Neutral Citation Number: [2010] IEHC 206

THE HIGH COURT

2009 141 Ext

Between:

The Minister for Justice, Equality and Law Reform

Applicant

And

Robert Rettinger

Respondent

Judgment of Mr Justice Michael Peart delivered on the 7th day of May 2010:

The surrender of the respondent is sought on foot of a European arrest warrant which issued in Poland on the 23rd September 2008. That warrant was endorsed for execution here on the 10th June 2009, and in due course on the 13th August 2009 he was arrested on foot of same and brought before the High Court as required by s. 13 of the European Arrest warrant Act, 2003, as amended ("the Act").

Surrender is sought so that the respondent can serve a sentence of two years' imprisonment which was imposed upon him on the 2nd August 2007 following his conviction in respect of one offence of burglary. Of that sentence, a period of 205 days has already been served, apparently while in pre-trial detention. There would appear to be 525 days or almost 18 months remaining to be served, less any remission if such applies in Poland.

No issue is raised in relation to correspondence, but it is easy in any event to be satisfied from the facts contained in the warrant that if the same act was done in this State it would amount to an offence of burglary contrary to section 12 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. Minimum gravity is satisfied by reference to the length of sentence imposed in respect of this offence.

It is not contended that the respondent was not present for his trial and conviction, and I am satisfied that no undertaking is required under s. 45 of the Act.

I am satisfied that there is no reason to refuse to order surrender by reason of any provision of sections 21A, 22, 23 or 24 of the Act, and subject to reaching a conclusion in relation to the single issue raised by way of objection to surrender, I am satisfied that there is no reason why surrender is prohibited either by a provision of Part III of the Act or the Framework Decision.

The issue - prison conditions in Poland:

The single issue relied upon by the respondent is that an order for surrender would give rise to a breach of the State's obligations under Article 3 of the European Convention on Human Rights, having regard to the prison conditions in Poland, and that under s. 37 of the Act his surrender should be prohibited.

Anthony Collins SC for the respondent accepts that there is a high onus upon a respondent who wishes to put forward an objection of this kind under s. 37 of the Act, and that it must be established by way of cogent and compelling evidence that surrender would constitute a real and serious risk of a breach of rights under the Convention if his surrender is to be ordered. But he submits that the onus is upon the respondent only to the extent that he must by such evidence satisfy the Court as to this matter on the balance of probabilities, and not to the point of mathematical certainty.

The section itself states as relevant:

> *"37.—(1) A person shall not be surrendered under this Act if—*
>
> *(a) his or her surrender would be incompatible with the State's obligations under—*
> *(i) the Convention, or*
>
> *(ii) the Protocols to the Convention … ."*

The State's obligations arise firstly from the obligation to which this State has submitted in Article 1 of the Convention which provides:

> *"The High Contracting parties shall procure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."*

One of those rights and freedoms appears in Article 3 which provides:

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

Mr Collins has submitted that this Article is engaged in extradition proceedings where there is shown to be a risk of such treatment in

the issuing state if the person were to be surrendered. He has referred to the test to be applied as set forth in *Soering v. The United Kingdom* [1989] 11 EHRR 439 where at paragraph of its judgment the Court stated:

> *"… the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of the State under the Convention, where substantial grounds have been shown for believing that the person concerned if extradited would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."*

In *Saadi v. Italy*, Application No. 37201/06, 28th February 2008, the Court of Human Rights set out certain principles which are applicable to a court's examination of risk under Article 3. Mr Collins has referred to these principles, even though *Saadi* was a deportation case rather than extradition. Those principles appear at paras. 128-133 of the Court's judgment:

> *" 128. In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court will take as its basis all the material placed before it or, if necessary, material obtained proprio motu. ……. In cases such as the present the Court's examination of the existence of a real risk must necessarily be a rigorous one…….*
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> *129. It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3……. Where such evidence is adduced, it is for the Government to dispel any doubts about it.*
>
> *130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances.*
>
> *131. To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department …… At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3…… and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence…….*
>
> *132. ……... . [not relevant]*
>
> *133. With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court …… . Accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive."*

