Neutral Citation Number: [2012] IEHC 270

THE HIGH COURT

Record No. [2011/No. 174 EXT.]

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003

AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

AND

SÁNDOR RAJKI

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 21st day of June, 2012

Introduction

The respondent is the subject of a European arrest warrant issued by the Republic of Hungary on the 11th November, 2010, in order that he might be prosecuted for the single offence particularised in the warrant. The offence in question is the subject of a ticked box in Part E I of the warrant, namely the box relating to "swindling". The warrant was endorsed for execution by the High Court in this jurisdiction on the 11th May, 2011. The respondent was arrested in Cork on the 21st June, 2011, by Garda Micheál O'Regan and on the following day was brought before the High Court in the normal way pursuant to s.13 of the European Arrest Warrant Act 2003 (hereinafter referred to as "the Act of 2003"). At the s.13 hearing the Court fixed a date for the purposes of s.16 of the Act of 2003, and the respondent was admitted to bail pending the s. 16 hearing taking place. The matter was then adjourned from time to time until coming before the Court on the 1st May, 2012, for the hearing of the s.16 application.

The respondent does not consent to his surrender to the Republic of Hungary. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s.l6 of the Act of 2003, as amended, directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the Act of 2003.

The respondent, as is his entitlement, does not concede that any of the requirements of s.16 aforesaid are satisfied. Rather, the Court is put on inquiry as to whether all of the requirements of s.16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In addition the Court is required to consider in the particular circumstances of this case two specific objections to the respondent's surrender, namely:

> (i) an objection that at the time at which the warrant was issued no decision had been made to charge the respondent with, and to try him for, the offence in question in the issuing state, and that accordingly the Court is obliged under s.21A of the Act of 2003 to refuse to surrender him; and
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> (ii) an objection that the surrender of the respondent is prohibited by s.37 of the Act of 2003 in that to surrender the respondent would expose him to a real risk of being subjected to inhuman and degrading treatment, alternatively to a breach of his right to bodily integrity, contrary to the respondent's constitutional rights and rights under the European Convention on Human Rights and Fundamental Freedoms (hereinafter "the Convention") including article 3 thereof. In addition, he contends that his right to respect for his family life under article 8 of the Convention would be breached.

Uncontroversial s.16 Issues

The Court has received an affidavit of Garda Michaél O'Regan, sworn on the 29th February, 2012, and has also received and scrutinised a copy of the European arrest warrant in this case. Moreover the Court has also inspected the original European arrest warrant which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the European arrest warrant was endorsed for execution in this State in accordance with s.13 of the Act of 2003;
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> (b) the warrant was duly executed;
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> (c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;
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> (d) the warrant is a prosecution type warrant relating to a single offence; (e) the warrant is in the correct form;
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> (f) no question arises of the respondent having been tried in absentia (as the case is a prosecution case), and accordingly it is not a case in which the court would require an undertaking under s.45 of the Act of 2003;
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> (g) correspondence is not required to be demonstrated between the offence particularised in the warrant and an offence in Irish law in circumstances where paragraph 2 of article 2 of the Framework Decision (Council Framework Decision (2002/584/JHA) of 13th June, 2002, on the European arrest warrant and the surrender procedures between Member

States, O.J. L190/1, 18.7.2002) has been validly invoked, as it has here;

(h) as the offence in question carries a potential maximum penalty of 3 years deprivation of liberty under Hungarian law the requirements of s. 38(1)(b) of the Act of 2003 with respect to minimum gravity are met.

In addition the Court is satisfied to note the existence of the European Arrest Warrant Act 2003 (Designated Member States) (No.3) Order 2004, (S.I. 206 of 2004) (hereinafter referred to as "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and article 2 of, and the Schedule to, the 2004 Designation Order, "Hungary" (or more correctly the Republic of Hungary) is designated for the purposes of the Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

The s. 21A Objection.
S.21A of the Act of 2003 was inserted by s.79 of the Criminal Justice (Terrorist Offences) Act 2005. It provides:

"21A.- (1) Where a European arrest warrant is issued in the issuing state in respect of a person who has not been convicted of an offence specified therein, the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for that offence in the issuing state.

(2) Where a European arrest warrant is issued in respect of a person who has not been convicted of an offence specified therein, it shall be presumed that a decision has been made to charge the person with, and try him or her for that offence in the issuing state, unless the contrary is proved."

