Neutral Citation Number: [2012] IEHC 434

THE HIGH COURT

Record Nos.: 2010/22 EXT

2010/23 EXT

2010/180 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

Between

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Applicant

-and-

ARTUR MACHACZKA

Respondent

JUDGMENT of Mr. Justice Edwards delivered on 12th day of October, 2012.

Introduction

In this case the respondent is the subject of three separate European arrest warrants on foot of which the Republic of Poland seeks his surrender either for prosecution, or to serve a sentence or sentences, as the case may be, in respect of the various offences that are the subject of the three warrants in question. It is necessary at the outset to identify each warrant properly and to give it a single and convenient label for the purposes of this judgment. It is proposed to simply label the warrants as warrant nos. 1 – 3, respectively.

Warrant No. 1

This is the subject of the proceedings bearing record no. 2010 no. 22 EXT and is dated the 30th July, 2007. It was endorsed for execution on the 27th January, 2010. It has two Polish domestic file reference numbers *viz*, A – IIK160/04 and B – II K 153/04 and the Polish European arrest warrant file reference number is III Kop 173/07.

Warrant No. 2

This is the subject of the proceedings bearing record no. 2010 no. 23 EXT and is dated the 28th January, 2008. It was also endorsed for execution on the 27th January, 2010. The Polish domestic file reference number is II K 854/01 and the Polish European arrest warrant file reference number is III Kop 319/07.

Warrant No. 3

This is the subject of the proceedings bearing record no. 2010 no. 180 EXT and is dated the 1st October, 2007. It was endorsed for execution on the 5th May, 2010. The Polish domestic file reference number is II K 371/04 and the Polish European arrest warrant file reference number is III Kop 228/07.

Uncontroversial issues

Before considering each warrant individually, and the specific objections to surrender raised regarding each one respectively, it is appropriate to indicate that certain matters are uncontroversial.

Firstly, no issues have been raised concerning arrest or identity in any of the three cases. The Court has an affidavit as to arrest and identity covering each of the warrants in question from the arresting member of An Garda Síochána, Garda John Butler. I am satisfied that each warrant was duly executed within the jurisdiction on the 12th June, 2011, and that in each instance the person who is before the Court is one and the same person as the Artur Machaczka named in the relevant European arrest warrant.

Following the execution of the warrant in each instance, the respondent was brought before the High Court as required by s.13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). This took place on the 13th June, 2011, and oral evidence was received as to arrest and identity which was not challenged. In each case, the Court, being satisfied at the s. 13 hearing as to execution of the warrant, and also as to identity, fixed a date for the purposes of s. 16 of the Act of 2003, such date being a date falling not more than 21 days from the date of arrest. Thereafter each case was adjourned from time to time until ultimately a date was fixed for a substantive surrender hearing.

The Court is satisfied that each of the European arrest warrants is in the correct form.

It is further uncontroversial, and the Court is satisfied, that an undertaking for the purposes of s. 45 of the Act of 2003 is not required in the case of warrants no. 1 and no. 2, respectively.

The Court is further satisfied that in each case, respectively, it is not required to refuse to surrender the respondent, under ss. 21A, 22, 23, or 24 (inserted by ss. 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003.

Finally, the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No. 3) Order 2004 (S.I. No. 206 of 2004) (hereinafter referred to as "the Designation Order of 2004"), and duly notes that by a combination of s. 3(1) of the 2003 Act, and article 2 of, and the Schedule to, the Designation Order of 2004, "Poland" (or more correctly the Republic of Poland) is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Council Framework Decision 2002/584/JHA of the 13th June, 2002, on the European arrest warrant and the surrender procedures

between Member States, O.J. L190/1 18.7.2002.

Correspondence and Minimum Gravity

Warrant No. 1

The respondent is wanted in this case for prosecution in respect of two offences which are particularised at paras. "A" and "B," respectively, of part E. 2 of the warrant.

A point of objection was raised by counsel for the respondent that the respondent's name does not appear anywhere within the particulars pleaded in part E.2 and that therefore there was a failure to comply with s. 11(1A)(f) of the Act of 2003. In support of this the Court was referred to the decision of Peart J. in *Minister for Justice, Equality and Law Reform v. Kasprowicz* [2010] IEHC 207 (Unreported, High Court, Peart J., 13th May, 2010).

The manner of pleading is to allege that between certain dates "acting together and in collaboration with [four named persons, none of whom is the respondent], …, …, they caused the Central Leasing Society … in Warsaw to unfavourably dispose of property of considerable value by concluding a bogus leasing contract …". This is completely different to the manner of pleading in *Minister for Justice, Equality and Law Reform v. Kasprowicz* [2010] IEHC 207 (Unreported, High Court, Peart J., 13th May, 2010), that Peart J. found objectionable. In that case the manner of pleading was that on a particular date "[a named person other than the respondent], along with [another named person other than the respondent] … acting together and in collaboration, they possessed without permission, a 'Valtro' gas pistol, model 8000 F.S. 9mm, calibre P.A. number 05886, Italian made, without having the required licence for that gun.."

In the present case, the Court, having considered the totality of the information provided, and having viewed the warrant as a whole, considers that it is to be inferred from the particulars pleaded that what is alleged is that it was the respondent "acting together and in collaboration with [the four persons named]", ….., ….., that "caused" etc, etc. That type of inference was not possible in *Minister for Justice, Equality and Law Reform v. Kasprowicz* [2010] IEHC 207 (Unreported, High Court, Peart J., 13th May, 2010) because the manner of pleading suggested that it was only the two persons actually named that, "acting together and in collaboration," had "possessed" the gas pistol.

In the circumstances the Court is satisfied that *Minister for Justice, Equality and Law Reform v. Kasprowicz* [2010] IEHC 207 (Unreported, High Court, Peart J., 13th May, 2010) is distinguishable on its facts from the present case, and that no failure to comply with s. 11(1A)(f) of the Act of 2003 has been made out.

At part E.I of this warrant, the boxes relating to "fraud" and "falsification of official documents and circulation of falsified documents", respectively, are ticked. Moreover, the words "not applicable" appear in part E. II of the warrant. It is clearly to be inferred from the particulars set out in part E.2 that the ticking of the box in relation to "fraud" is intended to cover the offence at E.2 "A" and that the ticking of the box in relation to "falsification of official documents and circulation of falsified documents" is intended to cover the offence at E.2 "B". Moreover, no issue was raised by the respondent suggesting the contrary. Accordingly, the issuing state has sought to invoke para. 2 of article 2 of the Framework Decision in respect of each offence.

Part C of the warrant makes clear that the offence particularised at E.2 "A" carries a potential sentence of up to ten years' deprivation of freedom, and that the offence particularised at E.2 "B" carries a potential sentence of up to eight years' deprivation of freedom. As both offences are punishable by imprisonment for a maximum period of not less than three years, the minimum gravity requirements of s. 38(1) (b) of the Act of 2003 are met in the case of both offences. Accordingly, para. 2 of article 2 of the Framework Decision has been validly invoked in respect of each offence and correspondence does not require to be demonstrated in the circumstances.

Warrant No. 2

The respondent is wanted in this case for prosecution in respect of five offences which are particularised at paras. "I" to "V" respectively of part E.2 of the warrant. At part E.I of the warrant, the box relating to "fraud" is ticked. Moreover, it appears from part E.II of the warrant that the ticked box procedure is not being relied upon in respect of the offences set out at part E.2.I and E.2.II, respectively. Accordingly, the issuing state has sought to invoke para. 2 of article 2 of the Framework Decision in respect of the offences described at parts E.2.III, E.2.IV and E.2.V, respectively.

Part C of the warrant makes clear that each of the offences described at E.2.III, E.2.IV and E.2.V, all of which are offences contrary to article 286 § 1 of the Polish Penal Code, carries a potential sentence of up to eight years' deprivation of freedom. As all three offences are punishable by imprisonment for a maximum period of not less than three years, the minimum gravity requirements of s. 38(1) (b) of the Act of 2003 are met in each instance. Accordingly, para. 2 of article 2 of the Framework Decision has been validly invoked in respect of the offences described at E.2.III, E.2.IV and E.2.V and, in so far as those offences are concerned, correspondence does not require to be demonstrated in the circumstances.

However, both correspondence and minimum gravity requirements must be demonstrated with respect to the offences described at E.2.I and E.2.II, respectively.

The offence described at E.2.I is as follows:

> "In July 2000 in Oborniki, acting together and in collaboration with Mr. Zbigniew Wolochowicz, he supplied Mr Zbigniew Welnica with a forged employment and income certificate stamped with a seal of PPHU "Zbyszko" company and talked him into submitting it to the PKO BP (Polish National Savings Bank"

The offence described at E.2.II is as follows:

> "In September 2000 in Szamotu³y, acting together and in collaboration with Mr. Zbigniew Wolochowicz, he supplied Mr Zbigniew Welnica with a forged employment and income certificate stamped with a seal of PPHU "Zbyszko" company and talked him into submitting it to the Bank Gospodarki Żywnościowej while opening a clearing and savings bank account."

The Court has also been provided with additional information from the Regional Court in Poznań, 3rd Criminal Division, in a letter dated the 2nd February, 2012, which states:

> "With reference to the offences designated as I and II in the European Arrest Warrant, investigations into these offences have established that Artur Machaczka was aware that the certificates that were presented in the financial institutions had been forged. These certificates attested as to Zbigniew Welnics salary and employment in the PPHU "Zbyszko" company, although in actuality he was never employed in that company. With the instigation of Artur Machaczka (and his accomplice), Zbigniew Welnic was then to present these certificates in banks with intent to defraud money. As consequence of the offence designated as I, an account was opened in the PKO BP bank situated in the town of Oborniki, although in this case no money was eventually defrauded. As consequence of the offence designated as II, an account was opened in the Bank Gospodarki Zywnosciowej bank in the town of Szamotuly, and a loas was taken out in the sum of PLN3000 (i.e. the act designated as V – offence designated as V is therefore in a way tied to the offence designated as II)"

The Court has been invited by counsel for the applicant to find correspondence in both instances with the offence of using a false instrument contrary to s.26 (1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 (hereinafter "the Act of 2001"); alternatively with the offence of having custody and control of a false instrument contrary to s.29(1) or (2) of the Act of 2001.

Section 26(1) of the Act of 2001 provides:

> "A person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence."

Section 29 of the Act of 2001 provides, inter alia:

> "(1) A person who has in his or her custody or under his or her control an instrument which is, and which he or she knows or believes to be, a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.
>
> (2) A person who, without lawful authority or excuse, has an instrument which is, and which he or she knows or believes to be, a false instrument in his or her custody or under his or her control is guilty of an offence."

Counsel for the respondent has submitted to the Court that the particulars supplied do not suggest that the respondent had custody of the forged document, or that he used it with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person. Counsel stated that he was not suggesting that the person supplying the document did not know it was forged.

The Court has considered the arguments put forward. Firstly, the Court is satisfied that the allegation that the respondent "supplied" the forged document is sufficient to establish both custody and user. Moreover, the Court is satisfied that it is clearly to be inferred from the totality of the information provided, and in particular the suggestion that the supplier "talked him" (the recipient) "into submitting it" (to a named bank in each case) and, specifically in the second case, "while opening a clearing and savings account", that he intended that another person would be induced to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person. Why "talk somebody into" using a forged document unless it was intended that that person would use it for some nefarious purpose? The Court is satisfied to find correspondence with an offence under s.26 of the Act of 2001 in each instance. However, even if the suggested inference were not capable of being drawn so as to allow correspondence to be found with an offence under s. 26 of the Act of 2001, correspondence with the offence under s. 29(2) is also made out in the Court's view.

In so far as minimum gravity is concerned, part C of the warrant makes clear that the offences described at E.2.I and E.2.II, both of which are offences contrary to article 270 § 1 of the Polish Penal Code, each carry a potential sentence of up to five years' deprivation of freedom. As both offences are punishable under the law of the issuing state by imprisonment or detention for a maximum period of not less than twelve months, the minimum gravity requirements of s. 38(1) (a) (i) of the Act of 2003 are met in the case of those offences.

Warrant No. 3

In this case the respondent is wanted to serve a sentence of one year's deprivation of freedom imposed upon him by the District Court in Oborniki on the 3rd February, 2005, which became legally binding on the 11th March, 2005, in respect of what is described at part E as "a series of twelve criminal acts", legally characterised as "causing persons to disadvantageously dispose of their property contrary to article 286 § 1 of the Polish Penal Code in conjunction with article 91§1 of the Polish Penal Code".

It is a little unclear as to whether the warrant relates to convictions on twelve separate counts in respect of which a single composite or aggregate sentence was imposed, or a single conviction and sentence for a multi-act offence and in respect of which twelve separate incidents collectively constituting the said offence are particularised. The reference to article 91§1 suggests the latter because it appears to provide for an aggravated form of the basic offence (*i.e.* the offence under article 286 § 1 of the Polish Penal Code) where "a perpetrator commits in a similar way two or more criminal acts one after another". In the Court's view nothing much turns on it in the specific context of this case, and counsel for the respondent has not sought to raise any suggestion that the uncertainty, such as it is, could cause difficulties for his client in invoking the rule of specialty in the issuing state should he need to do so. It is, of course, to be presumed by this Court that the issuing state will respect the rule of specialty in the event of the respondent being surrendered.

In so far as the specific instances alleged are concerned, they are all very similar. In summary, it is alleged that the respondent placed a newspaper advertisement purporting to be an importer of cars and automobile parts. When a person who was interested contacted him by telephone to order a car or parts he would accept the order conditional upon receiving a pre-payment from the customer. However, he had no intention of performing any such contract. In this way, and operating under this false pretence, he is alleged to have fraudulently obtained pre-payments from customers in each of the twelve specific instances set out in the warrant.

At part E.I of the warrant, the box relating to "swindling" is ticked. Moreover, part E.II of the warrant is stated to be "not applicable". Accordingly, it is clear that the issuing state has sought to invoke para. 2 of article 2 of the Framework Decision in respect of all matters described in part E of the warrant, and from the point of view of considering correspondence it is immaterial how they were charged in Poland.

The warrant makes it clear that an offence contrary to article 286 § 1 of the Polish Penal Code, carries a potential sentence of up to eight years' deprivation of freedom, and that where article 91§1 of the Polish Penal Code applies, the statutory maximum penalty can be "increased by half". As the potential penalty that might have been imposed comfortably exceeds three years' imprisonment, the minimum gravity requirement of s. 38(1) (b) of the Act of 2003 is met in this case. Accordingly, para. 2 of article 2 of the Framework Decision has been validly invoked and correspondence does not require to be demonstrated in the circumstances.

Other Specific Objections to Surrender
The respondent raises a number of common specific points of objection in respect of all three warrants, and one additional specific point of objection in respect of warrant no. 3 only. The specific objections may be grouped as relating to *mental health* and *flight* respectively, and dealt with on that basis.

The Objections based on the Respondent's Mental Health
The following common objections are pleaded in respect of all three warrants:

> "1. The surrender of the respondent to the issuing state would constitute a contravention of Article 40. 3 of the Constitution and/or would be incompatible with the State's obligations under Articles 2 and/or 3 ECHR and therefore is prohibited by section 37 (1) of the European Arrest Warrant Act 2003. This is in circumstances where the respondent suffers from grave psychiatric illness and where the surrender itself would be highly likely to cause a major deterioration in his mental health giving rise to a serious threat to his life and/or bodily integrity, as would any ongoing surrender proceedings.
>
> 2. The surrender of the respondent to the issuing state would constitute a contravention of Article 40.3 of the Constitution and/or Articles 2 and/or 3 ECHR and therefore is prohibited by section 37 (1) of the European Arrest Warrant Act 2003. This is in circumstances where the respondent receives intensive and specialist treatment and monitoring for his psychiatric illness in the State and where necessary specialist treatment and monitoring services would not be available to him in the issuing state, particularly were he to be remanded in custody awaiting trial in the issuing state, which is highly likely. The absence of such services would give rise to a serious threat to his life and/or bodily integrity.
>
> 3. The surrender of the respondent to the issuing state would constitute a disproportionate interference with the respondent's right to respect for his private and family life as provided for by Article 8 ECHR and therefore is prohibited by section 37 (1) of the European Arrest Warrant Act 2003. The respondent was previously judged unfit to be tried for the offence as referred to in the European Arrest Warrant herein in the issuing state and is currently unfit to be tried for same. The respondent has been in the State since 2004 and has lived openly with his partner and daughters. To surrender him in circumstances where he is unfit to be tried on any criminal charges would constitute an unjustified and disproportionate interference with his private and family life in the State."

