

THE HIGH COURT

[2021] IEHC 828
[2019 No. 393 EXT.]

IN THE MATTER OF THE EXTRADITION ACT, 1965, AS AMENDED

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND

SERGIU GINDEA

RESPONDENT

JUDGMENT of Mr. Justice Paul Burns delivered on the 20th day of December, 2021

1. In this application, the applicant seeks an order pursuant to s. 29(1) of the Extradition Act, 1965, as amended ("the Act of 1965"), committing the respondent, a Moldovan citizen, to prison, there to await the order of the Minister for Justice ("the Minister") for the respondent's extradition to the Republic of Moldova ("Moldova").
2. I am satisfied that a request for the extradition of the respondent to Moldova has been made in writing in accordance with s. 23 of the Act of 1965 and received by the Minister on 20th December, 2018, as confirmed in the certificate of the Minister dated 27th November, 2019, which was completed for the purposes of s. 26(1)(a) of the Act of 1965.
3. The High Court issued a warrant for the arrest of the respondent on 20th December, 2019 which was duly executed on 8th October, 2020.
4. The documentation received from the requesting state consists of:-
 - (i) A request for the extradition of the respondent dated 3rd December, 2018, a further letter dated 30th May, 2019 setting out further details of the alleged offence and enclosing relevant statutory provisions;
 - (ii) A copy of the ruling on charging dated 2nd October, 2018;
 - (iii) A copy indictment dated 23rd August, 2017, initial order for preventative arrest in default of pre-trial appearance of the respondent dated 29th August, 2017;
 - (iv) An extract from the State Register of the Population setting out details concerning the identity of the respondent, including a photograph; and
 - (v) Relevant extracts from the Criminal Code of the Republic of Moldova.
5. The surrender of the respondent is sought in order that he may be prosecuted in Moldova in respect of a single count of fraud contrary to Article 190(5) of the Moldovan Criminal Code. This offence carries a maximum penalty of between 8 and 15 years' imprisonment.
6. I am satisfied that the person before the Court, the respondent, is the person in respect of whom the request for extradition has been made. This was not put in issue.

7. I am satisfied that Moldova is a state to which Part 2 of the Act of 1965 applies and that Moldova is a designated extradition state.
8. I am satisfied that the minimum gravity requirements set out at s. 10 of the Act of 1965 have been met. The offence in respect of which extradition is sought carries a maximum penalty of between 8 and 15 years' imprisonment in the requesting state. The corresponding offence in this State carries a maximum penalty of 5 years' imprisonment.
9. I am satisfied that, in accordance with s. 10 of the Act of 1965, the requisite correspondence as between the offence in respect of which extradition is sought and an offence under the law of the State has been established. I find the relevant corresponding offence in this State to be an offence contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. This is discussed further herein.
10. I am satisfied that a warrant for the arrest of the respondent, dated 29th August, 2017, was issued by a judge of Chisinau Court in Moldova and a copy of same is before the Court.
11. I am satisfied that an adequate statement of the offence for which extradition is requested has been put before the Court by way of the ordinance of indictment dated 23rd August, 2017. In essence, it is alleged that the respondent transferred ownership of a property located on 21 Gr. Vieru Street in Ialoveni City in return for a loan of the equivalent of €22,000. At the end of 2011-early 2012 the respondent, knowing that the property in question did not belong to him, agreed to sell same to [G.P.] and received from [G.P.] the equivalent of €34,000.
12. I am satisfied that an accurate description of the requested person is set out in the documents provided.
13. The respondent concedes the formal proofs in respect of the request for his extradition but objects to extradition on the following grounds:-
 - (a) It is not possible to establish correspondence as between the offence in respect of which extradition is sought and an offence under the law of the State; and
 - (b) If surrendered, the respondent's fundamental rights would not be respected, in particular:-
 - (i) his right not to be subjected to inhuman or degrading treatment, and
 - (ii) his right to a private and family life.

Correspondence

14. Counsel on behalf of the respondent submits that correspondence between the offence in respect of which extradition is sought and the offence nominated by the applicant as the corresponding offence, viz. deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, could not be established. He submits that, on the description of the offence set out in the indictment, there was no suggestion that the respondent had, by a deception, induced [G.P.] into purchasing the property. I am satisfied that it is

alleged in the indictment that the respondent "*aiming at deception*" and "*although he knew for certain that the property in question did not belong to him*" agreed to sell the property to [G.P.] "*concealing the fact in question*". I am satisfied that what is alleged is that, by holding himself out as the owner of the property, the respondent dishonestly, by deception, induced [G.P.] to believe that the respondent was the owner of the property and could transfer title thereto and further induced [G.P.] to pay over to the respondent a sum in respect of the purchase of the property. I am satisfied that correspondence can be established between the offence in respect of which extradition is sought and an offence under the law of the State, viz. deception contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. I reject the respondent's objection to surrender based upon any lack of correspondence.

Prison Conditions

15. The respondent's solicitor, Ms. Danica Kinane, swore an affidavit dated 22nd January, 2021 in which she exhibited a number of reports concerning prison conditions and treatment of detainees in Moldovan prisons, including:-

- Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT"), dated 15th September, 2020;
- United States Department of State Human Rights Report on Moldova, 2019;
- Report of the United Nations Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") on Moldova, dated 21st December, 2017.

She also exhibits a report from a Moldovan lawyer, Ms. Ana Chian.

16. The expert report of Ms. Chian indicates that the preventive arrest of the respondent is to be executed in Penitentiary 13, Chisinau Prison. She opines that the detention conditions in Penitentiary 13 in Chisinau Prison are very poor, including overcrowding, and detention therein would constitute inhuman and degrading treatment in breach of his rights under Article 3 of the European Convention on Human Rights ("the ECHR"). She refers to various cases which have come before the European Court of Human Rights ("the ECtHR") where breaches of Article 3 ECHR due to prison conditions in Moldova have been declared.