The respondent's case in regard to this aspect of the matter is premised upon the fact that in Part B of the warrant, wherein details of the decision on which the warrant is based are supposed to be set out, there is in fact no reference to any domestic proceedings or domestic arrest warrant. Further, the respondent has expressed the belief on affidavit that *"the real purpose for seeking my surrender is to interrogate me about any knowledge I may have on gangland activities in Hungary and not for the purposes of charge and trial for the alleged offence set out in the ... European arrest warrant. "*

It is stated in Part B under the heading "Decision on which the warrant is based":

"Arrest warrant or judicial decision having the same effect: European arrest warrant of Szegedi Városi Bíróság (the City Court of Szeged) under number 6.Bny.934/2010/2., the force of which extends to the territory of the Republic of Hungary as well, thus it also constitutes a national arrest warrant.

Type: arrest warrant"

Counsel for the applicant has indicated that he has at all times been prepared to rely upon the s.21A(2) presumption, but that on an *ex abundante cautela* basis clarification as to the position was sought from the issuing judicial authority. In additional information furnished by the issuing judicial authority on the 19th October, 2011, it is stated:

"The requested person alleged that ' there appeared to be no Hungarian domestic criminal proceedings in being, other than the European arrest warrant itself, since there is no decision on which the European arrest warrant is based'.

Contrary to the above allegation, there is a pending criminal prosecution for the offence described in the European arrest warrant against Sándor Rajki in Hungary. Please be informed that according to section 25 subsection (7) of Act CXXX of 2003 on Cooperation Criminal Matters with the Member States of the European Union, a *'European arrest warrant* (issued by a Hungarian court) *shall be considered also as a national arrest warrant'*. As a result of this, there is no need to issue a separate national arrest warrant in Hungary. Consequently, there is no other decision of the court on which the European arrest warrant is based, since the European arrest warrant itself is **a decision of an independent and impartial Court.**

Box b) Section I of the European arrest warrant form is relevant only in cases where the issuing authority is other than a judge or a court (but a prosecutor etc.), since a judicial decision is indispensable for the deprivation of liberty. Nonetheless, if the European arrest warrant is issued by a Court or Judge, the European arrest warrant is a judicial decision itself."

(All emphasis as in original)

Counsel for the respondent has very fairly conceded that the respondent has been unable to adduce any evidence in concrete support of his asserted belief, but asks the Court to treat any reliance by the applicant on the s.21A(2) presumption with a healthy scepticism in the light of what occurred in the case of *Minister for Justice, Equality and Law Reform v. Bailey* [2012] I.E.S.C. 16 (Unreported, Supreme Court, 1st March, 2012), and to treat the presumption as being easily rebutted at least to the extent of the Court being put upon enquiry as to the actual, as opposed to any presumed position. Counsel for the respondent asks the Court to regard the presumption as being rebutted in this case and to refuse surrender. He further asks, in the alternative, that the Court would exercise its jurisdiction under s.20(1) of the Act of 2003 and seek additional information from the issuing judicial authority on the question of the purpose for which the respondent's rendition is sought.

The Court considers that the applicant is entitled to rely on the s.21A (2) presumption. Moreover, there is no cogent evidence tending to rebut that presumption. On the contrary, all of the available information is in any event consistent with that which is presumed. The Court considers that the position is clear, especially in the light of the additional information of the 19th October, 2011. The European arrest warrant also constitutes a national or domestic arrest warrant, and therefore there was no necessity for the issuance of a separate domestic arrest warrant. There are no good grounds that would justify the Court in seeking yet further information from the issuing judicial authority and I am not disposed to make a request under s.20(1) of the Act of 2003.

In the circumstances the Court is not disposed to uphold the objection based on s.21A of the Act of 2003.

The s. 37 Objection

Evidence adduced by the respondent

The respondent has deposed to the following matters (*inter alia*) in his affidavit sworn on the 10th October, 2011:

"7. Prior to coming to Ireland on or about 6 October 2007, I spent a period of three years in prison in Szeged in Hungary from 2004 to 2007. I was released in July 2007.

8. The offences (hereinafter referred to as the 'drug offences') for which I was imprisoned included cultivation of cannabis, trading in cannabis and possession of heroin for personal use. At the time of the offences I had been a heroin addict for 5 or 6 years."