In addition the following further specific point of objection has been pleaded in relation to warrant no. 3 only:

> "The surrender of the respondent to the issuing state would constitute a contravention of Article 38.1 and/or 40.4.1 of the Constitution and/or would be incompatible with the State's obligations under Article 6 ECHR and therefore is prohibited by section 37 (1) of the European Arrest Warrant Act 2003. This is in circumstances where the respondent was suffering from grave psychiatric illness and was medicated in relation to same at that time of the events detailed at section D subparagraph 1 of the European Arrest Warrant herein. No enquiry as to the respondent's fitness to plead guilty and agreed to sanction was carried out by the prosecuting authorities in the issuing state at the relevant time. Furthermore, the respondent did not have legal assistance at the said time."

Evidence on behalf of the Respondent on the Mental Health Issue

Affidavit Evidence

The respondent relies, *inter alia*, upon two affidavits of Ms. Karolina Malecki, who describes herself as his life partner, sworn on the 14th October, 2011, and on the 5th April, 2012, respectively, and the documents therein exhibited. He also relies upon an affidavit of his solicitor, Edward McGarr, sworn on the 10th February, 2012, and the documents therein exhibited.

Oral evidence

At a relatively early stage of these proceedings, this Court formed the view that it would be necessary in the interests of justice to hear oral evidence of certain matters described in the affidavit of Karolina Malecki sworn on the 14th October, 2011, from Dr. Michael Doran, consultant psychiatrist, whose report dated the 1st October, 2011, was exhibited with the said affidavit. Accordingly, on the 30th January, 2012, the Court of its own motion, and in exercise of the express statutory powers then enjoyed under s. 20(4) of the Act of 2003 (which subsection has since been repealed by s.13 of the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012), directed that oral evidence of those matters be given by Dr. Doran, and the case was adjourned until the 13th February, 2012, for that purpose. Dr. Doran attended on that date and gave oral evidence on behalf of the respondent, and also submitted to cross-examination by counsel for the applicant. The Court will review Dr. Doran's testimony later in this judgment.

Affidavit of Karolina Malecki sworn on 14th October, 2011

In this affidavit Ms. Malecka deposes that she has been in a relationship with the respondent for fifteen years and that they have two children together. Since around 2002, the respondent has been suffering from a serious psychiatric illness which has had a major impact on their lives. The respondent has made several serious attempts at taking his own life of which she is personally aware. Ms. Malecka exhibits a report of Dr. Doran, consultant psychiatrist, prepared on the 1st October, 2011, marked "KM 1", and some further correspondence, marked "KM 2", from Dr. Doran to various medical services, including the Lakeview Unit (a psychiatric in-patient unit) at Naas General Hospital, which does not really add anything to the information already at the Court's disposal. The Court will refer to Dr. Doran's report "KM1" separately later in this judgment.

Ms. Malecka deposes that she and the respondent arrived in Ireland together on the 25th October, 2004. She states that it was she who made the decision to leave Poland and settle in Ireland, and that this was due to her inability to find gainful employment in Poland. She states that the respondent was at that time in receipt of disability benefit, which was insufficient for them to survive on. She puts forward that the respondent's decision and her decision to come to Ireland had nothing to do with the Polish proceedings in relation to which the respondent is now sought. She states that medical reports had been submitted to the Polish courts showing that the respondent was understood to be tried and that both she, and she believes, the respondent were under the impression that

these cases had concluded. She asserts that the respondent was not attempting to evade justice by leaving Poland.

Ms. Malecka goes on in her affidavit to describe how she and the respondent took up employment in a toy packing facility on the 4th November, 2004, and continued working there until the 28th January, 2005. She states that in January, 2005 their daughter Klaudia received a place in a school in Newbridge. The respondent is a car mechanic by trade and wished to find work in this profession. He found a job through a friend in a garage in Dublin on the 10th February, 2005. However, he was let go after a few months as there was not enough work in the garage. He found another job as a mechanic in "Hutton & Meade Nissan dealers" on the 10th November, 2005. Ms. Malecka states that she would bring him to work and then collect him as the medication he was on did not allow him to drive mechanically propelled vehicles. She herself started a cleaning business on the 24th November, 2005. On the 22nd May, 2007, she gave birth to their second daughter.

Ms. Malecka then describes how the respondent changed jobs on the 5th June, 2006, to work with "Motor Services Ltd." in Dublin, where he worked until he was made redundant on the 28th September, 2007. He found another job with "Ray O'Brien Motors Ltd." in October, 2007 but was let go the following month due to a downturn in the business. She states that as the recession slowly settled in, people no longer availed of her services as a cleaner and she was forced to close her business. She started another business on the 10th October, 2007, by opening a sun bed salon in Newbridge. Six months later she opened another salon in Naas. She states that both salons are still in business. She is currently employing four people.

At para. 9 of her affidavit Ms. Malecka states that from 2004 to 2008 she and the respondent travelled to Poland every three to four months so that the respondent's treatment could continue. His psychiatrist in Poland, Dr. Pawel Jerzycki, was satisfied at that time that his condition was stable and that he could remain in full time employment, provided he continued taking his medications.

She states at para. 10 that after November, 2007 the respondent struggled to find employment and his medical condition began to deteriorate rapidly. She found some work for him in her company but as he had no prior experience in this kind of business he would mostly do cleaning and maintenance in the salons. In 2008 they began to travel to Poland more often. Dr. Jerzycki increased the respondent's dosage of medication with minor, yet insufficient, effects. In 2009 the number of visits to Poland increased yet again. Although her company was doing well enough to cover their daily expenses, travel to Poland began to take its toll on their lives due to the tiresome nature of the visits and the expenses involved.

Ms. Malecka goes on to depose that in June, 2010 she set about transferring the respondent's treatment from Poland to Ireland and took him to see a doctor here, who ultimately referred him to Naas General Hospital. She obtained a report from Dr. Jerzycki to indicate the respondent's background and medication for the Irish doctors. She exhibits that report together with a translation, marked "KM 3".

At para. 12 of her affidavit Ms. Malecka states that the respondent was admitted as an inpatient at the Lakeview psychiatric unit of Naas General Hospital for a period in September, 2010. Following the initiation of the present proceedings he was again admitted as an inpatient on the 30th June, 2011. She states that he is currently attending the Lakeview unit as a day patient three times per week: on Mondays, Wednesdays and Fridays. She asserts that due to his current psychiatric state the respondent is not in a position to swear an affidavit and that is why she has sworn her affidavit in support of his objection to his surrender. She states that not only would his surrender be traumatic for the children and her, she believes it is highly likely that he would attempt to take his own life if separated from them. She states at para. 13 that the respondent has a thirteen year old son in Poland who he was separated from and with whom he has no contact. Ms. Malecka contends that this has had a terrible effect on his mental health and she believes that separation from the children in Ireland and from her would be even more devastating for him. Although his mother lives in Poland, it is claimed that he has not spoken to her in thirteen years (Ms. Malecka later stated that this was an error and that the respondent had in fact not spoken to his mother in nine or ten years) and that he would not have any proper support in Poland if he were sent back there.

Ms. Malecka refers to Dr. Doran's report, and to what she characterises as the "highly specialised and intensive medical treatment plan" that the respondent is on at present. She expresses concern that he would not be able to receive the same treatment in Poland, particularly if he was imprisoned there. In support of this she exhibits the United States Department of State, *Country Reports on Human Rights Practices: Poland 2010*, which she has marked "KM 4", wherein it is stated that "Prison and Detention Centre conditions generally met international standards; however, prison medical staff vacancies and access to specialised treatment continued to be a problem".

Ms. Malecka states that for the purposes of the present proceedings she has obtained a further medical report from Dr. Jerzycki, which confirms that he has seen the respondent on 53 separate occasions and that in 2002 and 2003 he submitted several medical certificates to the Polish courts in respect of the respondent, all of which stated that the respondent was unfit to stand trial. She exhibits this report together with a translation, marked "KM 5".

At paras. 16 and 17 of her affidavit, Ms. Malecka exhibits a hospital discharge summary dated the 16th December, 2002, marked "KM 6", and a copy of a medico-legal report of Dr. Wlodzimierz Cierpka, consultant psychiatrist, which is marked as received by Szamotuly District Court on the 15th July, 2003, together with translations, marked "KM 7". This report certified to the court that the respondent was "currently unfit to stand trial, be it as the accused, a witness or in any other capacity".

Ms. Malecka concludes her affidavit by stating that "in July 2011 we instructed a lawyer in Poland, Mr Prezemyslaw Gomolec, to apply to the courts in Poland to cancel the warrants seeking the respondent's arrest. Mr Gomolec informs me that he was initially unsuccessful in doing so but that further proceedings are ongoing in this regard."

It is appropriate at this point to refer to the various exhibits referred to in Ms. Malecki's affidavit of the 14th October, 2011. The Court has considered and taken account of the contents of all of them. However, it is only necessary for the purposes of this judgment to specifically rehearse the contents of exhibits KM1, KM3, KM5 and KM7.

The report of Dr. Doran – exhibit KM1

The pertinent part of Dr. Doran's report states:

> "Mr Machaczka has been attending the Kildare Psychiatric Service since 30/08/2010. He was referred by his GP for assessment of low mood and psychotic symptoms.
>
> Mr Machaczka is a 33 year old Polish National who has been residing in Ireland since 2005.

Following review of medical records from Poland, it appears that Mr Machaczka had been attending the Polish Psychiatric Services since 2002 and to up to May 2010. He received a diagnosis of severe depressive disorder with psychotic features. It would appear from his Polish records that his symptoms were treatment resistant and Mr Machaczka never really reached full remission throughout his treatment in Poland.

During this period he attended the Polish services on 53 separate occasions and was admitted on several occasions to inpatient Hospital care. Of particular note, Mr Machaczka had two very serious attempts at suicide in his past in Poland. These consisted of one attempt at self hanging and one attempt at poisoning himself with gas.

On initial assessment with my service in August 2010, Mr Machaczka presented as a very unwell gentleman. He had pervasive low mood symptoms with disturbed sleep, poor appetite, concentration and energy levels. He complained of auditory hallucinations and paranoid beliefs. He was on a number of different psychiatric medications which had been prescribed in Poland.

I made an initial diagnosis of a very severe depressive episode with psychotic features. I increased his anti psychotic medications and admitted Mr Machaczka to Tús Nua Day Hospital for a period of assessment. During this assessment period, I then admitted Mr Machaczka to inpatient psychiatric unit in Lakeview, Naas General Hospital. This was due to the fact that Mr Machaczka's symptoms worsened.

Upon assessment in hospital I revised Mr Machaczka's diagnosis to be Schizoaffective Disorder which was of the treatment resistant type.

Following a period of in-patient treatment, I discharged Mr Machaczka on 20/09/11.

He continued to have residual symptoms of psychosis following discharge. I therefore referred Mr Machaczka for Cognitive Behavioural Therapy for psychosis run by the Department of Psychology in Kildare. Mr Machaczka engaged in psychological treatment fully and completed it in April 2011 with limited effect. He continued to attend my day hospital for treatment and continued to suffer regular relapse of depressive and psychotic symptoms.

In June 2011, Mr Machaczka suffered a major relapse of symptoms after having moved his Irish address. He presented on 21/06/11 with auditory hallucinations instructing him to end his life. He also described paranoid delusional beliefs.

I admitted Mr Machaczka to Lakeview Unit on 30/06/11 for initiation of Clozapine treatment.

Clozapine medication is a very expensive medication for treatment of resistant Schizophrenia and Schizo-affective disorder. It is very toxic medication and is required to be monitored on a weekly basis by blood sampling which is referred to a monitoring service based in Dublin and UK. (Clozapine Patient Monitoring Service, C.P.M.S.) In circumstances when blood monitoring has not taken place, many deaths of patients have resulted. As a consequence of this, the drug can only be commenced when all other drug strategies have failed.

Mr Machaczka was commenced on Clozapine therapy in Lakeview Unit in July 2011 and has been registered with the Clozapine monitoring Service in Dublin and the UK.

His symptoms have responded to the medication with limited effect and other anti-psychotic medications have been discontinued.

He was discharged from hospital on 22/07/11 and was admitted to my day hospital. He continues to have weekly blood tests which are monitored by the C.P.M.S. and reviewed by my team. This regular blood monitoring will be required to continue as long as Mr Machaczka is maintained on this medication.

At last review with myself on 30/06/11 Mr Machaczka presented with anxious and depressed mood. His psychotic symptoms had resolved somewhat, but he did continue to experience paranoid thoughts. His anti-depressant therapy was increased on this day.

Overall, I am of the opinion that it is necessary that Mr Machaczka continues on Clozapine treatment and he be closely monitored by a specialist blood sampling service and a specialised psychiatric service.

His current medication regimen is:

1. Sertraline 200mgs daily

2. Clozapine 250mgs nocte

Prognosis

Due to the nature of Mr Machaczka['s] chronic psychotic illness the prognosis for full remission of symptoms is unclear.

Mr Machaczka remains currently unfit to stand trial for charges presently. This would be consistent with the specialist psychiatric opinion from the service in Poland. Furthermore I feel that there are two other important factors which I would advise be considered by the court.

1. Mr Machaczka was separated from his wife 13 years ago in Poland. He has a 13-year-old son who he has not had contact with for this period.

This separation from contact with his son has been a significant factor in maintaining Mr Machaczka's depressive symptoms. It directly led to the two serious attempts at suicide in Poland and it continues to be a source of great distress for him. If Mr Machaczka was to be extradited to Poland to face charges, I feel that the distress of separation from his current family in Ireland would precipitate a major deterioration in his mental health. It is my opinion, that there is a strong likelihood that his mood will deteriorate and this would place him at high risk for suicide in the future. Mr

Machaczka's mental health remains highly vulnerable and one of the main positive factors in his recovery is the support of his partner and children in Ireland.

2. Clozapine treatment for Schizophrenia is a very expensive treatment requiring regular blood monitoring by specialist service and specialist supervision by a psychiatric service. In my opinion the nature of Mr Machaczka's chronic persistent symptoms indicates that he should continue on Clozapine treatment for a period of up to 1 year to ascertain whether treatment has been successful. With this therapy, slow resolution of symptoms can take as long as this. I am unsure as to whether this medication is available in Poland and I would be concerned about specialist monitoring services if he were in custody awaiting trial in Poland.

Dr Michael Doran

Consultant Psychiatrist."

The 1st Report of Dr. Jerzycki – exhibit "KM3"

The translated report of Dr. Jerzycki, dated the 24th June, 2010, states:

"Re: patient Artur Machaczka, son of Marian and Teresa, D.O.B. 14.04.1978. Social services number… [number provided]

Patient has been treated at this Clinic since 10.10.2002.

Patient sought medical assistance complaining of persistent suicidal thoughts. (History: several suicide attempts, one by hanging.) On first examination: full orientation, contact with patient somewhat difficult due to psychomotor impairment and passive negativism. His mood is very low, drive*is reduced, affect is unremarkable. He expresses delusions of self-accusation of which he is partially critical**, he complains of dereistic feelings and phobias. HRSD: 29 points.

Diagnosis:F32.3 - Severe depressive episode with psychotic symptoms.

Patient was treated with Sulpiryd (600 mg/d) and Clomipramina (75 mg/d). Due to no signs of improvement patient was referred to hospital. (21.11 - 16.12.2002, Perazin 600 mg/d, Mianserin 90 mg/d, diagnosis:F32.3). There was significant improvement on discharge.

Patient has been seen regularly every 1, 2 or sometimes 3 months. During the course of treatment he has had frequent periods of exacerbation and of some partial remission. (Apart from the recurrence of mood and drive*disorders he also began to show delusions of self-accusation and persecution). Patient has not developed new psychotic symptoms for nearly two years, however, he is not fully critical**of the previously expressed delusional thought contents. Symptoms present are of defective nature: withdrawal, lowered mood, reduced drive*and apathy.