17. The CPT report of 15th September, 2020 notes that some improvements to the material conditions at Chisinau Prison have been made since a visit in 2018 but the overall conditions of detention remain unsatisfactory. Cells were in a poor state of repair, had very limited access to natural light and were poorly ventilated. Criticisms were also made of the general state of hygiene and toilet facilities. Concern was expressed that many remand prisoners continued to be held in overcrowded cells with living space often below 4 square metres. The CPT also expressed surprise at the cramped and overcrowded conditions in which some remand prisoners were held while recently renovated four-

person cells appeared either empty or to hold only one person and the prison management were not in a position to provide any convincing explanation for this.

18. The United States Department of State Report of 2019 notes that there were more than 200 alleged incidents of torture or inhuman treatment at government facilities. The human rights ombudsmen reported that most allegations of torture were carried out at Penitentiary 13 in Chisinau Prison and a number of other institutions. It noted concerns in relation to intimidation of, and violence to, inmates carried out by other prisoners with the tacit agreement of prison management through informal prison gang leaders. Conditions at Penitentiary 13 in Chisinau Prison were reported as "*the worst in the country*".
19. The CPT found that the problem with inter-prisoner violence and intimidation remained as acute as ever it had in the past and was largely linked to well-established informal hierarchies in the prison system. The CPT found that, despite the vehement denials of the Moldovan authorities in their responses to the CPT's previous prison visit reports, it was clear that there was tacit collaboration between the management of the prisons visited and the informal prisoner hierarchies as regards maintaining order among inmates and ensuring the smooth operation of the establishments. Most strikingly, the informal hierarchy had a say in the initial classification and placement in cells of newly admitted prisoners as well as on a decision as to which prisoners were permitted to work (see paras. 50, 57 and 58 of the Report).
20. By letter dated 23rd February, 2021, presumably obtained as a result of the various reports exhibited in the affidavit of the respondent's solicitor, the Ministry of Justice of Moldova indicates that the respondent will be temporarily assigned to Penitentiary 13, Chisinau Prison. It states that the living spaces have been fully repaired and are intended for the detention of citizens of Moldova who are extradited, ensuring a minimum area of 4 square metres of personal space per inmate. After 15 days, transfer of the respondent will be considered, with priority given to the penitentiary located closest to the respondent's domicile or residence or any locality requested by him. It is stated that, following transfer, the respondent will be transferred in a detention place that will ensure him the highest possible level of security and that he will be held in a cell which will provide a minimum of 4 square metres of personal space per prisoner. It states that the respondent will be provided with bed linen, hygiene products, access to sanitary facilities, hot water and regular meals 3 times a day. It is stated that Moldova guarantees reasonable protection against violence and the personal security of the respondent and that, in the case of danger, the respondent will be able to address a request for the provision of personal security to the person in charge in the penitentiary, following which, the person in charge will immediately undertake measures to ensure the respondent's personal security. It is stated that if the respondent is exposed to violence between inmates, then the perpetrators will be transferred to other detention spaces and the respondent will remain in the detention spaces indicated in the guarantee. In the case of exceptional events necessitating the detention of the respondent in the disciplinary isolator, the period of detention in the cells of the disciplinary isolator will not exceed the strictly necessary period. It is stated that any cell occupied by the respondent will have light, a clean

mattress and bed, heating and will be without pests and he will have outdoor activities of at least 1 hour per day. It is stated that the respondent will have access to lawyers as well as medical assistance.

21. The solicitor for the respondent, Ms. Kinnane, swore a second affidavit dated 25th February, 2021 in which she exhibited a report from Mr. Vadin Vieru, a practising lawyer in Moldova. Mr. Vieru was critical of the procedures provided for in the Moldovan Criminal Code. This aspect of matters was not pursued on behalf of the respondent. A further report from Mr. Vieru was also exhibited in which he indicates that the respondent would most likely be detained on remand in Prison 13, Chisinau Prison. He is critical of prison conditions and, in particular, overcrowding.
22. The applicant referred the Court to the response of the Government of Moldova to the CPT report and, in particular, to the recognition and appreciation by the government of the observations and recommendations of the CPT regarding the material conditions of the visited penitentiaries. The government pointed out that the construction of a new penitentiary in Chisinau Prison was planned. As regards Penitentiary 13, Chisinau Prison, more than 100 cells had been renovated and other improvements had been made to the prison. As regards the prevention of violence and intimidation, in May 2020 the Council of Europe had created a working group to develop a strategy and action plan for reducing and preventing violence between detainees and to reduce the influence of criminal subculture. The response states that:-

"the competent services identify convicts with negative intentions who are trying to exercise their authority among the detainees, and carry prophylactic measures in this regard. In 2020, necessary measures were initiated to organise the process of compartmentalisation of detention facilities and walking yards. Employees are warned about taking measures to ensure that personal security of detainees when reporting issues related to the abuse of certain categories of inmates." (p.16)

The Moldovan Government indicated that staffing numbers had improved at Penitentiary 13, Chisinau Prison.

23. Counsel on behalf of the applicant submits that the government response to the CPT report, read in conjunction with the assurances and guarantees set out in the letter dated 23rd February, 2021, should satisfy the Court that there were no substantial grounds for believing that there is a real risk of the respondent being subjected to inhuman or degrading treatment or punishment, if extradited.
24. Counsel on behalf of the respondent submits that as a matter of law, the Court could not determine the matter on the basis of assurances from the issuing state. In the alternative, he submits that little, if any, credence could be given to assurances from the issuing state in circumstances where the issuing state had, he submitted, a poor history of addressing the conditions in its prison system and in particular the prevalence of informal hierarchies therein.