"13. I recall that when I was in prison in Hungary in the years 2004 - 2007, inclusive, there were six people housed in a cell designed for a much smaller number of inmates. The dimensions of the cell in which I was placed, were approximately 6 metres x 4 metres. It contained 2 bunk beds with three levels on each bed. Between 7 am and 7 pm cells sales open which enabled inmates to walk about from cell to cell, but there was only one hour provided for exercise outdoors each day.

14. There was one toilet per cell and it was hidden by a curtain which only afforded very limited privacy. There was no ventilation in the cell other than one small window approximately 1 metre by 1 metre which in size which would only open out approximately 10 centimetres. Meals were eaten in the cell and there was also a television in the cell.

15. During my time in prison, correspondence in and out of the prison was delayed by a number of weeks, which made communication difficult. Further family visits only took place once per month; each visit was only of 1 hours duration. In addition, the maximum number of visitors at any one time was two adults and two children.

16. I say and believe that the US Department of State 2010 country reports on Human Rights Practices for Hungary (hereinafter referred to as the '2010 Country Report for Hungary') indicates that prison and detention centres in Hungary fell short of international standards in some areas.

17. It further states that Human Rights Non-Governmental Organisations and Prison Monitors had repeatedly expressed concern about prison overcrowding in 2010. The said report also referred to a report of the CPT which observed severe overcrowding at the Borsod-Abauj-Zemplen prison in Hungary in almost all cells, with up to four prisoners in cells of eight square metres (86 square feet), 10 to 14 prisoners in cells of 25 square metres (269 square feet), and at 14 prisoners in cells of 32 square metres (344 square feet).

18. I say and believe that the Hungarian Helsinki committee, as referred to in the above-mentioned 2010 Country Report on Hungary, also noted that prison overcrowding increased during 2010 and there were reports of shortages of bed linens, towels and clothing with inadequate medical care. Sanitation and toilet facilities were also caught in some instances and in some prisons it was found that toilets were not separate from living spaces. Many police holding cells did not have toilets and running water and lighting and ventilation were often inadequate. [US Department of State 2010 Country Report on Hungary exhibited]

19. I say and believe that the official website of the Hungarian Prison Service acknowledges that the Hungarian Penal Institutions are characterised by overcrowding. It further states that at the end of December 2010 the average national rate of overcrowding totalled 134% and further that in some regions of the country where the crime rate is higher or accommodation capacity is smaller, prison overcrowding can be higher than the national level, reaching in some instances overcrowding at the level of 180% to 220%. [Print out from a website referred to exhibited]

20. I further say and believe that the European Court of Human Rights in two decisions published on 7 June 2011, namely 'Csullog v Hungary' and 'Szel v Hungary', found that prison conditions in Hungary violated the right guaranteed by Article 3 of the European Convention on Human Rights that no person shall be subjected to torture or to inhuman or degrading treatment or punishment.

21. I say and believe therefore that ifi am surrendered to the Republic of Hungary, there is a real risk that I will suffer inhuman and degrading treatment due to the prevailing prison conditions which I believe will be the same as I experienced in the year 2004-2007 at stated; I believe these prison conditions as described still prevail today."

"24. I say that I entered into a relationship with my partner Timea Lukacs in Hungary in the summer of 2007 following my release from prison. My said partner, who was divorced in 2006, was at the time already a mother to 3 children, named Roland, Daniel and Oliver who are now 15 years, 12 years and 5 years respectively.

25. I was released from prison in July 2007 and for the following number of months thereafter, came under constant pressure to main contact with [a particular] gang and become involved in their activities.

26. I say that in order to avoid a pressure I came to Ireland on or about 6 October 2007 and stayed for six months during which time I completed a safe Pass course and worked with BMD Marketing Company of 53 McCurtain Street, Cork.

27. I then travelled to England in or about April2008 where I remained until December 2010. During that time I travelled back to Hungary on approximately 5 or 6 occasions, during which time my relationship with Timea Lukacs continued to develop and strengthen, at which stage we discussed our future plans. In that regard, we travelled to Ireland in the summer of 2010 for approximately one month and also to London for about two months in order to help us to decide where we would begin our new life together.

28. I say that we decided that we would base our life in Ireland and as a result I travelled here on about 31 December 2010. I was then joined by my partner and her three children on or about 5 February 2011. At the time my partner was pregnant with our first child together and she subsequently gave birth to our child, who we named Victoria on 24 February 2011.

