of refusal has been made. If the requested person was to subsequently go to a third member state where such correspondence between offences did exist, there is no logical reason why the courts of that third member state should refuse surrender. I reject the submission on behalf of the respondent that this Court is obliged to refuse surrender on foot of the order of the Northern Irish court refusing surrender in respect of the same European arrest warrant.

Abuse of Process

30. While this Court is not obliged to refuse surrender on foot of the order of the Northern Irish court, the fact that the requested person has already been the subject matter of a previous application for surrender in respect of the same matters may be of relevance in the context of a plea of abuse of process. In *Minister for Justice and Equality v. Campbell* [2020] IEHC 344, Lithuania sought the surrender of Mr. Campbell in respect of serious firearms/terrorist offences alleged to have been committed between 2006 and 2007. A European arrest warrant was issued in December 2008, the respondent was arrested in January 2009 in this jurisdiction on foot of same and granted bail. In May 2009, while dropping his wife to work, he was arrested in Northern Ireland on foot of the same European arrest warrant and remanded in custody. In July 2009, the European arrest warrant before the High Court in Ireland was withdrawn. In 2013, Belfast Recorder's Court refused to surrender Mr. Campbell and an appeal in respect of same was refused. Mr. Campbell was released by the Northern Irish authorities and returned home. Shortly after his release in 2013, Lithuania issued a second European arrest warrant which was received by the Irish authorities in October 2016, which was endorsed by the High Court in November 2016, and Mr. Campbell was arrested and brought before the High Court in December 2016. Proceedings were contested on grounds, *inter alia*, of abuse of process, inhuman prison conditions in Lithuania and the competency of the Lithuanian Prosecutor General's Office to issue a European arrest warrant. In July 2020, Donnelly J. ordered the surrender of Mr. Campbell. In relation to the plea of abuse of process, Donnelly J. regarded the law as unsatisfactory but sought to determine the relevant principles. She considered the decisions in *Minister for Justice and Equality v. Tobin* [2012] IESC 37, [2012] 4 I.R. 147, *Minister for Justice and Equality v. J.A.T* [2014] IEHC 320, *Minister for Justice and Equality v. J.A.T. No. 2* [2016] IESC 17, [2016] 2 I.L.R.M. 262 and *Minister for Justice and Equality v. Downey* [2019] IECA 182.

31. Donnelly J. held:-

- (a) there is no bar to bringing a fresh application to the Court for surrender;
- (b) there can be circumstances which justify or require the High Court refusing an application for surrender on the basis of abuse of process;
- (c) a finding of an abuse of process should not be made lightly;
- (d) it is only where the case has exceptional circumstances that an abuse of process will be found (although exceptionality is not the test) and that the abuse of process is that of the High Court in this jurisdiction rather than a concern about an abuse of process to put the requested person on trial;
- (e) there is a broad public interest in bringing things to finality in one set of proceedings;
- (f) there is a strong public interest in Ireland complying with its international obligations and surrendering individuals in accordance with the relevant extradition provisions;
- (g) a repeat application for surrender is not *per se* abusive of process. It would only be abusive of the process where to do so is unconscionable in all the circumstances;
- (h) *mala fides* or an improper motive is not a necessary precondition for an abuse of process; and
- (i) the Court should look to the cumulative factors which may make the application for surrender oppressive or unconscionable.

32. In *Campbell*, Donnelly J. identified the true issues in that case as delay and the fact that Mr. Campbell had spent four years in custody in Northern Ireland, with almost three years of same spent in solitary confinement, awaiting the outcome of an application for surrender. As for the delay from the date of the alleged offences, approximately 14 years, no specific adverse consequences for Mr. Campbell or his family had been identified. The Lithuanian authorities were not entirely to blame for the delay. Mr. Campbell had gone to Northern Ireland where he was arrested. That was not the fault of the Minister or the Lithuanian authorities. The length of the proceedings in this jurisdiction was not due to Lithuania but was a consequence of legal challenges. The maximum time for which Lithuania had failed to ensure protection of human rights regarding detention conditions was under nine years from issue of the first European arrest warrant in 2008 to the assurance it gave in 2017. Time spent in custody would be taken into account should he be convicted but if surrendered, he was quite likely to be remanded in custody awaiting trial. The offences alleged were very serious.