Admissibility of Assurances

25. Counsel for the respondent submits that on the authority of *Bourke v. Attorney-General and Wymes* [1972] I.R. 36, the Court should not take into consideration assurances or undertakings given by the issuing state. The factual background to that case is rather colourful. Mr. Bourke was an Irish citizen who was serving a period of imprisonment in Wormwood Scrubs prison where he became friendly with the infamous spy, Mr. George Blake, who was serving a sentence of imprisonment for offences under the Official Secrets Act, 1911. The extradition of Mr. Bourke was sought in order to prosecute him in respect of an offence under s. 39 of the Prison Act, 1952 of aiding Mr. Blake to escape from prison. In the High Court, an issue arose as to whether the court could receive an undertaking from the Attorney General for England and Wales to the effect that Mr. Bourke would only be prosecuted for two offences being the offence challenged in the warrant and an offence contrary to s. 16 of the Offences Against the Person Act, 1861 for sending a letter to a policeman threatening to kill or murder him. This second offence related to a second warrant issued by the UK authorities. In the High Court, the undertaking of the Attorney General for England and Wales was accepted but extradition was ultimately refused on the basis that the offence charged was an offence connected with a political offence and extradition for same was precluded by reason of s. 50 of the Act of 1965 at the time. In the Supreme Court, much of the argument and judgments were taken up with the question of whether the offence was connected to a political offence. As regards the undertaking proffered on behalf of the Attorney General for England and Wales, Ó Dálaigh C.J. noted that while the *bona fides* of the Attorney General for England and Wales were not in any doubt, the desirability of accepting such undertakings in extradition matters had been gravely questioned by the House of Lords in *R. v. Governor of Brixton Prison, ex parte Armah* [1968] AC 192 where 3 of the 5 Law Lords had clearly disapproved of the acceptance of such undertakings. He quoted from the judgments of the 3 Law Lords to the effect that it would be undesirable that a foreign government should be encouraged to offer not to apply the ordinary law of its country, particularly if the requested person was one of its own subjects. However, it is clear that these comments were obiter dicta and as Lord Pearce said at p. 256 of the report: "... *I have reserved a final decision of the matter until it arises*". Ó Dálaigh C.J. indicated that he was impressed by the views expressed by the 3 Law Lords and stated: "*They set a sensible headline and one which, in my opinion, we should follow in our courts in Ireland*". However, again, this expression of opinion on the part of the Chief Justice would appear to be *obiter dicta* as the case before the Supreme Court was determined on the question of whether the offence in respect of which extradition was sought was connected to a political offence.
26. In *Attorney General v. P.O.C.* [2007] 2 I.R. 421, the extradition of the respondent was sought by the United States of America to face charges of alleged sexual abuse of a minor. Section 18 of the Act of 1965 provided that extradition would not be granted where the requested person had become immune by reason of lapse of time from prosecution or punishment according to the law of either the requesting state or this State. The High Court refused the application for extradition on the basis that [P.O.C.] had become immune from prosecution by reason of lapse of time. The Court also held

there was a real and serious risk of an unfair trial and that the applicant would be subject to a bail regime which would infringe his constitutional right to liberty. An issue arose concerning the treatment of persons held in Maricopa County Jail. In light of revelations regarding the conditions and the actions and statements made by the sheriff in control of same, an undertaking was provided that [P.O.C.] would at no time be housed in Maricopa County Jail but instead would be held in the custody of the Federal Government.

O'Sullivan J. referred to the judgment of Ó Dálaigh C.J. in *Bourke* and in particular his quote from Lord Upjohn at p. 65 that: "*There may be a genuine difference of opinion as to the proper interpretation of the undertakings*". O'Sullivan J. stated at para. 72 that: "*That was a reason given as to why a court should not accept an undertaking and I cannot see why it would not apply to the present case.*" O'Sullivan J. made it clear that he was deciding the case on the basis of the lapse of time and the bail regime but he went on to state at para. 80: "*In those circumstances the issue in relation to conditions in Maricopa County Jail is not central to my earlier conclusions in this case*". He further stated at para. 81:-

"81 *I would add, however, that I can see no reason why the principles enunciated by Ó Dálaigh C.J. in Bourke v. Attorney General [1972] I.R. 36 would not apply to the undertaking furnished in the present case because I think that they make sense in a general way and not in the limited way contended for on behalf of the respondent. Accordingly, I take the view on these authorities that I am precluded from relying on the undertaking furnished. I would emphasise, as other judges have done before me when applying this principle, that the bona fides of the high officials, including the Secretary of State, involved in processing the undertaking in this case, are not of course in question. Nonetheless, on this authority, I must disregard the undertaking and treat this application upon the basis that, if extradited, the applicant would find himself or could find himself in Maricopa County jail under the jurisdiction of Sheriff Arpaio. There is no way that in making an extradition order I could ensure and guarantee that such would not be the case and under the authorities cited it seems to me that I should accordingly proceed on the basis that for this reason also, namely for the reason that incarceration is likely to breach his constitutional rights because of the inhumane conditions in Maricopa County jail, an order extraditing the applicant would constitute a breach of those rights and I note in particular that it would simply be out of my control once such an order was implemented to ensure that he did not find himself in an unacceptable detention regime.*"

27. In so far as O'Sullivan J. in *P.O.C.* regarded the *obiter dicta* of Ó Dálaigh C.J. in *Bourke* as being a binding precedent compelling the Court to disregard undertakings or assurances from the requesting state in all instances, I am respectfully of the view that it was not intended to be such. It was undoubtedly a clear expression of opinion on the part of Ó Dálaigh C.J. but it was not relevant to the basis on which the case was decided. Furthermore, the case of *Armah* to which Ó Dálaigh C.J. was alluding concerned an undertaking to the effect that the normal law of the requesting state would not be applied to the requested person. It was in that context that the Law Lords quoted by Ó Dálaigh

C.J. made their comments. Seen in that context, there does not appear to me to be any binding precedent to the effect that a court dealing with a request for extradition is absolutely precluded from considering assurances or undertakings provided by the requesting state in all circumstances.