Current medication: Sulpiryd 800 mg/d, Sertralina 50 mg/d, Olanzapina 10 mg/d

Previously also on: Bupropion, Wenlafaxine, Buspiron, Minseryna, Fluoxetyna, Risperidon.

Upon last consultation: 11.05.2010 - partial remission: no psychotic symptoms, moved slightly lowered, drive* reduced, patient withdrawn and apathetic.

Pawel Jerzycki

Psychiatrist"

Translator's note: * or : 'vigour', 'motivation'

** or: 'discerning', 'aware'

The 2nd Report of Dr. Jerzycki – exhibit "KM5"

The translated report of Dr. Jerzycki, dated the 19th July, 2011, states:

"Re: Artur Machaczka, DOB 14.04.1978, currently 31 Abbey Manor, Newbridge Co Kildare.

Mr Artur Machaczka was my patient from 10.10.2002 to 11.05.2010. Throughout that time he attended my service on 53 separate occasions, where 18 attendances took place in the years 2002 - 2004 and 35 visits fell within the remaining dates.

Mr Machaczka originally presented with symptoms of severe depression and soon also developed persecutory delusions and delusions of guilt. I diagnosed him with severe depressive episode with psychotic symptoms (ICD-10: F32.3).

As his condition resisted all attempts at ambulatory treatment I ordered a period of admission (Mr Machaczka was hospitalised from 21.11 to 16.12.2002, diagnosis F32.3). This gave only a very slight and short lived improvement, however, as it resulted in a significant drop of the patient's suicidal tendencies, it allowed me to continue with ambulatory treatment upon discharge.

In the course of further treatment we never reached a full remission and the patient remained delusional practically all the time and on the rare occasions of partial lucidity he showed symptoms of particularly dark moods and seemed to be dissimulating psychotic symptoms.

In the course of further treatment we never reached a full remission and the patient remained delusional practically all the time and on the rare occasions of partial lucidity he showed symptoms of particularly dark moods and seemed to be dissimulating psychotic symptoms.

I issued several medical certificates (dated 20.12.2002, 06.02.2003, 03.04.2003 and 15.05.2003, respectively) which were submitted before and accepted by the relevant Court. All of the above certificates stated that Mr Machaczka was unfit to stand trial.

Pawel Jerzycki, MD

Psychiatrist"

The report of Dr. Cierpka – exhibit "KM7"

The Court does not consider it necessary to quote the translated report of Dr. Cierpka (undated but stamped by Szamotuly District Court as having been received on the 15th July, 2003), in its entirety. However, the following are relevant extracts from this document:

It is headed:

"Medico-legal psychiatric report compiled by Dr. Wlodzimierz Cierpka attached to 'Zdrowie Psychiczne' Psychiatric Outpatients Clinic in Poznan, ordered by Szamotuly District Court, Criminal Court No. II in Szamotuly, re: ARTUR MACHACZKA, son of Marian and Teresa, DOB: 14.04.1978 in Oborniki, resident in Oborniki, ul. Droga Lesna 84, the Accused. The court wishes to know about the current medical condition of the Accused AND particularly whether the said condition does or does not render him unfit to stand trial."

Then on p.4 of 4 it is stated:

"Mental condition:

Clear consciousness. Normal autopsychic and allopsychic orientation. Negative mood with a tendency towards dysphoria. Affective responses appear adjusted. Psychomotor reactions in normal, calm circumstances reveal slowness. Aggravated reactions when aroused. On preliminary examination the patient appears of normal intellectual capability. Compromised ability to experience deep emotions and severely compromised instinctual drives. During assessment the patient displays demonstrative tendencies and puerile behaviour.

Conclusions:

Having familiarised myself with the Book of Evidence and upon completion of the psychiatric examination ordered by the Court I conclude that Mr ARTUR MACHACZKA displays no symptoms of mental retardation. I did, however, detect severe depressive puerile tendencies secondary to the traumatic circumstances of the currently on-going court proceedings, negative mood, dysphoric tendencies, puerile behaviour and notable regression.

Medical opinion:

1. Having familiarised myself with the Book of Evidence and upon completion of the psychiatric examination ordered by the Court I conclude that Mr ARTUR MACHACZKA has no intellectual disability. I detected severe depressive puerile tendencies.

2. Due to the severity of Mr ARTUR MACHACZKA'S condition I hereby certify that he is currently unfit to stand trial, be it as the Accused, a Witness or in any other capacity.

Wlodzimierz Cierpka, MD

Consultant Psychiatrist"

The Oral Evidence of Dr. Doran

Dr. Doran gave evidence of the respondent's psychiatric history and his engagement with the psychiatric services in Poland in so far as he was aware of it. He then stated that he remembered Mr. Machaczka's first presentation to him. He was quite unwell and was paranoid. He was complaining of a lot of different hallucinations. His mood was severely depressed. The diagnosis that Dr. Doran had received from Poland was of a major or severe depressive disorder with psychotic elements. He offered Mr. Machaczka admission into hospital straightaway, which he stated would be quite unusual, but Mr. Machaczka declined, wishing to remain, and to continue treatment, at home. In the circumstances Dr. Doran admitted him into Tús Nua Day Hospital for observation and review. Upon Mr. Machaczka's admission Dr. Doran reviewed his diagnosis and changed it from one of a depressive disorder to one of a schizoaffective disorder. In addition to changing Mr. Machaczka's diagnosis, Dr. Doran also changed his medication.

Dr. Doran explained that schizoaffective disorder is very much related to schizophrenia except that you have both psychotic elements and mood elements at the same time. In schizophrenia, you do not have mood elements in the presentation but with schizoaffective disorder, you have concurrent mood and psychotic elements.

Dr. Doran testified that the main symptoms of Mr. Machaczka's presentation which makes him unwell are severe paranoid delusions. He is very fearful for his own safety. He thinks that people are following or out to kill him. He also hears quite derogatory command hallucinations which instruct him to kill himself. He becomes very distressed. He is not able to manage, even in the most basic environments including home which is a good support to him. When he is unwell in this way he requires hospital admission, which is why Dr. Doran offered it to him upon first meeting him.

The patient's history included over 40 admissions into the Polish psychiatric services over the years of treatment. These admissions were when Mr. Machaczka had two very, very serious attempts at suicide. One was by trying to gas himself and one was by trying to hang himself. These followed his separation from and loss of contact with his thirteen or fourteen year old son in Poland, something which, Dr. Doran believes, is still a very maintaining factor in Mr. Machaczka's illness and something which distresses him greatly.

Dr. Doran stated that when Mr. Machaczka came to him he was still suffering with these symptoms. He was admitted into hospital and

over the next six months Dr. Doran changed his medication to Clozapine, which is licensed in Ireland for treatment of both schizophrenia and schizoaffective disorder. Dr. Doran characterised Clozapine as being "a medication which is heads and tails above all the other antipsychotic medication we have." He added that it is a very expensive medication, costing around €40,000 a year to maintain a patient on it. It can also be a dangerous medication. It is immuno-suppressive and can cause a condition called agranulocytosis. There is a specialist monitoring service in the U.K. and Ireland called the Clozapine Patient Monitoring Service, or C.P.M.S. Dr. Doran's service works closely with them to monitor Mr. Machaczka's blood on a very regular basis.

Dr. Doran has been in contact with both the Polish psychiatric services and the manufacturer of Clozapine. He has been informed that, unfortunately for Mr. Machaczka, Clozapine is not licensed in Poland for the treatment of schizoaffective disorder. It is only licensed there for the treatment of schizophrenia. Asked whether it is possible to treat Mr. Machaczka's condition with other medications, Dr. Doran stated that other medications had been tried and had not worked.

In addition to pharmacological treatment with Clozapine, Mr. Machaczka has also been offered a well researched form of non-drug therapy for psychosis called C.B.T. (Cognitive Behavioural Therapy). Mr. Machaczka attended C.B.T. therapy for six months on a very regular basis as part of a group. Dr. Doran stated that his information is that CBT is also unavailable in the public system in Poland.

Dr. Doran stated that Mr. Machaczka attends his day hospital regularly three times a week, and "does need that support". He stated that it would be very unusual that he would have a patient attending his day hospital for any longer than a six week or two month period. Yet Mr. Machaczka has been attending it consistently over the last two years.

Dr. Doran opined that Mr. Machaczka understands the nature of the present rendition proceedings and why they are happening. However, his condition is extremely brittle and he is very vulnerable to a relapse of psychotic symptoms. His condition is a long term severe and enduring one which is going to wax and wane given periods of stress. Dr. Doran does not think that he is medically stable or psychiatrically stable to face trial, given the levels of stress that he would be burdened with during such a trial. In the doctor's view "his condition would probably breakdown."

Dr. Doran was asked by this Court whether there is any regime of precautions that could be put in place to ensure that the particular trauma of being transferred to Poland would not precipitate another attempt at suicide. In reply Dr. Doran indicated that his concern was not so much about the journey, but about what might happen in the days or weeks afterwards. He stated that medication was not the only important maintaining factor for Mr. Machaczka's general condition over the last two years. It is but one strand. However, the support of his family and the good level of support he has in Ireland have also been very important maintaining factors. Dr. Doran stated that he would be gravely concerned if Mr. Machaczka lost that family support, and he opined that it would put him "at a really genuinely grave risk of suicide if he was separated" from them.

Dr. Doran stated that if a person with Mr. Machaczka's condition were sent to prison in Ireland that person would be transferred to the Central Mental Hospital in Dundrum and would receive Clozapine treatment there. He is unaware as to whether there is an analogous facility to the Dundrum facility in Poland. He expressed hope that a person such as Mr. Machaczka would be treated in such a facility if incarcerated in Poland, but cautioned that to his knowledge psychiatric services within Poland were less advanced and less sophisticated than those in Ireland. Moreover, Clozapine is not licensed in Poland to treat schizoaffective disorder.

Dr. Doran stated that Clozapine is normally a life long medication. He was asked whether, in the light of that, he could explain the statement in his report that "You should continue on Clozapine treatment for a period of up to one year to ascertain whether the treatment has been successful. With this therapy, slow resolution of symptoms can take as long as this." Dr. Doran's explanation was that because Clozopine is so expensive, they are obliged to review after twelve months whether it is benefiting the patient. If there is no benefit there is no point in continuing to incur the significant expense. However, if the patient is benefiting from it then it is continued.

Moreover, he explained, the reference to a "slow resolution of symptoms" is a reference to the stabilisation of the patient's condition rather than actual recovery from the condition. Such stabilisation allows the patient to enjoy a quality of life with his family which needs to be maintained in a stress free environment. In elaboration of this Dr. Doran stated:

> "I'll give you an example, Judge. About eight to nine months ago, Mr. Machaczka had been doing very well and I discharged him for a short period from my day hospital. And his family moved address, a short distance from their residence in Newbridge, to another residence about a mile away in Newbridge. Mr. Machaczka relapsed and needed admission, and the stress of actually just moving family home caused a relapse in which he needed hospitalisation. He began checking out of the side windows. He became very fearful, stayed up all night because of having moved address. So even small amounts of stress have precipitated relapse and quite a severe relapse."

Dr. Doran was asked by the Court:

> "If this Court was considering surrendering him to Poland in circumstances where, as we now know, he couldn't continue to be treated on Clozapine in Poland, and in circumstances where he would have to, as a matter of likelihood, spend some period of time in prison, how would you grade the risk [of suicide]? Is it a moderate risk, serious risk, a very serious risk? How would you grade it?

Dr. Doran replied:

> "I would grade it a very serious risk, Judge … I would be also recommending that he be transferred, rather than to prison, to a forensic facility, a hospital facility straightaway due to the high risk, the very high risk that I would hold him at."

The following exchange then took place:

> MR JUSTICE EDWARDS: If that were possible, if he could be admitted immediately to a forensic facility, would that to some extent provide reassurance to you?
>
> A. It would. But the concern I would have in all of this is that his medication is not licensed for his condition in Poland.
>
> MR. JUSTICE EDWARDS: That's the biggest worry you have.
>
> A. That's the biggest worry.

MR. JUSTICE EDWARDS: And anything that he was on in Poland simply wasn't working.

A. He had over forty admissions, Judge, over a period of time, when he arrived at me having been discharged from a psychiatric facility in Poland, he arrived to me in a very unwell situation."

Under cross-examination by counsel for the applicant, Dr. Doran stated that he was unaware if Mr. Machaczka had been living anywhere other than Poland before coming to Ireland in October, 2004. He was unaware that the Polish authorities believe him to have lived in Germany. It was suggested to him that Mr. Machaczka had led a fairly productive life in terms of employment. Various employments were then put to him. The doctor responded that he was sure that Mr. Machaczka had given a history of having worked for short periods in some semi-skilled jobs. He was asked if, in relation to one such employment in a garage, he was surprised to learn that Mr. Machaczka had worked there for a number of months and that he was let go, not because of his medical condition, but because there was not enough work. Dr. Doran replied that would depend on what he was doing in the garage. When pressed, he stated that "Mr. Machaczka has been employed only for very short periods of time in any particular job, to my knowledge, not being able to secure due to regular relapses." Various other periods of employment of Mr. Machaczka were put to the doctor for commentary, and he responded that he was not surprised and that he was aware that the respondent had been employed in a number of semi-skilled jobs for short periods prior to coming under his care in Kildare. He stated he was also aware that he has been employed with his wife since then but had not been consistently employed or employed for longer periods than about a month.

It was suggested to Dr. Doran that the respondent's employment record suggested that his medication, whatever medication he was receiving, did give him periods of stability. Dr. Doran responded:

"Antipsychotic, long term antipsychotic with the conventional class of drugs are very good for treating positive symptoms of hallucination beliefs. They are very poor at treating mood elements and also the negative symptoms of psychosis which would involve poor motivation, anxiety, severe anxiety. So, in the early days of a psychotic illness, such as that of Mr. Machaczka has, conventional antipsychotic or the older group of antipsychotics can be effective in treating hallucinations. But it's the negative features of psychosis which really, …, when you enter into your thirties and forties, tend to predominate and that's why you would get a general withdrawal. It would be very hard for somebody … who suffered with psychosis for an enduring period of time to maintain a job, as in work in a working environment with the normal stresses that you and I could endure. So I feel with Mr. Machaczka's condition, we are entering into the more chronic, enduring, negative side of the syndrome of which the conventional antipsychotics, the ones he would have been treated with in the past, would have a very poor effect against."

Dr. Doran was further cross-examined about the circumstances in which the respondent came into contact with his service. He confirmed that Mr. Machaczka had had no hospital admissions in Ireland between 2004 and 2010 and stated that this was because he was still attending the psychiatric services in Poland. He had been going back and forth on planned visits with his doctor so he had not come to the attention of psychiatric services in this country. It was suggested to Dr. Doran that this indicated that there had been no emergency psychiatric admissions. Dr. Doran responded that it depended on one's definition of an emergency admission, but that it was likely that Mr. Machaczka's family, who were very supportive of him, had cared for him in the outpatient community and prevented an emergency admission of the sort that counsel was speaking of.

It was suggested to Dr. Doran that neither Mr. Machaczka nor his family had had any complaints about the Polish psychiatric services, or about the treatment he was receiving in Poland. Dr. Doran acknowledged this, and explained that he had been a little bit annoyed when he first met Mr. Machaczka regarding this because he had not actually been discharged from the Polish psychiatric services. He took up with Polish psychiatric services the issue of their continued involvement with Mr. Machaczka long after he had come to live in this country, and discovered that they were unaware that Mr. Machaczka could transfer to local services. He remarked:

"And that's why they continued to treat him while he had been here. Quite an astounding situation in my own book given that they were intending to admit him and arranged these admissions by courtesy of telephone or, you know, by the family contacting the Polish Psychiatric Service there and they would arrange an admission by telephone. Remarkable situation, you know, in this day and age…."

Dr. Doran was then cross-examined about the Clozapine treatment and was asked as to what would be the situation if the periodic blood tests revealed a drop in the respondent's blood count. Dr. Doran replied that the treatment would be stopped straightaway, but that the greatest risk of such a thing happening was in the first month of treatment. If, however, the treatment had to be stopped they would have to try other treatments. Pressed on this, he stated there were a number of different newer anti-psychotic drugs, some of which, such as Olanzapine, he had already been on. It would be trial and error.

