Neutral Citation Number: [2011] IEHC 41

THE HIGH COURT

2008 205 EXT

2008 206 EXT

2010 191 EXT

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY

AND LAW REFORM

APPLICANT

- V -

MARCIN SAWCZUK

RESPONDENT

JUDGMENT of Mr Justice John Edwards delivered on the 4th day of February 2011.

Introduction
The Court is concerned with an application on behalf of the applicant for orders pursuant to s. 16 of the European Arrest Warrant Act 2003 (hereinafter "the 2003 Act"), as amended, directing that the respondent be surrendered to the Polish state on foot of three separate European Arrest Warrants which have been endorsed by the Irish High Court for execution and on foot of which the respondent has been arrested. The three European Arrest Warrants in question have been produced to the court. The court is satisfied, on foot of the evidence that it has heard, that in each case the respondent is the person in respect of whom the European Arrest Warrant issued. The Court is further satisfied that in each case the European Arrest Warrant has been endorsed in accordance with section 13 of the 2003 Act, and further that in each case the High Court is not required under section 21A, 22, 23 or 24 of the 2003 Act (as inserted by sections 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act, 2005) to refuse to surrender the respondent. No issues arise, and the warrants are prima facie in order, with respect to correspondence, minimum gravity and form. In the circumstances the court is solely concerned with whether the surrender of the respondent is prohibited by Part 3 of the 2003 Act, as amended, or by the Framework Decision (including the recitals thereto). In that regard only one point is raised by way of objection under this heading in each case, and it is the same point in each instance. The point is this. The respondent contends that his surrender is prohibited by section 37 of the 2003 Act on the grounds that he faces a real risk that his rights under the European Convention on Human Rights and Fundamental Freedoms, and in particular his Article 3 rights, will be breached by reason of prison conditions in Poland.

The respondent's evidence
In support of his objection the respondent has filed an affidavit sworn by him on the 10th day of November 2010. In this affidavit he makes the following averments:

> "I have experienced prison life in Poland, particularly in Klodzko, Dzierzoniok and Pilawa. These are prisons in my local area in Poland. I spent about for and half years in Klodzko, about three days in Dzierzoniok and two years in Pilawa. I found conditions there to be very bad indeed. The prisons are unhealthy and overcrowded. I would say they are inhumane. In Klodzko there were sometimes up to twelve people in one cell and I believe this is much more than official limits. I regularly had eight or nine people in my cell which was a very small room indeed. We were only permitted a shower once a week and we had no privacy. We got half a bread and half a cheese for the day which was insufficient for my needs. We had little or no recreation. I believe prison conditions in Poland have been internationally criticised and condemned. I say rightly so. I have personal experience of the Polish prison system and I do not wish to be subjected to that regime again. I believe I will if I am surrendered there."

No further evidence was adduced by or on behalf of the respondent.

Admissibility of further information relied upon by the applicant
The applicant seeks to rely upon the information contained in two documents ostensibly supplied to it by the issuing state, and one document ostensibly supplied to it by the issuing judicial authority, by way of further information. The respondent objects to the Court having any regard to these documents on a number of grounds. His objections may be summarised as follows:

- The applicant has failed to prove the *provenance* of these documents and to show how he came into possession of them;

- Before the applicant can seek to put these documents before the Court as additional information supplied under s.20(2) the applicant must prove the invocation of that statutory provision and the making of a request to either, or both, the issuing state or the issuing judicial authority for additional information. The applicant has failed to do so.

• Even if the information contained in these documents was supplied in response to a request or requests made under s. 20(2) the Court should not receive it, having regard to the provisions of Order 98 Rule 7 of the Rules of the Superior Courts, and/or of s 20(3) of the 2003 Act, as it is neither evidence on affidavit nor evidence in any of the other receivable forms prescribed in s.20(3).

• The content of each of these documents is hearsay, and in each case the respondent has no means of cross-examining the author for the purpose of testing the truth of his assertions.

It is true that no formal evidence has been adduced, either viva voce or on affidavit, concerning the *provenance* of these documents or to show how the applicant came into possession of them.