29. Ms Lukasc and her three children, who I regard as my stepchildren, reside with the 20 Oliver Plunkett Street, Bandon, in the County of Cork along with Victoria our daughter. I say that she has no English and is totally dependent on me both for the purposes of daily communication and as a provider for her and her children. I say that I applied for, but I'm not getting receipt of, disability benefit and therefore providing for my family by using savings. I say the Oliver, our youngest boy (aged five years) started school in September, 2011. Daniel (aged 12 years) attend school in Ireland and Roland (aged 15 years) plans to commence school in this country.

30. I say that my surrender to Hungary will constitute a serious violation of my family rights as guaranteed by Article 44 of the Constitution and Article 8 of the European Convention on Human Rights."

Although the Court has not considered it necessary for the purposes of this judgment to quote the entirety of the respondent's said affidavit, and therefore has quoted only selectively from it, the Court has nonetheless had regard to the entirety of it.

Additional information adduced by the applicant

The respondent's said affidavit was furnished to the issuing judicial authority by the applicant to enable that party to respond to it, and the response is contained first within the letter dated the 19th October, 2011, to which the Court has previously referred, and further within a subsequent letter dated the 28th November, 2011, which has now been placed before this Court as additional information.

The additional information on this issue contained in the letter of the 19th October, 2011, states:

> "***Breach of fundamental rights***: In connection with the allegations concerning with a breach of fundamental rights (inhuman and degrading treatment), please be informed that the ***Republic of Hungary participates in most of the universal and regional European international conventions protecting human rights*** (for instance the European Convention of Human Rights signed in Rome on 4 November 1950 under the Council of Europe). Furthermore, since 1 May 2004 the Republic of Hungary is a ***member of the European Union***, which means that its legal system and the operation of its judicial and administrative organs fully complies with the very strict requirements of the European Union concerning human rights. As a result of this, there is no such ground for non-execution in the Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, since the ***proper protection of fundamental rights cannot be questioned among EU Member States***.
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> According to the common principle of evidence, the burden of proof always lies with the charger. As a consequence the Burden of proof lies with Sándor RAJKI to prove its very serious charges against Hungary. For example, according to him, a Hungarian police officer approaches truth during the interrogation that he did not file a complaint. We cannot understand the reason of it, since without complaint it is impossible to prove the charges and to proceed against the assault. Moreover, Sándor RAJKI alleged that he had spent a period of three years in prison in Szeged from 2004 to 2007, from which she had been in custody for approximately 2 years and 6 months before the trial. According to the authentic record of the General Directorate of Penal Institutions of Hungary, per person concerned was in preliminary attention from 11 October 2004 to 8 March 2006 (which is less than 1 year and 5 months), subsequently he served his final sentence to 6 July 2007. As a consequence, his allegations can be questioned. For your additional information, please find enclosed the criminal record of the requested person in Hungarian language
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> ***Family Life***: the family life is absolutely irrelevant in surrender proceedings. There are strict grounds for refusal in the. *Council Framework Decision of 13 June, 2002 on the European Arrest Warrant and the surrender procedures between Member States*. None of them relate to family life. If none of the grounds for nonexecution applies, the European arrest warrant has to be executed."
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> (emphasis as in original)

Further, the additional information contained in the letter of the 28th November, 2011, states:

> "Sándor Rajki was detained several times between 1998 to 2010, serving either pre trial detention or imprisonment. He was then detained in the Bekes County Regional Penitentiary Institution or the Szeged Strict and Medium Regime Prison which institutions are located close to his domicile.
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> Some of his allegations result from legal regulations (e.g. the number of visits, opening cell doors between 7 am and 7 pm) and not from the overcrowding of penitentiary institutions.
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> Concerning the overcrowded prison conditions we would like to emphasise that Sándor Rajki exaggerates and generalises the negative aspects. It is not true that the hygienic standards of the penitentiary institutions are low and that the level of medical services is unsatisfactory. Therefore the detainees fear that in Hungary he would be detained in cruel and degrading prison conditions is basically erroneous conclusion.
>
> As we informed you, the Republic of Hungary participates in most of the universal and regional European international conventions protecting human rights (for instance the European Convention of Human Rights signed in Rome on 4 November 1950). Furthermore, since 1 May 2004, the Republic of Hungary is a member of the European Union, which means that the legal system and the operation of its judicial and administrative organs fully comply with the very strict requirements of the European Union standards concerning human rights. Accordingly there is no such ground for non-execution in the Council framework decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States, since the proper protection of fundamental rights cannot be questioned among EU Member States."
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> (emphasis as in original)