Dr. Doran was also asked if it was possible that the respondent was exaggerating his symptoms as a means of avoiding rendition to Poland. Dr. Doran responded that as a psychiatrist with fifteen years experience he "would be pretty good at spotting somebody" who was exaggerating in that way.

Affidavit of Edward McGarr

The affidavit of Mr. McGarr exhibits a letter dated the 3rd February, 2012, from Mr. Przemyslaw Gomolec who is a Polish lawyer engaged by the respondent to represent him before the Polish courts. Strictly speaking, the contents of Mr. Gomolec's letter should have been made the subject of a sworn statement by Mr. Gomolec in accordance with s. 20(3) of the Act of 2003 which, although recently repealed, was in force at the time it was received. After this Court had expressed its dissatisfaction at the irregularity, counsel for the respondent subsequently proffered a further copy of the said letter, re-dated the 10th April, 2012, that was executed before Klaudiusz Jezierski, a notary public based in Szamotuly, Poland, on the 10th April, 2012. Accordingly, the Court was at that point satisfied that it had before it an attested document that purported to have been sworn, within the meaning of the s. 20(3) of the Act of 2003, and that the respondent was entitled to rely upon it in these proceedings.

Mr. Gomolec sets out the procedural history before the Polish courts of each of the cases which are the subject matter of the European arrest warrants with which this Court is presently concerned in so far as it is known to him, and the Court has duly noted the position in each instance. In particular the Court notes that an in-patient psychiatric assessment of the respondent was ordered by the court in relation to case no. II K 854/01 but it was never completed as the respondent did not attend his hospital appointment. Further, in relation to case no. II K 160/04, Mr. Gomolec states that on the 21st June, 2005, the Oboniki Wielkopolskie District Court made a decision "to discontinue the proceedings" on medical grounds. It is clear to this Court from the context in which this expression appears in Mr. Gomolec's letter that what in fact occurred was that the Oboniki Wielkopolskie District Court decided not to proceed with this case for the time being, based upon a medical report compiled on the 3rd July, 2003, wherein it was stated that the accused displayed severe situational response abnormalities with underlying depression and puerilism, and was unfit to stand

trial. However, it is clear that the proceedings were not ended because the matter came back before the court subsequently and we are told that "due to further absences" of the respondent the court issued another "temporary arrest warrant" for him followed by a "wanted letter".

Mr. Gomolec also proffers information concerning the availability of psychiatric treatment in Polish prisons and detention centres, and also concerning the availability of Clozapine in Poland. He states:

> "In Poland, persons remaining in pre-trial detention are placed in special detention units known as 'Custody Suites'. Some chosen prisons in Poland have specialised blocks or units where mental illness sufferers are held. These range from hospital units with full-time medical care to special units where medical care is provided by walk-in medical staff and the choice of individual placement depends on the severity of prisoners condition.
>
> Whether the mentally ill convict is fit to serve a prison sentence and, if so, whether they require placement in a specialist unit depends on the findings of medico-legal (e.g. psychiatric) reports compiled by court-appointed experts. It is the court which makes a final decision regarding this issue - provided that the enforcement proceedings have been instituted on foot of a valid and binding judgement or conviction.
>
> This is not to be confused with the issue of fitness to stand trial. In such cases the enforcement proceedings may be adjourned for as long as it takes for the condition deemed to cause the said unfitness to resolve, which is, again, subject to the findings of a psychiatric report submitted by court-appointed psychiatrists. Such reports are normally compiled by a team of three medical practitioners (two psychiatrists and one clinical psychologist) upon a single (out-patient) clinical examination and in view of the information contained in the relevant medical documents submitted, where and if the patient has a history of prior mental illness and psychiatric treatment. In circumstances where any difficulties or doubts arise upon the completion of the said (out-patient) clinical examination, the team of experts will normally request the court's consent to have the patient admitted to a psychiatric hospital for further investigations. Once the medical report has been compiled and submitted, the court then decides whether the patient/convict should be placed in a low-security psychiatric hospital (where the patient is not to remain in pre-trial detention) or a high-security psychiatric hospital (where the patient is to remain in pre-trial detention).
>
> In some circumstances, depending on the condition of the accused, in pre-trial detention may take the form of a temporary admission of the detainee to an appropriate hospital unit (article 260 Criminal Procedure Code). In such cases, it is the court, which ordered the pre-trial detention that appoints the appropriate hospital unit or institution where the said detention is to take place. It is also up to the court to outline the conditions on which such form of detention may be applied (article 213 Criminal Procedure Code).
>
> Due to the nature of the above-listed procedures it always takes quite a while for the final decision on the appropriate type and conditions of the pre-trial detention to be established. In the meantime, a detainee has access only to primary medical care, which does not include specialist medical services.
>
> It will take several weeks for a detainee who has been extradited back to the Republic of Poland to be based in the appropriate, court-approved detention facility. As they await the court's decision, they will be moved progressively from one custody suite to another. It is beyond any doubt that during that period no specialist medical care will be available to them, as only primary health services are available in these conditions.
>
> I understand that Mr Artur Machaczka is very ill and requires specialist treatment while continuing his treatment with an atypical antipsychotic drug, and dibenzodiazepine known as Clozapine, ATC (…) code N05AH. The 2012 issue of the Polish Index of Authorised Medicines lists two products containing Clozapine, namely Klozapol and Leponex.
>
> Clozapine is primarily prescribed to patients who are unresponsive to or intolerant of conventional neuroleptics, mainly where there exists some extrapyramidal system deficiency or an increased risk of severe extrapyramidal system dysfunction. It can only be prescribed to patients whose leukocyte and neutrophil granulocyte count meets the strict count criteria set forth by the medication manufacturer. During the first 18 weeks of Clozapine treatment the patient's blood must be monitored on weekly bases and once the 18-week period lapses blood tests must be performed at least once every four weeks.
>
> Leponex, in turn, is prescribed to schizophrenia sufferers were the condition does not respond to any other medications or where other medications are not tolerated.
>
> In both cases treatment is quite lengthy and must be continued over several months.
>
> Where Klozapol treatment is prescribed, it is vital that the patient's blood is closely monitored by means of specialist blood tests, which means that such patient must remain in a hospital, which can provide such services. It is not to be expected that any prison or detention suite in Poland has or can arrange such facilities.
>
> Please note that the foregoing information is has (sic) been provided upon prior consultations with independent clinical psychiatrist.
>
> The standards of medical services available in Polish prisons are questionable, at best, which state of affairs constitutes somewhat of a shameful secret. Any news of serious incidents arising due to the inadequacy of the medical services provided hardly ever see the light of day and the general public receives such information only occasionally and mainly in cases where independent media are involved. This has resulted in a considerable number of complaints regarding the inadequate medical services available in Polish prisons being made to the European Court of Human Rights in Strasbourg. The International Helsinki Federation for Human Rights is also involved and considers the said issue to be of critical urgency. Whenever the State decides that a person should be deprived of their freedom, it becomes answerable for that person and is responsible for the safety of such person as well as for providing them with adequate medical care. In reality, the practical application of this directive is very much questionable.
>
> As a practising barrister I have personally come across a situation where a blind person was not allowed to have a Guide and even denied regular eye drops administration as prescribed by their doctor. The eye drops were administered only during the opening hours of the in-prison medical services unit, i.e. twice instead of three times a day, weekdays only, excluding Saturdays, Sundays and all other holidays.

Judging from my experiences with the court and its position in respect to Mr. Artur Machaczka, I strongly suspect that despite the seriousness of his illness he need not expect any kind of humane treatment on behalf of the Polish authorities."

Supplemental Affidavit of Karolina Malecki, sworn on 5th April, 2012

In this affidavit Ms. Malecki exhibits a further report from the respondent's Polish psychiatrist, Dr. Pawel Jerzycki, dated the 7th February, 2012, which confirms that Clozapine treatment is not available in Poland to patients diagnosed with schizoaffective disorder.

She also exhibits two articles from the 27th January, 2012, and the 18th March, 2012, issues of the Polish weekly magazines *Nie* and *Angora* respectively, entitled "Death Sentence, Suspended" and "Flat down, doing time", together with translations thereof, as further purported evidence that the provision of specialist health care in Polish prisons and places of detention is inadequate. However, as these represent socio-political commentary in the press, rather than the opinions of properly credentialed experts/academics, the Court is not disposed to attach much weight to this additional material.

Ms Malecki also refers to two articles from the humanrightshouse.org website, entitled "Tackling the Problems of the Health Care in Polish Prisons - New Project of HFHR" (Helsinki Foundation for Human Rights) and "Insufficient Medical Treatment in Polish Prisons". As these are in the nature of country of origin information from an ostensibly reputable source, the Court has had regard to them, and has noted their contents. In particular, the Court notes that in the view of the Helsinki Foundation for Human Rights "insufficient medical treatment is one of the major problems in Polish prisons."

Evidence on behalf of the Applicant on the Mental Health Issue

Additional information dated the 11th October, 2011

This Court has had put before it certain additional information volunteered to the Irish Central Authority by the Circuit Court in Poznañ under the cover of a letter dated the 11th October, 2011. This additional information is comprised of a ruling (with translation) of a three judge regional court in Szamotuly, dated the 27th September, 2011, is an appeal against the earlier ruling of the District Court in Szamotuly, dated the 26th July, 2011, refusing the respondent's motion to have the domestic arrest and remand in custody warrant revoked in case II K 854/01 (i.e. the matters subject of warrant no. 2) on the basis of the respondent's mental health issues. The ruling is in the following terms:

"Pursuant to a ruling of 26th July 2011, District Court in Szamotuly rejected the counsellor's motion to revoke the domestic arrest warrant and remand in custody warrant issued in respect of defendant Artur Machaczka.

The defendant's counsellor appealed against the above ruling, stating that the court wrongly upheld the order to remand Artur Machaczka in custody despite the existence of a prerequisite condition to revoke the order under article 259 (1) point 1 of code of criminal procedure.

The court finds the appeal groundless

First and foremost, it must be said that the documents presented to the court by the appellant do not prove categorically that Artur Machaczka's health is in such state that remanding him in custody would present an imminent threat to his life or health. The appellant invokes a written statement made by forensic psychiatrists on 3rd 2003, a medical certificate issued by the "Paracelsus" Specialist Outpatient Clinic Complex – Psychiatric Health Clinic in Jarocin confirming that the defendant attended therapy sessions between 10th October 2002 and 11th May 2010 and certificates issued by a British psychiatrist dated 30th June and 4th July 2011. According to the above written statement, the defendant suffers from a depressive puerile situational response caused, according to the expert statement, by the ongoing criminal proceedings in respect of the defendant the statement goes on to state that the defendant is unfit to stand trial and the time of issuing. However, this statement was made more than 8 years ago, and cannot serve as an up-to-date opinion on Artur Machaczka's mental health, due to the lapse of time and the fact that the illness the defendant is suffering from is not of permanent character. The information supplied in the medical certificate issued by a psychiatrist from the Paracelsus Clinic in Jarocin, which states that Artur Machaczka attended therapy in that Clinic between 2002 and 2010, also cannot serve as an up-to-date opinion on the defendant's current state of mental health, as the defendant last visited the clinic on 11th May 2010, and the certificates confirming that Artur Machaczka was unfit to stand trial were issued in 2002 and 2003.

The only up-to-date information on the defendant's mental health is provided in the certificate issued by an Irish psychiatrist, which states that Artur Machaczka is suffering from schizoaffective disorder. According to the above certificate, dated 30th June 2011, the defendant is currently in a psychotic state, is unfit to stand trial, and is currently awaiting admittance to a hospital with view to further treatment. A further certificate, issued on 4th July 2011 by the same psychiatrist, states that Artur Machaczka was admitted to hospital on 30th June 2011.

The court finds that Arthur Machaczka's previous behaviour, who, despite being ordered to submit to a mental evaluation pursuant to a ruling issued by District Court in Szamotuly of 16th June 2004, failed to appear for designated evaluation dates, and furthermore moved out from his registered address in the town of Oborniki, at 84/6 Lesna street, suggests that his intent is to obstruct criminal proceedings. The court stresses that in the past 10 years the defendant was aware of the criminal proceedings in his respect. And yet failed to appear before the court when summoned and several times changed his place of residence in various European countries (Germany, currently Ireland). The illness the defendant is suffering from did not prevent him to find gainful employment and support himself while living in these countries, and he could even afford to pay for medical treatment or insurance. Furthermore, the illness did not prevent him from visiting Poland (e.g. to see a psychiatrist in Jarocin on 11th May 2010). In the opinion of the court, that Artur Machaczka may be suffering from a mental illness does not mean that remanding him in custody would pose a serious danger to his life and health.

Pursuant to provisions of article 260 of code of criminal procedure, the defendant may be remanded in custody in an appropriate mental institution instead of in prison, which will surely happen given that the court ordered a mental evaluation of the defendant. In its ruling of 9th August 2007 (ref. II AKz 402/07. LEX no. 301495, KZS 2007/12/75 OSAW 2008/3/102), the Court Appeal in Wroclaw stated that if a defendant who is remanded in custody is found by forensic psychiatrists to be unfit to stand trial due a mental illness, provisions of article 260 of code of criminal procedure alone are enough to remand the defendant in a mental hospital with view to initiate treatment. With the above possibilities in

mind, the court cannot agree with the appellant's opinion that it is impossible to treat the defendant in Poland in hospital conditions while he remains remanded in custody, as it is not the aim of remanding him.

In light of the above, the court found no grounds to overturn the appealed ruling."

Arising from the case being made by the respondent based upon his mental health, the applicant has requested from the relevant authorities in the issuing state, and has received and placed before this Court, additional information concerning the availability of psychiatric medical treatment for mentally unwell prisoners detained within the Polish prison system, both for those in pre-trial detention and those serving a sentence of imprisonment.

Additional information dated the 2nd April, 2012

The following information was received from the regional court in Poznań, 3rd Criminal Division, by letter dated the 2nd April, 2012. The letter stated:

"Further to your letter dated 20th March 2012, concerning European Arrest Warrants issued in respect of Artur Machaczka, please be advised of the following.

The Republic of Poland, like all other member countries of the EU, provides proper medical care, and psychiatric care in particular, to all prisoners, taking into account their state of health. Artur Machaczka will also be provided with such care, if he requires it.

In our opinion, proceedings concerning our requests to surrender Artur Machaczka on foot of the European Arrest Warrants issued in his respect should not be turned into a discussion on pharmaceutical grounds. We would like to note, however, that opinions among medical professionals as to the prescription of Clozapine are divided, and this matter should not be decided on Dr Doran's statement alone. We can assure you that Polish prison authorities will make every effort to take into account Artur Machaczka's mental disorders when executing the custodial sentences and other means of detention that have been pronounced in his respect.

The suggestions as to the low level of psychiatric care available in Polish prisons we find to be ungrounded and unjust, especially with regards to the medical staff who provide that care.

In the light of the above, we uphold our requests for the surrender of Artur Machaczka and ask that the High Tribunal consent to the execution of the European Arrest Warrants issued in respect of the requested person.

Yours sincerely,

Regional Court Judge Tomasz Borowczak"

Additional information dated the 22nd May, 2012

The following information was received from the regional court in Poznań, 3rd criminal division, by letter dated the 22nd May, 2012, which in turn enclosed a letter to that court from the Central Bureau of Prison Service in Warsaw, dated the 18th May, 2012. The letter from the "Central Bureau of Prison Service" in Warsaw stated:

In reply to your letter dated 17th May 2012, reference III Kop 319/07, III Kop 228/07, III Kop 173/08, please find below information concerning the psychiatric care available in Polish prisons.

Inmates are treated in medical facilities which constitute part of the organisational structure of penitentiaries. Facilities include ambulatories with sick bays, prison hospitals with specialist wards, diagnostic centres, dental practices and rehabilitation and physiotherapy centres.

Medical facilities for inmates are set up by the Minister of Justice pursuant to provisions of existing laws. The work of the prison medical services is supervised by the Director of the Prison Medical Service in cooperation with a specialist team working as part of the Central Prison Service in Warsaw. Each of them working as part of Prison Service employs a chief medical officer, whose duties include the supervision, control and coordination of prison medical service in the penitentiaries falling under his jurisdiction and cooperation with other regional Prison Service inspectorates in providing medical care to inmates.