33. Donnelly J. was not convinced by the argument on delay and was not satisfied that it was a crucial factor which inexorably pointed to an abuse of process, even in the absence of an explanation for same which was a factor to be taken into account. The fact that it took time for Lithuania to bring its prisons in line with human rights standards and/or seeking

surrender before it did so was not mala fides or an abuse of process. She held at para. 124:-

"Having considered all the factors relevant to the abuse of process, I am satisfied that individually or cumulatively there is no abuse of process. However unique the circumstances are in this case, they do not reach a level of unjust harassment or oppression that means it would be an abuse of the processes of this Court to surrender him. This point of objection must accordingly fail."

34. In the present case, the circumstances do not appear to me to be of an exceptional nature and fall well short of reaching what may be regarded as a level of unjust harassment or oppression that would render it an abuse of the process of this Court to surrender the respondent. The respondent was arrested on 29th December, 2017 in Northern Ireland on foot of a European arrest warrant issued by Romania. He was remanded in custody. At that stage, the respondent was in custody for other domestic matters in Northern Ireland. On 12th September, 2018, the European arrest warrant was withdrawn but the respondent was immediately arrested in respect of a fresh European arrest warrant issued by Romania. The fresh European arrest warrant had been issued because there had been a recalculation of the original sentences imposed on the respondent. On 13th September, 2018, the respondent was remanded in custody. On 30th November, 2018, the respondent was arrested and detained on a Belgian European arrest warrant. On 15th February, 2019, the Romanian European arrest warrant was heard before HHJ Miller QC and the respondent was discharged due to both the inhumane conditions that pertained in Romanian prisons at that time and the inadequacy of the assurances which had been given regarding same. Following 15th February, 2019, the respondent remained in detention in Northern Ireland on foot of the Belgian European arrest warrant only. On 11th June, 2019, the Belgian authorities withdrew the relevant European arrest warrant, apparently on the basis of the amount of time the respondent had already served in custody in Northern Ireland on foot of the sentence. As regards the domestic proceedings, the respondent had been given a two-year suspended sentence on 25th July, 2018.
35. The arrests and detention of the respondent in Northern Ireland on foot of the original and replacement warrants issued by Romania appears to have been in order. The respondent successfully challenged his requested surrender before the Northern Irish court and he was discharged in February 2019. While detained in Northern Ireland on foot of those warrants, the respondent was also being detained for a significant part of that time on foot of local charges, as well as on foot of a Belgian European arrest warrant. The respondent does not argue that the processing of the Romanian warrants by the Northern Irish court was an abuse of process. At some stage following his discharge in Northern Ireland, he left that jurisdiction and came into this jurisdiction where he was arrested on foot of the same Romanian European arrest warrant. He was admitted to bail in this jurisdiction. His personal circumstances are not exceptional. I have already held that the refusal of surrender by the Northern Irish court does not automatically operate as a bar to a fresh application to this Court on foot of the same warrant. I hold that the mere

application to this Court does not amount in itself to an abuse of the process of this Court. The respondent cannot point to any exceptional circumstances other than his discharge in Northern Ireland. There has not been any egregious delay in the processing of this matter. The respondent submits that the requesting state or the applicant should have disclosed to the Court when seeking endorsement of the EAW that it had already been adjudicated upon and surrender refused by a court in Northern Ireland. However, as that fact in itself was not a bar to making the application for surrender, I am not satisfied that the failure to disclose those details at the application for endorsement stage amounts to an abuse of process. There is no evidence of *mala fides* on the part of the requesting state or the applicant herein.

36. The respondent submitted that he might not be credited with the time served in custody in Northern Ireland on foot of the current and earlier European arrest warrant. However, the respondent did not adduce any evidence to support this contention. Pursuant to s. 4A of the Act of 2003:-

"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."

In *Minister for Justice and Equality v. Vestartas* [2020] IESC 12, the Supreme Court explained how that provision concerns the duties and obligations of an issuing state concerning the manner in which it will deal with the person, both if surrendered and after surrender has taken place. If there is cogent evidence of non-compliance, then issues may arise which an Irish court might have to address. However, a mere assertion of non-compliance, or the possibility of non-compliance, will not be sufficient to dislodge the presumption.

37. Furthermore, article 26 of the Framework Decision provides as follows:-

"(1) The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

(2) To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority of the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."