28. In *O’Keeffe v. O’Toole* [2008] 1 I.R. 227, the main issue was whether the requested person, if surrendered, would be given credit in respect of time spent in custody in respect of the extradition warrant in this State. Kearns J. noted that no undertakings or assurances of any sort had been sought from, or given by, the requesting authorities in the United Kingdom (“the UK”) as to whether credit would normally be given for time spent in custody in this jurisdiction. He pointed out: “This court is therefore required to resolve this case in something of an information vacuum”. Kearns J. referred to the earlier case of *Sloane v. Culligan* [1991] I.L.R.M. 641 in which Finlay C.J. had refrained from expressing any view as to whether, in proceedings under the Act of 1965, an undertaking from the requesting state could be accepted. *Sloane* concerned whether the requested person would only have to serve a sentence imposed for the offence for which his extradition was ordered. Kearns J. pointed out that Finlay C.J. did note the contents of a letter in which the Chief State Solicitor had informed the requested person’s solicitor that the Crown Solicitor for Northern Ireland had confirmed that account would be taken of the time spent on remand in Northern Ireland and the time spent in prison serving sentences imposed by the Special Criminal Court. Kearns J. also noted the reference by McCarthy J. in *Sloane* to the comments of Ó Dálaigh J. in *Bourke* and stated that he saw no logical reason for distinguishing in principle between undertakings given in respect of extradition sought for the purposes of prosecution and extradition sought for the purpose of serving a sentence. McCarthy J. quoted Lord Reid in *Armah* at p. 235:-

“But I would add that in general it appears to me to be very undesirable that a foreign government should be encouraged to offer not to apply the ordinary law of its country to one of its own subjects if he returned to that country. There may not be the same objection to the foreign government stating that it does not intend to take certain executive action with regard to the accused person and it might be proper to accept an undertaking on the lines of s. 3 (2) of the Extradition Act, 1870. But any undertaking or statement of intention is liable to create misunderstanding and perhaps acute difficulties in the event of a change of circumstances.”

29. In *O’Keeffe* Kearns J. reluctantly disagreed with the views expressed by McCarthy J. in *Sloane*. He stated at para. 134:-

“[134] ... An undertaking not to prosecute one or more of several offences is to my way of thinking in quite a different category from an undertaking which may really do no more than provide information as to the practice of the courts in the requesting state as to whether credit is or is not usually given by the courts of that state in the context of imposing sentence for time spent in remand custody.”

30. As there were in fact no undertakings given in *O’Keeffe*, the above comments of Kearns J. may equally be seen as *obiter dicta*.
31. Counsel on behalf of the applicant referred the Court to two English authorities where, contrary to the views expressed in *Armah*, the court had regard to assurances or undertakings provided by the requesting state. In *Mohammed Elashmawy v. Court of Brescia, Italy* [2015] EWHC 28, the Italian judicial authority relied on a letter from the Italian Ministry of Justice giving an assurance in relation to the conditions in which the requested person would be detained. This was a case which concerned proceedings pursuant to a European arrest warrant. In *Ravi Shankaran v. The Government of the State of India and the Secretary of State for the Home Department* [2014] EWHC 957, the court stated at para. 59:-

"59. We accept Mr. Hardy’s submission that extradition law has developed very substantially since the late 1960s, and that the scale of both immigration and of extradition decision making have made undertakings and assurances not merely normal but indispensable in the operation of English extradition law. Such undertakings regularly are taken into account, and given whatever weight is appropriate on the facts of the particular case: that is as it should be. Each case will depend on its own facts, and for my part, I would not identify a restriction as a matter of law as to may or may not give undertakings, nor to prescribe when they will be sufficient to obviate the risk of flagrant breaches of Article 5 ECHR."

32. Counsel for the applicant submits that this was a concise statement as to how the treatment of extradition matters had moved on since the case of *Armah* and that this Court should not regard itself as bound to disregard any assurances or undertakings based on past precedent.
33. On reviewing the cases referred to above, it appears to me that there is no binding precedent to the effect that the Court is absolutely precluded from considering assurances or undertakings given by a requesting state in the context of an application for extradition. Insofar as reservations have been expressed by the Supreme Court in that regard, these seem to concern undertakings not to apply the normal law of the requesting state to the individual whose extradition is being sought. I can see no objection in principle to the Court receiving undertakings or assurances as to how the law operates in the requesting state and/or how the normal operation of such law will impact upon the requested person if surrendered. Nor do I see any objection in principle to the Court considering assurances or undertakings given by the appropriate authorities in the requesting state as to intended actions which fall entirely within the sphere of the executive and which do not involve any departure from the normal laws of the requesting state.
34. I am prepared to consider the correspondence from the issuing state in that context. However, the weight to be given to such assurances or undertakings is a matter for the Court to determine in this particular case.

Principles Applicable to Assurances

35. As regards whether a requesting state in an application made under the Act of 1965 is to be presumed to respect the fundamental rights of the requested person, Edwards J. stated in *Attorney General v. O’Gara* [2012] IEHC 179 at para. 10.3:-

"10.3 The court considers that a default presumption does arise in extradition cases that the other country will act in good faith and that it will respect a proposed extraditee’s fundamental rights. As Fennelly J. has pointed out in Stapleton the making of bilateral extraction arrangements implies at least some level of mutual political trust and, at the judicial level, confidence in the legal systems of the cooperating states. However, in conventional extradition cases the presumption is much weaker and is much more easily rebutted than is the presumption that arises under the European arrest warrant system. This is because the whole European arrest warrant system is built and predicated upon the notions of mutual trust and confidence between member states, and mutual recognition of judicial decisions, and there is a continuing and ongoing commitment to abide by these principles as expressed in the recitals to the Framework Decision, including recital 12 thereto which expressly states that the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. Moreover, though it is by no means perfect, there is, by virtue of the fact that all member states operating the European arrest warrant system are signatories to the Convention, a greater common understanding between the States operating the European arrest warrant system of what constitutes an individual's fundamental rights, and what is required to be done to defend and vindicate those rights."