Treatment is available to inmates in 157 ambulatories and 13 hospitals with 37 specialist wards, situated in penitentiaries across the country.

Inmates suffering from psychiatric disorders are treated in psychiatric wards, where medical staff carry out psychiatric evaluations pursuant to court orders and provide psychiatric care to inmates who have developed psychiatric disorders while incarcerated. If the patient's mental state does not improve as a result of this treatment, medical staff request for his temporary release from prison and refer him to a mental hospital outside of prison.

Psychiatric wards have been set up in the Remand Prison in Kraków. Prison no. 2 in Łódź, Remand prison in Poznań, Remand Prison Warszawa-Mokotów, Remand Prison in Wrocław and Remand Prison in Szczecin. Below we present a summary of the number of inmates each psychiatric ward can accommodate for evaluation and treatment:

Penitentiary	Places Available		
	Evaluation	Treatment	Total
Remand Prison in Kraków	33	5	38

Prison no. 2 in Lódź	36	5	41
Remand Prison in Poznań	24	5	29
Remand Prison Warszawa-Mokotów	46	5	51
Remand Prison in Wrocław	23	23	46
Remand Prison in Szczecin	28	29	57
Total	185	48	262

In total, in 2011 460 patients were placed on psychiatric evaluation and 740 were given psychiatric care.

Treatment is provided to inmates entirely free of costs, including free medical consultations, specialist consultations, diagnostic examinations, surgeries, medicines, prosthetics, orthopaedic aids and support items and sanitary items.

Yours sincerely,

Acting Chief Medical Officer of Prison Service

Medical Service Bureau

Central Bureau of Prison Service

Major Adam Szewc, M.D."

Additional information dated the 13th June, 2012

The following further additional information was received from the regional court in Poznań , 3rd Criminal Division, by letter dated 13th June, 2012. That letter stated:

" …please be advised that should Artur Machaczka be surrendered to Poland, he will be examined by medical staff upon arrival, as Polish regulations require that every person placed in custody must first undergo a medical evaluation. If the examining medical officer determines that the requested person must be given medication, then such medication (i.e. the medication prescribed by the examining medical officer) will be given to him. We cannot however guarantee that it will be the same medication that was prescribed to the requested person by the Irish doctor.

We can confirm that Artur Machaczka will be given the same standard of medical care as any other Polish citizen suffering from the same condition."

Submissions on behalf of the respondent

It was submitted that, if the respondent were surrendered to the issuing state, there would be a real risk that he would be subjected to inhuman or degrading treatment or punishment contrary to article 3 of the European Convention for the protection of Human Rights and Fundamental Freedoms (hereafter E.C.H.R.). Furthermore, it was suggested that for the State to surrender the respondent to the issuing state where such a risk exists would constitute a breach of article 3 E.C.H.R. (the respondent cites *M.S.S. v. Belgium & Greece* (2011) 53 E.H.R.R. 2, at para. 365 in support of this), as well as being in breach of s.37(1) of the European Arrest Warrant Act 2003 and Article 40.3 of the Constitution of Ireland, 1937.

The risk to the respondent is said to arise from the conditions for persons with psychiatric illnesses who are subject to detention or imprisonment in Poland. It was submitted that the European Court of Human Rights (E.Ct.H.R) has found on many occasions that prison and detention centre conditions in Poland for those in need of specialist medical attention are in breach of article 3 E.C.H.R.

The Court has been referred to *Kaprykowski v. Poland,* (App. no. 23052/05) – E.Ct.H.R. 3rd February, 2009, in which the applicant suffered from severe epilepsy and other neurological disorders, which included hallucinations. He had made several suicide attempts. He was remanded in custody in Poland over the course of many years, including a period of more than four years between 2003 and 2007. Throughout his incarceration, various court-appointed and prison doctors recommended that he receive specialised psychiatric and neurological treatment and that he be under constant medical supervision. The European Court of Human Rights found that a breach of article 3 E.C.H.R. had occurred due to the fact that, despite the advice of the medical experts, the applicant was detained in ordinary detention facilities on all but a few occasions. The Court was unimpressed with the argument of the Polish government that supervision by his healthy cellmates was adequate. The Court found further that the applicant's suffering had been increased by the failure to provide him with the specialised medicines which had been prescribed to him. He had originally been prescribed an expensive medicine named Gabritil, but this was replaced by generic drugs prescribed by prison doctors who, the Court noted, were not neurologists. It was found that this resulted in more frequent and severe epileptic seizures.

The respondent also relies upon *Kupczak v. Poland* (App. no. 2627/09) – E.Ct.H.R., 25th January, 2011. In that case, the applicant had suffered spinal injury and required 24 hour relief from pain, which was provided by a morphine pump. During his two and a half year detention in Poland, the Polish authorities had failed to refill the pump with the mixture of morphine and other drugs which had been individually prepared for the applicant by a specialist clinic in Germany. Instead, they replaced it with a saline solution which had no painkilling properties. He was administered oral painkillers which were found to be unsuitable and addictive. The Court found that there had been a breach of article 3 E.C.H.R. in these circumstances.

Reliance was also placed on *Musiałek and Baczyński v. Poland* (App. no. 32798/02) – E.Ct.H.R., 26th July 2011. In that case the Court found a breach of article 3 E.C.H.R. on the part of the Polish prison authorities in circumstances where the applicant had not been given access to necessary specialist medical treatment while in detention in Poland and his condition (Dupuytren's Contracture) had as a result deteriorated to the extent that he had to have a finger amputated.

The respondent has further drawn the Court's attention to *Kumenda v. Poland* (App. no. 2369/09) – E.Ct.H.R., 8th June, 2010. In that case, the applicant had had a domestic violence charge against him dismissed on grounds of insanity, and the domestic court had ordered in accordance with law that he be detained in a psychiatric hospital to receive treatment. Notwithstanding the domestic court's direction, the applicant continued to be remanded in an ordinary remand centre for a further two months, due to a lack of space in the psychiatric hospital. The European Court of Human Rights (E.Ct.H.R.) found that there had been a breach of articles 5(1) E.C.H.R., with particular regard to the provisions therein relating to the detention of persons of unsound mind and the right of access to the courts to vindicate the right to liberty. In so finding, the Court made the following observations:

> "30. The Court observes that in the present case the proceedings were discontinued on 20 November 2008 and the decision was upheld on 3 February 2009 (see paragraph 13 above). However, as late as on 22 April 2009 the Wodzis³aw District Court ordered the applicant's placement in Rybnik Psychiatric Hospital (see paragraph 15 above). Despite the fact that the hospital immediately informed the court that it would not be possible to admit the applicant in the next two months, the District Court had not changed its order and had not decided to place the applicant in a different hospital. Throughout that time the applicant was detained in a regular detention centre and it is not clear whether he was provided with adequate medical treatment there.
>
> 31. The Court accepts that it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in a selected psychiatric hospital. However, a reasonable balance must be struck between the competing interests involved. Having regard to the balancing of interests, the Court attaches weight to the fact that the applicant was held in a regular detention centre without the adequate medical facilities. In addition, the Court notes that the Government failed to provide any argument explaining the delay in the applicant's admission to the hospital.
>
> 32. The Court cannot find that, in the circumstances of the present case, a reasonable balance was struck. The Court is of the opinion that the delay in admitting the applicant to a psychiatric hospital in the present case cannot be regarded as acceptable (see Morsink v. the Netherlands, no. 48865/99, §§ 61-70, 11 May 2004; Brand v. the Netherlands, no. 49902/99, §§ 58-67, 11 May 2004; and Mocarska, cited above, § 48). To hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the person concerned and thus impair the very essence of the right protected by Article 5 of the Convention.
>
> 33. There has accordingly been a violation of Article 5 § 1 of the Convention."

The Court also found a violation of article 5(3) E.C.H.R. in that case.

Further, the Court was also referred to *Musiał v. Poland* (App. no. 28300/06) – E.Ct.H.R., 20th January, 2009. The applicant in that case, who suffered from schizophrenia and other serious mental disorders, was charged with robbery and battery, and remanded in custody. On various occasions during his lengthy remand he was taken to state or prison psychiatric hospitals suffering from auditory hallucinations of a psychotic nature, and after prescription of medications and other treatments he was on each occasion transferred back to detention centre or prison. He had attempted suicide prior to his detention on remand and did so again during that detention. He claimed that he should have been detained in a psychiatric institution rather than an ordinary detention centre. On a number of occasions, including immediately following a suicide attempt, it was recommended by doctors that he be transferred to a state psychiatric hospital, but this did not occur as there was no room for him at the hospital, and he remained in the ordinary detention centre. In finding a breach of article 3 E.C.H.R., the E.Ct H.R., although noting the terms of article 260 of the Polish Code of Criminal Procedure, which provided for detention in a suitable medical establishment where appropriate, found that this provision had not been effective in practice, except for two relatively brief periods spent as an inpatient. In the course of its judgment the E.Ct H.R stated:-

> "92. On the other hand, the Court observes that, except for the two periods in 2005 and 2007 when the applicant was an in-patient in a prison psychiatric hospital, he shared his cell with inmates who were in good health and, except in cases of medical emergency, he received the same attention as them, notwithstanding his particular condition. As transpires from the documents, almost all doctors who examined the applicant during the different stages of his detention suggested that he should remain under regular psychiatric supervision. It is therefore clear that the applicant has been in need of constant and specialised medical supervision, in the absence of which he faces major health risks. Nonetheless, although he has had more or less regular access to prison in-house medical staff, he does not remain under psychiatric supervision and his access to a psychiatrist has been restricted to emergencies or to the dates when he has made an appointment.
>
> 93. The Court notes with concern that after the applicant attempted to commit suicide in Sosnowiec Remand Centre on 23 January 2006 he was examined only by an in-house doctor. It was not until the following day that he was seen by a psychiatrist, albeit only as an outpatient. On the very same day he was transferred back to the remand centre because two psychiatric hospitals had refused to admit him owing to the lack of places.
>
> 94. Mindful of the above considerations, the Court finds that while maintaining the detention measure is not, in itself, incompatible with the applicant's state of health, detaining him in establishments not suitable for incarceration of the mentally-ill, raises a serious issue under the Convention."

Counsel for the respondent submitted that the findings of the European Court of Human Rights in these cases is consistent with the most recent United States Department of State, *Country Reports on Human Rights Practices for 2011* on Poland (dated the 8th April, 2011) which finds, at p.3:

> "Prison and detention center conditions generally met international standards; however, prison medical staff vacancies and limited access to specialized medical treatment continued to be a problem."

It was submitted that, given the particular medical condition and medication requirements of the respondent, there is a real risk that he would not have access to the specialised treatment that he requires in the event of him being surrendered. It was further urged that there is a real risk that the respondent would be placed in an ordinary remand centre and/or prison with insufficient medical care rather than in a psychiatric hospital. Furthermore, counsel submits, even if he was given access to medical treatment, there is a real risk that the expensive Clozapine medication prescribed to him in Ireland will not be available to him in Poland and that it will be replaced by another cheaper and much less effective drug to his prejudice. Further, and in any event, counsel submits, the intensive monitoring programme necessary for Clozapine therapy will not be made available to him in Poland.

The respondent further relies upon the principles set out by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, 3 I.R. 783 as applied by the High Court in *Minister for Justice, Equality and Law Reform v. Rettinger v. Mazurek* [2011] IEHC 206 (Unreported, High Court, Edwards J., 13th May, 2011) and in numerous other cases. In that context counsel has sought to emphasise that, where a real risk of treatment contrary to article 3 E.C.H.R. is found to exist, the prohibition on

surrender in such a case is absolute and the real risk cannot be balanced against the State's obligations under the European Arrest Warrant Act 2003 or the Framework Decision (per Fennelly J. in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, at p.813).

It was further submitted, and the respondent has again sought to emphasise, that the European Court of Human Rights has stated in *M.S.S. v. Belgium & Greece* (2011) 53 E.H.R.R. 2, that the fact that the issuing state is a signatory to the E.C.H.R. does not serve as an adequate guarantee that it will be complied with. In that case the E.Ct.H.R stated at para. 353 of its judgment:-

> "The Belgian Government argued that in any event they had sought sufficient assurances from the Greek authorities that the applicant faced no risk of treatment contrary to the Convention in Greece. In that connection, the Court observes that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention
>
> (see, mutatis mutandis, Saadi v. Italy [GC], no. 37201/06, § 147, ECHR 2008 ...)."

It has been further submitted that even in European arrest warrant surrender proceedings, where mutual trust exists between the relevant member states, the status of the issuing state as a signatory to the Framework Decision cannot constitute a sufficient guarantee that rights will not be breached. In support of this contention the respondent relies upon the decision of the Grand Chamber of the Court of Justice of the European Union in the conjoined cases of *N.S. v. Secretary of State for the Home Department et. M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* (Cases C-411/10 and C-493/10 ; judgment dated 21st December 2011). These were two references for preliminary rulings concerning inter alia the interpretation of article 3(2) of Council Regulation (EC) 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national O.J. L50/1 18.02.2003. The references were made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No. 343/2003 and, respectively, the United Kingdom and Irish authorities.

In the course of its judgment the Court of Justice ruled that:-

> "105 ……European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.
>
> 106 Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."

Arguing by analogy, counsel for the respondent submits that the status of the issuing state in this case as a signatory to the Framework Decision cannot constitute a sufficient guarantee that the respondent's rights will not be breached. It is suggested that in circumstances where this Court has been appraised of Poland's poor track record in providing adequate medical treatment for prisoners, the manner in which it has breached prisoners' rights in the past, the particular medical condition of this respondent, the evidence that Clozapine represents the only effective treatment for the respondent, and the evidence that Clozapine is not licensed for treatment of schizoaffective disorder in Poland; substantial grounds exist for believing that the respondent would face a real risk of being subjected to inhuman or degrading treatment within the meaning article 3 E.C.H.R. in the event of being surrendered to the issuing state.

In so far as the case based upon article 8 E.C.H.R. is concerned, counsel for the respondent places much reliance on the evidence of Dr. Doran, particularly his evidence that the respondent is at a very high risk of suicide in the event of his Clozapine treatment not being maintained, and in such circumstances most particularly if he were then, by virtue of being surrendered to Poland and remanded in custody, to be separated from his family. It was suggested that the combination of relevant factors that exist in this case create the type of "truly exceptional circumstances" referred to by this Court in its judgment in *Minister for Justice, Equality & Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011), and the type of "striking and unusual circumstances" referred to in the jurisprudence on article 8 E.C.H.R. from the adjacent jurisdiction of England and Wales.

The Court was also referred specifically to the Supreme Court's decision in *Minister for Justice, Equality and Law Reform v. S.M.R.* [2007] IESC 54 [2008] 2 I.R. 242 as being authority for the proposition that, in principle, surrender may be refused by an Irish Court to protect a proposed extraditee's constitutional right to bodily integrity which arises under article 40(3) of the Constitution of Ireland, 1937. In that case the Supreme Court allowed an appeal against an order of the High Court refusing to surrender the respondent holding, *inter alia*, that the mere possibility that stress associated with the surrender of an applicant under a European arrest warrant could precipitate acute coronary disease was not sufficient for a court to prohibit a trial so as to protect an applicant's constitutional right to bodily integrity. Something much more definite by way of threat to life was required.

The Court was also referred to *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) and *Wrobel v. Poland* [2011] All E.R. (D) 10 (Mar) for their persuasive influence.

In *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) the appellant, whose extradition to Latvia on a European arrest warrant had been duly ordered by a District Judge in the Westminster City Magistrates' Court, sought to appeal that decision, not for any alleged error that the District Judge might have made, but because on the very following day, he attempted to commit suicide in Wormwood Scrubs Prison. Not only did he attempt to do so but he very nearly succeeded. It was argued on the appeal before a Divisional High Court in the Queen's Bench Division that his suicide attempt was a reaction by a mentally depressed and unstable person to his then imminent extradition to Latvia. It was submitted that although he had largely recovered from the immediate physical effects of his very serious suicide attempt, and his condition in prison has been managed by doctors and others so as to avoid a further suicide attempt up to that point, there was uncontested psychiatric evidence to the effect that if he was to be extradited to Latvia, he would commit suicide. The psychiatrist's report said that Mr. Jansons remained "at risk of suicide".