The Court should deal firstly with issue of *provenance*. Two of the documents clearly purport on the face of them to emanate from the issuing state and in particular the Polish Ministry of Justice, while the third document clearly purports on its face to emanate from the issuing judicial authority. I do not consider that any further proof of provenance is required in the absence of concrete evidence suggesting the contrary.

Next the Court must deal with whether it is necessary for the applicant to prove how these documents came into his hands. While there is no sworn evidence before the Court of the formal invocation by the applicant of the provisions of section 20(2) of the 2003 Act (as amended), or of any communication by the applicant of a request to either the issuing state, or the issuing judicial authority, for additional information, it would in my view, and adopting a characterisation previously employed by Peart J. in *Minister for Justice, Equality and Law Reform v Ward* [2008] IEHC 53 for the purposes of this judgment, be "fanciful" to suggest that such material might have arrived "out of the blue". In the circumstances, I consider that, having regard to the *sui generis* nature of these proceedings, as well as the principles of mutual trust and confidence which underpin the Framework Decision, formal proof of the invocation of s.20(2) of the 2003 Act, or of the making of a request pursuant to that provision, does not have to be adduced before this Court in the absence of any concrete evidence to the contrary or suggestive of irregularity. It will be sufficient in most cases if Counsel for the applicant simply confirms to the Court that the additional material being adduced was provided by the issuing state, alternatively the issuing judicial authority, in response to a request by the Irish central authority for additional information. In recording this as being the Court's view, I am reiterating an earlier ex-tempore ruling to that effect given by me on the 25th of January, 2011 in the conjoined cases of *M.J.E.L.R. v Wlodarczyk, Record Nos 229/2010 EXT & 230/2010 EXT* .

As to the third and fourth objections bullet pointed above, these can be considered together. I am satisfied that the objections raised are not novel and that in fact they were considered by Supreme Court in the case of *The Minister for Justice, Equality & Law Reform v Sliczynski* [2008] IESC 73. In his judgment in that case Murray C.J., said:

> "It is well settled that the Act of 2003 as amended falls to be interpreted in the light of the provisions of the Framework Decision (Council Framework Decision of 13th June, 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/584/JHA)). As has been noted in several previous decisions of this Court one of the objectives of the process of surrender on foot of the European Arrest Warrant is the introduction of a new simplified system of surrender of sentenced or suspected persons as referred to in Recital 5 of the Decision. That same provision refers to the process as "*a system of surrender between Judicial Authorities*" and Recital 10 states that "*the mechanism of the European Arrest Warrant is based on a high level of confidence between Member States*". As set out in Article 1(1) of the Decision a European Arrest Warrant "*is a judicial decision issued by a member state with a view to the arrest and surrender by another member state of a requested person …"* and as paragraph (2) of that Article says its execution is carried out "*on the basis of the principle of mutual recognition*".
>
> Article 7(2) of the Decision makes express reference to "*official correspondence*" relating to European Arrest Warrants and permits Member States to designate a central authority and make it responsible for the administrative transmission and reception of such correspondence in addition to the European Arrest Warrant itself. The transmission of such official correspondence (and Arrest Warrant) can only mean transmission from the requesting Judicial Authority to the executing Judicial Authority. The respondent Minister is, by virtue of s. 6 of the Act of 2003, designated as the Central Authority of the State.
>
> Article 15 of the Framework Decision, having provided that the executing Judicial Authority shall, in certain circumstances, request that supplementary information be provided then goes on, at paragraph 3 of the Article to make provision for the general supply of information additional to that in the warrant in the following terms: *"The issuing Judicial Authority may <u>at any time</u> forward any <u>additional useful information</u> to the executing Judicial Authority". (Emphasis added).*
>
> In the light of the foregoing provisions I think it is correct to state that the Framework Decision in establishing a new and simplified system for the surrender based on mutual trust and recognition of the Judicial Authorities of the Member States means that an executing Judicial Authority may rely on additional information relating to the warrant and its contents provided by an issuing Judicial Authority. The Central Authority may be used to transmit that information from one Judicial Authority to another.
>
> The basic and essential document on foot of which a person's surrender is sought and obtained is of course the European Arrest Warrant. The form of the European Arrest Warrant is provided for in the Framework Decision and, in turn, in the Act of 2003. The form of the European Arrest Warrant ensures that a considerable amount of information is provided relating in particular to the person whose surrender is sought and the offences in respect of which it is sought. Normally the information contained in the warrant should be sufficient to enable the executing Judicial Authority, in this country the High Court, to arrive at a decision on the application for surrender. I have no doubt that it was foreseen by the drafters of the Framework Decision that even with a carefully designed form of warrant and one which has been properly filled in that, in the ordinary nature of things, in particular cases ambiguities might arise, or some lacunae on points of detail in the information found to exist, particularly when the standard form of arrest warrant falls to be issued by a Judicial Authority in one legal system and executed by a Judicial Authority in another legal system. The use of different languages, and their translation is also another foreseeable risk of such problems. It is clear from the foregoing provisions that the Framework Decision intends that the executing Judicial Authority may both seek and receive further information related to a warrant from the issuing Judicial Authority and take into account that information for the purpose of deciding whether an order for surrender should be made on foot of the warrant. It is important to note that such information emanates from a Judicial Authority one of the characteristics of which is its independence in the exercise of its functions. Given that the simplified system of surrender of which the Framework Decision speaks is based, *inter alia*, on mutual respect between Judicial Authorities it is quite logical that the Decision would make a provision for one Judicial Authority, the executing one, to rely on information provided to it by the other Judicial Authority, the issuing one. In all events that