Submissions on behalf of the respondent

Counsel for the respondent submitted that he was basing his case upon four pillars: first the respondent's personal experience of Hungarian prisons between 2004 and 2007; secondly, country of origin information and in particular criticisms of Hungarian prison conditions contained with the U.S, Department of State 2010 Human Rights Report on Hungary (April 8, 2011); thirdly, information published on the website of the Hungarian Prison Service itself, and fourthly, recent decisions of the European Court of Human Rights concerning prison conditions in Hungary, and in particular the decisions of that Court in *Szél v Hungary* [2011] E.C.H.R. 898, and most recently in *Kovács v Hungary* [2012] E.C.H.R. 58.

In so far as the U.S. Department of State 2010 Human Rights Report on Hungary (April 8, 2011) was concerned counsel specifically drew the Court's attention to the following passages contained therein under the heading "Prison and Detention Centre Conditions" at pp.4-5 and 6:

"Prison and detention center conditions fell short of international standards in some areas. The government permitted visits by independent human rights observers.

Human rights nongovernmental organizations (NGOs) and prison monitors repeatedly expressed concern about prison overcrowding. For example, in its June 8 report, the CPT reported observing severe overcrowding at the Borsod-Abauj Zemplen Prison in almost all cells, with up to four prisoners in cells of eight square meters (86 square feet), 10 to 14 prisoners in cells of 25 square meters (269 square feet), and up to 14 prisoners in cells of 32 square meters (344 square feet).

According to the Hungarian Helsinki Committee (HHC), prison overcrowding increased during the year. Shortages of bed linens, towels, and clothing, and inadequate medical care remained problems. Sanitation and toilet facilities were also poor in some instances. In some prisons, toilets were not separate from living spaces.

Many police holding cells did not have toilets and running water; lighting and ventilation were often inadequate.

In its June 8 report, the CPT indicated that it received several credible accounts, supported by medical evidence, of staff mistreating prisoners (by punches and kicks) at the Miskolc Prison and allegations of mistreatment (by slaps, punches, and kicks) of prisoners at the Tiszalok Prison. At the Tiszalok Prison the CPT heard one allegation involving the unacceptable use of handcuffs (fixed behind a prisoner's back and raised to inflict pain) that could be considered assault.

On November 18, a military court found a guard at the Budapest Maximum and Medium Security Prison guilty of mistreating an inmate in June 2009. The court sentenced the defendant to one year in prison but agreed to three years' probation in lieu of the prison sentence. Both prosecution and defense appealed the verdict. According to the HHC, the same inmate alleged that following the verdict, a prison guard in the Metropolitan Penitentiary Institution mistreated him while referring to the conviction of his colleague. The appeals of the original case and an investigation into the allegations of mistreatment by a second guard were pending at year's end.

On May 7, the Metropolitan Court of Appeals upheld the conviction of two prison guards of physical abuse in an official capacity when they attacked an inmate in the Miskolc Prison in 2008. The court sentenced one guard to eight months' imprisonment, suspended him for two years, and demoted him in rank for one year. It fined the second guard 87,500 forint ($414).

Both the HHC and the CPT noted that detainees who alleged physical mistreatment were usually examined only by internal medical staff. Further, on May 27, the national police chief ordered that medical examinations could be conducted in the absence of law enforcement staff only at the request of the detainee or the doctor, and only if permitted by the senior guard supervisor.

According to the June 8 CPT report, conditions at police holding facilities were generally adequate; however, the committee noted that one prisoner in detention at the time of the visit was subjected to degrading treatment. He was in the Budapest police central holding facility in a high security "cell" that consisted of a barred area within a single cell. Both the detainee and his sanitary facilities were subjected to powerful round-the-clock spotlights and video surveillance. In May 2009 authorities reportedly installed infrared cameras so the spotlights could be turned off at night. However, the CPT noted that the unscreened sanitary facilities remained in the field of vision of video surveillance cameras and in full view of supervising staff."

"According to the Hungarian Prison Service, the prison population increased to 132 percent of capacity as of December 31, compared with 129 percent in 2009. On December 31, 16,366 inmates were in prisons and detention centers. On July 19, the government reopened the prison in Solt to reduce overcrowding, increasing the capacity of the system by 288."