Counsel for the appellant argued that he should be discharged under s.21 and/or s.25 of the Extradition Act 2003. Section 21 of that Act requires a judge at an extradition hearing to decide whether the person's extradition would be compatible with E.C.H.R rights within the meaning of the Human Rights Act 1998. If the judge decides that extradition would not be so compatible, he must order the

person's discharge. Section 25 applies if the person's physical or mental condition is such that it would be unjust or oppressive to extradite him. If so, the judge must order the person's discharge or adjourn the hearing to see if his condition improves.

Giving judgment for the Court, Sir Anthony May, rejected the s.21 argument to the extent that it was based upon article 3 E.C.H.R., holding that it was problematic in circumstances where the Court accepted in general terms that the prison arrangements in Latvia were such that all proper steps would be taken to treat the appellant's illness and to prevent his suicide. Nevertheless, he stated, the fact remained that the evidence before the Court was that if he was extradited, he would commit suicide.

The Court therefore moved to a consideration of a s.21 argument based upon article 8 E.C.H.R., and a s.25 argument based upon claimed oppression. The judge went on to state, at paras. 25 to 30 inclusive of his judgment:-

> "25. As to Article 8, in my judgment, there plainly is an Article 8 interference case of some seriousness to be considered and if one is considering, as one must, whether the interference with his private life would be disproportionate Dyson LJ has enunciated in the case of Jaso v Central Criminal Court (No 2) Madrid [2007] EWHC 2983, that in order to reach that stand there has to be striking and unusual facts. It seems to me that the facts of the present case are indeed striking and unusual.
>
> 26. Mr Lloyd in his persuasive submissions has submitted essentially this: that there is no evidence that the appellant's condition will inevitably deteriorate notwithstanding the treatment that he will get in Latvia. He submits that the mere fact that there will be mental deterioration is not sufficient to cross the Article 3 threshold. The point of submission to which Mr Lloyd returned was simply this. The court must accept, as indeed I do, that there are appropriate arrangements in place in the prison system in Latvia and that, as he would have it, the appellant cannot establish that the Latvian authorities will not properly cope with his mental condition and properly cope with the risk of suicide.
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> 27. Set against that is the uncontradicted evidence not only that his mental condition will be triggered to deteriorate if he is returned to Latvia but also and in unqualified terms that he will commit suicide if he is returned to Latvia.
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> 28. Taking account, of course, of the fact that Dr Drayer is unable to express an opinion as to the effectiveness or otherwise of prison arrangements in Latvia, it is nevertheless, of course, within his competence and it is unchallenged that he can assess what the appellant's mental state is and what he is able to predict will be the consequences of his return to Latvia, not because there may or may not be adequate arrangements when he get there, but from the very fact of his extradition.
>
> 29 There is, in my judgment, a quite stark and single decision which the court has to make in this case and that can be expressed under section 25 as whether it would be oppressive to order his return. In my judgment, in a very difficult case, it would be oppressive. It would, in my judgment, be oppressive to order his return when there is, on any view on the evidence, such a substantial risk that he will commit suicide. It is not as if this is an appellant who is threatening to commit suicide without any history of having tried to do so. Not only is he threatening that he will commit suicide and the doctor believes him but he has in fact, for the same reason, attempted to commit suicide in Wormwood Scrubs Prison and very nearly succeeded in doing so. In reaching the conclusion that it would be oppressive to return him, this is not a reflection on the ability of the Latvian prison authorities to protect him and provide the necessary treatment. But an assessment, so far as the evidence enables one to do so, that the risk that he will succeed in committing suicide, whatever steps are taken, is on the evidence, sufficiently great to result in a finding of oppression. The same line of reasoning, in my judgment, could be applied to Article 8 and I do not think it is necessary to proceed to Article 3. Under Article 8 it seems to me that the inevitable proportionality judgment that has to be made, taking account of the seriousness of the offences, the need to honour international treaties and the finding that the Latvian authorities will, generally speaking, take all reasonable steps to protect him, nevertheless has to be weighed against the risk which the doctor does not express as a risk but as a certainty that he will commit suicide, his mental state having deteriorated.
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> 30. In my judgment, a judgment of proportionality for Article 8 purposes falls on the side of the finding that his Article 8 rights would be infringed."

In *Wrobel v. Poland* [2011] All E.R. (D) 10 (Mar) the Polish judicial authorities had issued a European arrest warrant for the appellant and were seeking his extradition to serve a sentence imposed upon him by a court in Poland for offences of burglary and attempted robbery. He appeared before the City of Westminster Magistrates' Court where the sole issue was whether it would be unjust or oppressive, within the meaning of s. 25 of the Extradition Act 2003, to return him because of the risk of suicide if he was returned. The Court ordered his surrender, and he then appealed to the High Court.

In his judgment, Bean J. referred with approval to a decision of the Appeal Court of the High Court of Justiciary in Scotland*: Howes v. Her Majesty's Advocate* [2009] S.C.L. 341. Lord Reed, giving the opinion of the court, said:-

> "A judgment as to whether it would be unjust or oppressive to extradite a requested person is not ... a technical issue of law, but requires the court to form an overall judgment upon the facts of the particular case: a judgment which, as Moses LJ observed in *United States v Tollman* [2008] 3 All ER 150 at paragraph 50, is likely to reflect shades of grey rather than black or white. Previous cases are therefore illustrative of the court's approach rather than definitive of the circumstances in which an order for discharge may or may not be appropriate. That said, it is apparent from such cases *as Boudhiba v National Court of Justice, Madrid* [2007] 1 WLR 124, *United States v Tollman*, *R (Tajik) v United States* [2008] EWHC 666 (Admin), *Spanovic v Croatia* [2009] EWHC 723 (Admin) and *Jansons v Latvia* [2009] EWHC 1845 (Admin) that in practice a high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him. That reflects a number of considerations. One, on which Hale LJ placed emphasis in *R (Warren) v Secretary of State for the Home Department* [2003] EWHC 1177 (Admin) at paragraph 40, is the public interest in giving effect to treaty obligations in extradition cases. It follows, as Sir Anthony May observed in *Jansons v Latvia* at paragraph 7, that "this court will not lightly conclude that a threat of suicide is sufficiently grave and likely to be carried out successfully, so that what would otherwise be the due process of extradition under international arrangements should not take place." Another important consideration is the fact that the countries with which such treaties are concluded are likely to have adequate facilities available for treating the health problems of persons whose extradition is requested."

Bean J. then reviewed the decision in *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) quoting extensively there from, including paras. 26 and 29 which this Court has also quoted. He then remarked:-

"11. This case, as Foskett J observed in *Sbar v The Court of Bologna* [2010] EWHC 1184 (Admin), may be said to establish 'something of a benchmark by which to judge other cases', although I respectfully agree with the High Court of Justiciary in Howes that the court nevertheless has to form an overall judgment upon the facts of each particular case.

12. There is, however, a dispute as to what the proper ratio of Jansons is. The best case in which to seek assistance on that issue, in my judgment, is *R (on the application of Prosser) v the Secretary of State for the Home Department* [2010] EWHC 84 (Admin), because that was another judgment of a Divisional Court with Sir Anthony May presiding. …. what is useful is to see what the Divisional Court said …. about *Jansons*:

> '20. In principle a claim based upon a risk of suicide is capable of meeting the Article 3 threshold. But Mr Southey accepts that there is only one reported case based on the risk of suicide where extradition has been successfully resisted. That case was *Jansons v Latvia* [2009] EWHC 1845 (Admin), where not only had the claimant recently actually attempted to commit suicide on account of his threatened extradition while he was in prison and very nearly succeeded; but also uncontradicted expert opinion was that he would commit suicide if he were extradited. It was not expressed merely as a risk. Jansons was in fact decided under Article 8.'

Bean J. went on to refer to the judgment of Mitting J. in *Rot v. District Court of Lublin, Poland* [2010] E.W.H.C. 1820 (Admin). He noted that at para. 13 the judge had referred to *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) and the appellant's attempt in that case to commit suicide the day after the Senior District Judge's decision, and had continued:-

> "Until and unless the reasoning in *Jansons* is disproved, the risk of suicide must be accepted to be a relevant risk for the purpose of section 25. The question must therefore be addressed and answered in such a case: would the mental condition of the person to be extradited make it oppressive to extradite him? Logically, the answer to that question in a suicide risk case must be no unless the mental condition of the person is such as to remove his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying, and therefore may make it oppressive to extradite him. Untidy though it may be, and while Jansons remains good authority, the question must be approached in a somewhat less logical manner. When, as in Jansons, there is uncontradicted evidence that an individual who has made a serious attempt to kill himself will kill himself if extradited, it may be right to hold that it would be oppressive to extradite him. Anything less will not do. The Divisional Court, in a case presided over by the President, Prosser v Secretary of State for the Home Department... made observations consistent with those remarks..."
>
> [emphasis added]

Bean J. observed that Mitting J. had then quoted from para. 22 of *R. (on the application of Prosser) v Secretary of State for the Home Department* [2010] EWHC 845 (Admin), which includes the sentence:-

> "A very high risk would doubtless be capable of achieving the Article 3 threshold."

Bean J. then commented, at paras. 14 to 19 inclusive of his judgment:-

> "14. I agree with much of what Mitting J said in *Rot*, but not with the sentence I have italicised. I do not accept that the correct test under section 25 is that there must be evidence that the fugitive will kill himself if extradited, nor that this is the ratio of Jansons. I disagree for three reasons: firstly, I cannot see how any psychiatrist can state that if something disagreeable is done to a patient, for example, his extradition ordered against his wishes, he will certainly commit suicide, that is succeed in killing himself. All a psychiatrist can sensibly do is state, for example, that there is an extremely high risk that the patient will make an attempt to commit suicide, and that if, as in the case of *Jansons*, he has come close to success once before, there may be an extremely high risk that he will succeed the next time. However, predictions by psychiatrists cannot, as I see it, be in terms of certainty.
>
> 15. Secondly, I was struck by the President's words in paragraph 2 of *Jansons* when referring to the psychiatric report saying that Mr Jansons, if extradited to Latvia, "will commit suicide". The President commented:
>
> > 'The report says that in terms or, at least, one supposes, make every effort to do so.'
>
> That bears out, I think, the view I have just expressed about certainty of success.
>
> 16. I also note that in paragraph 29 of *Jansons* the President, with whom Dobbs J agreed, used the phrase: 'such a substantial risk that he will commit suicide', and in the same paragraph said:
>
> > 'the risk that he will succeed in committing suicide, whatever steps are taken, is on the evidence, sufficiently great to result in a finding of oppression.'
>
> Thirdly, in *Prosser* the President observed in paragraph 22 that:
>
> > 'A very high risk would doubtless be capable of achieving the Article 3 threshold.'
>
> 17. If a very high risk was sufficient in a case governed by Article 3, I cannot see that it would be right to interpret section 25 in a way that would be inconsistent, or indeed incompatible, with Article 3. I cannot see any reason why Parliament should have intended to impose a more stringent test under section 25 than under the Human Rights Act and Article 3 itself. I therefore conclude that the test is, as stated in paragraph 29 of Jansons, whether the risk that the fugitive will succeed in committing suicide, whatever steps are taken, is on the evidence sufficiently great to result in a finding of oppression.
>
> 18. In deciding what risk is sufficiently great to result in such a finding it must be borne in mind, firstly, that there is a public interest in giving effect to treaty obligations (see *Howes* and also *Norris* [2010] 2 AC 487); secondly, that it should be assumed, at any rate in a European arrest warrant case under Part 1 (such as the present one and Jansons), that the

requesting state has the facilities to cope with and treat mental illness. Whether or not the treatment is, in all respects, as good as the appellant might receive in London is not to the point. Thirdly, a high threshold has to be surmounted in order to show oppression. Finally, in a case based on the risk of suicide there must, in my view, be independent and convincing evidence of a very high risk of suicide if the fugitive is returned.

19. Taking all this into account, I consider that the unchallenged evidence of Professor Hirsch does provide independent and convincing evidence of a very high risk of suicide in this case if the appellant is returned to Poland. I therefore find that District Judge Evans ought to have decided the section 25 issue differently, and ought to have found, as I find, that it would be oppressive to return the appellant to Poland to serve the term of imprisonment for which his extradition is sought. Accordingly the appeal is allowed and the order for extradition quashed."

Submissions on behalf of the applicant

In reply to the submissions of counsel for the respondent, counsel for the applicant submitted that the starting point for this Court when it comes to consider the right to life and bodily integrity should be the decision in *Minister for Justice, Equality and Law Reform v. S.M.R.* [2007] IESC 54 [2008] 2 I.R. 242. The position in that case, counsel submitted, was that there was very cogent evidence before the Court. The Court was referred to the summary of the evidence at paras. 17 to 21 inclusive of the judgment of Finnegan J. , at pp. 250 to 252 of the report. In essence the prognosis of the respondent's general practitioner remained very guarded and he considered that the respondent was "at major risk of the sudden onset of an acute event that could lead to extremely serious consequences or death". He also indicated that the respondent had been instructed to avoid all stressful situations and not to place himself in a stressful environment under any circumstances on medical grounds. Further, there was evidence from a consultant cardiologist that the respondent's prognosis remained limited and that acute severe stresses should be avoided. Finnegan J.'s interpretation of this was that:-

> " ….the respondent has chronic impairment of heart muscle function and is at risk of developing heart failure. Stress *may* precipitate acute coronary disease and if at all possible should be avoided. His operations in June and September, 2004 were successful. An acute coronary event 'might well prove catastrophic in limiting heart function'. I do not understand this to mean that an acute coronary event is likely to be fatal but rather that it would result in further limiting heart muscle function."

Finnegan J.'s view was that the evidence, cogent though it may have been, did not justify the trial judge's finding that the respondent was at real risk of dying if placed in a situation of stress, and, at para. 23, p.252, that the appropriate test was that the court would "balance the risk to the health of the respondent directly related to his surrender on the one hand and the obligations of the State under the Framework Decision." He further stated, at para. 26, p. 253, that "[t]he evidence as to the respondent's health is not such as would prevent a person in similar circumstances to the respondent being put on trial in this jurisdiction."

Counsel submits that in the present case this Court should similarly have regard, *inter alia*, to the fact that the respondent's schizoaffective disorder would not prevent him from being put on trial in this jurisdiction. He would have to subject himself to the court process and there would, at the very least, have to be a determination as to his fitness to be tried. Moreover, if he were found fit to be tried, he would not be immune from the possibility of having a custodial sentence imposed upon him because of his condition.

Counsel submits that in *Minister for Justice, Equality and Law Reform v. S.M.R.* [2007] IESC 54 [2008] 2 I.R. 242, the Supreme Court, after considering the right to bodily integrity, went on to consider whether or not the respondent would receive appropriate health care in the requesting state. Although counsel for the respondent in the present case has argued that these are separate issues, counsel for the applicant submits that they are inextricably linked and that this is clear from the judgment in that case that both matters have to be considered before the court could reach a decision on whether to refuse surrender on the basis of a risk to life or bodily integrity. Finnegan J., giving judgment for the Supreme Court, ultimately held that:-

> "I am satisfied that in the United Kingdom, and whether on bail or in custody, the respondent will receive appropriate health care. While Dr. Kearney is of opinion that stress may precipitate acute coronary disease and should be avoided I am satisfied that something much more definite by way of threat to life would be required in this jurisdiction before the courts would involve Article 40.3.2¸ of the Constitution and prohibit a trial. The possibility that stress may precipitate acute coronary disease, I am satisfied, is insufficient."