is what the Decision provides for.

Following the adoption of the Framework Decision there was an obligation on Member States to introduce at national level the necessary legal measures to provide for the system of surrender as envisaged by the Decision for the purpose of achieving its objectives. That is the obligation of every Member State. Section 10 of the Act of 2003 as amended by the Act of 2005 provides that a person in respect of whom a European Arrest Warrant has been issued shall be arrested and surrendered in accordance with the provisions of the Act and the Framework Decision.

In my view s. 20(1) and (2) of the Act of 2003, as amended, are provisions by which the Oireachtas sought to give effect to the system of surrender envisaged by the Framework Decision so as to ensure that information could be furnished by the requesting Judicial Authority to the executing Judicial Authority, the High Court. If further information is transmitted by the requesting Judicial Authority either on its own initiative or following a request it is the function of the Central Authority to transmit it to the Executing Judicial Authority, in this country, the High Court. Section 20 must be interpreted in the light of the objectives of the Framework Decision and its provisions. In my view it specifically gives effect to Article 15(2) and (3) of the Directive. In so providing I am satisfied that the Oireachtas intended, consistent with the obligations of the State pursuant to the Framework Decision, that the High Court would have available to it the information provided by the issuing Judicial Authority and would have full regard to that information, in addition to information provided in the European Arrest Warrant itself, for the purpose of deciding whether a person should be surrendered on foot of a European Arrest Warrant. Moreover to interpret the provisions of the Act otherwise would render them meaningless since if direct evidence had to be given of the information concerned every Judge or member of the issuing Judicial Authority providing information would either have to give evidence personally or swear an Affidavit of matters within their own knowledge. If that were the case the provisions referred to would serve no purpose. Clearly in my view they were intended to ensure that the High Court would have, where required, information from the Judicial Authority concerned in addition to that already contained in the arrest warrant itself.

Before the High Court can receive and take into account such information it must be established that the information communicated emanates from the Judicial Authority of the requesting State. In this case that has been established by the express averments in the Affidavits lodged on behalf of the applicant in the High Court. In any event the source of the information has not been put in issue.

Since the receipt of such information and the entitlement of the High Court to rely on it is permitted by Statute the rule against hearsay relied upon by the appellant does not apply so as to prevent the Court from exercising its functions in that respect.

So far as the status of the information received by the High Court under the foregoing circumstances is concerned it is in the first instance a matter for the High Court to decide what weight it should attach to it. It is entitled to treat the information as prima facie evidence of the facts set out in the further information supplied by the requesting Judicial Authority.

The admission of such information as evidence does not preclude a respondent in such proceedings from calling evidence to the contrary.