38. It is clear from the wording of article 26 that it is for the issuing member state to deduct the periods of detention arising from the execution of a European arrest warrant from any period of detention to be served in the issuing member state. The obligation placed upon the executing member state is to transmit all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant. If there is a dispute between the respondent and the issuing member state as to whether or not a particular period of detention is to be deducted, then that dispute should be resolved in

proceedings before the issuing member state in the first instance and if necessary, can be adjudicated upon by the Court of Justice of the European Union (“the CJEU”) if it is alleged that the issuing member state has failed to properly implement or interpret the provisions of article 26 of the Framework Decision. It is not for this Court to determine in advance of surrender whether or not a period of detention spent by the respondent in respect of the present or an earlier warrant in a different jurisdiction should be deducted from any sentence to be served in the issuing member state. It is not for this Court to certify what periods of detention were served in another jurisdiction. Presumably, the relevant certification can be obtained by the respondent from the Northern Ireland authorities. The concept of mutual trust and confidence between member states underpins the Framework Decision and the European arrest warrant system. There is nothing before the Court to indicate that the Romanian authorities will not properly give effect to the provisions of article 26 of the Framework Decision. In such circumstances, this Court proceeds on the basis that the Romanian authorities will deduct such periods of detention as is required pursuant to article 26 of the Framework Decision.

39. I take some support for the approach adopted by this Court from the decision of Edwards J. in *Minister for Justice and Equality v. Zigelis* [2012] IEHC 12. In that case, the surrender of the respondent was sought by the Republic of Lithuania. The respondent consented to his surrender and the court made an order pursuant to s. 15 of the Act of 2003, but postponed the surrender of the respondent until such time as he had completed serving a sentence imposed upon him in this jurisdiction, pursuant to s. 18(3) of the Act of 2003. He completed that domestic sentence on 17th August, 2011 and on that date the applicant sought a surrender date of 19th August, 2011. It was submitted to the court that the respondent had spent longer in detention on foot of the European arrest warrant than he would be required to serve in Lithuania. He was admitted to bail and the matter came before the court on a number of occasions. The Lithuanian authorities took the view that the time spent by the respondent in prison in Ireland should not be deducted from the Lithuanian sentence as it related to a domestic sentence as opposed to the European arrest warrant. Edwards J. stated at para. 15:-

"It is clear from sub-article (1) of Article 26, in particular, that it is a matter for the issuing member state to deduct all periods of detention arising from the execution of a European arrest warrant. The role of the executing judicial authority or the central authority in the executing member state is confined, per sub-article 2 of Article 26, to transmitting relevant information to the issuing member state. It is a matter for the relevant authorities within the issuing member state to interpret and give effect to Article 26(1). Article 26(1) is certainly open to the interpretation that the Lithuanian authorities are placing on it. Arguably, it may also be open to the interpretation that respondent puts on it. It is not for this Court to adjudicate on who is correct. The issue is one for the respondent to raise before the Courts of the issuing state upon his surrender."

40. If deemed appropriate, this Court could direct that the information to be transmitted to the issuing judicial authority concerning the duration of the detention of the requested

person on the basis of the EAW shall include not only the relevant information relating to any period of detention in this jurisdiction, but also a copy of the report of Mr. Devine to assist the Romanian authorities in calculating any period of detention to be deducted from the sentence to be served. However, if that were to be done it should be made clear to the Romanian authorities that this Court has expressed no opinion on whether or not the period of detention spent by the respondent in Northern Ireland is so deductible.

41. I dismiss the respondent's submission that this application and/or an order for surrender on foot of same would amount to an abuse of process.

Section 37 of the Act of 2003

42. The respondent submitted that surrender was incompatible with the State's obligations under the European Convention on Human Rights ("ECHR"), and would amount to a violation of the respondent's right under article 3 ECHR not to be subjected to inhuman or degrading treatment due to prison conditions in Romania and/or under article 8 ECHR to a family life.
43. As regards the respondent's submission that surrender would amount to a violation of his right to a family life as guaranteed by article 8 ECHR, I am not satisfied that there is any substance to this objection. It is an unfortunate fact that a period of incarceration in prison is likely to have an adverse impact upon a person's family life. However, no evidence has been adduced to indicate that the impact upon the respondent's family life will be exceptional or out of the ordinary. I dismiss the objection to surrender based upon his right to a family life.
44. As regards prison conditions in Romania, the respondent adduced no evidence as to the conditions he was likely to face in prison. However, in light of the refusal of surrender by the court in Northern Ireland, I requested additional information from the issuing authorities as regards the likely conditions in which the respondent would be held if surrendered, and the reply to that request has been set out at para. 15 herein.
45. From the review of the relevant authorities carried out by McDermott J. in *Minister for Justice and Equality v. Pal* [2020] IEHC 143, the following non-exhaustive list of principles emerges:-
 - (a) the cornerstone of the Framework Decision is that member states, save in exceptional circumstances, are required to execute any European arrest warrant on the basis of the principles of mutual recognition and mutual trust;
 - (b) a refusal to execute a European arrest warrant is intended to be an exception;
 - (c) one of the exceptions arises when there is a real or substantial risk of inhuman or degrading treatment contrary to article 3 ECHR or article 4 of the Charter of Fundamental Rights of the European Union ("the Charter");