Counsel for the applicant has also brought to this Court's attention the subsequent decision of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Johnson* [2008] IESC 11(Unreported, Supreme Court, Macken J., 12th March, 2008) in which the Supreme Court referred to its earlier decision in *Minister for Justice, Equality and Law Reform v. S.M.R.* [2007] IESC 54 [2008] 2 I.R. 242. In the former case the respondent's rendition to Scotland on foot of a European arrest warrant was being resisted. One of the grounds on which it was being resisted was that the respondent had a psychiatric condition, with a history of self harm, and was at risk of committing suicide if surrendered. Having quoted at length from the judgment of Finnegan J. in *Minister for Justice, Equality and Law Reform v. S.M.R.* [2007] IESC 54, Macken J. stated, at pp. 9 and 10 of her unreported judgment:-

> "I do not consider it either desirable or appropriate that a detailed comparison should be made between the medical condition of one person being sought to be surrendered, as against that of another person being sought to be surrendered, as it is sought by the respondent/appellant, by implication, to do in the present case. But if it were necessary to do so, I would consider his medical, including psychiatric, condition, to be less serious than that of the appellant in the case of S.[M.] R., supra. I do not, however, base my judgment on such a consideration. Rather, I am satisfied that the learned trial judge did not misdirect himself in his assessment of the nature of the respondent/appellant's own medical, including psychiatric, condition even though his counsel argued that in the present case, the danger to him arises from the very fact of surrender, as was argued also in the case of S.[M].R.. Nothing submitted in the course of this appeal supports the contention that the learned trial judge came to a wrong conclusion on the materials before him. In this Court, on the evidence presented, I am satisfied that there are no medical evidence upon which a different view should be adopted on this appeal. The respondent/appellant is at present under the care of medical authorities in this jurisdiction and equally, until he is surrendered, he will continue to be protected and treated for his medical condition.
>
> I do not take into account either, in reaching my view in relation to the psychiatric condition of the applicant and the High Court judge's finding, the fact that some or other of the psychiatric reports raised an issue in respect of the possibility of feigned symptoms, but have considered the evidence relating to his condition in a light most favourable to him. It has to be borne in mind, as has been stated by this court in previous cases, including the S.[M.]R. case, *supra*.,

> that the United Kingdom and the authorities in all its constituent parts are obliged to protect the respondent/appellant, having regard to his medical, including psychiatric, condition. There was nothing before the High Court, and there is nothing before this Court, which would suggest that he would not be fully assessed and treated for his particular medical, including psychiatric, difficulties, there, upon surrender, or that his mere surrender would have the effects contended for by counsel on his behalf."

The Court was also referred by counsel for the applicant to Minister for *Justice, Equality and Law Reform v. Jason Brady* (Unreported, Supreme Court, ex tempore, Murray C.J., 14th January, 2008). The respondent's rendition to the United Kingdom to face trial for serious charges including murder was being resisted in that case on the grounds of his medical condition. While his surrender hearing was pending he had suffered a road traffic accident in which he sustained serious injuries, including being rendered paraplegic with its associated disabilities. Addressing the suggestion that he should not be surrendered on account of his medical condition, Murray J. stated in his *ex tempore* judgment:-

> "That, of course, is not a bar to prosecution and indeed it is not claimed that it could be so. The appellant says that the state has failed to demonstrate that if he is returned to the United Kingdom that he would receive a level of care and treatment that would be consistent with his right to respect for his bodily integrity as guaranteed by the Constitution or to establish that his treatment would not be such as to amount to a breach of Article 3 of the European Convention on Human Rights namely that he would not be subjected to what could amount to inhuman or degrading treatment due to an absence of proper care.
>
> However the onus is on the appellants to establish at the very least some systemic and fundamental deficiency or practice in the requesting state so that as a matter of probability he would be completely denied some fundamental right. He has failed to discharge that onus, there being no evidence to support or to establish such a probability.
>
> Moreover, insofar as evidence was given in the High Court there is a range of legal protections in United Kingdom statutory law as well as the European Convention on Human Rights itself which imposes duties on that stage with regard to his treatment as a disabled prisoner and which can be invoked by him should there be a threatened or actual breach. The treatment of disabled prisoners when committed to prison by a court is a matter in the first instance for the court making the order for detention in custody and in this context the relevant court is the court of the United Kingdom. At the same time there is a parallel obligation on the authorities responsible for its custody to ensure these rights in this respect are not transgressed.
>
> The conclusion of the court is that the appellant has not provided any evidence that establishes any ground for refusing his surrender on the basis of how he may be treated in the United Kingdom in the future from the perspective of his disabilities."

Turning then to the decisions of the E.Ct.H.R. upon which the respondent places reliance, counsel for the applicant disputed the contention that that Court had consistently found that prison and detention conditions in Poland for those who required specialist care were in breach of the E.C.H.R. Far from it, submitted counsel for the applicant, referring in particular to the E.Ct.H.R.'s judgment in *Musiał v. Poland* (App. no. 28300/06) – E.Ct.H.R., 20th January 2009, relied upon by the respondent and cited above. Counsel for the respondent has drawn the Court's attention to pp. 10 to 12 of the E.Ct.H.R's judgment where there is a very detailed recital of the specific rules and guarantees under Polish law regarding detention in a medical institution, as well as psychiatric care in prisons and remand centres, as well as a description of the recourse that may be had in Poland by an affected person to judicial review and complaints to administrative authorities. Counsel submits that contrary to the suggestion that there are systemic deficiencies, the cases in fact illustrate that there is a legislative regime that protects the health and welfare of imprisioned or detained medically vulnerable persons, and that there are remedies available in Poland where somebody does have a complaint about the level of care that they are receiving.

Counsel for the applicant has also drawn the Court's attention to para. 75 of the judgment of the E.Ct.H.R. in *Kaprykowski v. Poland*, (App. no. 23052/05) – E.Ct.H.R. 3rd February, 2009, another case relied upon by the respondent and referred to earlier in this judgment, wherein it is stated:-

> "The Court reiterates that the Convention does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population generally (see Nitecki v. Poland (dec) no 65653/01, 21 March 2002)"

In relation to Dr. Doran's evidence it has been urged upon the court that Dr. Doran appears to have been unaware of some of the background, perhaps to a worrying extent. It was suggested that the evidence in fact establishes that between 2002 and 2010 the respondent had a relatively productive life and he held down a number of employments and indeed has a significant work history during a time when he has been labouring under his illness. Further, there were no acute hospital admissions in Ireland between 2002 and 2010.

Turning to the decisions in *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) and *Wrobel v. Poland* [2011] All E.R. (D) 10 (Mar) upon which the respondent places reliance, counsel for the applicant draws the Court's attention to the more recent case of *Mazurkiewicz v. Poland* [2011] E.W.H.C. 659 (Admin).

This case was another appeal to a Divisional High Court in the Queen's Bench Division in which rendition on foot of a European arrest warrant was being resisted on the grounds of risk of suicide. The evidence was that the appellant had made a number of serious suicide attempts in the past in an effort to avoid being sent back to Poland. His psychiatrist testified, *inter alia*, that he was suffering from traits of both an emotionally unstable personality and an antisocial personality, and that these were what underlay his inability to envisage any future for himself if deported and his desire to kill himself. Perhaps critically, in terms of the ultimate decision in the case, the psychiatrist had that said he did not find evidence of severe and enduring mental illness. Nevertheless, the psychiatrist had opined that there was a high risk of the appellant killing himself, and that the risk would be higher if the appellant were to be extradited.

The appellant himself had given oral evidence before the lower court in which he claimed to have ready access to blades and vowed to commit suicide with a blade as soon as any extradition order was made. The District Judge reserved her decision and while she was considering her decision the appellant committed serious self harm by cutting deeply into his left arm.

At the hearing of the appeal the appellant contended that there was a high risk of suicide and sought to rely upon s. 25 of the Extradition Act 2003 and also articles 2, 3 and 8 E.C.H.R., in conjunction with s. 21 of the Extradition Act 2003.

Following a detailed review of the English case law up to that point, including the decisions in *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin); *Howes v. Her Majesty's Advocate* [2009] S.C.L. 341; *R (on the application of Prosser) v the Secretary of State for the Home Department* [2010] EWHC 84 (Admin); *Sbar v Court of Bologna* [2010] All E.R. (D) 237 (May); *Rot v. District Court of Lublin, Poland* [2010] E.W.H.C. 1820 (Admin). and *Wrobel v. Poland* [2011] All E.R. (D) 10 (Mar), Jackson L.J. went on to say:-

> "44. As the law now stands, I consider that the test which the court must apply is that stated in *Wrobel*. If the appellant proves that there is a very high risk of suicide in the event of extradition, then he demonstrates that it would be oppressive to extradite him within the meaning of section 25(1) of the 2003 Act.
>
> 45. I do, however, share the misgivings expressed by Mitting J in Rot. A person who is otherwise fit to serve a sentence of imprisonment does not escape such a sentence in this country simply by pointing to a high risk that he will commit suicide. Obviously mistakes are sometimes made, but the prison service has systems in place to protect vulnerable prisoners against self harm. Our criminal justice system operates on that basis. By way of analogy, the reasoning of the Court of Appeal in *R v Quazi and Hussain* [2010] EWCA Crim 2759; [2011] Crim. L.R. 159 is relevant.
>
> 46. Part 1 of the 2003 Act rests upon the principle of mutual respect for the different criminal justice systems within the EU. Furthermore, the growing number of cases in which the suicide argument is deployed, sometimes with success, must be a matter of concern. If the mistaken belief takes hold that any serious, but unsuccessful, attempt at suicide is rewarded by relief from extradition, this will be highly damaging for all concerned. In my view, therefore, this court was right to stress in *Jansons* that it is only in a truly exceptional case that in practice a fugitive can escape extradition to a category 1 territory on the grounds of suicide risk."

Though nothing turned on it, the Divisional Court ultimately found that the District Judge had correctly noted that there was no independent evidence to support the appellant's assertions beyond the very recent events and the appellant's account given to the psychiatrist. There was no evidence before the Court of previous mental illness or psychiatric treatment of the appellant, either in Poland or in the U.K. While this was undoubtedly a case where there was a suicide risk, the Court was unable to say that the suicide risk was so high that the appellant's rights under articles 2, 3 or 8 E.C.H.R were infringed, or that extradition would be "unjust or oppressive" within s. 25 of the Extradition Act 2003. The appeal was dismissed.

Counsel for the applicant urges that I should view *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) and *Wrobel v. Poland* [2011] All E.R. (D) 10 (Mar) in light of the remarks of Jackson L.J. in *Mazurkiewicz v. Poland* [2011] E.W.H.C. 659 (Admin) and approach the case on the basis that it is only in a truly exceptional case that in practice a fugitive can escape extradition on the grounds of a suicide risk, and that the present case is not truly exceptional in light of the evidence received from the issuing state concerning how he will be treated and managed in the event that he is surrendered. It was pointed out that *Mazurkiewicz v. Poland* [2011] E.W.H.C. 659 (Admin) has recently been applied in *Kieran Farrell v. Criminal Courts of Justice, Dublin* [2012] E.W.H.C. 676 (admin). However, that case does not advance matters in terms of the law.

Finally, the evidence that counsel for the applicant relies upon in relation to flight is the fact that in July, 2004 the respondent was requested to undergo a medical evaluation by a Polish court and that in October, 2004 he arrived in this jurisdiction. The Court is asked "to infer flight in all the circumstances of the case, but having particular regard to this aspect of the matter."

The Court's Decision

Section 37(1) issues

Section 37 of the Act of 2003 deals with the protection of fundamental rights. For the purposes of this judgment the Court is primarily concerned with s. 37(1)(a) & (b), respectively. These provide:

> "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,
>
> (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38 (1)(b) applies)"

Section 37(2) goes on to provide 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; and
>
> 'Protocols to the Convention' means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:
>
> (a) the Protocol to the Convention done at Paris on the 20th day of March, 1952;
>
> (b) Protocol No. 4 to the Convention securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto done at Strasbourg on the 16th day of September, 1963;
>
> (c) Protocol No. 6 to the Convention concerning the abolition of the death penalty done at Strasbourg on the 28th day of April, 1983;
>
> (d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984."

Section 37(1)(a) issues

Articles 2 & 3 E.C.H.R.

The Court accepts that a real risk of suicide, established on clear and cogent evidence, could in principle engage article 2 and/or article 3 E.C.H.R. Whether or not the provisions in question are in fact engaged will depend on the circumstances of the case. I do not, however, consider that the mere fact that a respondent is at high risk of committing suicide will *per se*, and without more, engage those provisions.

The Court accepts that the principles set out by the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, 3 I.R. 783 apply in respect of the suggested breaches of the respondent's right to life, (under article 2 E.C.H.R.); and his right not to be tortured or be subjected to inhuman or degrading treatment or punishment, (under article 3 E.C.H.R.).

In his judgment in *Minister for Justice, Equality and Law Reform v. Stapleton* [2007] IESC 30 [2008] 1 I.R. 669, Fennelly J. indicated that the normal presumption is 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'."

To assert this as a proposition is not in any way to seek to dilute or minimise the responsibility of the courts of Ireland, as an executing member state, to inquire appropriately into whether or not there is a real risk that a respondent's rights will be breached. It is certainly the starting position in every case and it is the "normal presumption", but it is only a presumption, and it is a rebuttable one at that. This Court readily accepts the proposition articulated by both the E.Ct.H.R. and the Court of Justice of the European Union that the mere fact that an issuing state is a signatory to an instrument such as the E.C.H.R., or the Charter of Fundamental Rights, or the Framework Decision cannot, of itself, constitute a sufficient guarantee that rights will not be breached. The principles of mutual trust and confidence upon which the European arrest warrant system is predicated, and the concurrent requirement that the decisions of courts and judicial authorities in other member states should be afforded mutual recognition, though very important, are not so far reaching as to give rise to a conclusive presumption that an issuing state will respect a respondent's rights. In particular, they are not to be so slavishly adhered to as to, in effect, so blinker a court in an executing member state as to cause it to ignore or overlook a real risk of a breach of the right to life or bodily integrity where it genuinely exists.

This is nothing new, however. In *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, 3 I.R. 783, Fennelly J. stressed 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."

It is made clear by both Denham J. and Fennelly J. in the latter case that these two principles are readily reconcilable and that they do not imply that "there is any underlying conflict between the Convention and the Framework Decision." (per Fennelly J. at p.813).

Accordingly, the subject matter of the Court's inquiry "is the level of danger to which the person is exposed" (per Fennelly J. at p. 814 in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45) and "it is not necessary to prove that the person will probably suffer inhuman or degrading treatment", or threat to life. It is enough to establish that there is a "real risk'" (per Fennelly J., at p. 801 in the latter case) "in a rigorous examination." (per Denham J. at p.802 in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45). However, the mere possibility of ill treatment is not sufficient to establish a respondent's case (per Denham J. at p. 801, in the latter case).

A court should consider all the material before it, and if necessary material obtained of its own motion (per Denham J. at p.801 in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45). Moreover, 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 E.C.H.R." (per Denham J. in at p.802), or, indeed, this Court would say, article 2 of the E.C.H.R.

The judgments in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45 also make clear that 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 a respondent as to conditions in which mentally ill prisoners are kept in the detention centres and prisons of a requesting state, and as to the treatment available to such prisoners, or the lack thereof as the case may be, with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 2 and/or article 3 E.C.H.R. 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. 802 in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45);

The court should examine the foreseeable consequences of sending a person to the requesting state (per Denham J at p. 802 in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45). In other words, the court must be forward looking in its approach. Moreover, in this Court's view, before it would be justified in intervening, it would also have to be satisfied that sufficient proximity of connection would exist between the apprehended event, were it to arise, and the act of surrendering the respondent to the requesting state.

In her judgment at p. 802 in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45, Denham J. also indicated that 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.

Before seeking to apply these principles to the present case, it is necessary to state that the Court accepts the evidence of Dr. Doran that there is a very serious risk that the respondent may commit suicide if he is surrendered to Poland in circumstances where Clozapine may not be available to him, and where he is likely to be detained for at least some time and separated from his wife and children. The Court found Dr. Doran to be an impressive witness, and disagrees with the suggestion of counsel for the applicant that Dr. Doran exhibited a worrying lack of knowledge of the background to the case, and the respondent's employment history. Dr. Doran

explained that the respondent's condition is progressive and, though he may have been unaware of them, he did not seek to seriously gainsay the possibility that the respondent may have held down employments, *inter alia* as a mechanic, for reasonable periods over the last decade. However, his evidence was that the respondent's condition had deteriorated with time and he is believed to be significantly worse now than he was. That said, his condition has now been somewhat stabilised by the prescription of Clozapine combined with Cognitive Behavioural Therapy. However, if these treatments are discontinued he will relapse. I am not inclined to attach huge significance to the absence of evidence of acute admissions in this country before the respondent came into Dr. Doran's care in circumstances where he was still returning regularly to Poland for treatment, and was being excellently supported by his family. The context has been satisfactorily explained by Dr. Doran in this Court's view.