Indeed the status of the information communicated by a requesting Judicial Authority in relation to European Arrest Warrants. should be treated in the same way as information contained in the European Arrest Warrant itself, even though the latter, being the actual originating document for setting any such application in train, is admitted without proof by virtue of another section of the Act. As I pointed out in ***Minister for Justice -v- Altaravicius*** "*Generally speaking extradition arrangements and the like are issued on reciprocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith. Those considerations apply equally to the system of surrender to the European Arrest Warrant having regard to the provisions, explicit and implicit, of the Framework Decision*."

Accordingly, until there is some reason to believe to the contrary, it is to be assumed that a statement of facts such as those that appear in the letters sent by the requesting Judicial Authority in this case, is a correct statement of the facts of the case in respect of which surrender is sought.

I have come to the foregoing conclusion notwithstanding the careful submissions of Counsel for the appellant. Counsel for the appellant referred in particular to ss 3 of s. 20 which provides:

> *"In proceedings under this Act, evidence to any matter to which such proceedings relate may be given by affidavit or by a statement in writing that purports to have been sworn –*
>
> *(a) By the deponent in a place other than the State, and*
>
> *(b) In the presence of a person duly authorised under the law of the place concerned to a test to the swearing of such a statement by a deponent,*
>
> *However such a statement is described under the law of that place."*

Subsection 4 of s. 20 goes on to make provision for the High Court to direct that oral evidence of the matters described in an affidavit or statement be given if it considers that the interests of justice so require.

In my view that subsection is simply permissive of the manner in which evidence may be given by a person by means of an affidavit or a sworn statement in writing where that affidavit or statement is sworn outside the State by a person in a place outside the State. That is to say it is a provision which permits foreign affidavits or statements duly sworn by a person in a foreign State to be tendered in evidence. It does not in my view qualify the earlier subsections concerning the transmission of information by an issuing Judicial Authority to the executing Judicial Authority. It applies not just to affidavits or sworn statements tendered by an applicant in such proceedings but also by any tendered by a respondent.

Counsel also submitted that the documents or information that can be admitted without formal proof are clearly identified in s. 12(8) of the Act of 2003 as amended. It was submitted that if the Oireachtas had intended that further information provided by an issuing Judicial Authority could be admitted without further proof it would have expressly so provided in a

similar fashion.

The documents for which s. 12(8) makes special provision are:

(a) The European Arrest Warrant;

(b) An Undertaking required under the Act of a Judicial Authority;

(c) A translation of either of the former;

(d) A true copy of either of the former.

(e) Any separate document containing information that should be specified in an Arrest Warrant but which is not specified in it because it is not practical to do so.

There are essentially two matters which the s. 12(8) permits to be received in evidence without further proof. These are the European Arrest Warrant itself and an Undertaking which is required to be provided under this Act. Its other provisions relate to translations or copies of those documents. In addition it refers to a document referred to in s. 11(2A) (inserted by s. 72(b)) of the Criminal Justice (Terrorist Offences) Act 2005. Such a document is also really part of or an adjunct to the European Arrest Warrant. Section 11(2A) provides that where it is not practical to provide in the Warrant itself a certain matter which the Act specifies should be contained in the Warrant it may be specified in a separate document. Such a document is really part of or an adjunct to the European Arrest Warrant itself. The two kinds of documents referred to, the Arrest Warrant (with or without a document specifying certain matters which should otherwise be in the warrant itself) and an Undertaking required under the Act (and not an Undertaking that may be proffered otherwise for any reason) are specific matters which an issuing Judicial Authority is under an obligation to provide as prescribed by the Act itself. Obviously the European Arrest Warrant must always be provided and an Undertaking in the circumstances specified such as pursuant to s. 45, the provisions of which are referred to later in this judgment. I do not consider that these prescribed matters fall into the same category as the transmission of additional information, which can only arise following a request in a particular case, by the issuing Judicial Authority to the executing Judicial Authority as provided for in s. 20. The Oireachtas has chosen to deal with the specified or expressly prescribed kind of documents by means of s. 12 and with the transmission of further information, which may vary according to the nature of the request in each case, pursuant to s. 20 or not arise at all.

