Neutral Citation [2013] IEHC 216

THE HIGH COURT

Record No. 37 EXT 2008

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003 (AS AMENDED)

BETWEEN:

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Applicant

AND

BRENDAN McGUIGAN

Respondent

JUDGMENT of Mr Justice Edwards delivered on the 16th day of April, 2013

Introduction:
The respondent is the subject of a European arrest warrant issued by the Republic of Lithuania on the 12th February, 2008. The warrant was endorsed by the High Court for execution in this jurisdiction on the 20th February 2008, and it was duly executed on the 28th February, 2008. The respondent was arrested by Sgt. James Kirwan on that date, following which he was brought before the High Court on the same day pursuant to s. 13 of the European Arrest Warrant Act 2003 (hereinafter "the Act of 2003"). In the course of the s. 13 hearing a notional date was fixed for the purposes of s. 16 of the Act of 2003 and the matter was adjourned to that date in the first instance, with the respondent remanded in custody. Subsequently on the 5th March, 2008 there was a bail hearing and the respondent was successful in obtaining bail. Thereafter the matter was adjourned from time to time ultimately coming before this Court on the 7th February, 2012 for the purposes of a surrender hearing. The case was initially scheduled to take three days. In the event it took somewhat longer than that, and the hearing was punctuated by a number of adjournments, primarily to facilitate the respondent in seeking to make a late amendment to his points of objection to add additional grounds, to adduce additional evidence in support of those grounds, and also to afford the applicant time to respond to the new material coming from the respondent's side, including seeking additional information from the issuing judicial authority / the issuing state.

The respondent does not consent to his surrender to the Republic of Lithuania (hereinafter "Lithuania"). Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the Act of 2003 directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. The Court must consider whether 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.

Uncontroversial S. 16 Issues:
The Court has received an affidavit of Sgt James Kirwan sworn on the 21st May, 2008 testifying as to his arrest of the respondent and as to the respondent's identity. In addition, counsel for the respondent has confirmed that no issue arises as to either the arrest or identity.

The Court has also received and has scrutinised a true copy of the European arrest warrant in this case. Further, it has of its own initiative taken the opportunity to inspect 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 these matters that:

(a) the European arrest warrant was endorsed for execution in this State in accordance with s. 13 of the 2003 Act;

(b) the warrant was duly executed;

(c) the person who has been brought before the Court is the person in respect of whom the European arrest warrant was issued;

(d) the warrant is in the correct form;

(e) the warrant purports to be a prosecution type warrant and the respondent is wanted in Lithuania for trial in respect of the three offences particularised in Part E of the warrant. Further, the domestic warrant upon which the European arrest warrant is based is a warrant issued by the 1st District Court of Vilnius City on the 8th February, 2008 "for a measure of constraint – arrest (criminal case No 10-9-105-07)";

(f) the first offence is described under the law of the issuing state as preparation to commit smuggling of firearms, and is an offence contrary to Article 21, Part 1 and Article 199, Part 2 of the Criminal Code of the Republic of Lithuania. The Court requires to be satisfied both as to correspondence and minimum gravity in respect of this offence.

(g) the second offence is described under the law of the issuing state as an act of terrorism, and is an offence contrary to Article 250, Part 6 of of the Criminal Code of the Republic of Lithuania.

(h) the third offence is described under the law of the issuing state as an act involving illegal possession of firearms, munitions, explosives or explosive substances, and is an offence contrary to Article 253, Part 2 of the Criminal Code of the Republic of Lithuania.

(i) the issuing judicial authority has invoked paragraph 2 of Article 2 of Council Framework Decision 2002/584/J.H.A. of

13th June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. L190/1 18.7.2002 (hereinafter referred to as "the Framework Decision") in respect of the second and third offences to which the warrant relates, by the ticking of the boxes in Part E. I of the warrant relating to "terrorism" and "illicit trafficking in weapons, munitions and explosives", respectively. Accordingly, subject to the Court being satisfied that the invocation of paragraph 2 of Article 2 is valid (i.e. that the minimum gravity threshold is met, and that there is no basis for believing that there has been some gross or manifest error), it need not concern itself with correspondence in so far as those two offences are concerned.

(j) The minimum gravity threshold in a case in which paragraph 2 of Article 2 of the Framework Decision is relied upon is that which now finds transposition into Irish domestic law within s. 38(1)(b) of the Act of 2003 as amended, namely that under the law of the issuing state the offence is punishable by imprisonment for a maximum period of not less than 3 years. We are told in Part C of the warrant that the second offence potentially carries up to 20 years imprisonment, and that the third offence potentially carries up to eight years imprisonment. Accordingly, the minimum gravity threshold is comfortably met in the case of both the second and third offences.

(k) There is no reason, upon a consideration of the underlying facts set out in Part E of the warrant, to believe that the ticking of the boxes relating "terrorism" and "illicit trafficking in weapons, munitions and explosives", respectively, was in error.

(l) No issue as to trial *in absentia* arises in the circumstances of this case and so no undertaking is required under s. 45 of the Act of 2003;

(m) There are no circumstances that would cause the Court to refuse to surrender the respondent under ss. 21A, 22, 23 or 24 of the Act of 2003 as amended.

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. No. 206/2004 (hereinafter "the 2004 Designation Order"), and duly notes that by a combination of s. 3(1) of the Act of 2003, and Article 2 and the Schedule to the 2004 Designation Order, "Lithuania" (or more correctly the Republic of Lithuania) 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.

Correspondence and Minimum Gravity – Offence No. 1
The facts underlying the offences to which the European arrest warrant relates are set out in Part E of the warrant as follows:

"Brendan McGuigan is suspected of the commission of the criminal acts specified under Art. 21, Part 1, Art. 199, Part 2; Art 250, Part 6; Art. 253, Part. 2 of the Criminal Code of the Republic of Lithuania, i.e. he illegally possessed a considerable amount of powerful firearms, ammunition, explosive devices and explosive substances, and made arrangements to commit smuggling of the aforesaid armaments, and provided support to a terrorist group, namely: in 2007, in the Republic of Ireland and the Republic of Lithuania, B. McGuigan illegally, without a special permission, agreed with Michael Campbell, born on 15 September 1972, and other persons to acquire in the territory of the Republic of Lithuanian a considerable amount of powerful firearms, ammunition, explosive devices and explosive substances and transport them from the Republic of Lithuanian to the Republic of Ireland and in such a way to provide support to a terrorist group RIRA (The Real Irish Republican Army). They had discussed the plan of the criminal acts and the way of their implementation. Later, in August 2007, in Kaunas Region, within the territory of the Republic of Lithuania, M. Campbell and he, acting according to their prior agreement, and aiming to acquire the aforesaid armaments and provide support to the RIRA terrorist group, had at their disposal sniper guns, submachine-guns, projectors and explosive devices; whereupon in January 2008, in Vilnius (the Republic of Lithuania) M.Campbell acquired from other persons a considerable amount of powerful firearms, ammunition and explosive devices, i.e. a sniper gun, trotyl, projectors and detonators. By these acts B. McGuigan, M. Campbell and other persons provided their support to the RIRA terrorist group."

Counsel for the applicant invites the Court to find correspondence, in the case of the first offence to which the warrant relates, with the inchoate offence in Irish law of conspiring to export firearms without authorisation (the relevant choate offence being an offence contrary to s. 16 of the Firearms Act 1925). No issue is taken as to this by or on behalf of the respondent, and the Court, having considered the underlying facts as disclosed in the warrant and the submissions of counsel, is satisfied to find such correspondence.

The relevant threshold for the purposes of minimum gravity is that set out in s. 38(1)(a)(i) of the Act of 2003, namely that "under the law of the issuing state the offence is punishable by imprisonment or detention for a maximum period of not less than 12 months." As the first offence to which the warrant relates carries a potential penalty of up to ten years imprisonment the threshold is comfortably met.

Points of Objection:
The respondent has filed a notice of objection dated the 21st May, 2008, and subsequently filed an additional points of objection dated the 9th July, 2009.

The notice of objection dated the 21st May, 2008 contains nine points of objection set out in numbered paragraphs. However, some of these were not substantive (e.g. merely asserting that the applicant is being put on full proof) and some others, though substantive, were not proceeded with. Accordingly, it is only necessary for the purposes of this judgment to set out those substantive points of objection that were in fact proceeded with, and that are relevant to whether or not the Court should make an order under s. 16(1).

The relevant points are:

"7. The surrender of the respondent should be refused under section 37 of the European Arrest Warrant Act, 2003 and, or in the further alternative, would be in breach of Ireland's obligations under Article 3 of the European Convention on Human Rights in that the places of detention in the Republic of Lithuania breach the human and constitutional rights of the Respondent's right to health and human dignity and the Respondent would suffer inhuman or degrading treatment or punishment if surrendered to the Republic of Lithuania.

8. The surrender of the respondent should be refused under section 37 of the European Arrest Warrant Act, 2003 since having regard to the fundamental defects in the criminal justice system in the requesting state, the Respondent's constitutional rights to fair procedures and his right not to be deprived of his liberty save in accordance with law would

thereby be breached."

A similar situation pertains with respect to the additional points of objection dated the 9th July, 2009. Once again, not all points pleaded were ultimately proceeded with. For example, although additional points 1, 2, 3 and 4 (suggesting that the Attorney General's scheme is insufficient for the purpose of vindicating the respondent's right to legal representation) were stated in the respondent's written submissions to be "not abandoned but the recent Supreme court decision in Olson (sic) is noted", no arguments were advanced in support of this basis of objection at the s. 16 hearing. Two other additional points (17 and 18) were struck out by Order of the Supreme Court. Those additional points that were in fact relied upon (some to a greater extent and others to a lesser extent) were:

> "5. The Respondent claims that the surrender of the Respondent would result in the breach of the respondent's fundamental rights under Articles 3, 5, 6 and 8 of the ECHR and Articles 38.1, 40.4.1 and 40.3.1-2 of the Constitution.
>
> 6. The surrender of the Respondent should be refused in circumstances where the provision of legal aid for the defence of serious criminal charges is inadequate in numerous respects including by virtue of the fact that the legal aid system in Lithuania does not permit of engaging foreign lawyers at public expense to advise and/or offer opinions and/or expert testimony on relevant aspects of foreign law.
>
> 7. The surrender of the Respondent should be refused under Section 37 of the European Arrest Warrant Act, 2003 and, or in the alternative, would be in breach of Ireland's obligations under Article 3 of the European Convention on Human Rights having regard to the content of the reports of exhibited in the Supplemental Affidavit of James MacGuill on behalf of the Respondent and the affidavits and reports previously filed herein and further having regard to the manner in which Michael Campbell has been treated by the Lithuanian authorities. Michael Campbell's alleged acts are alleged to be linked with the Respondent's and he is still in pre-trial detention since the 23rd January, 2008 and is still being held largely incommunicado. His trial is scheduled to commence on 18th August 2009. While some correspondence is permitted, Mr. Campbell has not had any contact of a direct kind with his family members and is only permitted visits by his lawyers in Lithuania. As recently as 11th June 2009 a renewed request by Michael Campbell for a telephone access to his wife was refused by the Courts.
>
> 8. The surrender of the Respondent should be refused under Section 37 of the European Arrest Warrant Act, 2003 and, or in the alternative, would be in breach of Ireland's obligations under Article 6 of the European Convention on Human Rights. In this regard the Respondent will rely *inter alia* on the standard procedure as applied in the investigation process in respect of the aforementioned Mr. Michael Campbell *inter alia* as to short notice in relation to the identity of proposed witnesses, no notice of the proposed evidence the witnesses intend giving, and limiting cross-examination to that which is permitted by the prosecutor; and a failure to maintain a proper record of questions put and answered.
>
> 9. The surrender of the Respondent should be refused on the above grounds in circumstances where the above conditions will as a matter of probability apply to the Respondent. Further as a matter of probability the Respondent will be exposed to the risk that the above evidence adduced in the investigation process of Mr. Michael Campbell will be admitted as evidence in the trial of the Respondent without any inquiry into its veracity, its probity and/or credibility.
>
> 10. The surrender of the Respondent should be refused due to the inadequate interpretation and translation facilities in Lithuania.
>
> 11 The surrender of the Respondent should be refused under Section 37 of the European Arrest Warrant Act, 2003 in circumstances where no undertakings or guarantees have been given as to the Respondent's entitlement to challenge the admissibility of any evidence allegedly obtained from the Respondent's home in the Republic of Ireland; and the Respondent will not or may not be permitted to make such a challenge. Efforts on the part of the Respondent to establish the nature and extent of such evidence sought through a request made pursuant to the Freedom of Information Act
>
> 12. The trial process in the requesting state vests discretion in the prosecuting authorities as to whether or not material should be disclosed at the pre-trial investigative stage. In circumstances where the testimony of witnesses and their examination at the pre-trial stage may be admitted in evidence for the purposes of the trial an accused person is put at a fundamental disadvantage as compared with the prosecuting authorities. Specifically the Respondent would be denied an entitlement to carry out any meaningful examination of any witnesses that might be called during the pre-trial stage.
>
> 13. Under the system of criminal procedure in the requesting state an accused is not entitled to have all of the relevant material in relation to the case against him translated into his or her native tongue. As such the Respondent, if surrendered, would not be capable of fully and properly instructing his lawyers and fully participating in his own defence.

In summary the respondent is alleging that Court is prohibited by virtue of s. 37 of the Act of 2003 from surrendering him on the basis that, if surrendered, he will face breach of certain of his constitutional and human rights, including his right to bodily integrity, his right to human dignity, and his right to receive a fair trial. The respondent bases his contentions in this regard on (a) alleged inhumane and degrading prison conditions and ill-treatment of detainees in Lithuanian places of detention, and (b) alleged fundamental defects in the criminal justice system in the requesting state.

There were substantive hearings in this case on 07/02/12, 08/02/12, 09/02/12, 13/02/12, 25/04/12, 18/05/12 and 24/10/12. It was also mentioned on numerous dates in connection with procedural issues. It is proposed, because of the extent of the material relied upon, and the complexity of the evidence on the issues raised, to deal with these issues in separate judgments. The remainder of this judgment will therefore concern itself solely with the issues raised as to prison conditions and alleged ill-treatment of prisoners in Lithuania. If necessary, it will be followed in due course by a second judgment dealing with the issues concerned with alleged fundamental defects in the criminal justice system in the requesting state.

Issues as to Prison Conditions and Ill-treatment of Prisoners:

Evidence adduced by the respondent

The evidence relied upon by the respondent on these issues commences with an affidavit of his solicitor, James MacGuill, affirmed on the 22nd July 2008, and the documents exhibited therewith. Mr MacGuill asserted his belief that the respondent's basic human and

constitutional rights would not be protected in Lithuania in the event of his surrender to that state. He has further asserted a belief that if the respondent is surrendered to the Lithuania he will face a real risk of being caused injury or damage to his health and psychological well being, alternatively he will face an unreasonable risk of being caused such damage or injury, by virtue of what Mr MacGuill characterised as "the regime" to which he will be subjected.

In support of his asserted beliefs Mr MacGuill exhibited a number of documents consisting of (a) the US Department of State, 2007, Country Reports on Human Rights Practices – Lithuania (hereinafter "the 2007 US State Department Report"); (b) the Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "the CPT") from the 17th to 24th February, 2004 (hereinafter "the 2004 CPT Report"); and (c) a similar type report based on a visit to Lithuania by the CPT from the 14th to 23rd February, 2000 (hereinafter "the 2000 CPT Report"). The Court has read and considered in detail the contents of these reports.

At paragraph 7 of his said affidavit Mr MacGuill averred that from reading these reports he was concerned that:

> "(i) There were reports that police physically mistreated detainees; [Country Reports on Human Rights Practices 2007 Paragraph C]
>
> (ii) The Ombudsman's Office in 2007 received 17 complaints that officials used force and psychological pressure to obtain evidence in pretrial investigations; [Country Reports on Human Rights Practices 2007 Paragraph C]
>
> (iii) Inadequate sanitation, overcrowding and limited access to medical services persists in the prisons; [Country Reports on Human Rights Practices 2007]
>
> (iv) Despite the fact the law prohibits arbitrary arrest and detention, and the government generally observed these prohibitions, nevertheless, there were complaints of illegally prolonged pretrial detentions; [Country Reports on Human Rights Practices 2007 Paragraph D]
>
> (v) There is a real risk of ill treatment, in the worst case ill-treatment amounting to torture at the hands of the Lithuanian police for anyone held in police custody. In the 2004 CPT Report on the Republic of Lithuania, the delegation received many allegations of ill-treatment of persons. "The forms of ill- treatment alleged consisted mostly of blows with hands or fists, or with objects such as batons or belts. In several cases, the alleged ill-treatment- asphyxiation by placing a gas mask or a plastic bag over the person's face, severe beating, infliction of electric shocks, and mock execution- could be said to amount to torture." [Paragraph 12 CPT Report 2004]
>
> (vi) The CPT was able to verify that the person concerned had been held in the police establishments, that the persons concerned were able to provide accurate descriptions of the offices where they claimed it had taken place and medical records revealed consistent injuries with their allegations of ill-treatment; [Paragraph 12 CPT Report 2004]
>
> (vii) In 2004 the CPT found that many of the measures recommended by them to the Lithuanian Government in 2000 had not been followed. Furthermore, they found that conditions in many police detention facilities remained unacceptable and that they continued to be inhuman and degrading;"

Mr MacGuill went on to express concern that updated information should be provided to the Court in circumstances where the CPT was known to have carried out a further visit to Lithuania in 2008 but where no 2008 CPT Report had as yet been published. He expressed concern on the basis of the available materials that a combination of over-crowding, poor regimes, unhygienic conditions and a failure by the custodial authorities to protect vulnerable prisoners from the depredations of other prisoners would undoubtedly amount to inhuman and degrading treatment in custody; and he contended that there was a significant risk that the respondent might be subjected to such treatment if surrendered to Lithuania.

> At paragraphs 10 and 11 he deposed to the following matters:
>
> "10 I say and believe that a relative of Mr. Michael Campbell who is referred to in the said EAW, has informed my office that Mr. Campbell is:
>
> (i) in custody in Lukiškės Prison;
>
> (ii) detained since 23rd January, 2008 in a very small cell with many inmates;
>
> (iii) denied access to his family;
>
> (iv) denied telephone access to his family;
>
> (v) permitted to have a shower only once per week;
>
> (vi) deprived of any adequate toilet facilities whatsoever and is required to use a hole in the ground with no running water;
>
> (vii) not given appropriate personal hygiene items;
>
> (viii) detained in a cell with very little natural light;
>
> (ix) given very little food per day;
>
> (x) sleeping on a metal bed with a thin mattress;
>
> (xi) permitted one hour per day in the fresh air;
>
> (xii) still in pre-trial investigation, has not been charged with any criminal offence and has been told he could be in pre-trial investigation for 12-18 months.

> 11. In this regard I say that the same source informed my office that Mr. Campbell's wife Fiona was also detained for an extended period as a person under suspicion but in respect of whom no decision to prosecute was made. …"

Although they were not objected to by counsel for the applicant, these averments are entirely hearsay. However, as the proceedings herein are *sui generis*, and are more in the nature of an inquiry than an adversarial contest, I am prepared to receive them notwithstanding their hearsay nature, but in determining what weight, if any, to attach to them I will take into account the fact that they are hearsay.

The Court also has a supplemental affidavit from Mr MacGuill affirmed on the 3rd November, 2008, which largely reiterates the assertions made, and concerns expressed, in his earlier affidavit. However, on this occasion these were supported by a "Report by Professor Rod Morgan on Prison Conditions in Lithuania in the case of Brendan McGuigan" dated the 2nd November, 2008 which was exhibited. It is unnecessary for the Court to review Professor Morgan's said report as its contents were later incorporated into an affidavit affirmed by Professor Morgan and filed in these proceedings, which will be reviewed momentarily.

As stated, an affidavit of Professor Rod Morgan, affirmed by him on the 6th November, 2008, and duly notarised by a Notary Public, was filed in these proceeding on the 18th November, 2008. He sets out his impressive credentials at paragraph 1 thereof, stating:

> "I am a Professor of Criminal Justice in the Department of Law, University of Bristol. ; currently Home Office advisor to the five criminal justice inspectorates (including prisons) for England and Wales; formerly Chairman of the Youth Justice Board for England and Wales (2004-7); formerly HM Chief Inspector of Probation for England and Wales (2001-4); co-author of the official Council of Europe's guide to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Morgan R. and Evans D. (2001) *Combating Torture in Europe,* Strasbourg: Council of Europe); author and co-author of many books and articles written over 40 years on custodial conditions and processes; *ad hoc* expert advisor on custodial conditions and processes to the Council of Europe Committee for the Prevention of Torture (the CPT), Amnesty International, the ICRC and the UN; author of many inspection reports on custodial conditions for various bodies and courts based on first-hand visits to places of detention in many countries world-wide; and, specifically relevant for present purposes, member, as expert advisor, of the Council of Europe Committee for the Prevention of Torture delegation which visited Lithuania in February 2000 and which resulted in publication by the Council of Europe of their report on Lithuania (*Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 23 February 2000*, Strasbourg: Council of Europe)(hereafter referred to as (CPT/Info (2001)."