- (d) the prohibition of surrender where there is a real or substantial risk of inhuman or degrading treatment is mandatory. The objectives of the Framework Decision cannot defeat an established risk of ill-treatment;
- (e) the burden rests upon a respondent to adduce evidence capable of proving that there are substantial/reasonable grounds for believing that if he or she were returned to the requesting country, he or she will be exposed to a real risk of being subjected to treatment contrary to article 3 ECHR;
- (f) the threshold which a respondent must meet in order to prevent extradition is not a low one. There is a default presumption that the requesting country will act in good faith and will respect the requested person's fundamental rights. Whilst the presumption can be rebutted, such a conclusion will not be reached lightly;
- (g) in examining whether there is a real risk, the Court should consider all of the material before it and if necessary, material obtained of its own motion;
- (h) the Court may attach importance to reports of independent international human rights organisations or reports from government sources;
- (i) the relevant time to consider the conditions in the requesting state is at the time of the hearing;
- (j) when the personal space available to a detainee falls below 3m² of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of article 3 ECHR arises. The burden of proof is then on the issuing state to rebut the presumption by demonstrating that there are factors capable of adequately compensating for the scarce allocation of personal space, and this presumption will normally be capable of being rebutted only if the following factors are cumulatively met:-
 - (1) *the reductions in the required minimum personal space of 3m² are short, occasional and minor;*
 - (2) *such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; and*
 - (3) *the detainee is confined to what is, when viewed generally, an appropriate detention facility, and there are no aggravating aspects of the conditions of his or her detention;*
- (k) a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of confinement in the issuing member state cannot lead, in itself, to the refusal to execute a European arrest warrant. Whenever the existence of such a risk is identified, it is then necessary for the executing judicial authority to make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. The

executing judicial authority should request of the issuing member state all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained;

- (l) an assurance provided by the competent authorities of the issuing state that, irrespective of where he is detained, the person will not suffer inhuman or degrading treatment is something which the executing state cannot disregard and the executing judicial authority, in view of the mutual trust which must exist between the judicial authorities of the member states on which the European arrest warrant system is based, must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of article 3 ECHR or article 4 of the Charter; and
- (m) it is only in exceptional circumstances, and on the basis of precise information, that the executing judicial authority can find that, notwithstanding such an assurance, there is a real risk of the person concerned being subjected to inhuman or degrading treatment because of the conditions of that person's detention in the issuing member state.

46. Bearing in mind the above principles, I turn to the information placed before the Court in the present case. It is indicated that if surrendered, the respondent would initially spend a period in quarantine of 21 days in the Bucharest Rahova penitentiary where he would have a minimum floor space of 3m². As outlined at para. 15, it is indicated that subsequent to the quarantine period, the respondent would most probably be detained under a semi-open regime at the Bistrița penitentiary where rooms have appropriate natural ventilation and lighting, heating and permanent access to water and sanitary items, while inmates had an individual bed comprising a mattress and bedding, as well as furniture for storing personal items and eating. Details were provided of regular disinfection, pest control and lighting conditions. Under the semi-open regime, inmates are able to walk unaccompanied in areas within the detention area and manage their own leisure time under supervision, while the doors of the rooms remain open during the entire day. Details were given in relation to access to telephone calls and information points in relation to prisoners' detention status. Inmates could perform work and attend educational and cultural events and therapeutic and psychological counselling. They could also attend social support, moral/religious activities and schools of professional training outside of the penitentiary under supervision. It was stated:-

"Hence, the prisoners executing the sentences under the semi-open regime have the possibility to spend their leisure time outside of their detention room during the entire day. They are put in their rooms only for having their meals and half an hour before making the evening call. In conclusion, apart from the time assigned for attending activities and programs, as well as for enforcing their rights, this category of prisoners can spend leisure time outside of their detention room, in open air, practically using their detention room only to rest or for various administrative and individual hygiene activities."

Having served one-fifth of the sentence, the convicted person will be reassessed in terms of the regime and, subject to the person's behaviour, could be assigned to serve the remainder of the sentence in the same penitentiary, but under an open regime which is more liberal than the semi-open regime and the details of same are set out. A guarantee was given that during the entire period of his detention, the respondent would be afforded a minimum individual space, including his bed and related furniture, but excluding the bathroom designated area, of 2m² under the semi-open regime and 3m² under the open regime.