In any event, since the Oireachtas has made a specific provision for the transmission of information referred to in s. 20 in the terms and with the effect which I have explained above it is not to be inferred that the information referred to in s. 20 must be proved by direct evidence because other and different provisions are made as regards the proof of the documents referred to in s. 12(8) when that would be, as I have indicated, to deprive s. 20 of its purpose."

I am therefore satisfied that the applicant's submissions to the effect that (a) the Court should not receive the additional information supplied either by the issuing state or by the issuing judicial authority, respectively, because it is neither evidence on affidavit nor evidence in any of the other receivable forms prescribed in s.20(3); and (b) because the contents of each of these documents is hearsay, are not well founded. It is clear on the basis of the decision in *Sliczynski* that the Court may receive these documents and have due regard to their contents without them being proved by direct evidence.

Moreover, although the information contained therein is hearsay the Court may receive such hearsay in proceedings such as this, which are *sui generis* in nature and which are more in the nature of an inquiry than an adversarial contest. The fact that the material is hearsay may be relevant to the weight to be attached to it, but not to the admissibility of it in proceedings such as this. The Court observes that such an approach is by no means unique to the European Arrest Warrant jurisdiction. In various other proceedings which are not wholly adversarial and which are to a greater or lesser extent *sui generis* a similar approach is adopted. For example, in asylum matters regard is routinely had to "country of origin information" which is invariably hearsay. Similarly, the Supreme Court made it clear in *Eastern Health Board v MK* [1999] I.R. 99 that hearsay evidence could be received in wardship proceedings involving children, having regard to the unique nature of such proceedings which are centred on the welfare of the child and place the court in an inquisitorial role in determining what, in all the circumstances, is in the best interests of the child.

The further information relied upon by the applicant

The Court has considered the additional material on which the applicant relies. It is appropriate the recite it in the chronological order in which it was received.

The first document containing additional information was a letter dated the 5th of October 2010 from the Ministerstwo Sprawiedliwoœci (the Polish Ministry of Justice) on behalf of the issuing state addressed to the applicant (in its capacity as the Irish Central Authority). It is in the following terms:

"The Government of the Republic of Poland would like to assert that in accordance with article 91 section 1 of the Polish Constitution, the European Convention on Human Rights is a directly binding law, which means that all governmental institutions of Poland, including the Central Board of Prison Service and Courts, are obligated to act in accordance with all of its provisions, including Article 3.

At the same time any person who feels that their rights have been violated, is entitled to seek legal remedies available under Polish law.

The Government of the Republic of Poland would also like to point out that although the issue of overcrowding in Polish prisons has been a concern in the recent past, however the current statistics show that the prison population stands at 97.8%."

The second document containing additional information was a letter dated the 18th of November 2010 from the Circuit Law Court of Œwidnica -Enforcement Section at 3rd Criminal Division on behalf of the issuing judicial authority addressed to the applicant (in its capacity as the Irish Central Authority). It is in the following terms:

"Referring to the affidavit of Marcin Sawczuk the Circuit Law Court of Œwidnica -Enforcement Section at 3rd Criminal Division firmly states that the accusations and complaints against the Polish correctional facilities/detention centres, the conditions there and the inhumane treatment of persons deprived of liberty are untrue.

The rules how to carry out penalties of imprisonment or of other measures consisting in the deprivation of liberty are defined in Poland by appropriate provisions of law. These rules of law provide, first of all, in all forms of punishment, punitive measures, security and preventative ones, shall be carried out in a humane manner, respecting the human dignity of a prisoner; both torture and inhumane or degrading/humiliating treatment and punishment of a convict are prohibited and the convict (unless otherwise provided by act of law or final and legally enforceable judicial decision) retains the rights and civil liberties (Article 4 of Executive Penal Code). Appropriate regulations also specify a number of prisoner's rights and entitlements. Among the others, they are Articles 102 and 103 of Executive Penal Code, which provides that a prisoner is particularly entitled to:

- in order to be able to stay healthy, suitable food, clothing, living conditions, facilities and health care and to adequate conditions of hygiene,

- maintaining ties with their family and other relatives/persons dear to them,

- exercising their freedom of religion,

- containing remuneration resulting from their being employed, to social insurance to the extent as provided in separate legislation and also to assistance in obtaining disability benefits,