36. Edwards J. emphasised that the level of mutual trust and confidence between Member States has been given statutory effect by the presumption in s. 4A of the Act of 2003 that *"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown"*. However, he noted that neither the Act of 1965 nor the Treaty on Extradition between the State and the United States of America, signed at Washington D.C. on 13th July, 1983, contained a comparable provision.
37. It was agreed by the parties that in approaching the issue of prison conditions in the requesting state, the principles set out by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783 were applicable. In *O’Gara*, Edwards J. distilled the applicable principles from the various judgments in *Rettinger* down to the following at para. 10.4:-

"10.4....

· - By virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment', the objectives of the [Washington Treaty] cannot be invoked to defeat

an established real risk of ill-treatment contrary to Article 3. (See analagous remarks of Fennelly J. at p.813 in Rettinger re the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant);

· - The subject matter of the court's enquiry 'is the level of danger to which the person is exposed.' (per Fennelly J. at p.814 in Rettinger);

· - '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'.' (per Fennelly J. at p.814 in Rettinger) 'in a rigorous examination.' (per Denham J. at p.801 in Rettinger). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (per Denham J. at p.801 in Rettinger);

· - A court should consider all the material before it, and if necessary material obtained of its own motion, (per Denham J. at p.800 in Rettinger);

· - Although a respondent bears no legal burden of proof as such, a respondent nonetheless bears an evidential burden of adducing cogent 'evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention.' (per Denham J. at p.800 in Rettinger);

· - 'It is open to a requesting State to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from an applicant as to conditions in the prisons of a requesting State with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the applicant were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court.' (per Denham J. at p.801 in Rettinger);

· - "The court should examine the foreseeable consequences of sending a person to the requesting State." (per Denham J. at p.801 in Rettinger). In other words the Court must be forward looking in its approach;

· - 'The court may attach importance to reports of independent international human rights organisations." (per Denham J. at p.801 in Rettinger)"

38. On reviewing all of the information before the Court, I am satisfied that the respondent has met the threshold to raise before this Court a live issue as to whether there is a real risk that, if surrendered, the respondent will be subjected to inhuman or degrading treatment in breach of Article 3 ECHR. The evidence adduced on behalf of the respondent is independent, objective and cogent as regards conditions of detention in Moldova. The

CPT report dated 15th September, 2020 and the United States State Department Report of 2019 are reasonably up to date, particularly given what must be limited opportunities for monitoring by outside bodies since the outbreak of the Covid-19 pandemic. The evidence adduced by the respondent must be considered in light of the evidence adduced on behalf of the applicant on this issue. The applicant relies upon correspondence from the requesting state which is largely in the nature of assurances.

39. In *Othman (Abu Qatada) v. The United Kingdom (Application no. 8139/09) (17th January, 2012)* the ECtHR set out guidance in respect of the consideration of assurances or undertakings in extradition cases as follows at para. 189:-

"189. More usually, the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving State's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to the following factors:

- (i) whether the terms of the assurances have been disclosed to the Court (Ryabikin v. Russia, no. 8320/04, § 119, 19 June 2008; Muminov v. Russia, no. 42502/06, § 97, 11 December 2008; see also Pelit v. Azerbaijan, cited above);*
- (ii) whether the assurances are specific or are general and vague (Saadi cited above; Klein v. Russia, no. 24268/08, § 55, 1 April 2010; Khaydarov v. Russia, no. 21055/09, § 111, 20 May 2010);*
- (iii) who has given the assurances and whether that person can bind the receiving State (Shamayev and Others v. Georgia and Russia, no. 36378/02, § 344, ECHR 2005-III III; Kordian v. Turkey (dec.), no. 6575/06, 4 July 2006; Abu Salem v. Portugal (dec.), no 26844/04, 9 May 2006; cf. Ben Khemais v. Italy, no. 246/07, § 59, ECHR 2009-... (extracts); Garayev v. Azerbaijan, no. 53688/08, § 74, 10 June 2010; Baysakov and Others v. Ukraine, no. 54131/08, § 51, 18 February 2010; Soldatenko v. Ukraine, no. 2440/07, § 73, 23 October 2008);*
- (iv) if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them (Chahal, cited above, §§ 105-107);*
- (v) whether the assurances concerns treatment which is legal or illegal in the receiving State (Cipriani v. Italy (dec.), no. 221142/07, 30 March 2010; Youb Saoudi v. Spain (dec.), no. 22871/06, 18 September 2006; Ismaili v. Germany, no. 58128/00, 15 March 2001; Nivette v. France (dec.), no 44190/98, ECHR 2001 VII; Einhorn v. France (dec.), no 71555/01, ECHR 2001-XI; see also Suresh and Lai Sing, both cited above)*

- (vi) *whether they have been given by a Contracting State (Chentiev and Ibragimov v. Slovakia (dec.), nos. 21022/08 and 51946/08, 14 September 2010; Gasayev v. Spain (dec.), no. 48514/06, 17 February 2009);*
- (vii) *the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances (Babar Ahmad and Others, cited above, §§ 107 and 108; Al Moayad v. Germany (dec.), no. 35865/03, § 68, 20 February 2007);*
- (viii) *whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers (Chentiev and Ibragimov and Gasayev, both cited above; cf. Ben Khemais, § 61 and Ryabikin, § 119, both cited above; Kolesnik v. Russia, no. 26876/08, § 73, 17 June 2010; see also Agiza, Alzery and Pelit, cited above);*
- (ix) *whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible (Ben Khemais, §§ 59 and 60; Soldatenko, § 73, both cited above; Koktysh v. Ukraine, no. 43707/07, § 63, 10 December 2009);*
- (x) *whether the applicant has previously been ill-treated in the receiving State (Koktysh, § 64, cited above);*
- (xi) *whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State (Gasayev; Babar Ahmad and Others, § 106; Al-Moayad, §§ 66-69)."*