47. Counsel for the respondent referred the Court to the judgment of the European Court of Human Rights ("the ECtHR") in *Rasinski v. Poland* (42969/18), [2020] ECHR 363 delivered on 28th May, 2020. In that case, Mr. Rasinski alleged he had been detained for 1 year, 8 months and 28 days in overcrowded conditions which amounted to inhuman and degrading treatment in breach of article 3 ECHR. The Polish Government contested that there had been over-crowded conditions and submitted that the conditions had not reached the minimum level of severity under article 3 ECHR due to various mitigating factors. The Government submitted that the sentence had been served in a semi-open penitentiary; his cell was open during the day and could have been opened during the night; he enjoyed freedom of movement outside his cell and had the opportunity to attend various out of cell activities. For the last nine months of the sentence he had a job and stayed out of his cell during working hours. However, these submissions were not confirmed in evidence. The Court once again emphasised that where the space per person was less than 3m², a strong presumption arose of a violation of article 3 ECHR. At paras. 24-25 the Court held:-

"24. *The Court finds that the reduction of the required personal space for more than one year and eight months cannot be considered 'short, occasional and minor' within the meaning of the Court's case-law (see Muršić, cited above, § 130). On the contrary, even in the presence of mitigating factors relied upon by the Government, the Court considers that such a period of detention in a cell where the space per person was below the statutory 3sq. m. is sufficient to establish that the strong presumption of a violation of Article 3 has not been rebutted.*

25. *Having regard to the above findings, the Court considers that the distress and hardship endured by the applicant exceeded the unavoidable level of suffering inherent in detention and went beyond the threshold of severity under Article 3 of the Convention."*

48. It would appear from *Rasinski* that a period of detention of approximately 1 year and 8 months with a personal space of less than 3m² was still a breach of article 3 ECHR despite the mitigating factors relied upon by the government.
49. Counsel for the applicant submitted that the reference to "*short, occasional and minor*" in the relevant caselaw could be interpreted to refer to the hours in a day in which the person detained would be required to spend with less than 3m² of personal space as opposed to the overall length of the period in detention. She submitted that in applying

such an approach, it would be found that the vast bulk of the detainee's waking hours were not spent in less than 3m² of personal space and that the period spent in such conditions on a daily basis could be seen as short, occasional and minor. Seen in that light, she submitted that the mitigating factors took the respondent's likely conditions of detention outside of the threshold of severity needed constitute a breach of article 3 ECHR. I do not believe that the caselaw can be read in such a light. It appears clear to me that the reference to "*short, occasional and minor*" is a reference to the period or periods of the term of incarceration in which it is a condition of the detention that the personal cell space afforded to the person detained falls short of what is required as opposed to a separate day-by-day or hourly analysis as to where the person detained may be.

50. In line with the applicable jurisprudence, surrender should not be lightly abandoned in the face of an anticipated failure by the requesting state to detain the requested person in conditions compliant with article 3 ECHR. Bearing this in mind, by letter dated 24th November, 2020, the Court called upon the issuing state to give an assurance that the respondent would be provided with a minimum individual space, including his bed and related furniture but excluding the designated bathroom area, of 3m² for the entirety of his detention, or to indicate any further mitigating factors of detention in the semi-open regime which would render his detention in such regime compliant with article 3 ECHR. By reply dated 3rd December, 2020, the issuing judicial authority stated quite frankly that it could not give such a guarantee or provide any further information regarding likely prison conditions.
51. In the present case the respondent, after a 21-day quarantine period, is to be detained in conditions where he will not be guaranteed a minimum individual space of at least 3m² and this gives rise to a strong presumption of a breach of article 3 ECHR rights. It is for the issuing state to rebut that presumption. As regards the time period which the respondent can be reasonably expected to remain with such limited space, this appears to be at least one-fifth of his sentence, i.e. approximately 6 months if no credit is given for the period of 1 years' imprisonment in Northern Ireland, or alternatively between 3 and 4 months' imprisonment if same is credited. The period in such conditions could in fact be longer. This is not a short, occasional or minor timeframe for a person to be detained in such conditions.
52. I am satisfied that such a reduction in personal space will be accompanied by significant freedom of movement outside the cell and adequate out-of-cell activities and that, viewed generally, the respondent will be detained in an appropriate detention facility. I am also satisfied that other than the reduced personal space, there are no other aggravating aspects of the likely conditions of his detention.
53. However, in light of the decision of the ECtHR in *Rasinski*, it appears that despite the existence of such mitigating circumstances, the likely conditions of his detention will be in breach of the respondent's right not to be subjected to inhuman or degrading treatment under article 3 ECHR and article 4 of the Charter. The parties are in agreement that s. 37(1)(c)(iii) of the Act of 2003 provides for an absolute prohibition on surrender if there