In so far as the website of the Hungarian Prison Service is concerned this is to be found at www.bvop.hu and counsel referred the Court specifically to the following passage which appeared upon the home page as of the 12th July, 2011, a printout of which was exhibited to an affidavit sworn by the respondent's solicitor, Jane O'Sullivan, on the 30th April, 2012 (this is the material to which the respondent refers at paragraph 19 of his affidavit):

"In compliance with the effective legal regulations the overall capacity of the 31 penal institutes is 12335 persons therefore penal institutions are characterized by overcrowding. At the end of December 2010 the average national rate of overcrowding totalled in 134%. In some regions of the country (where the crime rate is higher or accommodation capacity is smaller) prison overcrowding can be higher than the average national level (180-220%)."

For comparison purposes the affidavit of Ms. O'Sullivan further exhibits a printout from the home page of the same website reflecting the position as of the 30th of April, 2012. This states:

"In compliance with the effective legal regulations the overall capacity of our establishments is lower than the accommodated number of the prisoners; therefore penal institutions are characterized by overcrowding. At present the average overcrowding rate is 139% percent."

The court has checked the up to date position and as of the date of judgment the same information continues to be displayed on the said home page.

Counsel also referred the Court to the following passages from the judgment of the E.C.H.R. in *Szél v Hungary* [2011] ECHR 898 a case which he contends is both recent and "on all fours with the present case" (by which the Court infers that be means that the circumstances found in that case to constitute a breach of Article 3 of the Convention mirror the concerns expressed by the respondent in the present case).

Mr. Szél was sentenced to fifteen years imprisonment on the 20th April, 2006. Since then ...

"7. . ... he has been detained at Budapest Prison. At this prison, he has spent altogether over 21 months in various cells of 8.3 m^2 ground surface (accommodating three inmates, i.e. 2.76 m^2 per person), 21 months in various cells of6.3 m^2 ground surface (accommodating two inmates, i.e. 3.15 m^2 per person), over 9 months in a 6.3 m^2 cell with single occupancy, and 9 months in a cell of 25 m^2 ground surface (accommodating eight inmates, i.e. 3.125 m^2 per person). In

the material period, the average rate of occupancy of Budapest Prison was 150%; the national rate was 132% in October 2007 and 122% in July 2008."

Merits

14. The Government submitted that the conditions of the applicant's detention at Budapest Prison, quite independently of the ground surface available, did not amount to inhuman or degrading treatment, given that the cells were clean, well-maintained and with sufficient light and ventilation, and moreover because the applicant spent only part of his days in them, as he had been assigned outside work. The applicant contested these views, emphasising that, apart from overcrowding, in each of the cells where he had been accommodated, the toilets were separated only by a curtain, which did not provide the requisite privacy.

15. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, §119, ECHR 2000-IV).

16. The Court further recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is 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. Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Peers v. Greece,* no. 28524/95, §§ 67-68,74, ECHR 2001-III).

17. The Court has consistently stressed that a breach of Article 3 of the Convention would generally involve suffering and humiliation beyond that which is inevitably connected with a given form of legitimate treatment or punishment. Measures depriving a person of his or her liberty may often involve such elements. Thus, under this provision, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the prisoner's health and well-being are adequately secured (see *Kudla v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

18. The Court notes that at Budapest Prison, the applicant was accommodated for altogether over 21 months in cells with 2.76 m^2 ground surface per person, for 21 months in cells with 3.15 m^2 per person, as well as for nine months in a cell with 3.125 m^2 per person, in each case with a toilet without sufficient privacy. It observes by contrast that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") considers 4 m^2 living space per inmate an acceptable minimum standard in multi-occupancy cells (see, for example, in respect of other Hungarian prisons, paragraphs 65 and 80 of the Report to the Hungarian Government on the visit to Hungary carried out by the CPT from 24 March to 2 April 2009). The Court therefore finds that the applicant's detention under cramped conditions at Budapest Prison failed to respect basic human dignity and must therefore have been prejudicial to his physical and mental state (see, *mutatis mutandis, Savenkovas v. Lithuania*, no. 871/02, §§ 81-82, 18 November 2008). Accordingly, it concludes that the overcrowded and unsanitary conditions of this detention amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

19. Finally, mindful of the fact that the seriousness of the problem of overcrowding and of the resultant inadequate living and sanitary conditions in Hungarian detention facilities has been acknowledged by the domestic authorities (see paragraphs 8 and 18 above), the Court considers that an effective remedy responding to this issue could be offered by taking the necessary administrative and practical measures. In the Court's view, the authorities should react rapidly in order to secure appropriate conditions of detention for detainees."

