Neutral Citation [2013] IEHC 102

THE HIGH COURT

Record No: [2012 No. 82 EXT]

BETWEEN/

THE MINISTER FOR JUSTICE AND EQUALITY

Applicant

- AND -

JURIJS JERMOLAJEVS

Respondent

JUDGMENT of Mr. Justice Edwards delivered on the 12th day of February, 2013

Introduction:
The respondent is the subject of a European arrest warrant issued by the Republic of Latvia on the 24th February, 2012. The warrant was endorsed by the High Court for execution in this jurisdiction on the 6th March, 2012 and it was duly executed on the 16th April, 2012. The respondent was arrested by Garda Kathryn Christie on that date, following which he was brought before the High Court on the following 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 respondent was remanded on bail to the date fixed. Thereafter the matter was adjourned from time to time ultimately coming before the Court on the 29th November, 2012 for the purposes of a surrender hearing.

The respondent does not consent to his surrender to the Republic of Latvia. 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 dependent upon a judicial finding that they have been so satisfied.

Uncontroversial s. 16 issues:
The Court has received an affidavit of Garda Kathryn Christie sworn on the 26th November, 2012 testifying as to the 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 Latvia for trial in respect of the seven offences particularised in Part E of the warrant. Further, the domestic decision upon which the European arrest warrant is based is a decision of Daugavpils Court of the 9th October, 2007 "by which the security measure applied J.Jermolajevs – police supervision, residing in specific place of residence and notifying of address where correspondence shall be served – was substituted for the security measure – arrest."

(f) 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;

(h) There are no circumstances that would cause the Court to refuse to surrender the respondent under s.21A, 22, s.23 or s.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. 5) Order 2004, S.I. No. 449/2004 (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, "Latvia" (or more correctly the Republic of Latvia) 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.

Matters in controversy – Points of Objection.
The respondent has filed a notice of objection on the 6th July, 2012 containing ten 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) of the Act of 2003.

The relevant points are:

"2. …..surrender of the Respondent in respect of the offences described in paragraph E and in particular at paragraph E(3) of the warrant is prohibited by Section 5 and/or 38 of the European Arrest Warrant Act, 2003 as amended and/or Article 2(4) and/or Article 4(1) of the Framework Decision as the offences and each of them as described in the Warrant do not correspond in their entirety or at all to an offence or offences under the laws of the State. The Respondent humbly requests that this Honourable Court make enquiry as to correspondence in respect of each offence. In particular the offence at paragraph 3 of the European Arrest Warrant of; "failing to inform if it is certainly known that a serious criminal offence is committed" does not correspond with an offence within this jurisdiction.

3. The European Arrest Warrant herein does not comply with the requirements of s. 11 (lA)(g)(i) of the European Arrest Warrant Act 2003 in that the description of the applicable penalties upon conviction is not properly or adequately set out. Further the Respondent should not be surrendered as the minimum gravity requirements required by section 38 of the 2003 Act are not satisfied in respect of the offences set out in the European Arrest Warrant. The Respondent was underage at the time of commission of the offences alleged in the European Arrest Warrant. According to the Latvian Criminal Law he remained under age until he turned eighteen and the alleged offences were committed when he was seventeen.

4. In respect of the offences at numbers 3 and 5 of the European Arrest Warrant, in accordance with Article 7 of the Latvian Criminal Law, they are classified as less serious offences. In respect of less serious offences committed by a juvenile, Article 65 of the Latvian Criminal Law provides that a custodial sentence is not applicable. In the circumstances where the minimum gravity requirement is not satisfied the Respondent should not be returned to Latvia. Further in respect of the offences at numbers 1, 2, 4, 6, and 7 of the European Arrest Warrant, the penalties set out therein do not reflect the reduced penalty applicable to the Respondent in circumstances where these offences where were also allegedly committed while the Respondent was underage.

5. It is disproportional to surrender the Respondent to Latvia in circumstances where he may not receive a custodial sentence. The Court in sentencing the Respondent will take account of the nature of the offences which are not associated with violence and the fact that the Respondent has not been sentenced in the past while being underage and can decide not to execute the punishment if there are no new criminal offences and no violation of public policy.

6. The surrender of the Respondent is prohibited pursuant to Part 3 section 37 (l)(a) and/or section 37 (l)(b) and/or under the Framework Decision as:

i. If surrendered to the Republic of Latvia that there is a real risk that he would suffer treatment constituting a breach of his family rights under Article 8 of the European Convention on Human Rights;

ii. Further or in the alternative, the surrender of the Respondent would be a disproportionate interference with the Respondent's said rights and the said rights of his family and each or other of them.