The Assurances in this Matter

40. In light of the *Rettinger* principles and the guidance provided by *Othman*, this Court has to consider all of the evidence before it, including the evidence put forward by the respondent as to prison conditions in Moldova and the information provided by the Moldovan authorities. In doing so, the weight which the Court can attach to the information provided by the Moldovan authorities depends upon the nature of that information, for example is it a statement of fact or intention, is it supported by any evidence or is it a bare assertion, has such information or such assurances proven to be reliable in the past. As regards the guidance provided in *Othman*, of significance is the fact that the requesting state is a party to the ECHR, the assurances have been provided by an emanation of the requesting state with particular responsibility for administration of detention facilities and the assurances are provided specifically in respect of the respondent. Also of significance and referred to in *Othman*, but not addressed in the correspondence or otherwise by the applicant or requesting state, is the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances. There appears to be no history of extradition between Moldova and Ireland. The lack of previous extraditions cannot of

itself be significant as such arrangements have to start somewhere. However, in the absence of a record of satisfactory extraditions, it is perhaps more important for the requesting state to demonstrate its credibility and reliability as regards information on prison conditions and assurances.

41. While Moldova has engaged with international monitoring mechanisms including international human rights NGOs, counsel for the respondent takes issue with the extent to which any remedial measures are in fact put in place on foot of reports from such international bodies and has referred the Court to instances where, despite statements from the Moldovan authorities that particular deficiencies have been successfully ameliorated, the CPT has found this not to be the case.
42. Counsel on behalf of the applicant stated that the responses of the Moldovan Government to the CPT reports indicate that it acknowledges the existence of problems within the prisons and has engaged in trying to resolve same. Counsel on behalf of the respondent submits that when one considers the various reports from the CPT over the years and the responses thereto from the Moldovan Government it is clear that, despite apparent engagement and assurances that remedial measures had been taken to alleviate problems, such problems in fact persisted and had not been addressed. By way of example, he referred the Court to the Moldovan Government's response to the 2015 CPT Report in which the government indicated that steps were taken to deal with inter-prisoner violence and in particular to counteract the phenomenon of criminal hierarchy between the prisoners (pp. 15 and 16). In response to the 2018 CPT Report, the Moldovan Government had stated "*the implementation within penitentiary institutions of the programme of reducing violence has proven its effectiveness*". It indicated that psychological programmes had been introduced for persons susceptible to violence and intimidation of other detainees and that, in order to avoid conflict situations, detainees were placed in separate living spaces to ensure their security. It was specifically denied that prison services employees relied upon the help of informal leaders to maintain order:-

"Contrary to the CPT observation, employees of the penitentiary institutions do not use the help of informal leaders to maintain order and respect for detention by convicts in the penitentiary. The individual records of prisoners in penitentiary institutions are entrusted to the specialist for social reintegration in the administered sector, detainees are not involved in administrative tasks for the prisons management. Ongoing monitoring of detainees is being carried out to undermine the practice of delegating information leaders."

43. However, when one goes to the 2020 CPT Report, the following is stated at para. 48:-

"48. The problem of inter-prisoner violence and intimidation in Moldovan prisons has long been a source of serious concern for the CPT. In the report on its 2018 ad hoc visit, the Committee called upon the Moldovan authorities to take determined action to address this problem, in particular by taking effective measures to tackle the related phenomenon of an informal prison hierarchy."

The findings of the CPT's delegation during the 2020 visit showed that the problem of inter-prisoner intimidation and violence among the adult male inmate population remained as acute as ever and was, as in the past, largely linked to the well-established informal hierarchies in the country's prison system."

44. The CPT report further states at paras. 50-51:-

"50. Despite the vehement denials of the Moldovan authorities in their responses to the CPT's previous visit reports, it was again clear that there was tacit collaboration between the management of the prisons visited and the informal prisoner hierarchies as regards maintaining order among inmates and ensuring the 'smooth operation' of the establishments. Most strikingly, the informal hierarchy had a say in the initial 'classification' and placement in cells of new admitted prisoners, as well as in a decision as to which prisoners were to be permitted to work. This helped the informal leaders to consequently enrol 'unexperienced' prisoners into the informal community of inmates, offering protection and other support in exchange for their money and loyalty. This arrangement also meant that informal leaders were free to use intimidation and a 'reasonable' level of violence against those who refused to contribute to an illegal collective fun ('obshchak') managed by the informal hierarchy's leader.

51. As regards more particularly prisoners considered to be 'untouchable' by the informal hierarchy, they continue to live in a state of constant fear and humiliation. Once again, the delegation received many complaints from such prisoners of frequent verbal abuse and demeaning behaviour by other inmates. Some of them even feared that they would be raped as a punishment for the offences they were accused or convicted of. As was the case in the past, these prisoners were compelled to perform 'dirty' work (such as cleaning toilets and collecting rubbish) and were required by the hierarchy's internal rules to avoid any physical contact with other inmates. Further, being rejected by the mainstream prison population, they were not permitted to work with other inmates or to access communal areas, such as the gym, library or chapel. Moreover, with the notable exception of Taraclia Prison, inmates in this category were being held in the most sub-standard conditions to be found in the prisons.

As already stressed in the past, the CPT considers that the situation of the above-mentioned category of prisoner could be considered to constitute a continuing violation of Article 3 of the European Convention on Human Rights, which prohibits inter alia, all forms of degrading treatment and obliges State authorities to take appropriate measures to prevent such treatment, including by fellow inmates."

The CPT Report goes on to note that certain inmates effectively had to separate themselves from the mainstream prison population which usually entailed an impoverished regime for prolonged periods (in some cases for years on end) as the only way to escape potential aggressors.