Professor Morgan goes on to describe the circumstances in which his services were retained by Mr MacGuill, and the nature of his brief, and he confirms the preparation of a report dated the 2nd November, 2008 in the case of the respondent concerning prison conditions in Lithuania, and again that report is exhibited. He then proceeds at paragraph 6 of his affidavit to opine:

> "(i) There is a risk of ill-treatment, in the worse cases ill-treatment amounting to torture, at the hands of the Lithuanian police for anyone held in police custody, as the Respondent would be, were he surrendered to the Republic of Lithuania;
>
> (ii) There is a risk of ill-treatment at Lukiškės prison where Mr. Michael Campbell is detained;
>
> (iii) There is a real risk of inter-prisoner violence. The evidence is that these overcrowded conditions, combined with the presence of few staff, give rise to a good deal of inter-prisoner violence. At Lukiškės 719 prisoner injuries were recorded in 1999 and 'a significant number of prisoners lived in fear of physical violence (beatings) and were subject to a host of indignities (being forced to clean for others, verbal abuse) by stronger prisoners' (CPT/Info (2001) 22, para 64);
>
> (iv) There is a real risk of persons being detained for up to 17 days in police managed detention in the Republic of Lithuania;
>
> (v) Conditions fall short of both international and Lithuanian standards;
>
> (vi) It cannot be said with certainty that the situation has improved since the last CPT report;
>
> (vii) There is a high probability that the Respondent would be held in inhuman or degrading physical conditions, if surrendered to the Republic of Lithuania, particularly whilst being held in police custody;
>
> (viii) The conclusion of the CPT that there was a wide gap between law and practice to the guarantee to a right of defence and legal counsel;
>
> (ix) The conditions under which Mr. Michael Campbell is said to be held on remand seem entirely plausible given the empirical evidence of the CPT;
>
> (x) It would seem very probable that the respondent would also be detained in Lukiškės Prison;
>
> (xi) Lukiškės Prison was criticized by the CPT as being intensely overcrowded in 2000, remained so in 2004 and may continue to be so today;
>
> (xii) It seems clear in most accommodation units at Lukiškės prisoners were confined to their cells or dormitories for most of the day and in some units at Lukiškės some of the accommodation was distinctly unhygienic;
>
> (xiii) It seems clear from the most recent empirical evidence that conditions in many Police Detention Centres, where the Respondent would most likely to be held initially were he to be extradited to Lithuania, were "inhuman and degrading" according to the CPT in 2004 and may remain so."

The Court is also in receipt of a supplemental affidavit from Prof Morgan, affirmed by him on the 4th February, 2009, duly notarised by a Notary Public, and filed in these proceeding on the 13th February, 2009. In this affidavit Prof Morgan engages with the contents of a report of the Lithuanian Ministry of Justice on prison conditions in that country exhibited in an affidavit of Anthony Doyle, filed by the applicant in response to Professor Morgan's first affidavit. This Court will review Mr Doyle's said affidavit, and the documents exhibited therein, later in this judgment. It is sufficient at this point to state that Prof Morgan, while willing to accept at face value the proposition that the Lithuanian authorities had by various means reduced the prison population since the last published report from the CPT and that, as a consequence, the levels of overcrowding in both remand and other prisons had concomitantly been

reduced, was of the view that all the other various assertions in the report from the Ministry of Justice required to be operationally checked by independent inspectors, of which the CPT was the principal reputable agency. Prof Morgan then proceeded to exhibit a Supplementary Report on Prison Conditions in Lithuania prepared by him at the request of MacGuill & Company, Solicitors and dated the 31st December, 2008.

This report engages in more detail with the documents exhibited to the affidavit of Mr Doyle and proffered by the applicant in response to Prof Morgan's first affidavit. It concludes:

> "6.1 I find nothing in the supplementary documents furnished me substantially to modify the opinion as set out in section 8 of my original report. Namely, that on the basis of the most recent first-hand empirical evidence, there is a risk of ill-treatment, in the worst cases ill-treatment amounting to torture, at the hands of the Lithuanian police for anyone held in police custody, as Brendan McGuigan will almost certainly be held, should he be returned to Lithuania. Further that conditions in many Police Detention Centres, where Brendan McGuigan would most likely be held initially (up to 17 days) were he to be extradited to Lithuania, were 'inhuman and degrading' according to the CPT in 2004 and may remain so.
>
> 6.2 The statement in para 8.3 of my original statement relating to overcrowding at Lukiškės Prison, Vilnius, where Brenda McGuigan would likely be held were he to be extradited to Lithuania, should be modified in the light of this supplementary information. It appears that the level of overcrowding has been considerably reduced. However, this is not to say that they may [not ?? – *the court's insertion*] remain inhuman and degrading, there being no hard evidence that the level of cellular confinement and the poor sanitary conditions have been eliminated. Nor is there evidence that the risk for anyone detained in penal custody in Lithuania being mistreated at the hands of prison staff or, more commonly, at the hands of fellow prisoners has been reduced, indeed there is evidence that the problem persists.
>
> 6.3 Finally, it should be emphasised that the CPT visited Lithuania again (for the third time) early in 2008. The report resulting from that visit provides the best available first-hand evidence as to contemporary prison conditions in Lithuania. If, as the Lithuanian authorities maintain, custodial conditions and treatment in Lithuania have been substantial improved such that there is serious risk of neither torture or inhuman of degrading conditions in Lithuania then the CPT report will attest the fact. The CPT report is in the hands of the Lithuanian authorities. It can only be published with the permission of the Government of Lithuania. I humbly suggest that it should be made available to the court in these extradition proceedings or, failing that, the Lithuanian authorities should provide opportunity for an independent inspection to be made of the police and penal locations in which Brendan McGuigan will likely be held should he be extradited."

In a second supplemental affidavit affirmed in these proceedings by Mr James MacGuill on the 9th July, 2009, Mr MacGuill reiterates yet again the concerns that he had expressed in his earlier affidavits, and exhibits a further "Supplementary Report on Prison Conditions in Lithuania" by Professor Morgan dated the 7th July, 2009; together with a CPT Report based on a visit carried out from the 21st to 30th April, 2008 (hereinafter "the 2008 CPT Report"); and a Report of the Lithuanian Ombudsman dated the 30th January 2009 on the living conditions in three Lithuanian Remand Prisons, those at Lukiškės, Kaunas and Điauliai.

Professor Morgan's report of the 7th July, 2009 stated *inter alia*, and with reference to the said Ombudsman's Report, that:

> "2.2 The Ombudsman's report unequivocally finds that the living conditions in the three remand prisons cited above were at the material time in contravention of the human rights standards provided for by various Lithuanian sanitation and hygiene regulations and that this was so due to overcrowding and the failure, for want of sufficient funding, of the Lithuanian prison authorities to renovate the relevant accommodation."
>
> The report had also stated:
>
> "3.1 This report results from the CPT inspection visit carried out from 21-30 April 2008. The visit involved, inter alia, the detailed inspection of Lukiškės Remand Prison. The report provides the most up-to-date, authoritative, independent information relevant to the McGuigan case.
>
> 3.2 It is important to note that on this occasion … one of the CPT's two urgent notifications to the Lithuanian authorities concerned the need to provide an out-of-cell programme of activities for remand prisoners. This observation provides the setting for the Committee's more specific findings.
>
> 3.3 Police Remand Custody. In para 6.7 of my report of 2 November 2008 I pointed out that if Brendan McGuigan were returned to Lithuania he would very likely be held initially in Police remand custody and that were that the case he would likely be held in inhuman or degrading physical conditions. I suggested that the inhuman or degrading conditions found by the CPT in police remand custody in 2000 and 2004 might not have been improved on. The 2008 CPT report suggests (paras 10-11), on the basis of allegations received and evidence found by the Committee, that the incidence of physical ill-treatment at the hands of the police appears to have reduced. As for conditions of police remand custody, the CPT found evidence of improved conditions in one police station, but bad conditions in five others, conditions which the Committee continued to regard as 'inhuman or degrading', among the conditions which the CPT found to be 'totally unacceptable' (para 26) were:
>
> Cells in a poor state of repair and filthy
>
> Little or no access to natural light
>
> Inadequate artificial lighting
>
> Lack of ventilation
>
> Failure to provide aids to personal hygiene (soap, toothbrushes, etc)
>
> Unhygienic lavatories
>
> Inadequate drinking water provision
>
> Dirty bedding

Absence of outdoor exercise and facilities

These conditions, the CPT found, could be endured for up to 30 days or where prisoners were returned to police custody for further questioning, for months."

At paragraph 6 of his second supplemental affidavit Mr MacGuill outlines his concerns in the light of the contents of the three documents exhibited therewith. He stated:

"6. I say that arising from the said reports I am concerned as to the high degree of probability that the Respondent will be subjected to inhuman and degrading treatment if surrendered to Lithuania and these concerns include the following that:

(i) The CPT invoked Article 8 (5) of the European Convention for the Prevention of Torture which provides that following a visit the Committee may immediately communicate observations to the competent authorities of the Party concerned, a procedure adopted by the Committee when it has serious concerns about what it has found during the course of a visit;

(ii) Despite the fact that the incidence of physical ill-treatment at the hands of the police appears to have reduced, the delegation did receive a number of allegations of recent physical ill-treatment during questioning by officers of the criminal police, aimed at obtaining confessions or other information.

(iii) Despite the fact the CPT found conditions of police remand custody had improved in one police station, bad conditions were noted in five others which the CPT continued to regard as "inhuman or degrading" or "inhuman and degrading" [Par 26]. The majority of cells seen by the delegation were in a poor state of repair and filthy; further, they often had little or no access to natural light, dim artificial lighting, and were poorly ventilated. Although mattresses and blankets were available, they were often dirty and worn out. Moreover, it appeared that basic personal hygiene items (such as toilet paper) were not systematically provided. At Jonava, a tap placed directly above the minimally partitioned and unhygienic in-cell toilets was the only source of drinking water;

(iv) It is all the more worrying that detained persons, including juveniles, were being held under such conditions for up to 30 days [see paragraph 8 of the CPT report]; moreover, given the practice of returning prisoners to police establishments for further questioning, the cumulative periods of detention could even amount to months;

(v) At Lukiškės Remand Prison the CPT found continued prisoner overcrowding [Paragraph 33]. In some of the remand accommodation there the Committee found "outrageous" levels of overcrowding [Paragraph 44]. The authorities admitted to the CPT that prisons continued to be over-crowded [Paragraph 34]. The Committee found that the authorities calculate their measure of overcrowding according to space standards which the Committee judges inadequate. The Committee received continued reports of physical ill-treatment of prisoners at the hands of staff [Paragraph 36]. The Committee also found continued evidence of inter-prisoner violence [Paragraphs 40-41]. The Committee also found that some material cell conditions which in the CPT 2004 report noted to be "very poor" were now in a "deplorable" state and which in winter were reportedly unheated [Paragraph 44]. In the CPT's opinion, the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of a programme of out-of cell activities, see paragraph 48) could be considered to be inhuman and degrading, especially when persons are being held under such conditions for prolonged periods (i.e. up to several months).

(vi) Conditions fall short of both international and Lithuanian standards;

(vii) The CPT was concerned in relation to potential decisions of the police to control remand prisoners' correspondence. The CPT was informed that under proposed legislation on detention on remand (announced in the Lithuanian authorities' response to the report on the 2004 visit, but still under consideration in 2008) such a decision could only be taken by a judicial authority;

(viii) The CPT noted the legislation in force still did not allow remand prisoners to have access to a telephone [Paragraph 85]. The CPT recommended that access to a telephone be formally guaranteed for remand prisoners. The CPT reiterated its recommendation that the Lithuanian authorities review the current arrangements concerning visits for remand prisoners. In particular, restrictive practices currently applied in respect of such visits can and should be changed without waiting for the introduction of new legislation or regulations. [paragraph 87]

(ix) The CPT noted that matters had not improved since the 2004 recommendation in relation to visiting rights for remand prisoners. The CPT noted that the practice had remained very restrictive [Paragraph 87] The CPT noted it was vital that all prisoners, including remand prisoners, are able to maintain good contact with the outside world, and in particular with their families and friends.

(x) It appears to be very likely that the Respondent would be held in inhuman or degrading physical conditions, if surrendered to the Republic of Lithuania;

(xi) The CPT has concluded that there was a wide gap between law and practice to the guarantee to a right of defence and legal counsel;

(xii) The conditions under which Mr. Michael Campbell is said to be held on remand appear to be the norm and the allegations relating to his detention appear to be entirely plausible based on the content of the reports exhibited herein; These conditions appear to be entirely unacceptable;

(xiii) It would seem highly probable that the Respondent would also be detained in Lukiškės Prison;

(xiv) Lukiškės Prison was criticized by the CPT as being intensely overcrowded in 2000, remained so in 2004 and continues to be so according to the latest reports and evidence;

(xv) It seems clear in most accommodation units at Lukiškės prisoners were confined to their cells or dormitories for most of the day and in some units at Lukiškės some of the accommodation was distinctly unhygienic;

(xvi) It seems clear from the evidence that conditions in many Police Detention Centres, where the Respondent would most likely to be held initially were he to be extradited to Lithuania, were "inhuman and degrading" according to the CPT

in 2004 and continue to be.

(xvii) Article 31 of the Constitution and Section 50 of the Code of Criminal Procedure provide for the right of access to a lawyer "from the moment of deprivation of liberty or first interrogation". On the basis of these provisions, access to a lawyer from the outset of deprivation of liberty was allowed in principle. However, several detained persons met during the visit indicated that they had been informed of their right of access to a lawyer only at the time when the "protocol of apprehension" was drawn up, i.e. several hours after apprehension. Further, most of the detained persons who had applied for legal aid complained that they had had no contact with the state appointed lawyers before the first interrogation, or even before the first court hearing. In this respect, police officers confirmed that "state-appointed lawyers always arrive late". [Paragraph 18]. The CPT stressed that, without an effective legal aid system for persons in police custody, the right of access to a lawyer at this stage of the procedure will remain purely theoretical for indigent persons."

At paragraph 7 of the same affidavit Mr MacGuill quotes from the conclusions section of the Report of Professor Morgan dated the 7th July, 2009, as follows:

""4.1 Given the above up-to-date, authoritative evidence from the Lithuanian Ombudsman's office and the CPT I find reason marginally to modify the conclusions to which I came in paras 8.1 – 8.4 of my report of 2 November 2008. Whereas the CPT did not in 2000 and 2004 employ the term 'inhuman or degrading' with reference to prison remand conditions in Lithuania, though they did use that term to refer to police remand conditions, the Committee has now used the term with reference to *both* police *and* prison remand conditions. They have used the term in the cumulative manner I explained in para 8.2 of my report of 2 November 2008.

"4.2 It follows that in my opinion were Brendan McGuigan returned to Lithuania it is very likely that the conditions in which he would be held awaiting charge or trial for what may be a prolonged period would constitute 'inhuman or degrading' treatment in breach of Article 3."

Mr MacGuill further averred that Michael Campbell, whose alleged acts are alleged to be linked with the respondent's, is:

"still in pre-trial detention since the 23rd January, 2008; is still being held largely incommunicado; while some correspondence appears to be permitted, has not had any contact of a direct kind with his family members; and is only permitted visits by his lawyers in Lithuania; and is being held in inhuman and degrading conditions."

The respondent also relies upon yet a further supplemental affidavit affirmed by Professor Morgan on the 20th May, 2011 and filed in these proceedings on the 2nd June, 2011, and the documents exhibited therewith.

At paragraph 3 of this affidavit Professor Morgan exhibits a further report prepared by him on prison conditions in Lithuania and dated the 24th April, 2011. Then at paragraphs 6 to 8 he deposed to the following:

"5. I say that there has to my knowledge not emerged any additional, firsthand, authoritative evidence about police practices and custodial conditions in Lithuania since the 3rd periodic CPT report of April 2008 referred to above.

6. I say that I visited Vilnius on 24-25 May 2010 and at 14.00 on 25 May I went to Lukiškės Prison and interviewed Michael Campbell. I say that this visit arose in circumstances where a suggestion had been made by the prosecution in extradition proceedings in respect of Liam Campbell in the High Court in Belfast that the conditions in Lukiškės Prison had improved since the said CPT report.

7. Michael Campbell described the conditions under which he was held in police detention for 14 days and these are detailed in my report. Mr. Campbell asserted *inter alia* that:

a) he was not given oral or written notice of his rights by police;

b) he was not permitted to contact anyone on his arrest;

c) he was not permitted to speak with his lawyer alone during the period of his detention in police custody;

d) the interpreter provided was not capable of performing the required task to a satisfactory standard;

e) no violence was used against him by the police though he was slapped and shouted at when language difficulties impeded the proceedings;

f) hygiene facilities were inadequate;

g) he was permitted only two one hour periods of exercise during the 14 day period.

8. Michael Campbell described the conditions under which he was being held in Lukiškės prison and these are detailed in my report."

After proceeding to quote extensively from his most recent report, Professor Morgan concluded:

"11. I confirm therefore that my professional opinion has been strengthened that I believe it is virtually certain that were Brendan McGuigan to be extradited to Lithuania, be would be subject to inhuman or degrading treatment or punishment conditions of detention for a prolonged period, possibly years."

The Supplemental Report of Professor Morgan, dated the 24th April, 2011, and exhibited with the said affidavit, is lengthy. The Court has carefully considered the full document. For the purposes of this judgment it is not proposed to quote it in its entirety. It is, however, necessary to quote substantial portions of it. It states (*inter alia*):

"3. The evidence on which I rely

3.1 There has to my knowledge not emerged any additional, first-hand, authoritative evidence about police practices and

custodial conditions in Lithuania since the 3r'J periodic CPT report of April 2008 referred to above. However, as a result of proceedings in another case (Liam. Campbell, being heard by the High Court in Belfast) in which I gave evidence in early 2010, I was asked spring 2010 to go to Lukiškės Prison, Vilnius, where Michael Campbell, the brother of Liam Campbell, has been held on remand since January 2008. The High Court in Belfast wished to receive an up-to-date inspection, report on conditions at Lukiškės Prison, it being argued by the prosecution in that case that the conditions described by the CPT in their 3rd periodic report no longer applied: it was suggested that conditions had greatly improved.

3.2 In the event the Lithuanian authorities refused inspection access to general conditions at Lukiškės Prison, Vilnius. They did, however, give permission for Michael Campbell (MC) to be interviewed by me in his cell at Lukiškės Prison and I was asked by Kevin R. Winters Slctrs &. Co, Belfast, to go to Vilnius to carry out this task. I visited Vilnius on 24-25 May 2010 and at 14.00 on 25 May I went to Lukiškės Prison and interviewed MC. The interview lasted approximately one and a quarter hours. Inga Botyrienė (IB), lawyer for MC of Vilniaus 2-a advocatu kontora, was present when I interviewed MC as was Aruydas Ižička, Director of Lukiškės Prison. MC relied on notes when answering some of my questions about the history of his custody in Vilnius and Aruydas Ižička subsequently confirmed his account of the legal proceedings against him. The three other prisoners with whom MC shared the cell he occupied when I interviewed him were removed to another location while I interviewed him.

3.3 Although the Lithuanian authorities had in advance of my visit officially denied permission for me generally to inspect Lukiškės Prison, at the close of my interview with MC I asked Aruydas Ižička, Director of Lukiškės Prison, whether I could see parts of the prison that MC had described during the course of the interview (cells in which he had previously been held, the exercise yard in which he regularly took exercise, the shower room, etc). The Director gave me ready access and accompanied me to whatever part of the prison I asked to see. He also answered my questions regarding the likelihood of conditions at the prison being further improved or overcrowding diminished. All of this evidence is relevant in the current case, it being likely that, if extradited, Brendan McGuigan will, like Liam Campbell if extradited, be held on remand at Lukiškės Prison. I encountered no reluctance on the part of the Director of Lukiškės Prison to answer my questions: he was in every way both frank and co-operative.

4 Michael Campbell's account, as told to me, of his experience of custody in Lithuania

4.1 MC was apprehended and arrested in Vilnius, Lithuania on 22 January 2008. He was initially taken by the police to the main police custody station in Vilnius where he was held for 14 days. On the 15th day following his arrest he was transferred to Lukiškės Prison where he has been held ever since. He has at no stage been returned to police custody for questioning as can occur in Lithuania. He has been continuously held in the remand section of Lukiškės Prison apart from regular appearances at the Vilnius Court since his trial began on 19 August 2009. MC has dates for further court appearances, roughly two a month, until the end of July 2010 but neither he nor his lawyer were able to provide any estimate as to when the trial would be completed.