In order to discharge the evidential burden upon him, the respondent has made certain averments in two affidavits which have been filed on this application. The first affidavit was filed at a time when he was represented by a different firm of solicitors. In that affidavit, having set out some life history he sets out the circumstances in which he has already served a five year sentence while in his late teens in respect of an offence committed as part of a criminal gang, and he states that when he came out of prison, in spite of his wish to have nothing more to do with that gang, he was pressurized by them to commit another offence to which he pleaded guilty, and which resulted in the sentence referred to in the European arrest warrant and for which his surrender is sought. He states that he is afraid of meeting up with these gang members again if returned, and that his life will be in danger.

In that affidavit he makes no reference to having spent time in prison in relation to this particular offence either on remand or otherwise, but nevertheless he states:

> *"I say and believe that the prison conditions in Poland are very poor and that as there are members of the criminal gang even in the prisons that I am fearful that if I am returned to Poland I will be in danger. I beg to refer to the 2008 US Department of State Report which states that 'conditions in prison and detention centres remained generally poor. Overcrowding and inadequate medical treatment were among the main problems'……".*

He refers also to a report which he refers to as the 2009 report by Greifswald University and which he states found Polish prison conditions to be the worst in Europe. He has exhibited both reports.

These averments were very broad and unspecific. He has sworn a supplemental affidavit after his current solicitors came on record for him. In that affidavit he adds to the averments in his first affidavit by stating that prison conditions in Poland have been recently condemned by the European Court of Human Rights which, he says, has more than 100 cases before it in which complaints are being made that these conditions amount to inhuman and degrading treatment contrary to Article 3 of the Convention, and that the Court has held that such conditions amount to an infliction of inhuman or degrading treatment.

He goes on to say that if surrendered he could be sent to any prison in order to complete his sentence, and that as a consequence he believes that he is at a real risk of being detained in conditions that are inhuman or degrading because of overcrowding, lack of proper sanitation, lack of privacy and the practice of keeping prisoners locked in their cells for 23 hours a day.

As to his own experiences in prison already in Poland he avers as follows:

> *"When I was last detained in Poland I was in Szczelce Opolskie in Slask, about 150 kilometres from Krakow. The conditions were very harsh. There were 6 people in my cell which was designed for a far smaller number. There was very little room in the cell. There was an open toilet in the cell with just a curtain. There was no privacy. It was demeaning and disgusting. We were only allowed out of the cell for one hour a day. We ate our meals in our cells. We were only permitted to shower once a week, and then showered together with a group of inmates numbering in total between 12 and 24 persons. I believe that nearly all the inmates suffered mental problems, and required medical assistance either during their time in detention or shortly afterwards, because of the conditions of extreme overcrowding and lack of proper sanitation and exercise. It was not really possible to complain about the conditions in prison. If you did complain, you faced physical punishment from the prison officers and could be put in isolation. People*

> *were afraid to complain in prison. I cannot face the prospect of being returned to a prison in Poland because of the appalling conditions."*

Mr Collins has pointed to the fact that the applicant has filed no affidavit in response to these averments and that this Court should therefore consider that his evidence in this regard is uncontradicted. I should refer to the fact that the Central Authority here clearly communicated this objection to surrender to the issuing judicial authority in Krakow, who have replied in two letters. In the first such letter dated 22nd March 2010 it is stated that according to the Polish Criminal Code, when a person is sentenced to an unconditional sentence he will serve that sentence in a prison which is located closest to his permanent place of residence. Three such prisons are located in Krakow, and another three are identified by name and which are located within 50 kilometres from Krakow and it is stated that the respondent "should be held in one of this places (sic)". In relation to the question of over-crowding it is stated in that letter that a person can be transferred to a prison located further away but that such a decision is not within the competence of the court to decide.