45. The 2020 CPT Report also referred to ongoing problems in relation to a lack of sufficient space for prisoners.
46. Counsel for the respondent referred to a recent decision in England, *Tabuncic and Coev v. Government of Moldova* [2021] EWHC 1269. One of the central features of the appellants' case was that they would be at risk of inter-prisoner violence, quite apart from their general attack on the acceptability of prison conditions. The Court noted there was substantial evidence to support the appellant's case on both fronts and that Moldova had sought to meet this evidence by the provision of assurances. In Mr. Tabuncic's case, assurance was given that he would only be held in certain parts of Chisinau Penitentiary No. 13 and other institutions where conditions were markedly better than in other parts of the prison. An assurance was also given that if Mr. Tabuncic was exposed to inter-prisoner violence, requiring protection and where the perpetrators shares his cell with or has access to that shared by Mr. Tabuncic, the perpetrator(s) would be moved out of the cell/vicinity while Mr. Tabuncic would remain housed in the cell included in the assurance given. In exceptional, unforeseen, circumstances where he requires protection under the enforcement code or for disciplinary reasons, he will not be placed in solitary confinement for any period longer than strictly necessary and only in the renovated solitary confinement cells at Balti No. 11. The court noted that four mutually inconsistent assurances were given in relation to Mr. Coev. Mr. Coev also received an assurance in similar terms to that of Mr. Tabuncic as regards exposure to inter-prisoner violence. At first instance the District Judge concluded at paras. 16-17:-

"16. It is impossible to eradicate all risks of inter-prisoner violence in any prison. I have previously found that there is evidence of a powerful prison sub-culture that is tolerated by the prison authorities. However, I am satisfied that the assurances provided in this case provides the defendants with reasonable protection against violence by non-state agents. I am satisfied that if the terms of the assurances are fulfilled there is no real risk of the defendants being subjected to violence that would violate Article 3.

17. I am satisfied that it is compatible with the defendant's Article 3 rights to send the case to the Secretary of State but only on the basis of the assurances of 6 April, 2020."

47. On appeal, the court regarded the CPT Report of 2020 as significant in supporting submissions that the district judge had underplayed the risk of inter-prisoner violence and overstated the ability of the authorities to deal with it in a way that would avoid infringement of the requested persons' human rights under Article 3 ECHR. As regards the response of the Moldovan Government to the CPT Report of 2020, the court stated at para. 29:-

"29. We agree with the assessment and submission of the Appellants that, being generous, it might be conceded that the Respondent is doing its best to engage with the criticisms of the CPT as articulated in the CPT report. However, we also agree with the assessment and submission of the Appellants that, viewed overall,

the response demonstrates an almost total failure to get to grips with the problem of inter-prisoner violence and prisoner-led control of the prison estate in general and the prisons to which the Appellants might be sent in particular."

48. The court in *Tabuncic and Coev* held that the assurances provided by the Moldovan Government did not go sufficiently far to meet the substantial risk that had been identified.
49. The decision in *Tabuncic and Coev* was not cited to the Court by way of binding or even persuasive authority, but rather as an example of a case highlighting the failure of the Moldovan authorities to come to grips with the problems in the prison system.
50. The applicant relied upon further correspondence from the requesting state enclosing a letter from the Ministry of Justice of the Republic of Moldova, National Administration of Penitentiaries, dated 2nd September, 2021. This letter was by way of a reply to a request from the applicant for additional information which specifically referred to the case of *Tabuncic and Coev* in the United Kingdom ("UK") and which sought details concerning assurances provided by Moldova to the UK and any other states, as well as what monitoring mechanisms are in place to ensure compliance and remedies in Moldova for breach of assurances. The letter states that the National Administration of Penitentiaries will take all necessary measures to ensure the rule of law, legality and equality in penitentiary institutions as well as the security of persons therein. It is stated that all employees of penitentiary institutions are engaged in ensuring the safety of detainees and that prison staff also rely on detainees' ability to be aware of the need for good conduct and behaviour and encourage them to be open and to immediately inform the prison administration of any potential danger to personal safety. As regards *Tabuncic and Coev*, the letter states:-

"During the last 3 years, the National Administration of Penitentiaries has provided countless assurances and additional information to determine the positive settlement of extradition requests for citizens Constantin Simionescu, Igor Coev and Adrian Tabuncic from the United Kingdom to the Republic of Moldova.

Regarding the violation of the insurance (sic.) formulated regarding the citizen Constantin Simionescu we inform you that they occurred only in the part related to the cells expressly indicated in the insurance, which was due to the lack of experience in organizing the process of insurance issued, but all other points in the insurance were complied with by the authorities of the Republic of Moldova. On this fact, the National Administration of Penitentiaries carried out an internal control, as a result of which measures were taken in order to organize the implementation processes of the insurances and not to admit their violation in the future."

51. The letter does not refer to what remedies would be available to the respondent if assurances are breached. While the letter refers to providing countless assurances to the UK in *Tabuncic and Coev*, it does not refer to providing assurances to any other states. An explanation is given for the breach of assurance in relation to Mr. Simionescu, that same

was due to a lack of experience in organising the monitoring of implementation of assurances. It is stated that following an internal procedure, measures have been taken in order to organise the implementation processes for assurances and to prevent a violation in the future. No details of such systems have been provided.

52. Possibly as a result of a perception that the letter of 2nd September, 2021 did not adequately address the issues raised, a further letter was sent to the Moldovan authorities by the Department of Foreign Affairs dated 22nd October, 2021. The said letter referred to the earlier correspondence in which supplementary information had been sought in relation to:-

- "(a) Any comments which the Moldovan authorities wish to make in light of the criticisms contained in the Tabuncic decision of ...*
- (b) assurances provided by the Moldovan authorities to States when surrender of an individual is sought,*
- (c) whether such assurances have been complied with or otherwise whether there have been allegations that such assurances were not honoured,*
- (d) such monitoring mechanisms as are available in the Republic of Moldova to ensure assurances are honoured, and*
- (e) any legal or other remedies which may be available to Mr. GÎNDEA if there is an allegation regarding a breach of any assurance after his surrender."*

The letter indicated that the final hearing date had been set for 22nd November, 2021 and stated:-

"... if there is any further assistance or additional information which can be provided by the Moldovan authorities in relation to each of the questions asked in the letter of 4 August (and summarised above) such information would be gratefully received for the assistance of the Irish High Court in reaching its determination."