7. The return of the Respondent would result in adverse effect on his rights to family and private life contained in Article 8 of the European Convention on Human Rights and would be disproportionate to the legitimate aim of honouring extradition treaties with member states and that therefore the Respondent should not be surrendered as it would be unjust, invidious, oppressive or in breach of his constitutional rights to do so. Further to Order the Respondent's surrender without a determination of his rights under Article 47 of the Charter of Fundamental Rights under Article 6 of the European Convention by this Honourable Court would not only fail to provide the Respondent with an effective remedy, as required by the said Charter and Convention, but would fail to respect private life as protected by Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention on Human Rights, and his rights as a Union citizen who has exercised his right to free movement and has taken up residence and settled in this State.

8. Further and without prejudice to the forgoing the surrender of the Respondent is prohibited by Part 3 section 37 (l)(a) and/or section 37 (l)(b) and/or section 37 (l)(c)(iii)(II) of the European Arrest Warrant Act, 2003, as amended, and/or under Recital 13 of the Council Framework Decision of the 13th June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States (2002/5 84/JHA) ("The Framework decision") as the Respondent believes that if surrendered to the Republic of Latvia there is a real risk that he would suffer treatment constituting a breach of his rights under Article 40.3.2 of the Constitution and/or Article 3 of the European Convention on Human Rights as the Respondent holds a well founded fear of inhuman and degrading treatment. The Respondent if surrendered will be imprisoned in the Daugavgriva Prison until judgement."

Correspondence and Minimum Gravity
Offence No. 1:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

"Jurijs Jermolajevs in the group of persons pursuant to prior agreement committed covert stealing (theft) of movable property of another associated with entering into the premises, and namely:

On November 20, 2006 at about 3:30 J. Jermolajevs pursuant to prior agreement and together with G. Rakickis, implementing their intention related with stealing of movable property of another, by rock broke the window of SIA "ADA PLUS" office at Lâèplçðia ielâ 30-4, Daugavpils, entered into the premises of above-mentioned office and covertly stole from there red colour metal box with inscription "Cashbox" of A.Èaika (Ms.) for amount of LVL 12, wherein was money of SIA „ADA PLUS" in total LVL 24.20, and additionally G.Rakickis without saying about his intention to J. Jermolajevs covertly stole mobile phone of A.Èaika, SAMSUNG SCH D500" for amount of LVL 150

In total J. Jermolajevs together with G.Rakickis stole property of SIA „ADA PLUS" for total amount of LVL 24.20 and property of A.Èaika for

total amount of LVL 12, and additionally G.Rakickis stole property of A.Èaika for total amount of LVL 150.

Hence J. Jermolajevs committed the criminal offence provided for by the Section 175(3) of the Criminal Law."

The Court has been invited by counsel for the applicant to find correspondence with the offence in Irish law of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (hereinafter "the Act of 2001"); alternatively with burglary, contrary to s. 12 of the Act of 2001. Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion.

The Court is satisfied that correspondence can be found with both candidate offences in Irish law.

Minimum Gravity

The minimum gravity threshold is that set forth 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 twelve months. It is clear from Part C of the warrant that an offence under s. 175(3) of the Latvian Criminal Law carries a potential penalty of deprivation of liberty for a term of up to, but not exceeding, ten years. However, additional information received from the issuing judicial authority and dated the 8th October, 2012 establishes that reduced penalties apply in certain circumstances where the offender is a minor (under eighteen) at the time of the offence. The respondent was a minor when he committed this offence, having been born on the 13th May, 1989.

The additional information states:

"Please be informed that Criminal Law of the Republic of Latvia defines liability of minors (persons who have not attained eighteen years of age as of the commission of the criminal offence) and according to the Section 65 of the Criminal Law of the Republic of Latvia:

"(1) The following forms of basic punishment shall apply for minors:

1) deprivation of liberty;

2) custodial arrest;

3) community service; or

4) fine,

as well as the additional punishments provided for in this Law.

(2) For a person who has committed a criminal offence before attaining eighteen years of age, the period of deprivation of liberty may not exceed: ten years - for especially serious crimes; five years —for serious crimes, which are associated with violence or the threat of violence, or have given rise to serious consequences; two years - for other serious crimes. For criminal violations and for less serious and serious crimes the punishment of deprivation of liberty shall not be applied for such person.

(21) If a person has committed a criminal offence before attaining eighteen years of age regarding which the minimum limit of the applicable punishment of deprivation of liberty has been provided for in the sanction of the relevant Section of Special Part of this Law, a court may impose a punishment which is lower than this minimum limit also in the cases when a court has recognised that a criminal offence has been committed under liability aggravating circumstances.