- education and self-study and to performing works of their own, as well as to, with the consent of the director of a correctional facility, the manufacture and sale of the items made by themselves,

- using cultural educational and sports facilities and activities, radio, television, books and press,

- contacting their defence counsel, attorney, probation officer and a representative of their choice -- a person of trust,

- contacting various entities -- associations, foundations, organisations and institutions dealing with the punishment-implementation issues,

- becoming familiar with the opinions prepared by the administration of a correctional facility and constituting the basis for the decisions rendered in respect of them,

- submitting applications/propositions, complaints and requests to the competent authority to have them considered and presented, in the absence of other persons, two heads of organisational units of the Prison Service, to a penitentiary judge, to a public prosecutor and to the Ombudsman as well as to lodging complaints to agencies set up under the international agreements concerning the protection of human rights.

As to the conditions in the prison cells and the daily food norms, it should be mentioned here that the appropriate regulations specify that the residential area in the cell for a convicted person shall not be less than 3 m² (other area, however not smaller than 2 m², is only admissible under exceptional circumstances and these are clearly defined by the act of law). The release made by the Directorate-General of the Prison Service shows that as at the 12th of November 2010 the population density in correctional facilities and detention centres nationwide is 97.1%, which means that there is not overpopulation/overcrowding in the said institutions (the data available on website www.sw.gov.pl). The cells are equipped with appropriate furnishings to provide a prisoner with a separate place to sleep in, with adequate conditions of hygiene, with adequate supply of air and with appropriate temperature for a season of a year, according to the standards set out for accommodation, as well with lighting adequate for reading and work.

As to the food, a prisoner gets three meals a day, of adequate nutritional value (the requirements as to the calorific value, to the percentage of nutritional elements, the content of vegetables, etc are defined by relevant provisions), including at least one hot meal, taking the convict's employment and age in consideration, and if possible -- the convict's religious and cultural requirements, as well as a beverage to quench one's thirst. When a prisoner's health requires that there is a diet set for them following the doctor's prescription.

To sum up, our court finds Marcin Sawczuk's statement untrue, or rather astonishing. The requested man's statement results only from the situation he finds itself now in and from his desire to avoid serving sentences once imposed on him.

Wieslaw Pêdziwiatr, LLM

Head of 3rd Criminal Division at Circuit Law Court in Œwidnica."

The third and final document containing additional information was another letter, this one dated the 17th of December 2010 from the Ministerstwo Sprawiedliwoœci (the Polish Ministry of Justice) on behalf of the issuing state, and addressed to the applicant (in its capacity as the Irish Central Authority). It is in the following terms:

"The Government of the Republic of Poland would like to assert that in accordance with article 91 section 1 of the Polish Constitution, the European Convention on Human Rights is a directly binding law, which means that all governmental institutions of Poland, including the Central Board of Prison Service and Courts, are obligated to act in accordance with all of its provisions, including Article 3. At the same time any person who feels that their rights have been violated, is entitled to seek legal remedies available under Polish law.

All judges must take into account relevant legislation on penalties relating to imprisonment or other measures depriving a person of liberty. These provide that all forms of punishment, punitive measures, security and preventative, shall be carried out in a humane manner, respecting the dignity of the prisoner. Torture and inhumane or degrading humiliating treatment and punishment are prohibited (Articles 4, 102 and 103 of the Executive Penal Code).

Regulations in relation to conditions in prison cells and daily food norms must be followed. These specify that the

residential area in a cell for a convicted person shall not be less than 3 m². (An area smaller than 3 m² is only admissible under exceptional circumstances, clearly defined by law. This cannot be less than 2 m²). A report by the Directorate-General of the Prison Service shows that as of the 10th of December 2010 population density in correctional facilities and detention centres nationwide is 97.3%. (The data is available on http://sw.gov.pl/pl/o-sluzbie-wieziennel/statvstyka/statvstyka-biezaca/ and is updated regularly). In accordance with standards set out, the cells are equipped with appropriate furnishings, providing all prisoners with a separate place to sleep in, adequate hygiene conditions, supply of air and appropriate seasonal temperature, with adequate lighting for work and reading.