4.2 ***Police Detention ...***

4.3 ...

4.4 ...

4.5 ***Initial Prison Detention ...***

4.6 ***Information on Rights ...***

4.7 ...

4.8 ***Cell allocation and Moves ...***

4.9 ...

4.10 ***Inter-prisoner violence or intimidation***. On one occasion MC requested intervention and a cell move because of a serious conflict with a Russian cell mate who was attempting to intimidate him into buying cigarettes, who made to assault him (he wrapped a leather belt round his fist and came at him) and with whom, subsequent to the attempted assault which MC asserts he was able to resist, there was severe tension. MC/s lawyer (IB) corroborated that on this occasion she was able to assist, made representations to the Director, and managed to achieve a cell transfer for MC away from the Russian aggressor.

4.11 MC reported that inter-prisoner tensions are commonplace because practically all the remand cells at Lukiškės Prison are-small, severely overcrowded-and occupied for at least 23 hours per day. This was true of the cell that MC occupied at the time of my visit and in which I interviewed him. MC said it had also been true of all the other cells that he had occupied during 27 months, though the cleanliness and state of repair of the cells varied substantially. There was absolutely no dispute about the level of cell overcrowding and the Director was frank about the difficulties he faced as Director. On 25 May Lukiškės Prison held, according to the Director, 1044 prisoners, a figure substantially up on the average in 2009 of 950. Numbers, the Director reported, are rising and the prison budget is under severe strain.

4.12 MC said that though he had never been seriously assaulted by a fellow prisoner he was aware that inter-prisoner violence often occurs at Lukiškės Prison and he was very nervous about serving any sentence in Lithuania because he knew on the grapevine that sentenced prisoners, particularly foreign sentenced prisoners, are vulnerable because they are not confined to their cells during much of the day. Sentenced prisoners are provided with a more active regime, are out of their cells and thus are easily preyed upon.

4.13 ***Cell size, Crowding and Conditions.*** MC asserted that all the cells he had occupied had been the same as that occupied when I interviewed him, that is: 2 x 3.5 or 4 metres (thus a little less than approximately 8m square); containing 4 iron bunks arranged in two tiers placed at right angles (one laterally, placed under the window, and one lengthwise from the door, opposite the sink and lavatory) and occupied by four prisoners. This leaves standing room in the space alongside the lengthwise tier of approximately 1.5 square metres. There is no space for a chair and none is provided. There is no space in which a prisoner might do a press-up. The cells are extremely cramped and require prisoners to eat either standing or sitting on their bunk beds. All cells contain a sink with cold, running water only and on the other wide of a low partition from the sink is a lavatory which in some cells comprises a hole in the ground (according to MC) and in others a flushing pedestal lavatory, some of which lavatories work and others do not (according to MC).

4.14 The cell then occupied by MC housed four prisoners as described above (they were removed from the location for the purposes of my interview), appeared clean and neat, had generally well painted walls (though there were patches of

failing plaster) and contained a flushing, pedestal lavatory that worked. It lacked a glassed in window, however. The window frame and glass panes (approx 1.5 metres square) lay in two sections propped up against the wall adjacent to the cell door. Why was it not fitted? MC was unsure. He had occupied his current cell for only two weeks and it was windowless. It follows that the window aperture was entirely open save for a frame of metal bars over it on the inside, a more restricted framework of metal bars on the outside and outside that a metal mesh, not so fine as to restrict entry of daylight nor sufficient to prevent heat loss. The cell, MC explained, was very cold at night if it was cold outside: the wall-mounted metal radiator opposite the lavatory, the sole source of cell heating, never got more than slightly warm according to MC.

4.15 Suspended above this restricted cell space were two lengths of string from which hung the prisoners' washed clothes, drying. This was the only means by which prisoners could have clean clothes. They were provided (according to MC) with two bars of soap and two rolls of lavatory paper a month between four prisoners and with this soap they must wash both themselves and their clothes in cold water in the cell using a metal bucket provided for the purpose. They were not, according to MC, provided with other hygiene materials (toothpaste or toothbrush or detergent) and must buy these materials themselves from either the prison shop (which I was subsequently shown by the Director) or have them sent in. They were provided with a towel per prisoner. Their towels, which I inspected, comprised a small, thin rectangle of material not unlike a British tea towel for drying dishes.

4.16 [the report contains no paragraph 4.16]

4.17 The absence of the window in MC's cell was indicative of the variation in cells he has experienced generally. Some, he asserted, are filthy. Some are cold. Some are hot. Some are very dilapidated. Some have working lavatories, some do not. It depends on the locations and the occupants.

4.18 ***Food. ...***

4.19 ***Showers and Personal Hygiene. ...***

4.20 ***Clothing. ...***

4.21 ***Lighting and reading material. ...***

4.*22* ...

4.23 ***Electronic Equipment. ...***

4.24 ***Exercise***. MC asserted that there is outside exercise daily for one hour. At Lukiškės Prison exercise is offered at either 06.30 or 08.30 and is taken by cell occupants together -meaning that there are normally four prisoners on each yard at a time - and is taken in a walled semi-triangular yard the sides of which measure approximately 7 metres by 7 metres by 4 metres (MC's estimate). Subsequent to my interview with MC the Prison Director permitted me to inspect the exercise yards. They were exactly as MC described them. The walls of each yard were of brick and approximately 10-12 feet high, the whole area being covered with a wire mesh, like a relatively small, walled cage. The exercise yards were not large enough for prisoners to run such as to 'exert themselves physically' the standard set by the CPT.

4.25 ***Infestations. ...***

4.26 ***Prisoner Contact with the Outside World. ...***

4.27 ***Legal Advice and investigatory procedure. ...***

4.28 ...

5 My First Hand Inspection of Lukiškės Prison.

5.1 I interviewed MC in his four man cell and was therefore able fully to verify the grossly overcrowded conditions in which "MC was living (see paras 4.13-1.7),

5.2 Though the Lithuanian authorities denied permission for me generally to inspect Lukiškės Prison in advance of my visit, in practice the Director allowed me to see areas of the prison other than MC's cell after I had interviewed MC. The Director met me at the prison gate and after I had interviewed MC he happily showed me the shower room, the exercise yards, the ground floor accommodation and was keen to show me cell blocks other than that in which MC is currently housed and which have either been renovated or were in the process of being renovated. The latter were being refurbished or have been refurbished but their essential character remains the same. That is, the plaster had been renewed, windows replaced, central corridors tiled and plumbing and electrical wiring systems replaced. But the structure of the wings, including the size of the cells, remained exactly the same. Which means that if they are as intensively used as at present, and if the regime remains unchanged, the cells are just as crowded for the 23 hours a day in which prisoners are confined in them.

5.3 Further, the Director explained that prisoner numbers arc rising again (see para 4.11) and the state of the Lithuanian economy in this post-recession period means that there is no budget to make further improvements. The Director explained that he is generally powerless to greatly improve matters. It is clear that the prison was more crowded in 2010 than it was in 2008/9 and the Director reported that numbers are rising and he expected them to rise further.

6 Conclusion

6.1 I find no reason, therefore, to alter the conclusions reached in my earlier reports. The prison conditions in which MC was held at Lukiškės in May 2010 were as described by the CPT in 2000, 2004 and 2008 and they have not altered in 2010, though as described in the 2008 CPT report a refurbishment programme is underway. Indeed the evidence suggests that though parts of the prison have been refurbished, the prison is now more overcrowded than it was in 2008 and 2009. Which is to say that most remand prisoners enjoy approximately 2 square metres of cell space per person, well below the standard deemed acceptable by the CPT, they are required to meet the needs of nature without privacy in those cells and they are confined to their cells for 23 hours a day. No prisoner programmes or work is provided and prisoners are required to exercise in small cages not large enough for them to exert themselves physically. The conditions remain 'inhuman and degrading' according to the standards of the CPT and as endorsed by the European Court of Human Rights. The police conditions of detention in which MC says he was

initially held are much as those described by the CPT.

6.2 If MC's testimony, and that of his Lithuanian lawyer, are to be relied on there is also risk of abuse of legal process by the Lithuanian authorities.

6.3 It follows that I reiterate and strengthen my earlier expressed opinion, namely, that I think it virtually certain that, were Brendan McGuigan extradited to Lithuania he would be subject to inhuman or degrading treatment or punishment conditions of detention, that his period of detention would probably be prolonged (possibly years), that he would probably not be allowed any visits other than from his lawyer."

In a further affidavit affirmed by Professor Morgan and filed in these proceedings on the 18th October, 2011, he joins issue with assertions contained in a letter from the Chief Prosecutor at the Vilnius Regional Prosecutor's Office to the Irish Central Authority dated 30th September, 2011 that had characterised his opinions and conclusions as being based upon presumption and guesswork, and as being, *inter alia*, "tendentious, inaccurate and contravening of the laws of the Republic of Lithuania". He has averred in response:

"5. I beg to refer to the 5th paragraph of page 5 of the said letter. I say that while I took into account my evaluation of the statements made to me by Ms Botyrienė and Michael Campbell, my findings and opinions expressed in my said report and affidavit are based primarily on my personal observations and matters on which I have firsthand experience and knowledge. This includes my verdict regarding the conditions at Lukiškės prison, which I saw at first hand. I say and believe that this verdict corresponds to the conditions reported on by the Council of Europe Committee for the Prevention of Torture (CPT); that my judgement corresponds with the CPT's judgement; and I say and believe that nothing said by the Lithuanian authorities of which I am aware, invalidates the relevant evidence and judgement.

6. I beg to refer to the 1st paragraph of page 6 of the said letter. I say that my opinion that Mr McGuigan would probably not be allowed any visits other than from his lawyer is based on my evaluation of the statements made to me by Ms Botyrienė and Michael Campbell and my own knowledge and experience.

7. I stand by my said report and affidavit and the professional opinions expressed therein."

Additional Evidence adduced by the Applicant

The first material filed in these proceedings by the applicant in response to the evidence adduced by the respondent concerning the objection based upon alleged inhumane and degrading prison conditions and ill-treatment of detainees in Lithuanian prisons was an affidavit of Anthony Doyle, Executive Officer in the office of the applicant, sworn in these proceedings on the 4th December, 2008. Mr Doyle sought to exhibit a number of documents consisting (*inter alia*) of :

(i) correspondence received from the issuing judicial authority including a letter dated 28th October, 2008 containing additional information concerning Lithuanian prison conditions submitted previously to the UK authorities in a case of Natalia Ježova ;

(ii) the 2007 US State Department Report;

(iii) 2006 Response of Government of Lithuania to the 2004 CPT Report on Lithuanian Prison Conditions (hereinafter "the 2006 Response").

The additional information dated 28th October, 2008 stated:

"Further to the statements regarding the overpopulation of Lukiškės Prison - Closed Prison, Kaunas Remand Prison, and Šiauliai Remand Prison, marked in the report of the visits in 2004 by the European Committee for the Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and 2007 Report of the Human Rights Monitoring Institute please note that total level of inmates during 2003-2007 gradually decreased from 154% (2003) to 111 % (2008). Number of inmates in the Kaunas Remand Prison constitute 90% of facility capacity of Šiauliai Remand Prison - 137%. Living area per inmate of a Remand Prison increased from 2.46 sq. m. (2000) to 4.63 sq. m. (2008).

It is expected to solve the problem of overpopulation of prison facilities after implementation of the Program of Renovation of Prisons and Humanization of Prison Conditions in 2004-2009 (approved by the 24 May 2004 Decision No. 619 of the Government of the Republic of Lithuania (Žin., 2004, No. 85-3181)) (hereinafter referred as CPT 2004), reconstruction 13 objects of detention facilities and establishing 1348 new places for imprisoned persons. It should also be noted that the Strategy on development of institutions subordinate to the Prisons Department under the Ministry of Justice and Implementation Plan 2008-2033 of the said strategy (approved by the 26 March 2008. Decision No. 288 of the Government of the Republic of Lithuania (Žin., 2008, No. 40-1469)), which provide for the fact that before the 2026 2 new Remand Prisons shall be built and equipped, 6 detention institutions (including Lukiškės Remand Prison - Closed Prison (before 2011), Šiauliai Remand Prison and Prison Hospital (before 2012)) shall be removed from the central parts of the cities to newly equipped premises on the outskirts of the cities, other detention institutions shall be renovated.

Please also note that pursuant to the art. 10 of the Law on Detention in Remand of the Republic of Lithuania (Žin., 1996, No. 12-313; 2006, No. 68-2494) (Hereinafter referred to as LDR) detained and convicted men shall be kept separately from women. It should be stressed that the number of prisoners in the block intended for women in the Lukiškės Remand Prison - Closed Prison never exceeds the limit and currently is below 50%. In Šiauliai Remand Prison the number of inmates in the cells intended for women constitutes 65% of the total capacity.

We would like to note that following the conditions of the Section 2 Chapter III LDR persons detained in the remand prisons are entitled to receive information about the procedure of having them detained in a remand prison, conditions and legal status, see their defence lawyer, provide suggestions, requests (statements), petitions, claims, have correspondence, meet journalists, participate in elections, referendum or public inquiry (plebiscite), conclude civil transactions, marry, perform his forms of worship, meet other persons, make a phone call, receive mail and parcels with press, receive and send money orders, acquire literature and means of writing, use TV, radio, computers, game consoles, and other things, buy food and necessities, have a walk outside, have a short trip outside the limits of the remand prison,

also are entitled to other rights which are specified in valid Laws and correspond to the requirements of the Convention For the Protection of Human Rights and Fundamental Freedoms and its Additional Protocols and other acts of law regulating human rights and freedoms ratified by the Republic of Lithuania.

Further to the statements of the CPT 2004 regarding healthcare services in the Lukiškės Remand Prison - Closed Prison please note that currently the staff of the health care service of the Lukiškės Remand Prison - Closed Prison includes eleven doctors (five of them on a part-time basis), eleven paramedics and nurses (one of them on a part-time basis), and 3 technicians (two of them on a part time basis). Health care service has the following doctors: physician, odontologist, dermatovenerologist, psychiatrist, pulmonologist, gynaecologist, two radiologists.

Please also note that as long as the Prisons Hospital is situated nearby the Lukiškės Remand Prison - Closed Prison (these two institutions share a common territory), having a doctor on duty during the night is inexpedient because there is an agreement made with the Hospital regarding provision of qualified medical assistance to the inmates of the Lukiškės Remand Prison - Closed Prison during the night. After the Prisons Hospital is moved to Pravieniškės, night duties of a qualified specialist of medicine during the night time shall immediately be organized in the Lukiškės Remand Prison - Closed Prison. Please also be informed that in case a special medical assistance is necessary for the inmates and it is impossible to provide it in the Prisons Hospital, further to the procedure specified in the acts of law such inmates shall be sent to specialised health care institutions outside the prison. Therefore, we would like to note that all the health care services that are provided to free persons are available to the inmates also.

Further to the statement of the report of the 2002 visit by the European Committee for the Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment we herewith inform you that the metal panels which used to cover the windows of the Lukiškės Remand Prison - Closed Prison cells were removed back in the 2004.

Further to the statement of the 11 March 2008 report of the U.S. Department of Justice (hereinafter referred to as: Report) regarding the 16 November 2006 Ruling by the European Court of Human Rights in the case Ciapas versus Lithuania (which stated the violation of the article 8 of the Convention For the Protection of Human Rights and Fundamental Freedoms in respect of censorship of inmate's correspondence) please be informed that the Court in its decision stated that the internal legal norms enabling censorship of correspondence must be precise, specific and providing for regular reconsidering of the decisions regarding censorship of correspondence (in respect of the nature, grounds, duration). Regarding the lack of legibility of legal regulation of correspondence of inmates, a law amending the LDR was adopted. It shall validate on 1 April 2009 and specify the conditions of the remand prison inmates in compliance with the conditions recommended by the EU Committee of Ministers Recommendation No. R (2006) 2 On Prison Rules.

To solve the matter of violence between inmates the programs for prevention of violence are implemented in the prisons. New inmates are placed in separate, premises for the term of up to two weeks. There the explanatory-examination work is done with them. Inmates are appointed to living premises according to their physical state, psychological characteristics, nature of the crime they committed, and other factors. An internal investigation is conducted in respect of each case of violence between the inmates. Specialists of the Social Rehabilitation and Psychological Services developed a the (sic) draft plans of the Strategy For Overcoming the Phenomenon of Inmate Subculture In Prisons and means of implementation thereof. When reconstructing the correctional facilities large premises that used to contain up to 20 convicts are divided into smaller ones having an average of 8 inmates. Such reconstructions wore made in the Kybartai correctional facility, Vilnius 2nd correctional facility, Pravieniškės 3rd correctional facility. Positive changes in solving the problem of violence between inmates are expected by gradually reconstructing large living premises into even smaller, intended for 3-6 inmates in all prisons.

Following the Recommendations of the CPT 2004 prisons and inmates are supplied with written information about frequent contagious diseases, (tuberculosis, flue, intestinal contagious diseases, HIV/AIDS, kinds of hepatitis). On 24 May 2004 by the Order No. 4/07/132 of the Director of the Prisons Department under the Ministry of Justice of the Republic of Lithuania the Typical Program of Adaptation of New Convicts was approved (Žin., 2004, No. 87-3192). On 29 December 2006 by the Order No. V-312 of the Director of the Prisons Department under the Ministry of Justice of the Republic of Lithuania the Training Strategy of the staff of Prisons Department and subordinate institutions 2007-2010 was approved. The said strategy was drafter (*sic*) regarding the CPT recommendations regarding training of staff."

The 2007 US State Department Reports on Human Rights Practices had already been exhibited by Mr MacGuill in his affidavit of 22nd July, 2008, and its contents in so far as they relate to prison conditions and the treatment of prisoners in Lithuania were fairly summarised by him, and it is not proposed to review this report further at this stage.

The 2006 Response is a lengthy and detailed document, and the Court has carefully considered it. Parts A and C thereof seek to address CPT criticisms of conditions and treatment of prisoners in police detention centres on the one hand, and Kaunas psychiatric hospital on the other hand. These are perhaps of lesser relevance than Part B of the document which seeks to address CPT criticisms of conditions and treatment of prisoners in prisons including remand prisons.

In its 2004 Report the CPT had, *inter alia*, recommended that the Lithuanian authorities should continue to pursue their efforts to bring about a permanent end to overcrowding, in the light of the remarks made by them previously in responding to an earlier (2000) CPT Report. The 2004 CPT Report, at paragraph 48 thereof, had sought to remind the Lithuanian authorities that:

> "In their responses to the report on the 2000 visit, the Lithuanian authorities informed the CPT of legislative changes (Law on Amnesty and amendments to the Criminal Code), which enhanced the possibilities of imposing non-custodial sanctions (in particular, as regards juveniles). At the same time, the legal standards for the provision of living space for prisoners in Lithuania were increased (to 5 m2 per person in multi-occupancy cells in prisons and 3 m2 in dormitories in correction homes)."

The report went on:

> "The CPT welcomes these steps. However, the information gathered during the 2004 visit showed that overcrowding still posed a major problem, not only in the establishments visited, but in the prison system as a whole (cf. paragraphs 64 and 65)."

At the commencement of Part B of the 2006 Response (p. 18) the Lithuanian authorities stated:

> "A plan of the expedient usage of the existing material facilities of the custodial establishments has been drawn, and its

implementation is started. It should be noted, that on the 1st of May 2003, after the new penal laws came into force the number of inmates convicted for the first time decreased. Consequently, the institutions that were housing this category of prisoners stayed half-empty while the institutions for prisoners convicted for repeated crimes were overcrowded. The wider use is intended of the joint functioning of two or more types of correctional institutions; at the same time the principle of the isolation of the different categories of inmates has to be secured.

The Program of the Renovation of Custodial Places and the Humanization of Conditions of Imprisonment for the years 2004 - 2009 has been approved by the Resolution of the Government of the Republic of Lithuania No. 619, dated 24 May 2004. The reconstruction of the 13 custodial places has been scheduled in it. The implementation of this program would require 81 million 734 thousand LTL. After this program is implemented additionally 1,348 new places for prisoners would be installed, and 630 places would be completely renovated.

It should be also noted, that the new Kaunas Remand Prison with the capacity of 262 places has been built and it was opened on 12 July 2004. This has allowed to reduce the number of the inmates in the Lukiškės Remand Prison."

Part B of the 2006 Response goes on to seek to address numerous other issues raised by the CPT in its 2004 report. The Court has read and has taken full account of this material.