Counsel for the respondent submits that although the ECHR urged in *Szél* on the 7th June, 2011 that "the authorities should react rapidly in order to secure appropriate conditions of detention for detainees," the available evidence suggests that the opposite has in fact occurred. In that regard he relies on the July, 2011 extract from the home page of the Hungarian Prison Service's website referred to earlier, and seeks to compare it with the more up to date information in the printout from the website dated the 30th April, 2012.

Counsel submits that the increase in the national average rate of overcrowding from 134% in July, 2011 to 139% in April, 2012 (and indeed up to the present day) indicates some deterioration in the overall position and certainly not the rapid reaction demanded by the E.C.H.R. He concedes that the national average figure is of no help to a person seeking to assess the prospects of any particular prisoner receiving living space of less than 4m^2, but contends it raises a sufficient level of concern to rebut any presumption that the rights of the respondent will necessarily be respected and says that it is enough to cause the Court to seek to enquire into the matter.

He also relies upon the *Kovcás* case in further support of his contention that there has been little or no improvement in the position with respect to overcrowding in Hungarian prisons. In that case the applicant was arrested on the 8th January, 2008. From the 11th January, 2008 on he was detained on remand at Szeged Prison on charges of trafficking in goods subject to excise tax. On the 9th October, 2009 the Csongrád County Regional Court found him guilty as charged. Pursuant to the final judgment of the 9th June, 2010, of the Szeged Court of Appeal, he served a prison sentence of three years and six months in a strict regime at Szeged Prison. His pre-trial detention was credited against his imprisonment.

The E.C.H.R. noted that Szeged Prison is comprised of two separate parts: Unit I, a strict-and medium-regime facility for sentenced prisoners, and Unit II, a facility for remand prisoners. The applicant's pre-trial detention, which is the subject matter of his complaints, took place in various cells of Unit II, and the remainder of his detention, as from the 10th June, 2010, in Unit I. (It is a matter of some significance that this is one of the prisons in which the respondent has been detained in the past and in respect of which he makes specific complaints).

The applicant in *Kovcás* submitted that he had shared cells with an average of 16 sq metres' ground surface with five to seven persons, not counting furniture, and could stay outside the cell only about an hour daily. He also stated that he could receive visitors

for only one hour every month (an exception being his brother, who was granted three extra visits, lasting two hours on each occasion); however, he had not been at all allowed to touch his family members during these visits. He alleged that his rights under articles 3 and 8 respectively, of the Convention, had been breached.

In respect of the alleged violation of article 3 the ECHR stated in its judgment of the 17th January, 2012 at pgrfs. 26 and 27:

> "26. The Court notes that in Unit II of Szeged Prison, the applicant was accommodated for 67 days in cells with under 4.00 sq metres' ground surface per person (see paragraph 22 above), furnishings included. It observes by contrast that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") considers 4.00 sq metres' living space per inmate an acceptable minimum standard in multi-occupancy cells (see, for example, paragraphs 65 and 80 of the Report to the Hungarian Government on the visit to Hungary carried out by the CPT from 24 March to 2 April 2009). The Court therefore finds that the applicant's detention under cramped conditions at Szeged Prison in conjunction with the fact that he had to spend almost the entirety of the days inside those cells, (a non-refuted allegation- see paragraph 8 above) failed to respect basic human dignity and must therefore have been prejudicial to his physical and mental state (see, mutatis mutandis, *Savenkovas v. Lithuania*, no. 871/02, §§ 81-82, 18 November 2008). Accordingly, it concludes that the overcrowded conditions of this detention amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.
>
> 27. Finally, mindful of the fact that the seriousness of the problem of overcrowding and of the resultant inadequate living and sanitary conditions in Hungarian detention facilities has been acknowledged by the domestic authorities (see *Szél v. Hungary*, no. 30221/06, § 8, 7 June 2011), the Court considers that an effective remedy responding to this issue could be offered by taking the necessary administrative and practical measures. In the Court's view, the authorities should react rapidly in order to secure appropriate conditions of detention for detainees."

Moving then to the response of the Hungarian state to his client's affidavit, counsel for the respondent has submitted that they have failed to engage in any meaningful way with the concerns raised by him.