There are relevant provisions nutritional requirements, calorific value, nutritional elements, vegetable provisions etc. A prisoner gets three meals a day and beverages, including at least one hot meal per day, taking into account a prisoner's age, employment, religious and cultural requirements. Dietary requirements of prisoners with health problems are met following doctor's prescriptions."

The Applicable Law

Relevant statutory provisions

S. 37(1) of the 2003 Act provides (*inter alia*) that:

"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

(b) ……..

(c) there are reasonable grounds for believing that—

(i) …….

(ii) ……..

(iii) were the person to be surrendered to the issuing state—

(I), ……or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment."

Moreover, s. 37(2) provides (*inter alia*) that:

"In this section—

"Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994"

Relevant case law

The Supreme Court has said in *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 I.R. 669 that a Court must proceed on the assumption that the courts of the issuing state will respect human rights and fundamental freedoms. Accordingly, only rights affected by the surrender of the requested person are protected by s.37. In his judgment in that case Fennelly J stated (at p.689):

"69 The principle of mutual recognition applies to the judicial decision of the judicial authority of the issuing member state in issuing the arrest warrant. The principle of mutual confidence is broader. It encompasses the system of trial in the issuing member state. The Court of Justice has ruled, in its recent decision in *Advocaten voor de Wereld v. Leden van de Ministerrad (Case C-303/05)* (Unreported, European Court of Justice, 3rd May, 2007) that the issuing member state, as is "stated in article 1(3) of the framework decision, must respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

70 It follows, in my view, that the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "respect … human rights and fundamental freedoms". Article 6.2 provides that the Union is itself to "respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the member states, as general principles of community law"."

However, it is also clear from the decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45 that, 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 system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3. In the course of his Supreme Court judgment in *Rettinger*, Fennelly J stated:

"The inevitable consequence of the principle of absoluteness is that the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3. This does not mean that there is any underlying conflict between the Convention and the

> Framework Decision. As is stated in recital 10, *"[t]he mechanism of the European arrest warrant is based on a high level of confidence between member states." The normal presumption is, as I said in my judgment in Stapleton, cited above at page 689, the courts, "when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union 'respect human rights and fundamental rights and fundamental freedoms.'" "*

The Supreme Court decision in *Rettinger* sought to address two questions certified by Peart J, pursuant to section 16(12) of the Act of 2003, as amended by section 12 of the Criminal Justice (Miscellaneous Provisions) Act 2009, following upon his judgment in the High Court in the same matter (see *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IEHC 206). Peart J had certified that his decision "*involve[d] a point of law of exceptional public importance and that it [was] desirable in the public interest that an appeal should be taken to the Supreme Court."*

The following were the certified points:

> *"(a) Where a respondent relies upon section 37(1)(a) of the European Arrest Warrant Act 2003 in order to prevent his surrender to a requesting State by reason of an apprehended breach of his rights under Article 3 of the European Convention on Human Rights and adduces evidence capable of establishing substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 were he to be surrendered, does the onus of proof then shift back to the applicant to adduce evidence in order to dispel any doubts as to the treatment the respondent would face if surrendered?*
>
> *(b) Where a respondent relies upon section 37(1)(a) of the European Arrest Warrant Act 2003 in order to prevent his surrender to a requesting State by reason of an apprehended breach of his rights under Article 3 of the European Convention on Human Rights, is the respondent required to prove that there is a probability that, if surrendered, he will suffer treatment contrary to Article 3, or is it sufficient for him to show that, on the balance of probabilities, there is a real risk that he will suffer such treatment?*

In directly addressing these issues in the course of his judgment in the Supreme Court, Fennelly J stated:

> "The first question asks whether the onus of proof shifts back to the Minister once the respondent to the application "*adduces evidence capable of establishing substantial grounds"* for his complaint. The second asks whether the burden of proof required him to show, as a matter of probability, that he would (meaning "would probably") suffer treatment prohibited by Article 3 or whether it would be sufficient for him to show, also as a matter of probability, that "*there is a real risk that he will suffer such treatment."*
>
> A partial answer to these questions can be found in the very wording of section 37(1)(c) of the Act of 2003. According to the section, it is sufficient to establish that "*there are reasonable grounds for believing that" the person would be "subjected to ……inhuman or degrading treatment." The European Court in Soering spoke of "substantial grounds for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment…*" Each test focuses, firstly, on the quality of the evidence or "*grounds*" and, secondly, on the level of risk. In practice, the two elements are closely connected and will, in many cases, merge into a single test. The subject-matter of the enquiry is the level of danger to which the person is exposed. There is no discernible difference between "*reasonable grounds*" and "*substantial grounds*." It is equally clear that it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a "*real risk*." The 13th recital to the Framework Decision speaks of "*serious risk*;" the term "*real risk*" is consistently used by the European Court in its case-law, including *Soering* and *Saadi*. It is appropriate to the seriousness of the subject matter. It would be absurd to require a person threatened with expulsion to a state where he may be exposed to inhuman or degrading treatment, not to mention torture, to prove that he would *probably* suffer such treatment. It must be sufficient to establish "*real risk*."

Denham J, in concurring with the judgment of Fennelly J, suggested the following approach:

> "(i) A court should consider all the material before it, and if necessary material obtained of its own motion.
>
> (ii) A court should examine whether there is a real risk, in a rigorous examination.
>
> (iii) The burden rests upon an applicant, such as the appellant in this case, to adduce 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 ECHR.
>
> (iv) 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 ECHR. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court.
>
> (v) The court should examine the foreseeable consequences of sending a person to the requesting State.
>
> (vi) The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the U.S. State Department.
>
> (vii) The mere possibility of ill treatment is not sufficient to establish an applicant's case.
>
> (viii) The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this Court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary."

Decision

Having carefully considered the evidence put forward in the affidavit of the respondent, as well as the additional material emanating from the issuing state, and the issuing judicial authority, and having paid due regard to the approach commended in *Rettinger*, this Court finds that it is not satisfied that the respondent has demonstrated that substantial grounds exist for believing that if he is returned to the issuing state he would be exposed to a real risk of being subjected to inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights and Fundamental Freedoms. In the circumstances he has not demonstrated that his surrender would be incompatible with the State's obligations under the Convention in that respect, or indeed in any other respect.

In particular, the Court notes that the personal experience related by the respondent in his affidavit occurred a considerable time ago, and the respondent has provided no evidence to suggest that the conditions that he claims to have experienced in times past continue today. For example, he has not put forward an affidavit from any person who is presently in prison, or perhaps recently released from prison, in Poland concerning the conditions that currently obtain there, or that have obtained there in the very recent past. Neither has he sought to adduce material from a Polish Prisoners Rights organisation, an organisation such Amnesty International, or from any other reputable source concerning the up to date position with respect to conditions in Polish prisons.

In addition, his affidavit speaks only of the conditions experienced in three specific institutions, namely the prisons at Klodzko, Dzierzoniok and Pilawa. However, there is no evidence suggesting that the conditions that are said by the applicant to have obtained in the past in these three particular prisons typify the conditions presently obtaining in all, or even most, Polish prisons.

The Court has to set against the evidence proffered by the respondent, which contains the weaknesses just alluded to, the additional information recently supplied by the issuing state, and by the issuing judicial authority, respectively. Although this material is undoubtedly hearsay, there is no doubt as to its provenance. Moreover, while the information providers are interested parties, and this has also to be taken into account, the Court has no reason to doubt the accuracy or reliability of the information supplied. The Court has been impressed by the level of detail supplied, by the references to the data sources unpinning the claims made, by the fact that the relevant data is in the public domain and may be accessed via the internet, and by the up to date nature of the information in question, and in the circumstances has no hesitation in attaching considerable weight to it. This Court has to be forward looking in considering whether there is substance to the objection raised. In the Court’s view the up to date information that has been provided serves to dispel any concerns raised by the affidavit of the respondent that he would, if returned to Poland, be exposed to a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights and Fundamental Freedoms.

For these reasons the Court is not disposed to uphold the objection raised by the respondent, and it is disposed in the circumstances to order that the respondent should be surrendered to the Polish authorities in accordance with s. 16 of the 2003 Act as amended.