The applicant further relies upon an affidavit (described in the title thereto as a supplemental affidavit) of John Davis, sworn on the 11th February, 2010 in which he exhibits (*inter alia*) a Report of a Seimas Ombudsman of the 30th January, 2009. The full title to the document is: "*Report on the Investigation (initiated on Ombudsman's own initiative) into possible violations of human rights due to failure to ensure accommodation conditions complying with Lithuanian hygiene regulations in Lukiškės interrogation ward-prison and interrogation wards of Šiauliai and Kaunas*". This is in fact the document referred to in Professor Morgan's report of 7th July, 2009 and described therein as "report of the Lithuanian Ombudsman". The Seimas of the Lithuanian Republic (Lithuanian: *Lietuvos Respublikos Seimas*), or simply the Seimas, is the unicameral Lithuanian parliament. Accordingly Seimas Ombudsmen are parliamentary ombudsmen. The Court is aware from other cases that their function is investigate citizens' complaints concerning abuse of official position or bureaucracy by certain categories of officials, including members of the police and prison service.

The report in question is an impressive, very detailed and ostensibly balanced document. It records conditions as found by the Seimas Ombudsman, Ms Albina Radzevičiūtė, upon her inspection matter of factly while at the same time describing improvements, where such were found to have occurred since, or indeed in response to, criticisms made in the past by the CPT and others, as well as plans for further improvements. However, nothwithstanding improvements observed, and plans for further improvements noted, the Seimas Ombudsman ultimately declared that "the allegations on possible violation of human rights due to failure to ensure accommodation conditions complying the [*sic*] Lithuanian hygiene regulations in Lukiškės Interrogation Ward-Prison and interrogations wards of Kaunas and Šiauliai were proved during the investigation". The report recommended:

"Following the provisions of Article 19 Paragraph 1 Points 1 and 17 of the Law on the Seimas Ombudsmen, the Seimas Ombudsman:

1) informs the Committee for Human Rights and the Committee for Law and Order of the Seimas of the Republic of Lithuania about possible violations of human rights due to failure to ensure accommodation conditions complying the Lithuanian hygiene regulations in Lukiškės Interrogation Ward-Prison and interrogations wards of Kaunas and Šiauliai;

2) suggests that the Ministry of Justice together with Department of Prisons, Prosecutor General's Office and the Council of Judges should initiate an investigation in order to identify the reasons of the overcrowding of interrogation wards, analyze the practice in application of detention and make suggestions how to solve the problem of the overcrowding of interrogation wards."

The next document in chronological order relied upon by the applicant is a letter to the Irish Central Authority from the Chief Prosecutor at the Vilnius Regional Prosecutor's Office dated the 30th September, 2011 and placed before the Court as additional information. For the most part this document represents an engagement with that part of the respondent's relating to fair trial issues, and most of the letter is devoted to joining issue with assertions or opinions put forward by the respondent's principal deponent in regard to those matters, namely Ms Ingrida Botyrienė, a Lithuanian lawyer. There is, however, some engagement with averments made by Prof Rod Morgan in the affidavit affirmed by him on the 20th May, 2011 which touch, *inter alia*, on alleged restrictions or limitations on procedural rights, including the ability to contact outside persons, the ability to speak to a lawyer alone, and other such issues, afforded to persons in remand custody in Lithuania. The letter states in that regard:

"The affirmations produced by Professor Rod Morgan in his affidavit, namely: that Lithuanian law enforcement officers failed to give to M. Campbell the notice of his rights, that MC was not permitted to contact anyone on his arrest, or speak with his lawyer alone during the period of his detention, that the interpreter was not capable of performing the required task to a satisfactory level, that he was slapped and shouted at, are not confirmed by any objective evidence. Therefore, there is no sufficient ground to rely on them.

Besides, Lithuanian court or other law enforcement authorities have not established any facts that Lithuanian officers could have abused their procedural rights in respect to M. Campbell in the course of pre-trial investigation. Professor Rod Morgan have not [*sic*] produced any official conclusions made by competent European or Lithuanian authorities regarding the inhuman conditions in Lukiškės prison where M. Campbell is held. Thus, the affirmation of Prof. R. Morgan, that '… were Brendan McGuigan to be extradited to Lithuania, he would be subject to inhuman or degrading treatment or punishment conditions' cannot be considered as substantiated.

Professor's affirmation that B. Mc. Guigan '...would not probably be allowed any visits other than from his lawyer" is based on presumption and guesswork. This issue both in pre-trial investigation and court is being ruled by law order, dealing with every case individually, with regard to the existing situation in the investigation or examination process.

Summarising the above, we think that the affirmations declared in the Affidavits of Lawyer Ingrida Botyrienė and Professor Rod Morgan are tendentious, inaccurate, contravening the laws of the Republic of Lithuania as well as the existing practice of criminal investigation and trial. …"

The affidavit of Prof Morgan filed on the 18th October, 2011, and referred to earlier in this judgment, contains his response to Chief Prosecutor's remarks.

There is then a further letter that was put before the Court by way of additional information, *i.e* a letter from the Prosecutor General's Office of the Republic of Lithuania to the Irish Central Authority dated the 30th January, 2012. This letter appears to be by way of response to some queries raised by the Irish Central Authority in a letter dated 3rd January, 2012. The letter of the 3rd January was not provided to the Court, but it can be inferred from the reply that queries were raised both with respect to fair trial issues and also with respect to prison conditions. The reply of 30th January deals with the fair trial issues in that it enclosed a further lengthy letter from the Vilnius Chief Prosecutor's office dated the 19th January, 2012 addressing the queries raised in that regard. However, in regard to the queries that had been raised relating to prison conditions, it stated:

> "The questions related with the prison conditions and treatment in police detention or in a remand prison have been referred to the Ministry of Justice of the Republic of Lithuania - an institution competent to answer this kind of questions. As soon as the reply from the Ministry of Justice is received, we will immediately re-forward it to you."

On the 9th February, 2012 the Prosecutor General's Office of the Republic of Lithuania duly forwarded a letter that it had received from the Ministry of Justice. The enclosure, dated 6th February, 2012, stated:

> **"RE: PROVISION OF INFORMATION**
> In reply to the questions presented in the letter of the Irish Department of Justice and Equality, which was transmitted by the Prosecutor General's Office of the Republic of Lithuania, based on our competence, please find the information about the conditions of imprisonment at the Lukiškės Remand Ward Prison.
>
> It should be noted that the documents enclosed to the said letter, which describe the conditions of imprisonment at remand prisons, were based on the data specified in the report of the European Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the "CPT") on their visit in Lithuania on 21-30 April 2008. Please note that the representatives of CPT once again inspected the imprisonment facilities in Lithuania during their visit on 14-18 June 2010. The report of the said visit the main purpose of which was to check the implementation by Lithuania of the recommendations put forward by CPT in 2008, stated about the progress achieved in the improvement of the conditions of imprisonment.
>
> It should be noted that in order to provide a complex solution to the problem of overcrowding at the imprisonment facilities (and also in remand wards), on 30 September 2009 the Government of the Republic of Lithuania approved a new strategy for the modernization of imprisonment facilities and a plan *of* measures for its implementation, which specifies that 4 new remand wards-corrective institutions and 1 prison are planned to be built by 2017. According to the said strategy, by 2014 the convicted persons held in the Lukiškės Remand Ward-Prison shall be moved to the Pravieniškėss Prison, which *is* currently under construction. Thus, it shall become possible to move the arrested persons held in the Lukiškės Remand Ward-Prison to the cells currently intended for the convicted persons, which may solve the problem of overcrowding. It should be noted that it has been planned to move the arrested persons to the new imprisonment facility by 2017.
>
> Meanwhile we would like to inform you that considerable attention is also being paid to the enhancement of custody conditions of detainees before their transfer to new modern imprisonment facilities In 2000-2010 Block II of Lukiškės Remand Ward-Prison was renovated, the conditions under which the detainees held here may fulfill their cultural and spiritual needs are being further enhanced (there is a separate room for movie demonstration, a chaplain's room).
>
> In pursuance of recommendations put forward by CPT in its report regarding the 2008 year visit in Lithuania, special attention is also devoted to proper training of staff for work with detainees and convicts. During the training courses the officers are also made familiar with international standards of custody of convicts and detainees, they are trained how to deal with aggressive individuals and the like. It must also be emphasized here that the process of tackling problems related to provision of health care services for imprisoned persons as pointed out in 2008 CPT report has yielded a number of positive results: the Prisons' Hospital in Vilnius is to be relocated to new premises in Pravieniškės by October 1st , 2012, mobile X-ray apparatus (for car use) was acquired in 2010."

On the following day, the 9th February, 2012, the Prosecutor General wrote again to say:

> "The Prosecutor General's Office of the Republic of Lithuania hereby pays all due respect to you and assures you that the Republic of Lithuania as a Member State of the European Union which has also acceded to the European Convention for the Protection of Human Rights and Fundamental Freedoms does guarantee the protection of human rights enshrined in this Convention and - specifically - in Article 3 thereof."

Further Evidence adduced by both sides post 13.02.2012

The evidence reviewed heretofore in this judgment represents the evidence adduced up to the adjournment of this case on a part heard basis following the initial four days of hearing. Further evidence was filed by both sides during the adjournment, and was subsequently relied upon at the resumed hearing.

On the 23rd April, 2012 Prof Rod Morgan affirmed a further affidavit that was subsequently filed in these proceedings by the respondent. That affidavit asserted:

> "3. I say that I have been sent a note from MacGuill & Company Solicitors containing eight questions arising out of submissions made during the hearing of the application herein in the High Court in Dublin on the 9th and 13th of February 2012. I have briefly considered the transcript of the said hearing. I say that I set out below the text of those questions and my replies in summary form:
>
> 1. *Why have Lithuanian prisoners not got recent judgements from the ECHR in relation to adverse custodial conditions in Lithuania?*
>
> There could be any number of reasons. No simple conclusion can be drawn from the absence of recent judgements.
>
> 2. *What conclusions can be drawn from the fact that the CPT uses the wording that the conditions at Lukiškės 'could be considered' inhuman and degrading?*

The CPT, unlike the ECHR, is a purely fact-finding not a judicial body. It follows that the CPT has frequently used the term 'could be considered' to describe conditions that it is for the Court to pronounce either torture or inhuman or degrading. No inference to the effect that the CPT's findings are 'less serious' can be drawn from use of this phrase.

3. What conclusions can be drawn from the fact that the CPT has made criticisms regarding the Republic of Ireland and the UK of a similar nature to those made regarding Lithuania?

The most recent published report in respect of the UK (from 2008) is highly critical of the rise in the prison population and of acute prison overcrowding (well above CNA) but did not find that overall conditions of confinement 'could be considered inhuman and degrading', merely that they made it more difficult for staff to treat prisoners with dignity. The position in UK prisons is not comparable to that regarding Lukiškės where a deterioration in what prisoners are experiencing has been found in successive reports and explicit reference to 'inhuman and degrading' made.

Nor is a comparison with CPT reports on the Republic of Ireland particularly useful. The Republic has been inspected five times since 1993 (all five reports published). In the most recent (2010) concerns were expressed by the CPT about overcrowding and prisoners having to sleep in emergency situations on mattresses on the floor. But the overall assessment of conditions (space, regime, treatment by staff, etc) did not lead the CPT, as it did not in previous visits, to suggest that anything amounting to a breach of Article 3 was at stake. The Irish and Lithuanian assessments are not comparable.

4. *Is it the case that the Lithuanian authorities have demonstrated a commitment to improve conditions at Lukiškės and elsewhere?*

Successive responses from the Lithuanian authorities have demonstrated a written commitment to address the various shortcomings found by the CPT and successive reports from the CPT have found improvements in processes and conditions in several respects. In particular there has been a programme of refurbishment at Lukiškės Prison, to which I made reference in the report on my visit to Lukiškės in May 2010 (see paras 3.1-2). However, I did not find that these improvements impacted the particular combination of conditions of confinement experienced by Michael Campbell, which I witnessed during my visit to interview him and which are the subject of the CPT's assessment regarding Article 3 issues. These remained largely unchanged and, according to the testimony of the Governor of Lukiškės Prison, were unlikely to be changed in the foreseeable future *(Ibid.).*

5. *How has the population ofLukiškės Prison changed since the millennium and is it not the case that the population is less crowded (when CNA and space definitions are taken into account) than was the case in 2000?*

Certified Normal Accommodation (the term used in the UK) data have been the subject of many critical assessments and are methodologically questionable in the UK. Whether CNA equivalents in Lithuania are credible is not something I am in a position systematically to assess. However, it would be surprising if they could be relied on. In my considered opinion, and with no disrespect intended to Mr Collins SC, certainly the sort of calculations that appear to have been advanced by senior counsel for the Minister herein in his submissions to the Court in February are for various reasons not reliable. This is so because:

- Most prisons contain several types of accommodation or different sized rooms built at different times and for different purposes. It follows that one cannot assume a total space capacity from a space standard which the country concerned says it follows or aspires to and derive a total space capacity from a CNA or its equivalent.

- CNAs or their equivalent for particular establishments are typically retained for long periods despite minor changes of use or conditions. Thus they are at best only an approximate guide to accommodation use that is either desirable or acceptable at any one time. For example, they tell us nothing about accommodation that for various reasons cannot be used (cells smashed up, damaged, being redecorated or part of a refurbishment programme). Nor is all accommodation suitable for the population being accommodated – thus under –usage of prisoner accommodation can be taking place alongside over-usage – for either this reason or because the staffing complement is incompatible (one needs more intensive supervision of large dormitory accommodation than small cells).

The CNA equivalent of Lukiškės has been reported by the CPT as reduced since 2000 as has the population accommodated. The capacity reduction appears to be because some accommodation has been taken out of use. What is not clear is whether the refurbishment programme, aspects of which I witnessed in May 2010, has rendered accommodation included in the present CNA unusable or whether the reduction in the CNA is attributable to the temporary unavailability of accommodation being refurbished. Either way any aggregate measure of overcrowding by treating population as a numerator and CNA as a denominator is highly questionable and probably misleading. The only acid test is looking at the space that either all or some prisoners are actually housed in and the regime conditions to which they are subject. My report of May 2010 based on first-hand evidence demonstrated beyond doubt that the cell and regime conditions which the CPT earlier maintained could be considered to amount to inhuman and degrading conditions, prevailed still in 2010 and Michael Campbell was experiencing them, whatever the overall CNA or population of Lukiškės Prison. Moreover, no one with whom I spoke pretended that those conditions were other than typical.

In this context, I draw attention to the fact that the Lithuanian authorities knew that I was visiting Lukiškės Prison in May 2010 in order to collect evidence for extradition proceedings in which complaints about conditions of detention were a major issue. Michael Campbell was the only officially approved source of evidence for my visit. The authorities therefore appeared to have an incentive to house Michael Campbell in less crowded conditions, and if such superior conditions were available, it would appear to be surprising that they were not made available to Mr Campbell.

I repeat that no suggestion was made to me to the effect that Mr Campbell's conditions of detention were not typical.

6. *Did the fact that the CPT did not visit Lukiškės Prison in 2010 mean that the CPT was no longer concerned about conditions there?*

No such inference can be drawn. The CPT made only a short visit to Lithuania in 2010, and concentrated almost exclusively on a juvenile centre probably because they were in receipt of new intelligence which concerned them. They were also looking into the issue of whether Lithuania had provided secret custodial conditions for international purposes. The CPT has very limited resources and many countries to visit. It had already inspected Lukiškės three times and made its findings regarding Lukiškės very clear.

7. *Why is there no evidence of criticism from other sources regarding Lithuania*?

I do not accept the premise of this question. While Lithuania is not the Council of Europe member state whose prisons are exciting the most concern at present, substantial concerns have been expressed by various bodies.

8. *Any comments on the Lithuanian authorities' recent responses to CPT reports and the lack of reference in recent submissions to your own reports?*

I assume that the Lithuanian authorities did not address the position in Lukiškės prison because it was not visited in the latest CPT visit. I note that my evidence has not been addressed in evidence or submissions. I stand by my evidence as set out in previous reports and affidavits."

Professor Morgan's affidavit of the 25th April, 2012 was forwarded by the applicant to the Lithuanian authorities for their comments, and these were furnished by way of a letter dated the 16th May, 2012 from the Ministry of Justice of the Republic of Lithuania addressed to the Prosecutor General's office, and which was forwarded in turn to the applicant on the 17th May, 2012, and which the applicant has put before the Court by way of additional information.

The letter of the 16th May, 2012 states:

"Please find the comments of the Ministry of Justice of the Republic of Lithuania on the affidavit of Prof. Rod Morgan about the confinement conditions in the Lukiškės Remand Prison.

1) *On the objects chosen for supervision by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter referred as CPT) during the visit to Lithuania in 2010*

By commenting the opinion expressed by the Prof. Rod Morgan that the visit of 14-18 May 2010 to Lithuania concentrated almost exclusively on Juvenile Interrogation Isolator - Correctional Facility of Kaunas, hereby we note that in the CPT Report of 2010 visit it is directly stated that this object was chosen for the reason that during the visit to Lithuania in 2008 the confinement conditions in the said Facility were recognized as improper and it was sought to evaluate the progress achieved by responsible Lithuanian institutions implementing the recommendations outlined on the CPT Report on visit to Lithuania in 2008.

It should be also noted that CPT Report on visit to Lithuania in 2008 in relation to other prison facilities checked (Lukiškės Remand Prison, 3rd Correction Facility of Pravieniškės) does not state that the confinement conditions in these facilities violate the human rights and degrade the dignity of the imprisoned persons; only some drawbacks were indicated that in most of the cases were removed by the competent Lithuanian institution prior to the submission of the Governmental Report on the Implementation of the Recommendations to CPT (in 2009).

2) *The comparison of the number of persons kept in the Lukiškės Remand Prison since 2000 until 2012.*

When comparing the number of persons kept in the Lukiškės Remand Prison in 2000 with present situation it should be highlighted that the average number of the prisoners kept in this facility has reduced by 30 per cent. This reduction has been affected by the essential changes of Lithuanian criminal policy, since in 2003 new Code - Criminal Code and Criminal Procedure Code - had come into force. We would like to draw your attention that in 2000 1574 arrested persons and 253 sentenced persons in average were kept in Lukiškės Remand Prison. According to the data of 2012 1141 arrested person and 555 sentenced persons in average have been kept in this facility. Thus, when in 2003 the number of the persons imprisoned in this facility began significantly to reduce, the number of vacancies in the prison cells was also reduced, as a result of this the capita living space in prison cells had increased. It should be also noted that since 2008 the European Court of Human Rights has adopted not a single decision that would recognise that the confinement conditions in Lukiškės Remand Prison failed to meet the requirements set forth in the provisions of the Convention on Human Rights and Fundaments Freedoms.

3) *On works done to improve the confinement conditions in Lukiškės Remand Prison*

We would like to draw your attention to the fact that despite the economic downturn and reduced budgetary allocations, the reconstruction works in Lukiškės Remand Prison were still continued in the period of 2008-2011 that allowed not only improving the prisoners' welfare, but also doing of the major repairs and full renewal of 67 per cent of all prison cells, where arrested persons are kept. The repair works of other premises and spaces used by the prisoners were also done, namely: the renewal of shower rooms and courtyards for walking; the instalment of 3 gyms with sports equipment; the instalment of the premises for demonstration of films and of the cabinet of chaplain, and etc.

4) *on actions of Lithuanian Government when dealing with the issue of moving Lukiškės Remand Prison to new premises*

We would like to inform you that the Imprisonment Facility Modernisation Strategy and Plan on it Implementing Measures approved by the Government of the Republic of Lithuania on 30 September 2009 (in the section that covers the issue of moving Lukiškės Remand Prison to new premises) foresee to transfer the sentenced persons kept in the said facility to a new Pravieniškės Prison, and the arrested persons - to a new Vilnius Remand Prison until 2014. The Ministry of Justice believes that a major progress has been achieved in the process of the implementation of these plans, as the Government of the Republic of Lithuania has already approved all documents related with a project of a new Pravieniškės Prison, thus a public tender shall be announced for the purpose of selecting an operator, who will have to carry out all necessary works until 2014 in order the sentenced persons, currently kept in Lukiškės Remand Prison, were transferred to Pravieniškės Prison. And the vacant cells will be occupied by the arrested persons kept in Lukiškės Remand Prison until 2017, when a new Vilnius Remand Prison is planned to be built. As a result of this, the requirements for proper

confinement conditions will be fully met already in the period mentioned and there will be no problems related with overcrowded prison population.

In summary it could be noted that the Ministry of Justice does not consider that the confinement conditions in Lithuanian prison facilities could be deemed as violating the human rights, as they fully meet minimal international standards for confinement conditions, despite some minor shortages. By the same token it can be noted that Brendan McGuigan during his trial may be not necessarily kept in Lukiškės Remand Prison but in other facilities executing the coercive measure - arrest, for example, in a fully modernised Kaunas Remand Prison."