The second letter dated 9th April 2010 refers to overcrowding in Polish prisons as referred to by the European Court of Human Rights in *Orchowski v. Poland* [*infra*], and to which I shall refer again, and the letter states that in that regard the overcrowding referred to in that case was in prisons located in the west and north-west of Poland, whereas the respondent would be held in a prison in the south or south-east of Poland, and it makes the point that many of the detention centres and prisons in this area have been renovated in the last few years and that the living conditions have considerably improved.

Apart from these two letters there is no other information by way of affidavit or otherwise available from the issuing state.

The Court has been referred to the US State Department's 2009 Report on Human Rights in Poland, published on 11th March 2010, and to its comments in relation to prison conditions in Poland. I note that it states, *inter alia*, that prison and detention centre conditions remained poor and did not meet international standards; but it notes also that "overcrowding eased somewhat during the year". It goes on to state:

> *"Under the country's criminal code, the minimum cell size is three square meters (32 square feet); however, in practice this standard was often not met. According to the criminal code, prison directors may place prisoners for a limited time in cells smaller than 32 square feet per person. In practice, however, prisoners generally remained in small cells for the duration of their sentence…..".*

The question of over-crowding in Polish prisons has been a concern at European Council level over the past number of years. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") has reported in 1996, 2000 and again in 2004 in relation to prison conditions in Poland, and has expressed concerns about, *inter alia*, over-crowding in prisons across Europe, and particularly in eastern and central Europe. These reports are referred to by the European court of Human Rights in *Orchowski v. Poland*, Application Number 17885/04, 22nd October 2009 – a case relied upon by Mr Collins to a significant extent on the present application.

In *Orchowski,* the Strasbourg Court found it "*established to the standard of proof required under Article 3 of the Convention that the majority of the applicant's cells in which he had been held for most of his detention were overcrowded beyond their designated capacity, leaving the applicant with less than 3 sq. m of personal space and at times with less than 2 esq.", and that "the applicant's situation was further exacerbated by the fact that he was confined to his cells day and night, save for one hour of daily outdoor exercise and, possibly, an additional, although short, time spent in an entertainment room".*

As far as the facts of *Orchowski* are concerned, it is worth noting that he was in detention on remand prior to his conviction for offences, and he later received a four year sentence. During all that period between 2003 and 2008 he was detained in eight different remand sentences and prisons, and in respect of each such detention centre or prison much detailed evidence is given by the applicant as to the conditions in which he was held. At paragraph 124 of its judgment the Court stated that "*the focal point for the Court's assessment is the living space afforded to the applicant during his detention in [eight named locations]*".

I mention that particular sentence in order to highlight the fact that in that case, the Court was obviously looking at specific conditions at particular locations. Naturally, where the Court is considering a complaint that conditions actually experienced in the past constituted a violation of Article 3 standards, the evidential burden is more easily overcome by the complainant than where, as in the present case, a Court is being asked, on the basis mainly of findings and conclusions in another case, to look into the future and, on the basis of past facts, conclude that a breach of Article 3 will as a matter of probability occur. I appreciate that in the present case the respondent has had actual experience of conditions while on remand in the present case, but I have set forth the full extent of his evidence in that regard. I have referred to the evidence also that the issuing judicial authority cannot state with certainty what prisons or detention centres the respondent will be held in following any surrender, and to their statement that the locations referred to in *Orchowski* are in a different area of Poland to the area where the respondent would be held.

I accept that cases such as *Orchowski* contain material which can provide this Court with information which describes in a general way what problems there have been in Poland historically and certainly up to the point at which the Strasbourg Court was hearing the case in question. But this Court must take account also in a general way of what is stated in material provided in relation to improvements undertaken and being undertaken by the Polish government to improve the overcrowding problems. There is no more recent CPT report in relation to Poland than that of 2004, so it is not possible to form a view as to what level of improvement has taken place overall since that Report.