are reasonable grounds for believing that the person to be surrendered would be tortured or subjected to other inhuman or degrading treatment. (emphasis added) In such circumstances, it appears that his surrender would be in breach of the State's obligations under article 3 ECHR and is thus precluded by s. 37 of the Act of 2003 and therefore I am obliged to refuse surrender at this time on this EAW.

Section 45 of the Act of 2003

54. For completeness, I will briefly address the respondent's objection based on s. 45 of the Act of 2003. It is clear from the additional information furnished by the issuing judicial authority that the sentence of 2 years and 6 months' imprisonment in respect of which the surrender of the respondent is sought is a composite sentence imposed in respect of three separate offences/sentences, viz.:-
- (a) a sentence of 1 year and 2 months' imprisonment imposed on 30th May, 2018 relating to an offence committed on 20th February, 2015;
 - (b) a sentence of 6 months' imprisonment imposed on 30th June, 2016, following an appeal, relating to an offence committed on 6th February, 2015; and
 - (c) a sentence of 1 year and 2 months' imprisonment imposed on 10th February, 2014 but suspended (suspension lifted by virtue of 2016 conviction) relating to an offence committed on 15th December, 2010.
55. By letter dated 28th January, 2020, the Court sought additional information from the issuing judicial authority, including a completed table D in respect of each sentence. By letters of additional information dated 31st January, 2020 and 17th June, 2020, the issuing judicial authority set out a table D abstract for the 2018 sentence confirming that the respondent was not present and would be given the opportunity of an appeal or rehearing upon surrender. In relation to the 2016 sentence, no table D was formally completed, however it was indicated that the respondent had not appeared in person but had been represented by an attorney whom he had contacted personally and in such circumstances, he would not be given the opportunity of an appeal or rehearing upon surrender. In relation to the 2014 sentence, no table D was formally completed, however it was indicated that the respondent did not appear in person and that he had not been notified personally of the hearing date, but he would be given the opportunity of an appeal or rehearing upon surrender.
56. At hearing, counsel for the respondent submitted that as no table D had been specifically completed as regards each sentence, surrender was prohibited by s. 45 of the Act of 2003. While it could be said that the requirements of s. 45 had been met in substance as regards the 2014 and 2018 sentences, he submitted that, as regards the 2016 sentence, the issuing judicial authority was essentially relying upon part 3.2 of table D. He submitted that in such circumstances the issuing judicial authority was obliged by part 4 of table D to provide information as to how the relevant condition had been met, and that a bare statement in terms of part 3.2 was not sufficient.

57. By letter dated 28th September, 2020, the Court requested additional information from the issuing judicial authority in relation to the 2016 sentence, and in particular seeking confirmation that the respondent had an attorney to represent him in respect of that matter and that the attorney did in fact represent him at the hearing which took place on 9th March, 2016. The Court also sought details of any other hearing dates relevant to that matter where the respondent was represented by his attorney.
58. In a reply dated 5th October, 2020, the issuing judicial authority confirmed that the respondent was in fact represented throughout the entire trial by an attorney of his own choosing. The attorney did not attend for the actual handing down of the sentence but was present for submissions in respect of same. It was also confirmed that the same attorney represented the respondent for the trial of the appeal.
59. Taking into account all of the relevant information to hand, I am satisfied that the requirements of s. 45 of the Act of 2003 have been met. I am satisfied that the mischief which s. 45 of the Act of 2003 and article 4a of the Framework Decision seek to avoid has not arisen and that the defence rights of the respondent have not been prejudiced. I dismiss the respondent's objections based on s. 45 of the Act of 2003.

Conclusion

60. I am satisfied that the surrender of the respondent is precluded by reason of s. 37 of the Act of 2003. It follows that this Court will make an order refusing the surrender of the respondent to Romania at this time on this EAW.
61. I emphasise that it is not intended that this refusal should operate as a permanent bar to surrender and the issuing state may bring a fresh application when it is in a position to provide the necessary assurances as to the conditions the respondent will be held in if surrendered and subjected to detention.