53. By letter dated 18th November, 2021, the Prosecutor General's Office of the Republic of Moldova replied attaching a letter dated 11th November, 2021, from the National Administration of Penitentiaries, Ministry of Justice of the Republic of Moldova. This indicates that, as a result of the *Tabuncic* case in the UK, the National Penitentiary Administration is actively and continuously involved in coordinating and directing activities aimed at improving detention conditions and combating violence in the penitentiary environment. As regards assurances offered by the Moldovan authorities to other states, the letter indicates:-

"Regarding the guarantees offered by the Moldovan authorities to other states within the extradition procedure, we inform you that they are formulated based on the standards deriving from the provisions of art. 3 of the Convention on Human

Rights. In this regard, in recent years the Moldovan authorities have sent several extradition requests to several states in the European Union, the United Kingdom, the Russian Federation and other states, which are being examined."

The letter goes on to state once more that as a result of the finding by the UK courts that guarantees provided by the Moldovan authorities had been violated, the National Administration of Penitentiaries had initiated a process of organising the control, implementation and observance of guarantees on extradition cases in order not to avoid any derogations from same.

54. The letter concludes as follows:-

"In this regard, the National Administration of Penitentiaries expresses its readiness to cooperate with the Irish authorities in organizing the detention process in the system of penitentiary administration of Moldovan citizens who will be extradited from the Republic of Ireland in maximum safety, respecting their rights and freedoms."

55. The solicitor for the respondent, Ms. Danica Kinane, swore an affidavit dated 19th November, 2021 in which she exhibits a further report from Mr. Vadim Vieru, a practising lawyer and member of Promo-Lex, an organisation engaged in strategic human rights litigation arising in the Republic of Moldova including before the ECtHR in Strasbourg. The report of Mr. Vieru consists of an analysis of CPT and CAT reports into Moldovan prison conditions. He highlights a number of cases where the ECtHR has found Moldova to be in breach of the ECHR as regards the conditions in which prisoners are detained. It should be noted that these cases go back a number of years. Mr. Vieru's report also addresses the letter of assurances provided by the Moldovan authorities and he expresses his opinion that the assurances provided are unlikely to be observed and, in some instances, cannot be implemented, for example in the case of personal violence, removing the perpetrator from the cell while leaving Mr. Gindea in the cell.

56. In the instant case, the Moldovan authorities have chosen to provide assurances as to future treatment of the respondent should he be surrendered, as opposed to presenting evidence of actual conditions in the Moldovan prison system and proof that measures have been taken to adequately deal with issues such as inter-prisoner violence, unofficial criminal hierarchies and overcrowding. Such evidence could presumably have been provided by an independent expert retained on behalf of the Moldovan authorities, if such evidence exists. While some reference was made in the letter to improvements having been made to Chisinau 13 it was also pointed out that the respondent would only be there for a short period. Similarly, no independent or objective evidence has been adduced to establish that past assurances given to executing authorities on foot of extradition requests have been adhered to. No information has been provided as regards any remedies which may be open to a surrendered person if assurances provided to an executing state are breached.

57. I have due regard to the fact that Moldova is a contracting party to the ECHR and that the information provided has come from an emanation of the state with responsibility for prison conditions. However, the mutual trust and confidence to be afforded a requesting state which is not a member of the European Union ("the EU"), or part of the European arrest warrant system is of a lesser nature. The presumption that a requesting state, which is not a member of the EU or part of the European arrest warrant system, will respect the requested person's fundamental rights is weaker and more easily rebutted than the presumption that arises under the European arrest warrant system. In such circumstances, depending upon the nature of the evidence relied upon by the requested person to establish a risk of a breach of his or her fundamental rights if surrendered, a mere assurance by the requesting state may not be sufficient. In such cases, a requesting state should engage with the evidence adduced on behalf of the requested person and contest same, or adduce evidence to satisfy the Court as to the reliability of assurances given. In the instant case, the requesting state has not at any significant level engaged with the evidence adduced on behalf of the respondent, in particular it has not sought to dispute that evidence by way of adducing independent reports or opinions, but rather has given an assurance that, if surrendered, the respondent will not be subjected to the conditions and treatment as evidenced by the materials presented by the respondent.
58. I must determine the matter on the basis of the evidence before me. In doing so, I am satisfied that there are significant, widespread and ongoing deficiencies in the Moldovan prison system such as to establish substantial grounds for believing that, if surrendered, the respondent would be exposed to a real and significant risk of a violation of his fundamental right not to be subjected to inhuman or degrading treatment.
59. The presumption that the requesting state will respect the fundamental rights of the requested person is of a weaker nature than such presumption under the European arrest warrant system. I find the presumption in this instance has been rebutted by the evidence adduced on behalf of the respondent. I find the assurances provided by the Moldovan authorities, in the absence of cogent and objective evidence supporting the accuracy and reliability of same, fall short in meeting the evidence adduced by the respondent and fall short in allaying my concerns. On the particular evidence before me in this case, I find that there are substantial grounds for believing that if surrendered to Moldova, the respondent would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR. That being so, I must refuse the application.
60. I should point out that this decision is not intended to act as a permanent bar to the surrender of the respondent to Moldova, based as it is on current prison conditions in Moldova. In the event that the Moldovan authorities take effective remedial steps to alleviate issues such as overcrowding and inter-prisoner violence, so as to render detention conditions compatible with fundamental human rights, and present cogent and objective evidence in that regard, I see no reason why a future application for surrender could not be reconsidered. Similarly, if the Moldovan authorities are in a position to satisfy the Court that an effective system is in place to ensure compliance with assurances, then it may be that extradition can be ordered.