However, in terms of the legal issues which the court has to decide, the critical question which requires to be addressed is not whether the respondent will commit suicide if he is surrendered (the Court profoundly hopes that he will not, but accepts that he is at very serious risk of doing so); but, rather, whether there is a real risk in the circumstances of the case that to surrender him would breach his rights i.e. his right to life, to bodily integrity and not to be subjected to inhuman or degrading treatment – in other words to be treated with human dignity.

Applying the principles in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45 to the facts of the present case, I do not consider that the evidence adduced by the respondent goes so far as to establish a real risk that the respondent's right to life, or his right to bodily integrity and not to be subjected to inhuman and degrading treatment but rather to be treated with human dignity, would be breached by the issuing state in the event of him being surrendered by this Court.

Notwithstanding breaches by Poland in the past of the fundamental rights of prisoners with serious medical conditions, including those of psychiatrically ill persons, and the concerns expressed recently by the U.S. State Department about medical staff vacancies in Polish prisons, and difficulties in accessing specialist treatment, the Court is satisfied that if this respondent is surrendered he will receive the level of psychiatric care and treatment available to the population generally in the issuing state. The Court has the benefit of an express assurance contained within the additional information dated the 13th June, 2002, that he will be given the same standard of medical care as any other Polish citizen suffering from the same condition.

Further, I consider that the cases from the E.Ct.H.R., and the country of origin information, relied upon by the respondent do not go so far as to establish a systemic and fundamental deficiency or practice in the treatment of mentally ill prisoners in the requesting state, such as might cause this court to conclude that, in the event of the respondent being surrendered, there is a real risk that some fundamental right of his would be breached or that he would be denied the benefit of such a right in whole or in part. They merely establish anecdotally that a deficiency has occurred in some cases, but they do not in this Court's view establish a systemic problem. Moreover, with particular respect to the United States Department of State, *Country Reports on Human Rights Practices: Poland 2010* , the Court would remark that the views of Latham L.J. in *Miklis v. Lithuania*, [2006] E.W.H.C. 1032 (Admin), with which this Court has expressed concurrence in previous judgments, again appear apposite. In that case Latham L.J., who was giving judgment on behalf of a Divisional High Court in the Queen's Bench Division in England, said at para. 11:-

> "It is, however, important that reports which identify breaches of human rights, or other reprehensible activities on the part of governments or public authorities are kept in context. The fact that human rights violations take place is not of itself evidence that a particular individual would be at risk of being subjected to those human rights violations in the country in question. That depends upon the extent to which the violations are systemic, their frequency and the extent to which the particular individual in question could be said to be specifically vulnerable by reason of a characteristic which would expose him to human rights abuse."

Though the medical evidence suggests that there is a very serious risk that the respondent may attempt suicide there is also evidence that the Polish authorities are well aware of his medical condition and of the associated risk. The treatment that he may expect to receive in Poland may not be as good as the treatment he is presently receiving in Ireland, but that is somewhat beside the point. The inability of the Polish State, for medicinal licensing reasons, to offer him the same treatment as he is getting in Ireland could not, in this Court's view, in and of itself, be regarded as breaching his rights under article 2 and/or 3 E.C.H.R. As has been pointed out, the European Court of Human Rights has also confirmed in para. 75 of its judgment in *Kaprykowski v. Poland*, (App. no. 23052/05) – E.Ct.H.R. 3rd February, 2009, that the E.C.H.R. does not guarantee a right to receive medical care which would exceed the standard level of health care available to the population generally.

Article 2 E.C.H.R., in so far as relevant, provides: "1. Everyone's right to life shall be protected by law. (...)" While it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under article 2 (see *Nitecki v. Poland* [admissibility decision], no. 65653/01, E.Ct.H.R. 21st March, 2002) the failure of a state *per se* to licence a particular medicine to treat a particular condition, would not in this Court's view engage article 2, even if indirectly it might have implications for an individual's life or health.

In so far as article 3 E.C.H.R. is concerned, it is well established that for this provision to be engaged a person has to be subjected to ill-treatment. Moreover, the ill- treatment must attain a minimum level of severity if it is to fall within the scope of article 3 E.C.H.R. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Vilvarajah and Others v. the United Kingdom*, E.Ct.H.R. 30 October 1991, Series A, no. 215, p. 36, § 107; Kud³a v. Poland [GC], App No. 30210/96, § 91, E.Ct.H.R. 2000-XI; and *Peers v. Greece*, App No. 28524/95, § 67, E.Ct.H.R 2001-III). The European Court of Human Rights has consistently stressed that the suffering and humiliation involved must in any event go beyond that which is inevitably connected with a given form of legitimate treatment or punishment. As regards prisoners or detainees, the Court has repeatedly noted that measures depriving a person of his liberty may often involve such an element. However, under article 3 E.C.H.R, the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.

Providing a mentally ill prisoner is detained in conditions which are compatible with respect for his human dignity, and there is no cogent evidence to suggest in this case that that will not happen, the failure by a state to make the best possible medical treatment available to him is not ill-treatment in my view, and therefore does not engage article 3 E.C.H.R., even if directly or indirectly it may have implications for that individual's life or health. A person only has a right (under article 14 E.C.H.R.) to expect that he/she will not be arbitrarily discriminated against in terms of the availability of medical care and treatment in their country of residence, and that in that regard they will be treated in the same way as everybody else in that country. The respondent in this case has been guaranteed that.

Another point of importance is that although Dr. Doran believes that the respondent will be at very serious risk of committing suicide if

surrendered, he does not go so far in his evidence as to say that the respondent will succeed in committing suicide, whatever steps are taken. If the respondent is surrendered it will be the responsibility of the requesting state to take all measures necessary to watch over him and prevent him from taking his own life. This may involve the commitment of significant resources but in circumstances where this Court has received an express commitment from the Polish authorities that the respondent will receive proper medical care, and psychiatric care in particular, taking into account his state of health, this Court must accept, as indeed it does, that there are appropriate arrangements in place in the prison system in Poland to properly cope with his mental condition and properly cope with the risk of suicide.

For these reasons the Court is not satisfied that articles 2 and 3 E.C.H.R. are engaged at all in the circumstances of this case, but even if they are engaged, the Court is not satisfied in any event that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to a breach of his right to life as guaranteed under article 2 E.C.H.R., or of being ill-treated contrary to article 3 E.C.H.R.

Article 8 E.C.H.R.

This Court noted in *Minister for Justice Equality & Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011) that article 8(2) E.C.H.R. permits interference by a public authority with the exercise of the right to respect for family life where that is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". I went on to say that:-

> "It would be preposterous to suggest that persons could not, or should not, be sent to prison simply because that would interfere, and indeed significantly interfere, with their enjoyment of family life, or that the sending of persons, particularly any person with a spouse and children, to prison would amount to a failure to respect the right of those affected to family life. That is not to say that there can never be circumstances in which a person's imprisonment could amount to a failure to respect family life but such circumstances would be highly exceptional and are likely to be exceedingly rare. Before a Court would intervene in that regard it would have to be satisfied as to the existence of some truly exceptional circumstance that would render the usually permitted level of interference with family life that imprisonment normally entails unacceptable in the circumstances of the particular case and disrespectful of the right to family life as guaranteed by article 8."

As it happens, although I was unaware of the *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin), *Wrobel v. Poland* [2011] All E.R. (D) 10 (Mar), and *Mazurkiewicz v. Poland* [2011] E.W.H.C. 659 (Admin) judgments of the English High Court at the time of giving my judgment in *Minister for Justice Equality & Law Reform v. Bednarczyk* [2011] IEHC 136 (Unreported, High Court, Edwards J., 5th April, 2011), my reference to the need for "truly exceptional circumstances" mirrors Sir Anthony May's characterisation of *Jansons v. Latvia* [2009] E.W.C.A. 1845 (Admin) as being, in the first para. of his judgment in that case, "not only a most unusual case but in one respect I think exceptional", and Jackson L.J.'s statement at para. 46 in *Mazurkiewicz v. Poland* [2011] E.W.H.C. 659 (Admin) that "this court was right to stress in *Jansons* that it is only in a truly exceptional case that in practice a fugitive can escape extradition to a category 1 territory on the grounds of suicide risk." Moreover, other English cases speak of the need for "striking and unusual circumstances" (e.g. per Dyson L.J., at para. 57, in *Jaso v. Central Criminal Court (No. 2) Madrid* [2007] E.W.H.C. 2983). Although different language is used I am satisfied that they are all saying essentially the same thing, and that the bar that must be vaulted before a court will interfere on article 8 grounds must be regarded as having been set at a very high level.

There has only been one previous case in this jurisdiction to the knowledge of this Court in which surrender on foot of a European Arrest Warrant has been refused on article 8 grounds. That was a decision of Peart J. in *Minister for Justice, Equality and Law Reform v. Gorman* [2010] IEHC 210 [2010] 3 I.R. 583. The judge concluded at p. 613 that "proportionality is not satisfied on the unique and exceptional facts of this case" (this Court's emphasis).

The question for the Court in the present case is whether truly exceptional circumstances exist such as would justify this Court in concluding that it would be a disproportionate measure to surrender the respondent having regard to his rights, and those of his partner Ms. Malecki, and their two daughters, to respect for their family life under article 8 E.C.H.R. After much reflection I have concluded that truly exceptional circumstances do exist.

First, there is the strong medical evidence that the respondent suffers from a progressive schizoaffective disorder, characterised by low mood symptoms coupled with psychotic symptoms such as auditory hallucinations and paranoid beliefs, which has proved difficult to treat in his particular case. He has made two serious attempts at suicide in the past, and these crises were linked to the break-up of his first marriage in Poland and in particular the enforced separation from a son of that marriage, who would now be about thirteen years old.

Secondly, his condition has been somewhat stabilised by Dr. Doran through the use of Clozapine combined with Cognitive Behavioural Therapy, in an environment where his family here in Ireland have been very supportive of him. In his evidence, which I accept, Dr. Doran stressed the importance of this family support for the maintenance of the respondent's mental stability.

Thirdly, if the respondent is returned to Poland he is likely to be remanded in custody, and although the Court accepts that the Polish authorities will do all in their power to look after him and will afford him the same standard of psychiatric treatment and medical care as is available to the general populace of Poland, the fact remains that Clozapine is not licensed in Poland for prescription to patients suffering from schizoaffective disorder, and the Court also has unchallenged evidence that Cognitive Behavioural Therapy would also be unavailable to him. Further, and most significantly, he would be separated from his family who, as I have said, are providing essential support for him.

Fourthly, the evidence of Dr. Doran is that if he is returned to Poland there is *a very serious risk that he will commit suicide* (the Court's emphasis), and that the tipping or precipitating factors are likely to be the withdrawal of Clozapine treatment, coupled with the distress of being separated from his family, in circumstances where no other effective or very effective alternative treatment is available to be substituted for the Clozapine treatment. Such anti-psychotic and other medications as are available in Poland have been tried previously but have proved to be of little effect in the respondent's case.

Fifthly, it is hardly realistic or reasonable to expect that the respondent's partner, Ms. Malecki, and the couple's two daughters, should have move to Poland in the event of the respondent being surrendered, in circumstances where they have put down roots here, and Ms. Malecki has her own business here. Nevertheless, their support for the respondent to date has been impressive and they might well elect to do so, as difficult as that choice might be to make, for the purposes of being able to visit him more conveniently. Be that as it may, contact will inevitably be confined to periodic prison visits and they will be unable to provide the level

of continuing family support that Dr. Doran has stressed is so important in the respondent's case.

In arriving at its decision, the Court has very much taken into account, and has balanced against the above considerations, the significant public interest in the extradition of fugitives from justice. The Court has also had regard to the seriousness of the alleged offences for which the respondent is wanted for trial, the seriousness of the offences for which he has already been convicted, the potential penalties that might be imposed, and those that have already been imposed. The Court has also taken into account the fact that the respondent was found unfit to plead by a Polish court some years ago, and the fact that, as is dealt with in more detail below, there is little evidence to support the suggestion that the respondent fled from Poland to evade justice, certainly not enough to satisfy this Court.

The Court has concluded that it would, in the truly exceptional circumstances of this case, be a disproportionate interference with the rights of the respondent, and of his family (Ms. Malecki and their two daughters), under article 8 E.C.H.R. to respect for their family life, to surrender the respondent on foot of the three European arrest warrants before the Court.

Section 37(1)(b) issues

Article 40.3 of the Constitution of Ireland, 1937

In circumstances where the Court is not prepared to surrender the respondent on s.37(1)(a) grounds, *i.e.*, on the basis that to do so would be incompatible with the State's obligations under article 8 E.C.H.R., it is unnecessary to move to s.37(1)(b) and consider whether the respondent's surrender is also prohibited by reason of contravening the respondent's rights to life, to bodily integrity and to be treated with human dignity as guaranteed under Article 40.3 of the Constitution of Ireland,1937.

Section 10(d) – the flight issue

While strictly speaking, it is probably also unnecessary to consider the issue of flight, the Court is prepared to indicate its position having arrived at a clear view. The Court is not satisfied that there is sufficient evidence of flight in the sense described in *Minister for Justice, Equality & Law Reform v. Tobin* [2007] IEHC 15 & [2008] IESC 3 [2008] 4 I.R. 42,, *i.e.* an attempt to evade justice. The Court has considered the entirety of the information provided to it in this case. In the Court's view there is insufficient direct evidence of flight. Equally there is insufficient evidence to ground an inference of flight. Indeed, the many trips that the respondent made back to Poland for medical treatment are not consistent with him having fled to evade justice. Moreover, the respondent's partner's evidence is to the effect that it was she who made the decision to leave Poland and settle in Ireland, and that this was due to her inability to find gainful employment in Poland. Ms. Malecki has stated that the respondent was at that time in receipt of disability benefit, which was insufficient for them to survive on. She has further stated that the respondent's decision and her decision to come to Ireland had nothing to do with the Polish proceedings in relation to which the respondent is now sought. She has said that medical reports had been submitted to the Polish courts in these cases showing that the respondent was unfit to be tried. That is borne out on the evidence. She states that both she and, she believes, the respondent were under the impression that the proceedings had concluded. I find no sufficient reason not to accept Ms. Malecki's evidence.

The Court would add the following comment. Even if the Court had not been prepared to accept Ms. Malecki's evidence on this issue, and I do accept it, I do not think it is helpful to seek to judge the actions of a person who is psychiatrically ill by applying, or attributing to such a person, the reasoning processes or the rationality of a person who is in the whole of his or her mental health. Just because the timeline of events, viewed objectively, might suggest a possible intention to flee, it does not automatically justify the inference of flight. It seems to this Court that when the circumstance of the respondent's mental illness is taken into account, his subjective intention is the only intention that counts. The Court is not prepared to foreclose on the possibility that it may have seemed rational, and to have made logical sense to him, mentally unwell as he was, to leave in the circumstances in which he did, without there having being any intention on his part to flee in the sense referred to in *Minister for Justice, Equality & Law Reform v. Tobin* [2007] IEHC 15 & [2008] IESC 3 [2008] 4 I.R. 42.

Section 45 – Warrant No. 3 only, trial in absentia issue

Although the respondent raised no point of objection based on s. 45 of the Act of 2003, the Court is still obliged to be satisfied that the respondent was either not tried in absentia, or if he was, that he was personally notified about his trial in a manner sufficient to satisfy the requirements of section 45. Failing that, the Court would require an undertaking as to a re-trial from the issuing state.

It appears from what is stated in part D of warrant No. 3 that the respondent may have been tried in absentia as a result of a plea bargain similar to that which was the subject of this Court's judgment in *Minister for Justice and Equality v. Tokarski* [2012] IEHC 148 (Unreported, High Court, Edwards J., 9th March, 2012) (which is currently under appeal to the Supreme Court, on foot of a certificate granted by this Court). There is no evidence of personal notification of the time when, and place at which, he would be tried, and there is no undertaking as to a re-trial. In the circumstances the Court considers that, in the case of warrant No. 3 only, it is also prohibited from surrendering the respondent on s. 45 grounds.

Conclusion

For the reasons indicated above, the Court cannot, and is not disposed to, surrender the respondent on any of the three European arrest warrants before it. The Court therefore declines to make the requested orders under s. 16(1) of the Act of 2003.