Counsel for the respondent indicated that his client was further seeking to rely upon the Responses of the Lithuanian Government to the 2008 CPT Report (15th September, 2009); the Report to the Lithuanian Government on the visit to Lithuania carried by the CPT from the 14th to 18th June, 2010 (hereinafter "the 2010 CPT Report") and the Responses of the Lithuanian Government to the 2010 CPT Report (19th May, 2011). The Court has read each of these documents and has considered them, particularly in the light of the contents of Prof Morgan's affidavit of the 25th April, 2012 and the letter of the 16th May, 2012 from the Ministry of Justice of Lithuania issued in response thereto. I have taken them into account in my deliberations but I do not consider it necessary to review them in detail in this judgment. It is sufficient to note that, as indicated by Prof Morgan, the focus of the 2010 CPT Report was very much on juvenile facilities, police detention centres, and alleged secret detention facilities for "high value" terrorist suspects and operated by the Central Intelligence Agency (CIA) of the United States. The report was not concerned with either remand prisons or prisons for sentenced persons.

To the extent that the 2010 CPT Report concerned police detention and police detention facilities, it was stated that observations made during the 2010 visit seemed to confirm the positive trend noted during the periodic visit in 2008 with regard to the way persons deprived of their liberty are treated by the police in Lithuania. However, and in contrast, little progress had been made concerning, firstly, safeguards against ill-treatment and, secondly, conditions of detention in police establishments. It noted that it was regrettable that certain recommendations made by the CPT after its first visit to Lithuania a decade previously had still not been implemented.

The Responses to the 2008 CPT Report and to the 2010 CPT Report focus on, and purport to engage with, the contents of the CPT Reports to which they relate. The response to the 2010 CPT Report, which was not concerned with adult remand prisons, or adult prisons for sentenced persons, is therefore also only of peripheral relevance. The Response of the 15th September, 2009 describes ambitious plans by the Lithuanian authorities to address deficiencies identified in the 2008 CPT Report and earlier reports. However, it seems to be the case that there has been considerable slippage in the timetable.

Finally the Court has been informed that the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) carried out a further periodic visit to Lithuania from the 27th November to 4th December, 2012. However, the report of that visit has yet to be published.

Relevant statutory provisions and legal principles

The objection is based upon s. 37(1)(a) and (b) of the Act of 2003 which are in the following terms:

"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)"

S. 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."

The respondent contends that there are reasonable grounds for this Court to believe that to surrender him would expose him to a real risk of ill-treatment contrary to Article 3 of the European Convention on Human Rights (hereinafter "ECHR"); alternatively, breach of his personal rights to bodily integrity and/or to be treated with human dignity, arising under Article 40.3 of the Constitution of Ireland.

In its judgments in *Minister for Justice, Equality and Law Reform v. Mazurek* [2011] I.E.H.C. 204, (Unreported, High Court, Edwards J., 13th May, 2011); *Minister for Justice, Equality and Law Reform v. Wlodarcyzk* [2011] I.E.H.C. 209 (Unreported, High Court, Edwards

J., 19th May, 2011); *Minister for Justice, Equality and Law Reform v. Mihai* (High Court, *ex tempore*, Edwards J., 10th October, 2011); *Minister for Justice, Equality and Law Reform v. Machaczka* [2012] I.E.H.C. 434, (Unreported, High Court, Edwards J., 12th October, 2012); and *Minister for Justice and Equality v Holden* [2013] I.E.H.C. 62 (Unreported, High Court, Edwards J., 11th February, 2013), this Court has reviewed and applied 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 ECHR rights, and in particular a person's rights under Article 3 of the ECHR.

I said in *Mazurek* that the following principles can be distilled from the authorities:-

1. "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);
2. 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*);
3. 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*);
4. The subject matter of the court's enquiry "is the level of danger to which the person is exposed" (*per* Fennelly J. in *Rettinger*);
5. "[I]t 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." (p*er* 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*);
6. A court should consider all the material before it, and if necessary material obtained of its own motion (*per* Denham J. in *Rettinger*);
7. 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*);
8. 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*);
9. 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;
10. 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."

I do not believe that any of these principles are controversial in the present case. It seems to me that such controversy as exists is concerned with how the Court should interpret the evidence and what findings of fact are justified. In particular, the key question, assuming the presumption arising under s. 4A of the Act of 2003 as amended to be rebutted so as to put the Court upon enquiry, is whether there are there reasonable grounds for this Court to believe that to surrender the respondent would expose him to a real risk of being ill-treated contrary to Article 3 ECHR; alternatively, breach of his personal rights to bodily integrity, and/or to be treated with human dignity, arising under Article 40.3 of the Constitution of Ireland ?

Submissions on behalf of the respondent

Lengthy written submissions were filed on behalf of the respondent, and these were amplified and supplemented by oral submissions at the hearing. In large measure they were devoted to identifying with particularity the evidence upon which the respondent relies and setting out the applicable legal principles for the assistance of the Court (which, as I have stated, I consider to be uncontroversial). The Court has considered the submissions on behalf of the respondent in detail, and has taken them into account. As I have already reviewed the evidence in the case in great depth, and as there is no controversy on the law, it is not proposed to review counsel for the respondent's submissions in detail.

It is sufficient to state that it was urged upon the Court that the respondent has adduced compelling evidence, amounting to a strong probability, that, if extradited, he would be subjected to inhumane and degrading treatment; and that the Court has no material before it sufficient to prevent it, upon a rigorous enquiry, making a finding to that effect.

In that regard, the Court was referred to the judgment of Peart J. in *Attorney General v. Pratkunas* [2007] IEHC 418 (Unreported, High Court, Peart J, 28th November, 2007) in which extradition to the Russian Federation (in an application under Part II of the Extradition Act 1965) was refused in circumstances where no sufficient material was before the Court to challenge adduced by and on behalf of the respondent as to ill-treatment in detention in Russia.

The Court has also been referred by both parties, but primarily by the respondent, to a decision of the Recorder of Belfast, Burgess J., entitled *Lithuania v. Liam Campbell* (Unreported, Belfast Recorder's Court, Burgess J., 16th January, 2013) concerning the same Liam Campbell (brother of Michael Campbell) mentioned in the evidence in this case, and who is a co-accused in Lithuania with the respondent in the present proceedings.

The history to the matter is that Liam Campbell was originally arrested in this jurisdiction upon a European arrest warrant issued by the Republic of Lithuania. He had been granted bail and, before a surrender hearing in accordance with s. 16 of the Act of 2003 could take place, he breached the conditions of his bail and absconded to Northern Ireland. The Lithuanian authorities then sought his rendition from the UK authorities, again upon a European arrest warrant. He was arrested in Northern Ireland and, not surprisingly in the circumstances of the case, was refused bail and remanded in custody pending a surrender hearing. That hearing took place before the Recorder of Belfast who issued his judgment on the 16th January, 2013 refusing to surrender Liam Campbell to Lithuania on the grounds that he had "satisfied the court that to be returned to Lithuania would expose him to a real risk that he would be subject or would be likely to be subject to inhuman and degrading treatment by reason of the prison conditions in Lithuania."

What is particularly interesting about the case from this Court's perspective is that Liam Campbell had relied upon testimony from Prof Rod Morgan very similar to, and in many respects identical to, that which has been put before this Court in the respondent's case. In the Liam Campbell case, Prof Morgan gave both written and oral evidence which was tested in the crucible of cross-examination. Burgess J. was impressed by Prof Morgan's evidence.

In the course of his judgment he reviewed certain UK and European jurisprudence on Article 3 based challenges to surrender, including *Soering v. United Kingdom* [1989] 11 E.H.R.R. 439; *Wright v. Government of Argentina* [2012] E.W.H.C. 669 (Admin) ; *Miklis v. Deputy Prosecutor of Lithuania* [2006] E.W.H.C. 1032 (Admin); and *Janovic v. Prosecutor General's Office in Lithuania* [2011] E.W.H.C. 710 (Admin) (another case in which Prof Morgan had given evidence). In summary, no challenge to surrender, based upon alleged inhuman and degrading prison conditions in Lithuania, had previously succeeded before the UK courts. In the most recent case reviewed, that of *Janovic*, Silber J. had stated:

> "35. In my view, the judge was correct that the appellant would not be at risk of suffering mistreatment sufficient to engage Article 3 of the Convention. As I have explained the test to be applied to submissions pursuant to Article 3 of the Convention is high. There is no doubt that Professor Morgan's reports are deeply troubling. His expertise is unrivalled and his standing world class. Professor Morgan states that, in his view, the condition at Lukiškės Prison could be described as 'inhuman and degrading'. However, the conditions he describes do not compare with the conditions as found by the European Court to have existed in the case of Kalashnikov. In his evidence Professor Morgan accepted that he was not applying or using the words 'inhuman and degrading' in the legal sense of the terms. So his assertion that the prison conditions were inhuman and degrading did not mean that the appellant's extradition to Lithuania would inevitably involve a breach of his Article 3 rights. There is no evidence about how long the appellant will be on remand and detained in the conditions Professor Morgan describes as Lukiškės Remand Prison. It is simply assumed that bail will not be available. The Lithuanian authorities confirmed in their 22 June 2010 letter that they are aware of their obligations pursuant to the Convention. Given the assumptions we are obliged to make I cannot see that we can find that the Lithuanian authorities will not take steps to ensure that the appellant's Convention rights are protected, both on remand and after conviction, should that follow. Based on the extensive jurisprudence on Article 3 and evidence before the court about prison conditions in Lithuania, my view is that the judge was correct that the appellant would not be at risk of suffering mistreatment sufficient to engage the article."

Burgess J. acknowledged being faced with the temptation in the case of Liam Campbell to adopt the assessment of Silber J. given that it was based on the same evidence (in terms of Professor Morgan and the various CPT Reports) as was before him. However, he went on to state:

> "[21]…I believe that it would be an abrogation of the court's duty simply to take that course, but rather that it should in its own right examine the evidence it has before it particularly in relation to the oral evidence of Professor Morgan. In relation to the views of the court at paragraph [35] of Janovic set out above, I believe that there are four points that I must also take into account before simply adopting the assessment of the court in Yanovic (*sic*). These are:-
>
> (1) While the conditions may not compare with those found by the European Court to have existed in Kalashnikov that in itself would not determine that the conditions in this particular prison nevertheless would not be inhuman and degrading.
>
> (2) Professor Morgan is stated to have accepted in his evidence that he did not apply or use the words "inhuman or degrading", in the legal sense. However in the 2008 CPT report it stated:
>
> > "At Lukiškės Remand Prison material conditions varied considerably from one part of the prison to another. The best conditions were to be found in the recently renovated sections (in particular Wing 1 of building 2 containing approximately 60 cells). However, the cells were still overcrowded, some times to an outrageous degree (for example, up to six prisoners in a cell measuring approximately 8 metres square). In the sections which have not been not been renovated (building 3 and most of wing 2 of buildiing 2), conditions, which were described as very poor in the report on 2004 visit - had deteriorated to the extent that they could be described as deplorable (dilapidated cells and furnishings, poor ventilation etc). Some of the cells were dirty. Furthermore several prisoners complained that the buildings were not sufficiently heated in winter.
> >
> > In the CPT's opinion, the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of a programme of out of cell activities, see paragraph 48) could be considered to be inhuman and degrading, especially when persons are being held under such conditions for prolonged periods (ie up to several months)."
>
> Therefore the reference to the cumulative effect being capable of being considered 'inhuman and degrading' is that the members of the committee addressing inhuman and degrading treatment within the context of the Convention. The court also notes that the reference to prolonged periods is 'up to several months', in circumstances where this court has to consider the Requested Person being held on remand for much longer than that.
>
> (3) It is stated that the assertion of Dr Morgan "did not mean that the appellant's extradition to Lithuania would inevitably involve a breach of his Article 3 rights". Whilst earlier in its judgment the Court makes reference to Soering, the test is not that the breach would 'inevitably' involve a breach of the Article 3 rights.
>
> (4) Reference is made to the length of time that the appellant would be on remand and that the argument on behalf of the Requested Person in case simply assumed that bail would not be available. The court has sufficient evidence to be specific to this particular case to have reasonable grounds for believing that bail will not be granted and,

based on the time taken in relation to the parallel case of Michael Campbell, that the Requested Person will be held on remand and potentially, should he be convicted, will be open to serving a sentence in this particular establishment, established and confirmed by the Lithuania authorities as the prison to which he would be sent, for some very considerable period of time - certainly well in excess of "several months".

[22] This court has had particular regard to the issues of overcrowding and allegations of ill-treatment as found in the 2008 report and has considered the responses of the Lithuania authorities to those particular aspect and in particular as it relates to Lukiškės Remand Prison.

(a) Overcrowding

I add some particulars to the general thrust of the CPT report stating that at the time of their visit all of the remand prisoners in the country (except Kaunas Juvenile Remand Prison) were overcrowded. The legislative provisions as to living spaces in Lithuania provided for the capacity of prisons to be calculated on the basis of living space of three square metres per inmate in the dormitories and five square metres per inmate in the cells. In the CPT's view a standard of three square metres does not offer a satisfactory amount of living room and that for as long as dormitories remained in use a recommendation that that be raised to at least four square metres per millimetre with the official capacity of the prisons concerned to be reviewed accordingly.

In his supplementary opinion Professor Morgan, following his visit in May 2010 states:

> "3.1 Although the Lithuanian authorities denied permission for me generally to inspect Lukiškės prison in advance of my visit, in practice the Director allowed me to see areas of the prison other than the cell of Mr Michael Campbell after I had arrived and interviewed MC. The Director met me at the prison gate and after I had interviewed MC he happily showed me the shower room, the exercise yards, and ground floor accommodation and was keen to show me cell blocks other than that in which MC is currently housed and which have either renovated or in the process of being renovated. The latter had been refurbished or have been refurbished but their essential character remains the same. That is, the plaster has been renewed, windows replaced, central corridors tiled and plumbing and electrical wiring systems renewed. But the structure of the wing, including the size of the cells, remains exactly the same. Which means that if they are as intensively used as at present (my underlining) and if the regime remains unchanged, the cells are just as crowded for the 23 hours a day in which prisoners are confined in them.
>
> 3.2 Further, the Director explained that prison numbers are rising again and the state of the Lithuania economy in this post-recession period means there is no budget for make further improvements. As Director he explained he is generally powerless to greatly improve matters.
>
> 4.1 I find no reason to alter the conclusions reached in my earlier report. The prison conditions in which MC is held in Lukiškės are described by the CPT in 2000, 2004 and 2008 and they have not altered in 2010, although as described in 2008 CPT report a refurbishment programme is underway. Indeed the evidence suggest although parts of the prisons have been refurbished the prison is now more overcrowded than it was in 2008 and 2009. Which is to say that most remand prisoners enjoy approximately two square metres of cell space per person, well below the standard deemed acceptable by this CPT; they are required to meet the needs of nature without privacy in those cells; and they are confined to their cells for 23 hours a day. No prison programmes of work is provided and they are required to exercise in small cages not large into for them to exert themselves physically. The conditions remain 'inhuman and degrading' according to the standards of the CPT and is endorsed by the European Court of Human Rights.
>
> While they accepted that his visit was 'necessarily short and my inspection superficial in nature, the defects and provision were clear for me to see'."

[23] This report of Professor Morgan should be seen in the context of the reply given by the Lithuania authorities in September 2009 to the question of overcrowding referring to the provision of resources for the erection of new cells and renovation of certain blocks of cells. I note however that at page 19 of their response it states "the renovation work cannot be speeded up due to lack of funds and the impossibility to a larger number of cells in the overcrowded establishment at the same time". That prophecy appears to have been borne out by the report of Professor Morgan.

[24] (b) Ill-treatment.

The 2008 report stated that at Lukiškės Remand Prison the delegation had received several allegations from prisoners physical ill-treatment inflicted by staff. This CPT recognised that prison staff would on occasion have to use force to control violent and/or recalcitrant prisoners but that the force should not be more than is strictly necessary. What the report shows that there appears to be considerable under staffing due to posts not being filled. This issue of any allegation of ill-treatment by staff is the responsibility of the Lithuania authorities. This in counter-distinction to ill-treatment by prisoners on other prisoners, although even here it is the obligation of the State to ensure that they take all possible steps to prevent such ill-treatment or violence. This matter is addressed at paragraph 41 of the CPT reports which states:

> "41. In its report of 2004 visit the CPT called upon the Lithuania authorities to develop strategies with a view to addressing the problem of inter-prisoner violence in prisons. In their response, the authorities listed a number of measures taken in response to the recommendations.....
>
> However the findings of the delegation during the 2008 visit clearly demonstrated that staffing levels in the three establishments (I interpose to say that Lukiškės was one of these establishments) were insufficient to ensure proper supervision of inmates. Moreover many staff (at all levels) did not seem to receive suitable training to enable them to detect (potential or actual) trouble or conflict between prisoners, and take the necessary action.
>
> The CPT recalls that, for a strategy to reduce inter-prisoner intimidation or violence to be effective, staffing levels

must be sufficient (including night time) to enable prison officers properly to supervise the activities of prisoners and support one another effectively in the performance of their tasks. Moreover staff members (of all grades) must receive training in managing inter-prisoner violence so that they are able to intervene appropriately when necessary."

[25] The response of the Lithuanian Government in September 2009 was to set out a substantial number of steps being taken by them to address these particular issues including training programmes.

[26] However the court also has had the benefit of the report from the Seimas Ombudsman dated 30 January 2009. This report links the overcrowding to a number of issues including ….".

Burgess J. then quoted bullet points from paragraph 6 of the Seimas Ombudsman's report (the same Seimas Ombudsman's report as that referred to earlier in this judgment) relating to violence, self harming behaviours, suicides, and diminishment of the proportion of staff to prisoners (with prisoners taking on responsibility for keeping order in some instances) leading to more frequent conflicts. He further referred to failures by the Lithuanian authorities to implement that which had been promised in the past.

Burgess J. then alluded to the case of *Savenkovas v. Lithuania* [2008] E.C.H.R. 1456 (reviewed in detail by this Court in its judgment in *Minister for Justice and Equality v. Holden* [2013] IEHC 62 (Unreported, High Court, Edwards J., 11th February, 2013)), and concluded:

"[29] This gives the court a starting point namely that the conditions in 1999 amounted to a breach of Article 3 of the Convention. Having considered all of the evidence I find that matters have not improved, and indeed in certain aspects, particularly in relation to overcrowding, that they have deteriorated. No evidence was given on behalf of the Requesting State to counter the evidence given particularly by Professor Morgan and particularly in the light of what he found in 2010. Applying the test in Soering I find the Requested Person has satisfied the court that to be returned to Lithuania would expose him to a real risk that he would be subject or would be likely to be subject to inhuman and degrading treatment by reason of the prison conditions in Lithuania."

The decision and judgment of Burgess J. was appealed by the unsuccessful party to a divisional bench of the High Court of Northern Ireland, Queens Bench Division. The Court was comprised of Morgan L.C.J., Girvan L.J. and Coghlin L.J. Girvan L.J. delivered the judgment of the Court on the 22nd February, 2013 dismissing the appeal. He stated (*inter alia*):

"[20] We are satisfied that the judge understood and applied the proper test to be applied in determining whether the extradition of an individual would infringe his Article 3 rights. The test stated in Soering v UK is whether there is sufficient evidence of a cogent nature to establish substantial grounds for believing that the requested person would face a real risk of being subjected to treatment contrary to Article 3 if removed to the relevant State in this case Lithuania. The responsibility of the contracting State is to safeguard him against such treatment in the event of expulsion.

[21] The court in Harkins and Edwards v United Kingdom rejected as erroneous the proposition espoused by a majority of the court in R (Wellington) v Secretary of State [2009] 1 AC 335 that in the case of a removal of an individual on the basis of extradition the desirability of extradition is a factor to be taken into account in deciding whether the treatment likely to be imposed in the receiving state attains the level of severity necessary to amount to a violation of Article 3. Strasbourg confirms that the same approach must be taken in the assessment whether the minimum level of severity has been met for the purposes of Article 3 irrespective of the nature of the expulsion."

Then at paragraph 26 *et seq*. he continued:

"[26] The compelling and uncontradicted evidence relating to conditions at the relevant prison is such that the judge was right to conclude that it had been established that there was a real risk that if returned to Lithuania the requested person would be subjected to serious ill-treatment falling within the scope of the expression inhuman and degrading treatment. As the Strasbourg case law demonstrates there is a violation of Article 3 even in the absence of an intention to debase or humiliate if the measures adopted at the relevant prison are implemented in a manner which causes feelings of fear, anguish and inferiority (see Peers v Greece, Harkin and Jenkins and Savenkovas). While it might be possible for the prison authorities in Lithuania to ensure that the requested person would be incarcerated in an uncrowded cell with adequate facilities so as not to give rise to a breach of Article 3 it is clear from evidence that there are substantial parts of the relevant prison where conditions are such that prisoners' Article 3 rights would be breached. The Lithuanian authorities have given no assurance or indication that the requested person would in fact be housed in suitable conditions compliant with the Convention obligations.