Under the *Saadi* principles this Court must consider rigorously both the general and the particular situation in the country concerned. It is stated at para. 132:

> *"130. In order to determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances."*

Mr Collins has submitted that this Court should accept the prison overcrowding as found in *Orchowski*, since the issuing state has not sought to contradict on affidavit or otherwise what the respondent has stated in his affidavits or to address in the present case the facts and findings in *Orchowski*, other than by the short comment in relation to the latter in the letter dated 9th April 2010 which I have already set forth. It is submitted that this Court should be satisfied, in the absence of any evidence from the issuing state, that the situation has not changed and that therefore there is a substantial risk that if surrendered the respondent will be detained in conditions which have been shown to violate Article 3 of the Convention, and that his surrender is therefore prohibited by s. 37 of the Act.

The respondent in his second affidavit has said certain things about the conditions which he kept in while on remand in 2007 in a particular prison at Szczelce Opolskie in Slesk which is in the south western part of Poland. He was there for about six months, if that was where he was for the 205 says referred to in the warrant. It is certainly not a location which was examined in Orchowski. In fact it would appear to be quite distant from the area of Poland in which the prisons in Orchowski were located.

His first affidavit contains averments only of a general kind about prison conditions in Poland.

Given the general situation gleaned from the material provided and from the Ostrowski judgment, there is no reason to cast doubt on what the respondent has stated or to consider that he has exaggerated the conditions under which he was held while on remand. But it is another matter altogether to go further and reach a conclusion in the present case, which would, if correct, mean that until such time as this Court was satisfied by evidence that prison conditions had improved substantially, no person sought by Poland on foot of a European arrest warrant transmitted to this State, in particular to serve a sentence, could be surrendered. We do not know to which prison the respondent will be sent. Those conditions in which he was detained for six months or so in one particular prison, described in as brief a way as they are, even if corroborated by what appears in Ostrowski, could not be sufficient in my view to establish to the required standard that if surrendered to Poland now there is a real risk that his Article 3 rights would be breached, and therefore that his surrender is incompatible with this State's obligations under Article 3 of the Convention.

It is inevitable that a respondent seeking to establish to the necessary standard of proof that in the future his rights will be breached if surrendered has a more difficult probative task than a person complaining of what has already occurred. But that inevitability must not be allowed to lower the standard by which this Court must examine the question. The averments made by the respondent and the material he has referred the Court to are probably the best the respondent could do. But in my view neither the respondent's own evidence nor the Orchowski findings are sufficient. The latter in particular speak to the position of that person and the conditions which he endured during his periods of imprisonment. It does not follow in my view that those conclusions can avail other persons who are sought for surrender to Poland.

This Court must be forward-looking in its considerations, and in that regard it is worth saying again that it is not known at this stage even which prison or other detention centre the respondent my be required to spend time if surrendered. Speculation as to what conditions he may have to experience in some prison somewhere in Poland, even if supported by the criticisms and shortcomings which have been identified in various reports and even cases before the European Court of Human Rights is insufficient to enable the respondent's objection to surrender to succeed.

Article 8 rights to privacy:
While prison conditions were argued in this case on the basis of Article 3 of the Convention only, the respondent has in his Points of Objection raised them also in relation to Article 8, and specifically on the basis that these overcrowded conditions, as shown in Orchowski and as averred to by the respondent based on his previous experience in prison, breach the respondent's Convention right to privacy. While this particular aspect of the case was not argued as such, Mr Collins has stated at the conclusion of his submissions that the point is not abandoned. He stated that the threshold of proof in relation to this objection is lower than that in relation to Article 3, and he points to the fact that in Orchowski, the Strasbourg Court made no finding in relation to Article 3 as it was finding in favour of violation in relation to Article 3.

In the absence of any pursuit of this point of objection and not having heard submissions from either side in relation to it, I cannot be persuaded that it alone can amount to a prohibition to surrender under Part III of the Act or the Framework Decision, given my findings and conclusions in relation to Article 3.

I am therefore required to make the order for surrender sought in this application, and I will so order.