Submissions on behalf of the applicant

In response to counsel for the respondent's submissions, counsel for the applicant has submitted that his client is entitled to rely upon the presumption in s.4A of the Act of 2003 (as inserted by s.69 of the Criminal Justice (Terrorist Offences) Act 2005). S.4A provides that, *"It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown."* Moreover, recital 12 of the Framework Decision states (inter alia) that:

> "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union (1), in particular Chapter VI thereof."

while recital 13 to the same instrument expressly asserts that:

> "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

Counsel for the appellant submits that the Court must act on the presumption unless it considers that the respondent has put forward evidence of sufficient cogency to rebut the presumption so as to put the Court upon its enquiry. Having drawn the Court's attention to various passages in the Court's own judgment in *Minister for Justice, Equality and Law Reform v. Mazurek* [2011] I.E.H.C. 204 (Unreported, High Court, Edwards J., 13th May, 2011) he contends that no evidence of sufficient cogency had been adduced such as would justify the Court in regarding the presumption as having been rebutted.

The Court's Decision

This Court in its judgment in *Mazurek*, and more recently in its judgment in *Attorney General v. O'Gara* [2012] I.E.H.C. 179 (Unreported, High Court, Edwards J., 1st May, 2012), reviewed the jurisprudence of the Supreme Court concerning resistance to surrender based upon apprehended subjection to inhuman and degrading treatment, alternatively breach of the right to bodily integrity, contrary to a person's constitutional and convention rights, and in particular a person's rights under Article 3 of the Convention. I said in the *Mazurek* case that the following principles can be distilled from the authorities:

> - "The normal presumption is" (per Fennelly J in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45) "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"." (per Fennelly J in *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 I.R. 669);
>
> - However, "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." (per Fennelly J in *Rettinger*);
>
> - The two foregoing principles are readily reconcilable and they do not imply that "there is any underlying conflict between the Convention and the Framework Decision." (per Fennelly J in *Rettinger*);
>
> - The subject matter of the court's enquiry "is the level of danger to which the person is exposed." (per Fennelly J in *Rettinger*);
>
> - "it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a *'real risk*'" (per Fennelly J in *Rettinger*) "in a rigorous examination." (per Denham J in *Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (per Denham J in *Rettinger*);
>
> - A court should consider all the material before it, and if necessary material obtained of its own motion. (per Denham J in *Rettinger*);

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

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

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

- The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the U.S. State Department.'

Applying these principles it seems to me that at its high water mark the respondent's case only establishes a mere possibility of ill-treatment if he is surrendered but his evidence is not of sufficient cogency to establish a real risk of breach of article 3. S.37 of the Act of 2003 requires the Court to be forward looking. There is clear evidence as to overcrowding in the past in some Hungarian prisons (including one in the region of the respondents domicile, and in which the respondent has previously been detained and claims to have been ill-treated) at a level amounting to a violation of article 3. However, there is no evidence as to what is the present day situation with regard to overcrowding in Hungarian prisons apart from the statement that appears today on the home page of the Hungarian Prison Service website that acknowledges that some overcrowding continues to occur and that "the average overcrowding rate is 139% percent." There is a complete evidential deficit with regard to prisons in the respondent's specific region of domicile. In that regard counsel for the respondent has very fairly conceded that it is impossible to extrapolate from the general to the specific in as much as the national average figure is of no help to a judge seeking to assess the prospects of any particular prisoner receiving living space of less than $4m^2$.

The Court again adopts with approval the following remarks of Latham L.J. in *Miklis v. Deputy Prosecutor General of Lithuania* [2006] 4 All E. R. 808 (to which I also referred in my judgment in *O'Gara*) where he stated at p. 813:

> "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."

The evidence in regard to an apprehended breach of article 8 of the Convention is even more tenuous than it is in the case of the claim based upon an apprehended breach article 3, and it also fails to reach the degree of cogency necessary to rebut the s.4A presumption.

In my judgment the evidence adduced by the respondent lacks the degree of cogency necessary to displace the presumption that the issuing state will respect the respondent's fundamental rights including his rights under articles 3 and 8 of the Convention, respectively, and his rights under the Constitution. The Court is not therefore disposed to uphold the s.37 objections in this case.

Conclusion
The Court is disposed in all the circumstances to surrender the respondent and will make an Order under s.16 of the Act of 2003 to that end.