[27] As noted Mr Simpson strongly contends that there was no up to date evidence to show that if extradited the requested person would now face inhuman and degrading treatment. This submission fails to take account of a number of aspects of the uncontradicted evidence. Firstly, the problem of overcrowding which in the past as described in the 2004 and 2008 CPT reports gave rise to inhuman and degrading treatment had not altered in 2010 when Professor Morgan visited the prison. He stated without contradiction that overcrowding had got worse in 2010. The Director of the prison frankly admitted to Professor Morgan that the prisoner numbers were rising again and that the current state of the Lithuanian economy was such that there was no budget to make further improvements. In its 2008 report the CPT, contrary to its recommendations in 2000 and 2004, found little improvement had been made in providing out of cell activities and prisoners were still required to spend 22½ hours a day in cells. At paragraph 44 of its 2008 report the CPT stated:

"44. At Lukiškės Remand Prison material conditions varied considerably from one part of the prison to another. The best conditions were to be found in the recently renovated sections (in particular Wing 1 of Building 2 containing approximately 60 cells). However, the cells were still overcrowded, sometimes to an outrageous degree (for example up to 6 prisoners in a cell measuring approximately 8 metres squared). In the sections which had not been renovated (Building 3 and most of Wing 2 of Building 2) conditions – which were described as very poor in the report of the 2004 visit – had deteriorated to the extent that they could be described as deplorable (dilapidated cells and furnishings, poor ventilation etc). Some of the cells were dirty. Furthermore, several prisoners complained that buildings were not sufficiently heated in winter.

> In the CPT's opinion the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of programme of out of cell activities, (see paragraph 48) could be considered to be inhuman and degrading, especially when prisoners are being held under such conditions for prolonged periods (ie up to several months).
>
> The delegation was informed that there were plans to build a new remand prison near Vilnius and to close Lukiškės Remand Prison in 2011 (sentenced prisoners would be transferred to Pravieniškės – (2 Correction Home No1). The CPT welcomes these plans and recommends that the Lithuanian authorities implement them as quickly as possible. In this regard the CPT would like to receive a detailed schedule concerning the construction to ask commissioning of the new remand prison in Vilnius."

[28] There is no evidence or suggestion by the Lithuanian authorities in the present case that the plan to build a new remand prison has progressed or that Lukiškės has closed down or is likely to close down in the near future. The comments of the Director of the relevant prison to Professor Morgan suggest quite the contrary. The picture which emerges from the evidence is that the problems identified by the CPT in 2000, 2004 and 2008 have not fundamentally been resolved and in some respects the situation is getting worse. Even if conditions in some cells such as those in the renovated wing are such that the treatment of remand prisoners there may well fall short of being inhuman and degrading (although the CPT does comment on the continuing severe overcrowding *throughout* the prison) there is a real risk and indeed probability that during at least a significant part of this remand (which may well be lengthy as is borne out by the length of the remand of the requested person's brother on similar charges) the requested person would be detained in parts of the prison where the conditions are such as to give rise to a breach of Article 3. In a continuing situation demonstrating deterioration rather than improvement and an economic situation showing a lack of resources to counter that trend, the common sense inference to be drawn is that the conditions already condemned as inhuman and degrading by Strasbourg still prevail, at least in parts of the prison to which the returned person may very well be exposed.

[29] Mr Simpson submitted that the judge failed to properly take account of the presumption that a Convention State like Lithuania which is a signed up party to the European Arrest Warrant system would comply with its Convention obligations. We must conclude that any assumption or presumption that is to be applied has been rebutted. In KRS v UK Application No 32733/08 2 December 2008 the European Court of Human Rights stated *that in the absence of proof to the contrary* it has to be presumed that Greece would comply with its Convention obligations and secure the rights to be found therein including the guarantees under Article 3. Mitting J in R (Jan Rot) v District Court of Lublin, Poland [2010] EWHC 1820 Admin took the view that there was effectively an irrebutable presumption that Category 1 Convention countries would comply with their Convention obligations and that for the purposes of Article 2 and, if relevant Article 8, the treatment of the extradited person was a matter between the individual extradited person and the receiving state and not between him and the United Kingdom. Mitting J's approach was to apply a presumption that the extraditing state would comply with its Article 3 obligations.

[30] In Re Targosinski [2011] EWHC 312 Admin Toulson LJ stated at paragraph 10:

> 'If the Strasbourg Court were to find that conditions in a particular state systemically contravened prisoners' rights I can readily envisage a defendant who faced an application for an extradition order relying on such a judgement in order to displace the presumption referred to in KRS. I instance this as an example where a defendant would be able to place cogent material before the English court to displace the presumption. The second reason I mention it is because it has direct relevance to the present case. There is no cogent or satisfactory evidence in this case to demonstrate that the conditions criticised in the Strasbourg court during the period up to May 2008 still obtain in Poland or that this appellant's extradition would involve a contravention of rights.'

In Agius v Court of Magistrates Malta (2011) EWHC 759 at paragraphs 32 and 33 Maddison J said:

> '32. It must therefore follow that a court would be wrong to proceed on the basis that because the requesting territory is Category 1 territory the court need not, absent exceptional circumstances examine the compatibility of the proposed extradition with the human rights of the person concerned. That examination should take place in every case to which Section 21 applies.
>
> 33. In making that examination however a court may legitimately assume that a signatory to the European Convention will comply with it. That assumption is rebuttable but only by cogent evidence satisfying the stringent tests referred to in paragraph 24 of the speech of Lord Bingham in the case of Ullah to which My Lord Sullivan LJ has referred.'

[31] Unlike the situation in Targosinski in the present case the requested person has placed before the court cogent material to displace the presumption that the requested person's Article 3 rights would be vindicated and protected during his likely detention in the relevant prison. There is convincing evidence, which is fortified by the drawing of reasonable inferences flowing from the evidence, that the conditions criticised by Strasbourg in Savenkovas still obtain at the relevant prison.

[32] We recognise that the conclusion which the judge reached and with which we agree differed from that reached by the Divisional Court in England in Janovic v Prosecutor General's Office Lithuania [2011] EWHC 710. On the evidence adduced before the judge Professor Morgan was clearly making the case and the CPT had found that the combined effect of the conditions at the relevant prison amounted to inhuman and degrading treatment. The English Divisional Court appears to have interpreted Professor Morgan's evidence as adduced before the English court as suggesting that he was not using the terminology "inhuman and degrading treatment" in the legal sense. In the instant case, the judge had to interpret the evidence as adduced before him and the evidence before him justified his conclusion. In Janovic the court concluded that the Professor's assertion that the prison conditions were inhuman and degrading did not mean that his extradition to Lithuania would inevitably involve a breach of Article 3. The question is not whether a breach of Article 3 is inevitable. Of course, it is true that the requested person may be granted bail (but this seems to be very unlikely in view of his having left Lithuania and left the Republic of Ireland in breach of bail conditions in that jurisdiction). Of course it is true that he might possibly be detained in the best conditions available in the relevant prison and that the prison

> authorities might possibly make a special exception for him in the manner of his treatment or the location and conditions his incarceration. There is, however, a very real risk and, in reality a strong probability, that absent of any assurance by the Lithuanian authorities to the contrary, he will be treated like all the other remand prisoners at the relevant prison and will be detained for at least significant parts of his remand (which may very well be lengthy) in the same type conditions as were categorised as inhuman and degrading in Savenkovas. An application of the Soering test leads us to the conclusion that, contrary to the view taken by the English Divisional Court, it would infringe the requested person's Article 3 rights to be extradited. The continuation by the Lithuanian authorities of conditions condemned by Strasbourg as infringing Article 3 does not betoken an adequate process within that state to vindicate the Article 3 rights of prisoners detained in the relevant prison.
>
> [33] We feel compelled to conclude that applying the law as we currently understand it in the light of the Soering test, this appeal must be dismissed."

It has since been confirmed to me by the parties that the Divisional High Court in Belfast certified a question of law but refused leave to appeal to the UK Supreme Court. An application for leave to appeal has now been made directly to the UK Supreme Court and a decision is awaited in respect of that application.

Submissions on behalf of the Applicant

The applicant referred the Court to a number of decisions from the Northern Ireland and UK Courts where respondents have in each case failed to stop their surrender to Lithuania on the grounds that there is a real risk of a violation of Article 3 if surrendered to that State. The Court was referred to the following cases: *Rozaitiene v. Republic of Lithuania* [2009] N.I.Q.B. 3; *Klimas v. Prosecutor Generals Office of Lithuania* [2010] E.W.H.C. 2076 and *Miklis v. Deputy Prosecutor General of Lithuania* [2006] E.W.H.C. (Admin) 1032.

In the first case in time, *Miklis*, Latham L.J. considered an objection on the grounds that there would be a risk of violation of Article 3 of the ECHR if surrendered to Lithuania. Considering the risk of Article 3 violation and whether it met the necessary threshold such that a Member State ought not comply with its obligations under the Framework Decision and surrender a person to another Member State, the Court said at paragraph 11 of the judgment:-

> "The final point made in relation to the District Judge's decision in this respect is that he was unduly dismissive of these reports. [CPT reports and Amnesty International report]. There is no doubt but that he approached them with a degree of scepticism. That is not surprising bearing in mind the very general nature of the allegations that were made. That is not intended to belittle the reports. It is, however, important that reports which identify breaches of human rights, or other reprehensible activities on the part of Governments or other 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'.

In that case it was alleged that reports of police brutality gave rise to a risk that the requested person's rights under Article 3 ECHR would be violated if he was surrendered.. The Court noted that there was considerable evidence of police brutality from authoritative monitoring bodies such as the CPT, US State Department and Human Rights Monitoring Institute. At paragraph 15 of his judgment Latham L.J. referred to the fact that there was little doubt that the behaviour of the police had been the subject of adverse comment over a significant period of time and, although there was clear evidence that the authorities did not condone such behaviour, there was, also scepticism about the extent to which effective steps were being taken to improve the situation. In so far as inter-prisoner violence was concerned, a matter raised by the respondent in the present case, reports the 2000 and 2004 CPT reports were referred to and it was noted that there was evidence that in two prisons at which the requested person might be held, there had been serious incidents of inter-prisoner violence.

The Court held, however, that the material did not suggest that inter-prisoner violence was commonplace or condoned and said the most that could be said was that the CPT was not satisfied that sufficient steps had been taken to institute prosecutions when such incidents occurred. It was concluded that the material before the Court did not provide a sufficient basis upon which the Court could conclude that the applicant's life was at risk or that there was a real risk that he would be subject to Article 3 ill treatment were he to be returned.

In the second case, *Rozaitiene*, the Queens Bench Division of Northern Ireland (Higgins L.J., Coghlin L.J. and Girvan L.J.), also had to consider claims of likely human rights violations upon surrender to Lithuania. At paragraph 15, Higgins L.J. outlined the human rights complaints made by the respondent. At paragraph 16 he referred to the fact that Lithuania had joined the EU and had been the subject of several reports from the CPT including those in 2000 and 2004. He also said that an Ombudsman had been appointed in that State. In so far as prison conditions were concerned, he did note at paragraph 19 that overcrowding had been a considerable problem in 2004 and the CPT report in 2004 had led the Lithuanian authorities to provide a programme of building and carrying out improvements. He also referred to a number of legislative steps that had been taken including a programme for protection and recognition of human rights.

Having cited earlier case law, including *Miklis*, Higgins L.J. (at para. 23) said that the Court had to bear in mind Lithuania was a full member of the EU, a country in whose justice system the UK posted a high level of confidence under the Framework Decision and a signatory to the ECHR. In rejecting the claim of the proposed extraditee, the Court also referred to *R (Bagdanavicius) v. Home Secretary* [2005] 4 All E.R. 263 where the House of Lords held, in an asylum case where a claimant claimed he would be subjected to ill treatment contrary to Article 3 if returned to Lithuania, that to make out such an objection the claimant had to establish that he would be at a real risk of suffering serious harm and also that those within the receiving country did not protect those within its territory with a reasonable level of protection against such harm if the harm was brought about by the actions of non-State agencies.

Finally the Court was referred to the judgment of Mitting J. in *Klimas*, also a case where prison conditions in Lithuania were in issue. In the course of his judgment in that case, Mitting J. referred to an earlier decision of his in another EAW case, *Rot v. District Court of Lublin* [2010] E.W.H.C. 1820 (Admin) where he had referred to the European Court of Human Rights ("E.Ct.H.R.") judgment in *KRS v. UK* (4th Section of E.Ct.H.R., 2nd December 2008), and reasoned as follows:-

> "That where prison conditions in a Category 1 Convention State were criticised in the course of extradition proceedings it was not necessary for the District Judge to examine the arguments for and against because as a matter of principle it was for the requesting State to put its house in order and if it did not, it was a matter between the individual and the requesting State and ultimately the Strasbourg Court and the requesting State if the individual complained that his Article

3 rights were infringed."

KRS was a removal case, under the Dublin II Convention, where the proposed deportee complained about the conditions of detention in Greece. In that case heavy emphasis was laid by the Court, in rejecting that ground of objection, on the obligations of Greece under the relevant EU Directive and Article 3 of the ECHR. The Court furthermore referred to the fact that, were any claim under the ECHR to arise from conditions in Greece, this should be first pursued with the Greek domestic authorities and the Court. Having referred to this and other E.Ct.H. R. case law, Mitting J. said that:

> "…..I would hold as I did in *Jan Rot* that when prison conditions in a Convention category 1 state are raised as an obstacle to extradition, the district judge need not, save in wholly extraordinary circumstances in which the constitutional order of the requesting state has been upset -- for example by a military coup or violent revolution -- examine the question at all. If that proposition goes too far, then it would be necessary to look at the facts [in the particular case]."

He concluded based on the US State Department Report before him that prison conditions in Lithuania in some detention facilities, but not necessarily all, fell below international standards.

> Mitting J then stated. (at paragraph 16 of his judgment):
>
> "There is all the difference in the world between saying that prison conditions in a state do not meet international standards and saying that any individual returned to spend time in such facilities would inevitably be subjected to ill-treatment of the kind which crossed the high threshold of Article 3, or even that there were substantial grounds for believing that there is a real risk that he would be subjected to such treatment. All the US State Departments report establishes is that there is significant shortcomings in prison conditions in Lithuania. It does not begin to establish that this appellant, if extradited to Lithuania, would be subjected to Article 3 ill-treatment or even there are substantial grounds for believing that there is a risk he would be."

The claim was ultimately dismissed on the basis that the high water mark in terms of the evidence adduced by the appellant was that the prisons in Lithuania in certain instances fell below international standards. In the view of Mitting J, that fell:

> " …far short of the threshold which is required to be crossed before the United Kingdom would be in breach of its obligations under Article 3 to the appellant by extraditing him to Lithuania."

It was submitted on behalf of the applicant in the present case that, in addition to the case law of the Irish Superior Courts, this Court should note the approach taken by the Courts in Northern Ireland and in England Courts as demonstrated in the cases of *Rozaitiene*, *Klimas* and *Miklis*, and apply a similar approach to the claims made by the respondent concerning the alleged risk that his rights under Article 3 E.C.H.R. would be breached in the event of him being surrendered to Lithuania. It was further submitted that were the Court to conclude that there was evidence before it of past inhuman and degrading treatment in Lithuanian prisons and detention centres, this would not be sufficient, in and of itself, to justify the Court in intervening and refusing to surrender the respondent. It was submitted that the evidence in this case, as was also the situation in the three cases cited above, does not demonstrate that the respondent would inevitably be subjected to treatment of a kind which would pass the high threshold required to establish that the respondent would be at a real risk of suffering breach of his rights under Article 3 if surrendered to Lithuania (per Mitting L.J. in *Klimas*); or that he would not be offered reasonable protection by the authorities in that State (per Higgins L.J. in *Rozaitiene*); or that by a combination of the systemic nature of the violations relied upon, their frequency and the respondent's own individual characteristics, he is rendered particularly vulnerable (per Latham L.J. in *Miklis*).

It was further submitted that the judgments of the Northern Ireland and English Courts in *Rozaitiene*, *Klimas* and *Miklis* demonstrate that it is not sufficient for a person whose surrender is sought by another EU Member State to demonstrate a departure in certain respects from international norms, for example in the treatment of persons detained in custody, in that other State. Merely to demonstrate shortcomings in the prisons of another Member State does equate with the establishment of a real risk of a breach of the rights of a particular respondent under Article 3 of the ECHR. It is submitted that the approach adopted in the three cases cited is consistent with the approach of the Irish Courts to date, and that the law in Ireland, per *Rettinger*, *is that* there must be a rigorous examination of the facts of the individual case to see whether there are reasonable grounds for believing that there is a real risk that the respondent's rights under Article 3 of the ECHR would be violated by surrendering him to the issuing state.

It was further urged that it is not unreasonable to say that from time to time many democratic states, whether a member of the European Union, or a state that has ratified the ECHR have criticisms levelled as their prisons and / or system of trial. It was submitted that the mere fact that criticisms of aspects of the prison system or process of trial in other democratic states had been made would not and should not, of itself, result in the refusal of this State to honour its obligations at international law to surrender fugitives to such states.

It was further submitted that the respondent has wholly failed to adduce evidence to show the Court that there are substantial grounds for believing that if he were now surrendered to Lithuania and detained pending trial, or following conviction if this occurs, he would be exposed to a real risk of a breach of Article 3 of the ECHR. It was further submitted that, alternatively, if the Court has any concerns in this regard having considered the evidence now before it and presented by the applicant and respondent, it should of its own motion seek further information from the Judicial Authority in Lithuania in that regard.

From the respondent's outline submissions on this issue, it appears that the following are the main complaints raised by or on behalf of him in this regard:-

> (a) The alleged police mistreatment of detainees;
>
> (b) Alleged inadequate sanitation, overcrowding and limited access to medical services in Lithuanian prisons;
>
> (c) Alleged instances of prolonged pre-trial detention;
>
> (d) Allegedly inhumane and degrading conditions in Lithuanian police stations;
>
> (e) Allegations of uncontrolled inter-prisoner violence in prisons

It was submitted that the role of this Court, in considering a possible breach of Article 3 of the ECHR and therefore a breach of the duty of the State to vindicate the life, bodily integrity and human dignity of the respondent, is to assess whether there is any real

risk in that regard at the time of the hearing in the High Court. It was urged that the most up to date reports on these issues are obviously of greatest assistance to the Court. On the other hand the Court must be also be entitled, in assessing on a forward looking basis whether or not the State of Lithuania will respect the respondent's rights in the event that he is surrendered, to consider earlier reports that identified situations in that State which, at the relevant time, had the potential to breach the rights of individual prisoners under Article 3 of the ECHR and/or the Constitution, in order for example to see how the matters complained have been addressed over the years in that State. In assessing whether there is a risk of an Article 3 breach, the Court is entitled to take into account the actions of the Lithuanian authorities in response to any well founded criticisms made in the past by European and international bodies.

Alleged Mistreatment by Police in Detention Centres

At paragraph 10 on p.12 of the 2008 CPT Report, the CPT said that it had interviewed many persons who had been detained in police custody and that the majority had indicated they had been treated by the police in the correct manner. The paragraph then continued:-

> "It should also be noted that numerous persons with considerable experience of the police stated that there had been a change for the better in recent years as regards the manner in which police officers treated persons in their custody."

Although there was subsequent reference to a number of allegations of ill treatment in police detention and although the CPT called upon the authorities to redouble their efforts to combat ill treatment and to continue to remind police officers of the importance of avoiding all forms of ill treatment and, furthermore, that appropriate steps be taken to ensure prosecutorial and judicial authorities take resolute action when any indication of such treatment emerges, the position nonetheless remains that there appears to have been (in the view of CPT) considerable improvement in this regard over the years.

Furthermore, it was submitted that the respondent has not referred to any instance of ill treatment, or allegation of ill-treatment, of Michael Campbell, whilst he was detained in police custody or indeed in prison. It is submitted that, for the purposes of Article 3 of the ECHR, the respondent has not established that there is a substantial risk that he, Brendan McGuigan, would be exposed to mistreatment by the police or that no adequate remedy would be available to him under Lithuanian law were he to be exposed to such mistreatment. In considering this issue, the Court was invited to compare the most recent information as set out in the 2008 CPT report (supplemented by the 2010 CPT report) with the position outlined in the 2004 CPT report. It was submitted that comparison reveals that there has been a considerable improvement over the years on this issue.

Unduly Lengthy Pre-trial Detention

It was submitted that the Lithuanian authorities have demonstrated that they are conscious of their obligations under European Human Rights Law. It was submitted, as stated by the issuing Judicial Authority in its letter of the 2nd November, 2009, that Ms. Botyrienė is simply wrong when she says that there is a very real risk of persons being detained for prolonged and unnecessary periods in the pre-trial stage of the process amounting in some instances to five years. It was further submitted that, as stated in the US State Department Report of 2007, there is no reality to this complaint and, furthermore, as stated by the issuing Judicial Authority the Court can grant bail in appropriate cases.

Conditions in Police Detention Centres

It was submitted that the 2008 CPT Report, in the section dealing with conditions of detention at pages 17 – 19 thereof, shows an improved situation in relation to the conditions of detention in police custody centres. The Court was referred to Part II (A)(4) (pp. 17 to 19) of the 2008 CPT Report, commencing with the following comments at paragraph 24 thereof:-

> "The CPT's delegation noted that efforts were being made to improve conditions of detention in certain police detention centres. Particular mention should be made of the recent substantial renovation of the detention facilities at Kaunas City Police Headquarters, which had been the subject of severe criticism by the CPT after the 2000 and 2004 visits. During the 2008 visit, the delegation observed very good material conditions in this establishment.
>
> Further, the Authorities informed the delegation at the outset of the visit that major renovation had also been carried out in police detention centres at Klaipeda and Panevezys. Indeed, when visited by the delegation, the latter establishment was found to offer good conditions of detention.
>
> The CPT welcomes these developments.
>
> 25. The delegation was informed that renovation works were planned in several other detention centres, in the context of the "Police Development Programme for 2007/2011". The CPT would like to receive detailed information on this point."

Having referred then to short comings in the material conditions in other police detention centres visited, and the fact that various detention facilities were intended to be taken out of service, the CPT at paragraph 27 called on the Lithuanian authorities to "step up their efforts" to bring these detention centres up to acceptable international standards.

It was urged upon the Court that at paragraph 35 of the CPT Report of 2000, the CPT had been particularly critical of the conditions in police detention centres. In the 2004 Report there was also criticism of a number of police custody or detention centres, including Kaunas and Marijampole. At paragraph 34 of the 2004 CPT Report, there was criticism of the fact that the proportion of the detention centres which conformed to requisite standards had remained as low as 20% and, furthermore, that many of the CPT's key recommendations had yet to be implemented. It was submitted, therefore, that the situation with regard to police detention centres was certainly improving considerably by the time of the CPT Report of 2008. It was submitted that the respondent's complaints in this regard fail to demonstrate the existence of a substantial risk of a breach of Article 3 of the ECHR were he to be surrendered to Lithuania.

Overcrowding and Other Complaints re Detention in Prison

The applicant notes that the respondent's belief that he would be detained at Lukiškės Prison if surrendered to Lithuania is based on the experience of Mr. Michael Campbell. It is said that there is a real risk of ill treatment at such prison, a real risk of inter-prisoner violence and furthermore that conditions in Lithuanian prisons in general (and more particularly in Lukiškės Prison) do not meet international standards particularly due to overcrowding and other issues raised in the various reports and affidavits submitted by the respondent in this case. It was further accepted that in the 2004 CPT Report, at paragraphs 47 – 69 thereof, there was criticism of a

number of features of the Lithuanian prisons system.

The applicant responds by pointing out that the CPT had, however, positively welcomed the legislative changes in that State which had increased the possibility of non-custodial sanctions and had increased the legal minimum personal space for prisoners in Lithuania. Prisoners are now entitled to 5 m^2 in multi-occupancy cells and prisons and 3 m^2 in dormitory accommodation in correction homes. While welcoming these measures the CPT noted that overcrowding remained a problem see in particular paragraphs 64 and 65 of the 2004 CPT report, At paragraph 65 of the 2004 CPT Report, referring to the Lukiškės Prison, it was said that material conditions varied considerably from one part of the prison to the other. The CPT also welcomed the quality of renovation work being carried out in certain parts of the building but noted that conditions of detention remained very poor in parts where renovation had not yet begun. The CPT had also sought a timetable for completion of renovation works.

In the 2008 CPT Report, conditions of detention in prisons are dealt with in Part II(B)(3)(a), at pp 24 to 26. However, in preliminary remarks at the commencement of the section on prisons (at p. 20), which referred *inter alia* to Lukiškės Prison, the CPT welcomed recent developments in relation to prison conditions. It was also noted that a "plan for release on parole in Lithuania" had been drawn up which was expected to reduce the prison population. The CPT recommended the Lithuanian authorities pursue their efforts to combat overcrowding in prison and that for so long as dormitories remained in use minimum personal space be raised to at least 4 m^2 per inmate from the 3 m^2 that was then the legal minimum In Part II(B)(3)(a) of the Report there is detailed reference to works being done on various prisons in Lithuania and at paragraphs 44 to 45 there is reference to the developments in Lukiškės. The CPT, was of opinion that the cumulative effect of overcrowding and poor material conditions, added to which was lack of any programme of out of cell activities, could be considered to be inhumane and degrading. However, the committee also acknowledged that various parts of the prison had been renovated and conditions in the renovated sections were described as good. The delegation was also informed of the plans to build a new prison and to close Lukiškės Remand Prison in 2011 and welcomed these developments. At paragraph 45 the CPT accepted that the construction of such new buildings absorbed a significant amount of financial resources but recommended that all efforts in this regard be pursued.

In so far as hygiene conditions in Lithuanian prisons were concerned, the applicant accepts that the 2008 CPT report records that, in the case of the two prisons visited, one of which was Lukiškės prison, in spite of the legislation and regulations adopted following the CPT's 2004 visit, many inmates did not have essential personal hygiene products (soap, toilet paper, sanitary towels, toothpaste, toothbrushes). The CPT had therefore made a further recommendation in that regard.

Inter-Prisoner Violence

In relation to inter-prisoner violence, the applicant points out that this issue is dealt with at paragraphs 40 to 42 (pp. 23 to 24) of the 2008 CPT Report. That report in turn referred to the CPT's earlier report on the 2004 visit, in which the CPT had called upon the Lithuanian authorities to develop strategies with a view to addressing the problem of inter-prisoner violence in prisons. In their response, the authorities had listed a number of measures taken in response to the recommendation (assessment period for all prisoners upon admission to prison and assignment to accommodation on the basis of the assessment; conversion of the large dormitories into cells holding a maximum of six prisoners; automatic medical examination of any prisoners with injuries and transmission of the results to the relevant prosecutor, etc.). The CPT had welcomed these measures. It also noted that that the situation had improved in recent years in that prisoners at one institution interviewed by the delegation had reported that the beating of vulnerable prisoners was no longer "routine". However, it appeared that some problems remained. The CPT had therefore recommended that the Lithuanian authorities pursue their efforts to address the problem of inter-prisoner violence and, in particular, ensure that all prisons have adequate numbers of properly trained staff.

In conclusion, the applicant submitted that, whilst there are ongoing difficulties in relation to prison and detention centres in Lithuania, the respondent had not proven that there were reasonable grounds for believing that, if the Court were to surrender him to Lithuania, he would face a real risk of the violation of his rights under Article 3 of the ECHR .

The Court's Decision
I have carefully considered all of the evidence in this case. The evidence consisting of country of origin type information, including the various CPT reports, and US State Department Reports, describe a worrying, albeit slowly improving, situation with respect to prison conditions in Lithuania. The concerns expressed in these reports find echo in the Report of the Seimas Ombudsman, 2009.

In *Minister for Justice, Equality and Law Reform v. Machaczka* [2012] I.E.H.C. 434, (Unreported, High Court, Edwards J., 12th October, 2012), and a number of other cases, this Court has previously endorsed certain remarks by Latham L.J. in *Miklis v. Lithuania* [2006] E.W.H.C. 1032 (Admin), and in particular where he said at para. 11 of his judgment:-

> "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."

However, that said, the evidence in this case goes beyond criticisms contained in reports of this type. In addition to reports from reputable bodies such as those mentioned, the Court has the evidence of Prof Rod Morgan concerning what he personally found and observed in the course of a visit to Lukiškės prison.

Unlike in the cases of *Liam Campbell* in Northern Ireland, and *Janovics* in England, in which he gave oral testimony, Prof Morgan's evidence was presented by affidavit in the case before me. He was not cross-examined because the applicant did not seek to cross examine him as to his affidavit. However, he could have been cross-examined. Even if he had not been available to travel to Ireland the possibility now exists of taking oral evidence from witnesses, particularly expert witnesses, based abroad, by means of video link technology. However, in this case there was simply no request on the part of the applicant that he should submit to cross-examination.

As I have indicated, Prof Morgan's affidavit evidence included details of a personal inspection of Lukiškės prison in the company of the prison governor in May 2010 which confirmed that conditions were still largely as described in the 2008 CPT Report. His reports and affidavits were submitted to the authorities in the issuing State for their commentary, and in this Court's view there was only limited engagement with the Professor's evidence. There was really no engagement at all with his reported observations, and in so far as issue was joined it was with his stated opinions. However, the disagreement expressed with Prof Morgan's opinions rings somewhat

hollow in circumstances where the underlying evidence upon which those opinions were based is effectively left unchallenged.

Notwithstanding that which the Court is required to presume in the first instance, by virtue of s. 4A of the Act of 2003, namely that the issuing state will respect the respondent's fundamental rights in the event that he is surrendered by this Court, I am satisfied that the evidence adduced by the respondent in the present case is cogent and gives rise to deep concerns. Such is the level of the Court's concerns that it may be stated without hesitation that I regard the evidence that has been adduced as being sufficient to rebut the s. 4A presumption and to put the Court upon enquiry as to whether there is a real risk that the respondent's rights under Article 3 of the ECHR, and cognate rights under Article 40.3 of the Constitution of Ireland, will be breached in the event of the Court surrendering him. I consider that the evidence put forward by the respondent in the present case, and the responses offered by the authorities in the issuing state through the applicant, require to be rigorously examined as mandated by the Supreme Court in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] 3 I.R. 783.

While the applicant is correct as identifying the respondent's criticisms as falling into the categories identified (*i.e.* alleged police mistreatment of detainees; alleged inadequate sanitation; overcrowding and limited access to medical services in Lithuanian prisons; alleged instances of prolonged pre-trial detention; allegedly inhumane and degrading conditions in Lithuanian police stations; and allegations of uncontrolled inter-prisoner violence in prisons), and while it is true that progress has been made by the Lithuanian authorities on some of these fronts, the question for the Court is whether cumulatively they create reasonable grounds for believing that there is a real risk that the respondent may be exposed to "inhuman and degrading" treatment or punishment contrary to Article 3 ECHR and/or breach of his constitutional rights to bodily integrity and to be treated with human dignity.

Alleged Police Mistreatment of Detainees

In his supplementary report dated the 31st December, 2008, at para 6.1 thereof, Prof Morgan had opined that:

> "on the basis of the most recent first-hand empirical evidence, there is a risk of ill-treatment, in the worst cases ill-treatment amounting to torture, at the hands of the Lithuanian police for anyone held in police custody, as Brendan McGuigan will almost certainly be held, should he be returned to Lithuania."

The most recent first hand empirical evidence at that point was the 2004 CPT Report, and the 2007 US State Department Report. The former had recorded that:

> 12. As was the case during the 2000 visit, the delegation received many allegations of ill-treatment of persons - including minors - deprived of their liberty by the police. The allegations heard related mainly to the time of apprehension and to the period surrounding the investigation by the police; certain persons alleged ill-treatment during transport by the Convoy Division. The forms of ill-treatment alleged consisted mostly of blows with hands or fists, or with objects such as batons or belts. In several cases, the alleged ill-treatment - asphyxiation by placing a gas mask or a plastic bag over the person's face, severe beating, infliction of electric shocks, and mock execution - could be considered to amount to torture.
>
> In a number of cases, the delegation was able to verify that the person concerned had been held in police establishments during the periods to which the ill-treatment in question could be ascribed; moreover, certain of them provided accurate descriptions of the offices where they claimed it had taken place. Further, medical records revealed that upon their admission to prison or a police detention centre, numerous persons had displayed injuries consistent with their allegations of ill-treatment. …"
>
> 13 ….
>
> "14. The CPT remains concerned by the high number and the severity of allegations of ill-treatment of persons in police custody in Lithuania; the situation has scarcely improved since the visit in 2000, despite the considerable volume of legislative acts and orders related to the subject which has been promulgated in the interim. Further, according to the Seimas Ombudsman, the "illegitimate use of physical force by police officers" is one of the main problems identified concerning the Ministry of the Interior."
>
> The latter *i.e*. the 2007 US State Dept Report, had in turn reported that:
>
> "The constitution prohibits inhuman or degrading treatment or punishment; however, there were reports that police physically mistreated detainees.
>
> During the year the ombudsman's office received 17 complaints that officials used force and psychological pressure to obtain evidence in pretrial investigations compared to 14 in 2006."

In his subsequent report dated 7th July, 2009, issued post the publication of the 2008 CPT Report, Prof Morgan acknowledged that the 2008 CPT Report suggested, on the basis of allegations received and evidence found by the Committee, that the incidence of physical ill-treatment at the hands of the police appeared to have reduced. At paragraphs 10 and 11 of the 2008 CPT Report it is stated:

> "10. During the visit, the delegation interviewed many persons who were, or had recently been, in police custody. The majority of them indicated that they had been treated by the police in a correct manner. It should also be noted that numerous persons with considerable experience of the police stated that there had been a change for the better recent years as regards the manner in which police officers treated persons in their custody.
>
> However, the delegation did receive a number of allegations of recent physical ill-treatment during questioning by officers of the criminal police, aimed at obtaining confessions or other information. It would appear that juveniles are particularly at risk in this respect. The ill-treatment alleged mainly consisted of kicks, punches, slaps and blows with truncheons or other hard objects (such as wooden bats or chair-legs). Some allegations were also heard of extensive beating and asphyxiation using a plastic bag or gas mask. In certain cases, the delegation gathered medical evidence which was consistent with the allegations made.
>
> Further, some persons interviewed by the delegation alleged ill-treatment of a psychological nature, such as verbal abuse or threats to use violence. In addition, a few allegations were received concerning the excessive use of force (e.g. kicks

and truncheon blows) at the time of apprehension, after the person concerned had been brought under control.

11. On examination by the delegation's doctors, some detained persons were found to display visible marks consistent with their allegations of recent ill-treatment by the police. …"

The trend of improvement continued such that in the 2010 CPT Report it is stated:

"11. The majority of persons interviewed by the delegation who were, or had recently been, in police custody indicated that they had been treated in a correct manner. However, the delegation did receive some allegations of physical ill-treatment by law enforcement officials, including from juveniles. Most of these allegations concerned excessive use of force at the time of apprehension or slaps, kicks, punches or truncheon blows during questioning.

In addition, some detainees complained of insulting language or behaviour by custodial officers in police detention centres."

However, and as previously stated, the CPT while acknowledging progress was robustly critical that little progress had been made concerning safeguards against ill-treatment by the police establishments.

The response of the Lithuanian Government to the 2010 CPT Report points to improvements in training for police officers, legal provisions circumscribing the circumstances in which the police may engage in physical coercion, and the liability that might attach to a police officer for improper behaviour and using unlawful coercion. It also covers complaints procedures, and the establishment of various alleged safeguards (though the latter were not considered by the CPT to be an adequate response to its recommendations in that regard).

The applicant suggests that the evidence does not establish that Michael Campbell was mistreated at any time while in police detention. However, there is certainly an allegation of some degree of mistreatment. It was suggested that law enforcement officers failed to give to Mr Campbell a notice of his rights, that he was not permitted to contact anyone on his arrest, or speak with his lawyer alone during the period of his detention, that the interpreter was not capable of performing the required task to a satisfactory level, and that he was slapped and shouted at. All of this was disputed, however, in the letter dated 30th September, 2011 from the Chief Prosecutor at the Vilnius Regional Prosecutor's Office which complained that these allegations were not confirmed by any objective evidence.

Having considered the totality of the information provided the Court finds that its concerns are in large measure allayed in respect of alleged mistreatment of detainees by the police. While there are some residual problems there is no evidence of a serious, ongoing, systemic problem involving mistreatment of detainees by the police in Lithuania in police stations and police detention centres.

Alleged Inadequate Sanitation, Overcrowding

and Limited Access to Medical Services in Lithuanian Prisons

Prof Rod Morgan opines that as a matter of likelihood the respondent will be held on remand in Lukiškės remand prison in the event that he is surrendered, and Ms Ingrida Botryiene agrees with this and has further opined that the period of his pre-trial detention could be lengthy. While the Lithuanian authorities have stated as recently as the 16th May, 2012 that the respondent may not necessarily be kept in Lukiškės Remand Prison and that it is possible that he could be held elsewhere, *e.g* in a fully modernised Kaunas Remand Prison, they have not sought to gainsay the evidence of respondent's experts, both of whom are familiar with the Lithuanian prison system, that the probability is that he will detained in Lukiškės Remand Prison.

The most up to date CPT report dealing with material conditions in institutions of this type is the 2008 CPT Report, following the visit of the committee to the Pravieniškės - 2 Correction Home No 3 and Lukiškės Remand Prison. The report states at paras 43 – 46:

43. *At Pravieniškės -2 Correction Home No. 3*, over 80% of the detention areas had been renovated since the start of the year 2000. In particular, the material conditions in the arrest section, which was opened in 2003, were good: the cells, which had a maximum capacity of six places, were in a good state of repair and suitably furnished (including fully partitioned toilets), and had adequate access to natural light and appropriate ventilation and artificial lighting.

The ordinary regime and "lenient" regime sections had also been refurbished recently. However, the sanitary facilities - which were not in the cells - left much to be desired. Most of the toilets were only partially partitioned (some were not partitioned at all) and several were not functioning properly (or at all). Furthermore, the building that accommodated the prisoners who worked was not equipped with showers : as a result, these prisoners were only able to have a shower once a week (in another building). The delegation also found that many mattresses were in a very bad state. **The CPT recommends that these shortcomings be remedied rapidly**.

In the strict regime section, the material conditions were mediocre (dilapidated cells, sanitary equipment and facilities in a poor state, etc.). The delegation was, however, informed that this section, which was empty at the time of the visit, would be refurbished by 1 July 2008 at the latest, the date when the new occupants would arrive (see paragraph 33). **The CPT would like to receive detailed information about the refurbishment work carried out in the strict regime section**.

44. *At Lukiškės Remand Prison*, material conditions varied considerably from one part of the prison to another. The best conditions were to be found in the recently renovated sections (in particular, wing 1 of Building 2, containing approximately 60 cells). However, the cells were still overcrowded, sometimes to an outrageous degree (for example, up to six prisoners in a cell measuring approximately 8 m^2). In the sections which had not been renovated (Building 3 and most of wing 2 of Building 2), conditions — which were described as very poor in the report on the 2004 visit - had deteriorated to the extent that they could be described as deplorable (dilapidated cells and furnishings, poor ventilation, etc.). Some of the cells were dirty. Furthermore, several prisoners complained that the buildings were not sufficiently heated in winter.

In the CPT's opinion, the cumulative effect of overcrowding and poor material conditions (to which must be added the lack of a programme of out-of cell activities, see paragraph 48) could be considered to be inhuman and degrading,

especially when persons are being held under such conditions for prolonged periods (i.e. up to several months).

The delegation was informed that there were plans to build a new remand prison near Vilnius and to close Lukiškės Remand Prison in 2011 (sentenced prisoners would be transferred to Pravieniškės -2 Correction Home No. 1). The CPT welcomes these plans and **recommends that the Lithuanian authorities implement them as quickly as possible. In this regard, the CPT would like to receive a detailed schedule concerning the construction/commissioning of the new Remand Prison in Vilnius**.

45. The CPT is aware that the construction of new buildings inevitably absorbs a significant amount of the financial resources available. However, care should be taken to ensure that this does not lead to unacceptable situations; the decision to deprive a person of his or her liberty entails a correlative duty upon the State to provide decent conditions of detention. Regardless of the timetable for the above-mentioned developments, the CPT **recommends that the necessary steps be taken to ensure that all persons detained in Lukiškės Remand Prison, including remand prisoners, have acceptable conditions of detention as regards cell equipment and furnishings, as well as heating during cold weather. Furthermore, all prisoners should be provided with cleaning products (in sufficient quantity) for their cells**.

46. In the *two establishments* mentioned, the delegation noted that, in spite of the legislation and regulations adopted following the CPT's 2004 visit, many inmates did not have essential personal hygiene products (soap, toilet paper, sanitary towels, toothpaste, toothbrushes).

The CPT reiterates its recommendation that steps be taken to ensure that all prisoners in Lithuania have adequate quantities of essential personal hygiene products."

(emphasis as in original)

Whatever about the intentions of the Lithuanian authorities to address the problems complained of for remand prisoners, the evidence establishes that they had not been addressed by the time the Seimas Ombudsman issued the report relied on in these proceedings, in 2009, or by the time Prof Morgan visited Lukiškės Prison in May 2010. Prof Morgan was of the firm view that conditions remained "inhuman and degrading" according to the standards of the CPT and the E.Ct.H.R.

A matter of particular concern is the evidence of Prof Morgan in paragraph 6.1 of his supplemental report dated the 24th April, 2011 that:

> "most remand prisoners enjoy approximately 2 square metres of cell space per person, well below the standard deemed acceptable by the CPT, they are required to meet the needs of nature without privacy in those cells and they are confined to their cells for 23 hours a day. No prisoner programmes or work is provided and prisoners are required to exercise in small cages not large enough for them to exert themselves physically."

The E.Ct.H.R. held in *Orchowski v. Poland* (Application No. 17885/04) that a person cannot be afforded humane treatment in a prison cell, in which individual living space is less than 3 m².

The responses of the Lithuanian authorities, both to the CPT and also by way of additional information provided to this Court, has been to point to a plan to build some new prisons, following which it was planned to close old prisons, or parts of old prisons, such as Lukiškės, thereby alleviating the overcrowding situation. *Pro tempore* it was intended to refurbish some existing prison accommodation and, by means of certain law reforms to what are described as Penal Laws, to reduce the number of prisoners being committed to the worst accommodation. The evidence is that while there has been some reduction in numbers, and also some superficial refurbishment works, there has been slippage in the timetable and Lukiškės Prison remains overcrowded to a significant degree and material conditions remain well below acceptable standards.

Even in the additional information dated the 6th February, 2012 the emphasis is on the Lithuanian authorities' plans, rather than on what has actually been achieved. It is stated, *inter alia,* that:

> "It should be noted that in order to provide a complex solution to the problem of overcrowding at the imprisonment facilities (and also in remand wards), on 30 September 2009 the Government of the Republic of Lithuania approved a new strategy for the modernization of imprisonment facilities and a plan of measures for its implementation, which specifies that 4 new remand wards-corrective institutions and 1 prison are planned to be built by 2017. According to the said strategy, by 2014 the convicted persons held in the Lukiškės Remand Ward-Prison shall be moved to the Pravieniškės Prison, which is currently under construction. Thus, it shall become possible to move the arrested persons held in the Lukiškės Remand Ward-Prison to the cells currently intended for the convicted persons, which may solve the problem of overcrowding. It should be noted that it has been planned to move the arrested persons to the new imprisonment facility by 2017."

The earliest implementation date at which significant alleviation of the current overcrowding problem should occur is 2014 when the planned new prison at Pravieniškės comes into operation, assuming no further slippage to the schedule. Moreover, the additional information of the 16th May, 2012 is hardly encouraging when it states that:

> "We would like, to inform you that the Imprisonment Facility Modernisation Strategy and Plan on it Implementing Measures approved by the Government of the Republic of Lithuania on 30 September 2009 (in the section that covers the issue of moving Lukiškės Remand Prison to new premises) foresee to transfer the sentenced persons kept in the said facility to a new Pravieniškės Prison, and the arrested persons - to a new Vilnius Remand Prison until 2014. The Ministry of Justice believes that a major progress has been achieved in the process of the implementation of these plans, as the Government of the Republic of Lithuania has already approved all documents related with a project of a new Pravieniškės Prison, thus a public tender shall be announced for the purpose of selecting an operator, who will have to carry out all necessary works until 2014 in order the sentenced persons, currently kept in Lukiškės Remand Prison, were transferred to Pravieniškės Prison. And the vacant cells will be occupied by the arrested persons kept in Lukiškės Remand Prison until 2017, when a new Vilnius Remand Prison is planned to be built. As a result of this, the requirements for proper confinement conditions will be fully met already in the period mentioned and there will be no problems related with overcrowded prison population.
>
> In summary it could be noted that the Ministry of Justice does not consider that the confinement conditions in Lithuanian prison facilities could be deemed as violating the human rights, as they fully meet minimal international standards for confinement conditions, despite some minor shortages."

It would seem that although the Imprisonment Facility Modernisation Strategy and Plan was approved as far back as 2009, as late as the 16th May, 2012 the Lithuanian authorities were saying that progress amounted to approval of all documents related to the new Pravieniškės Prison project, and that they hoped to announce a public tender for the purpose of selecting an operator. It is unclear whether construction has even commenced. There is no document or evidence from the Lithuanian authorities to suggest that a single brick has yet been laid in the planned construction of the new prison. If that is the case, the 2014 target is hopelessly optimistic. But, in any event, even if the Court is wrong about that the plans have certainly not been implemented as of the date of this judgment, and overcrowding in remand prisoner accommodation remains a serious problem. This is not to gainsay that some progress has been made. The most up to date information, contained in a letter dated the 16th May, 2012 from the Ministry of Justice of the Republic of Lithuania, points out that:

> "When comparing the number of persons kept in the Lukiškės Remand Prison in 2000 with present situation it should be highlighted that the average number of the prisoners kept in this facility has reduced by 30 per cent. This reduction has been affected by the essential changes of Lithuanian criminal policy, since in 2003 new Code - Criminal Code and Criminal Procedure Code - had come into force. We would like to draw your attention that in 2000 1574 arrested persons and 253 sentenced persons in average were kept in Lukiškės Remand Prison. According to the data of 2012 1141 arrested person and 555 sentenced persons in average have been kept in this facility. Thus, when in 2003 the number of the persons imprisoned in this facility began significantly to reduce, the number of vacancies in the prison cells was also reduced, as a result of this the capita living space in prison cells had increased."

The difficulty with this is that the starting position was one of gross overcrowding so that even a 30% reduction, while to be welcomed, has not had the effect of eliminating the overcrowding problem. At best there may have been some alleviation. However, it is a matter of concern that while the number of remand prisoners at Lukiškės has reduced, the total prison population at that prison has increased according to the Lithuanian authorities' own figures. Moreover, it does not automatically follow that reducing numbers increases individual living space. It very much depends on the material structure and its layout. Certainly, when Prof Morgan visited Lukiškės, well into the new era said to have commenced in 2003, he was unimpressed with the level of individual space afforded to individual remand prisoners, and was of the view that conditions remained inhuman and degrading because of overcrowding.

There does seem to have been some progress with respect to access to health care in prison in recent times. The information of the 6th February, 2012 states that:

> "it must also be emphasized … that the process of tackling problems related to provision of health care services for imprisoned persons as pointed out in 2008 CPT report has yielded a number of positive results: the Prisons' Hospital in Vilnius is to be relocated to new premises in Pravieniškės by October 1st, 2012, and a mobile X-ray apparatus (for car use) was acquired in 2010."

Moreover, it has to be stated that no gross deficiencies were identified in regard to the matter of health care in the 2008 CPT report. Despite some criticisms, health care facilities, examinations and treatment were considered to be, on the whole, satisfactory.

Concern about prolonged pre-trial detention

In my judgment in *Minister for Justice and Equality v Holden* [2013] I.E.H.C. 62 (Unreported, High Court, Edwards J., 11th February, 2012) I reviewed the possibilities in regard to pre-trial detention in Lithuania as described in the series of CPT reports relating to that country. There are two possibilities, detention in a police detention centre for an initial period, and possibly a temporary return to such detention for some further interrogation during the pre-trial phase, and detention in an adult remand prison such as Lukiškės Remand Prison. Under Lithuanian law the initial detention in a police facility is required to be fairly short, although there is some anecdotal evidence reported in the CPT's reports to suggest that the legal limits are sometimes not respected. After initial detention in police custody a suspect is then transferred to a remand prison where he spends the majority of his pre-trial detention. While it is not possible to say for certain how long the respondent will be in pre-trial detention, the court has the opinions of both Ms Botryiene and Prof Morgan suggesting it may be at least some months. This is consistent with what is stated in the US State Department Report of 2007 which reported that during that year the average length of pre-trial detention was six months. Six months would not be regarded as excessive where conditions of detention are humane and up to international standards. However, where conditions are not up to international standards and are sub-optimal, perhaps significantly sub-optimal and deficient to the point of being possibly inhuman and degrading, it is an entirely different matter. While bail might theoretically be available to the respondent, and the Court notes that the evidence suggests that bail is widely used in Lithuania, the practical reality of the respondent's case must be that there would be an inherent likelihood that he would be denied bail in circumstances where he has had to be returned to face trial on foot of a European arrest warrant. While his case may not be exactly identical to the respondent's Michael Campbell has been detained for a lengthy period in pre-trial detention and has not been afforded bail.

The Court was impressed by the way in which Burgess J. approached a similar concern about the length of possible detention, both pre-trial detention and post sentence in the event of conviction, in the *Liam Campbell* case. He said at paragraph 21(4):

> "Reference is made to the length of time that the appellant would be on remand and that the argument on behalf of the Requested Person in case simply assumed that bail would not be available. The court has sufficient evidence to be specific to this particular case to have reasonable grounds for believing that bail will not be granted and, based on the time taken in relation to the parallel case of Michael Campbell, that the Requested Person will be held on remand and potentially, should he be convicted, will be open to serving a sentence in this particular establishment, established and confirmed by the Lithuania authorities as the prison to which he would be sent, for some very considerable period of time - certainly well in excess of "several months"

I think those remarks are entirely apposite and applicable to the respondent's case as well.

Alleged Inhumane and Degrading conditions in Lithuanian Police Stations

The overwhelming preponderance of the evidence contained in the various CPT reports from 2000 to 2010 is to the effect that conditions in police detention facilities in Lithuania are grim in many instances. That said, some (particularly the newer facilities such as at Kaunas) range from very good to satisfactory. In the 2010 CPT Report the committee reported:

> **"4. Conditions of detention**
> 25. Material conditions of detention in the three police detention centres visited ranged from very good (Kaunas) to satisfactory (wing 2 at Klaipeda) to poor - and in some areas very poor (wing 1 at Klaipeda and Vilnius).

Kaunas City Police Detention Centre had been renovated prior to the 2008 visit and the CPT's report commented favourably on the material conditions. The delegation which carried out the 2010 visit observed that those conditions remained of a very good standard.

Klaipeda City Police Detention Centre had been partially refurbished. In the renovated wing of the building (wing 2). material conditions were satisfactory on the whole. Nonetheless, access to natural light left something to be desired, and the toilets were insufficiently partitioned. Conversely, conditions in the non-renovated wing (wing I) were very poor. The cells were in a dilapidated state, dirty and damp, and the same was true of the mattresses and blankets. Further, access to natural light, artificial lighting and ventilation were limited, and the toilets lacked a partition and were malodorous. As for the electrical installations, they seemed hazardous. The delegation was also informed that, in winter, the cells were very cold.

At ***Vilnius City Police Detention Centre***, the cells were in a poor state of repair and hygiene, and access to natural light and ventilation were inadequate. Moreover, the toilets only had a low partition. In four cells (Nos. 8 to 11). the windows had been concreted over, and there was therefore no access to natural light and no evident means of ventilation; the atmosphere in these cells was damp and suffocating.

Consultation of the custody registers revealed that both of the latter two establishments were frequently overcrowded.

26. Soap and toilet paper were supplied at Kaunas and Vilnius. However, at Klaipeda, detained persons received no personal hygiene products.

27. The regime was impoverished in the three establishments visited. Detained persons were in principle entitled to one hour of outdoor exercise per day. However, the delegation received numerous allegations that outdoor exercise periods often lasted no longer than 30 or 40 minutes. Furthermore, the outdoor areas were too small to allow detained persons to exert themselves physically. No other out-of-cell activity was proposed. Detained persons, including juveniles, accordingly spent 23 hours (or more) per day locked up in their cells in a state of enforced idleness.

28. It should be added that persons could be detained in the above conditions for prolonged periods, sometimes for several weeks, and on occasion even months, in the case of remand prisoners or persons placed in administrative detention.

29. During the end-of-visit talks, the delegation emphasised that cells Nos. 8 to 11 at Vilnius City Police Detention Centre should be immediately fitted with windows or taken out of use. It also stated that one cell (No. 12) at Klaipeda City Police Detention Centre, which was in a deplorable state of repair and hygiene, should no longer be used for detention purposes.

In their letter of 10 September 2010, the Lithuanian authorities indicated that a police establishment optimisation programme for 2009-2015 had been adopted. The aim was to reduce the number of police detention centres in Lithuania to 27 by 2015 and to ensure that all the centres offered satisfactory conditions. In this context, it was planned to renovate wing 1 at Klaipeda City Police Detention Centre and to build a new police detention centre in Vilnius. It was not possible to carry out works in the current detention centre in Vilnius, since the building was included in "the list of the state's protected objects".

(emphasis as in original)

As was pointed out by this Court in its judgment in *Holden*, long term exposure to the conditions described could indeed breach a person's rights, but one would not expect shorter term exposure to do so unless the person was specifically vulnerable in some respect.

Inter Prisoner Violence

The evidence gives some basis for concern in relation to inter-prisoner violence. While the CPT reports suggest some level of improvement between 2004 and 2008, problems were acknowledged as remaining. The Lithuanian authorities were requested to take further measures to address the deficiencies identified. In their response to the 2008 CPT Report the Lithuanian authorities stated:

"The following is done in order to address the problem of inter-prisoner violence:

1. As remarked by the Committee's delegation, dormitories are, as much as possible, converted into cells for an average of 6 persons. An amendment to the Penal Code of the Republic of Lithuania providing that living space in houses of correction must be locked at night has been prepared and submitted. Thus, convicts would feel safer.

2. The following preventive measures have been taken in prison establishments:

2.1. The HCR-20 violence risk assessment scheme, which is designed to predict the future occurrence of violence, was acquired and launched in 2008. All psychology specialists in prison establishment have finished special training intended for those applying the scheme.

2.2. The programme of prevention of criminal subculture manifestations in prison establishments was approved by the Director of the Prison Department under the Ministry of Justice of the Republic of Lithuania on 20 January 2009.

2.3. A cognitive behavioural correction programme entitled Just You and Me was acquired in 2008. One of programme modules is designed for therapy for manifestations of violence in behaviour. The programme is currently implemented by correctional inspectorates.

2.4. Psychology specialists of prison establishments implement target programmes orientated towards the prevention of violence, e.g. Identification and Management of Emotions, Stress and Crisis Management, Conflicts and Solutions, Development of Communication Skills, etc.

2.5. Individual psychological support is provided to convicts in correctional establishments who committed acts of violence before being taken into custody and are prone to violence.

Adapted to the needs of a specific prison establishment, a typical programme of individual work with convicts maintaining criminal subculture traditions, which is aimed at motivating convicts to break with criminal subculture traditions, was approved by Order No 1-115 of the Director of Pravieniškės House of Correction No 3 of 1 July 2008 (with other prison establishments taking over the experience).

We believe that the introduction of the abovementioned programmes and other measures in prison establishments will help to ascertain the main reasons for inter-prisoner violence and reduce the number of cases of violence."

There is no independent up to date evidence to confirm the extent to which these measures have in fact been implemented, and the issue is not addressed in additional information supplied by the Lithuanian authorities. That said, there is no evidence that Michael Campbell has experienced, or been a victim of, inter prisoner violence while a prisoner in Lukiškės prison.

Overview

There is no doubt in the Court's mind that progress has been made, and continues to be made, by the Lithuanian authorities in addressing the problem of ill-treatment of prisoners and sub-standard prison conditions. In *Minister for Justice and Equality v. Holden* [2013] IEHC 62 (Unreported, High Court, Edwards J., 11th February, 2013) I refused to uphold the respondent's s. 37 objection based, *inter alia*, on alleged inhuman and degrading prison conditions in Lithuania and was not satisfied on the evidence in that case that there were substantial grounds for considering that that respondent faced a real risk of his Article 3 and Article 40.3 rights being breached in the event of his surrender. However, *Holden* can be distinguished from the present case on a number of grounds.

The evidence in the present case is much more extensive than it was in *Holden*, where reliance was placed primarily on CPT reports. Moreover, there was no expert evidence offered in *Holden* akin to that of Professor Morgan in the present case, particularly evidence of relatively recent first hand observation of conditions in the prison concerned. In addition the respondent had no personal experience of, nor did he adduce evidence from any third party concerning, conditions in Lukiškės or any other remand prison. The only evidence he could adduce was that of two days approximately spent in a police detention centre, not a remand prison. While the respondent in the present case also has no personal experience of Lukiškės or any other remand prison the Court has been provided with details of the conditions in which his alleged associate, Michael Campbell, is detained there. In addition, Prof Morgan has testified on affidavit concerning what he personally observed and ascertained during a visit to Lukiškės Prison to see Michael Campbell, and during a tour of the facility in the course of which he was shown around by, and received first hand information from, the Governor. In *Holden*, the primary focus of the s. 37 objection was possible return to detention in police detention facilities. The prospect of being held in inhumane conditions in Lukiškės or any other remand prison was not addressed beyond referring the Court to the CPT Reports from 2000 to 2008. However, there were more up to date and unchallenged assertions by the Lithuanian authorities that measures were being taken to address the deficiencies identified and stating that significant reforms were underway. The evidence in the present case has been more comprehensive by far, and the Court has been able to form a clearer picture of the situation in Lithuanian prisons, particularly with respect to material conditions, including overcrowding.

It is somewhat unfortunate that the report of the most recent visit by the CPT to Lithuania has not been published yet, as that would provide very up to date information to guide the Court in its decision. However, a decision in this case cannot await publication of that report. Having carefully considered all of the evidence in this case, I find that I have continuing significant concerns about material conditions and overcrowding in Lithuanian remand prisons, and in particular in Lukiškės prison where I believe the respondent would be incarcerated as a matter of likelihood in the event of his surrender. The extent of unsanitary conditions and overcrowding in 1999 was, as pointed out by Burgess J. in the Liam Campbell case, sufficient to support a finding by the E.Ct.H.R. of detention amounting to degrading treatment in breach of Article 3 ECHR in *Savenkovas v. Lithuania* [2008] E.C.H.R. 1456. As recently as 2008, the CPT characterised the cumulative effect of overcrowding and poor material conditions at Lukiškės as potentially inhuman and degrading to prisoners detained there, especially when those prisoners are being held under such conditions for prolonged periods (*i.e.* up to several months). Prof Morgan's evidence suggests strongly that notwithstanding grandiose plans on the part of the Lithuanian authorities to address that situation, there had been little significant remediation as of May 2010. Lukiškės remand prison remains in use. There are fewer remand prisoners certainly, but the total number of prisoners housed in the Lukiškės prison complex is up. The overwhelming emphasis in the issuing state's responses to criticisms made has been based on planned future actions, rather than on actual achievements. While the Court has no reason to doubt the *bona fides* of the Lithuanian resolve to implement a programme of new prison building and refurbishment of existing prison buildings, and to close or partially close, some of the older prisons, and to alleviate overcrowding in that way, I remain concerned that that which is planned has not yet been achieved certainly in the case of Lukiškės, and will not achieved before 2014 at the earliest.

In the case of the rights guaranteed to the respondent under Article 3 ECHR, and the respondent's personal right to bodily integrity and his right to be treated with human dignity arising under Article 40.3 of the Constitution of Ireland, there can be no margin of appreciation. These rights are absolutely guaranteed. While the evidence does not go so far as to establish that any or all of these rights will definitely, or even probably, be breached in the event of the respondent's surrender, it is not necessary to go that far. It is sufficient if there are reasonable grounds for believing that there is a real risk of those rights, or some of them, being breached in the event of the respondent being surrendered. The Court's concerns, particularly with respect to overcrowding and poor material conditions, in remand prisons have not been allayed. These concerns coupled with somewhat lesser concerns about ongoing issues with respect to material conditions in police detention centres cumulatively give rise to reasonable grounds for believing that there is a real risk that this respondent's rights under Article 3 of the ECHR, and under Article 40.3 of the Constitution of Ireland, may be breached in the event of him being surrendered, particularly where he is likely to be in pre-trial detention for at least some months.

Conclusion

In all the circumstances of the case the Court is disposed to uphold the s. 37 objections raised by the respondent in respect of conditions of detention in Lithuania. That being the position the Court considers that it is prohibited from surrendering the respondent under Part 3 of the Act of 2003.

Finally, the Court wishes to emphasise that its decision on the prison conditions issue in this case is based on the strength of the evidence adduced on behalf of the respondent. This judgment does not purport to propound any new principle of law and does not therefore have precedent value. It represents a decision on the facts of the individual case. Accordingly, in so far as future cases are concerned, whether an objection to a respondent's surrender to Lithuania based upon alleged poor prison conditions or conditions of detention can similarly succeed will depend on the strength of the evidence adduced in the particular case. Allegations as to matters of fact will require to be supported by evidence, and the Court's findings as to matters of fact in the present case will not be capable of being relied upon to support another case.