(3) A person, who has committed a criminal offence before attaining eighteen years of age, may be conditionally released from punishment before serving the term of the punishment, if he or she has served not less than half of the imposed punishment.

(4) A fine is applicable only to those minors who have their own income. A fine applied to a minor shall be not less than one and not exceeding fifty times the amount of the minimum monthly wage prescribed in the Republic of Latvia.

(5) A person, who before attaining eighteen years of age, has committed a criminal violation, shall, after serving the punishment, be deemed to have not been convicted".

J. Jermolajevs is called to the criminal liability for committing serious crime (Section 175(3)) and less serious crimes (Section 185(1) and Section 315).

"Section 7. "Classification of Criminal Offences" of the Criminal Law of the Republic of Latvia

(1) Criminal offences are criminal violations and crimes. Crimes are sub-divided as follows: less serious crimes, serious crimes and especially serious crimes.

(2) A criminal violation is an offence for which this Law provides for deprivation of liberty for a term not exceeding two years, or a lesser punishment.

(3) A less serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding two years but not exceeding five years, or an offence, which has been committed through negligence and for which this Law provides for deprivation of liberty for a term exceeding two years, but not exceeding ten years.

(4) A serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding five years but not exceeding ten years, or an offence, which has been committed through negligence and for which this Law provides for deprivation of liberty for a term exceeding ten years.

(5) An especially serious crime is an intentional offence for which this Law provides for deprivation of liberty for a term exceeding ten years, life imprisonment or the death penalty. "

It is clear that an offence contrary to s. 175 (3) of the Criminal Law of Latvia is classified in Latvian law as a serious crime in accordance with s. 7(4) of the same code. Further, by virtue of s.65(2) of the same code the applicable penalty in the case of a person who was a minor on the date of the crime may not exceed five years (for a serious crime, which is associated with violence or the threat of violence, or has given rise to serious consequences) or two years (for all other serious crimes).

Counsel for the respondent has argued that the additional information of the 8th October, 2012 is ambiguous to the extent that s. 65(2) says, on the one hand that for a person who has committed a criminal offence before attaining eighteen years of age, the period of deprivation of liberty may not exceed five years for serious crimes, which are associated with violence or the threat of violence, or have given rise to serious consequences; alternatively two years - for other serious crimes, and on the other hand, that for serious crimes the punishment of deprivation of liberty shall not be applied for such person. The Court accepts that there is an ostensible ambiguity, but after reading the document as a whole it is clear that this is almost certainly either a typing or a translational error. It was open to the respondent to adduce evidence from a Latvian lawyer as to the correct interpretation of the statute to support his contention. He has not done so. In circumstances where one interpretation of the provision makes abundant sense, and the alternative interpretation is nonsensical, the Court should adopt and proceed upon the basis of the sensible interpretation, unless cogent evidence (i.e. evidence from a Latvian lawyer) has been adduced to establish that that is not the correct interpretation. Absent any evidence to the contrary, the Court considers it to be quite clear that in Latvia serious crimes committed by minors are to be subject to reduced maximum penalties of either five years or two years deprivation of liberty, and that it is only in the case of less serious crimes that the punishment of deprivation of liberty is not to apply.

The minimum gravity threshold provided for in s. 38(1)(a)(i) is met in the circumstances, regardless of whether the applicable penalty in the case of this respondent is potentially one of up to five years deprivation of liberty, or two years deprivation of liberty.

Offence No. 2:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

> "Jurijs Jermolajevs repeatedly committed covert stealing (theft) of movable property of another by entering into the premises, and namely:
>
> In the night to December 3, 2006 J. Jermolajevs with intention to commit theft of property through window entered into premises of Daugavpils City Municipal Council Social Affairs Department at Kr.Valdemâfira ielâ 13, Daugavpils, and covertly stole from there computer monitor Samsung Sunc Master 740N of Daugavpils City Municipal Council Social Affairs Department for amount of LVL 145 and thereafter sold it for LVL 30 to some person that was not identified during the investigation.
>
> Hence J. Jermolajevs committed the criminal offence provided for by the Section 175(3) of the Criminal Law."

The Court has again been invited by counsel for the applicant to find correspondence with the offence in Irish law of theft contrary to s. 4 of the Act of 2001; alternatively with burglary, contrary to s. 12 of the Act of 2001. Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion.

The Court is satisfied that correspondence can be found with both candidate offences in Irish law.

Minimum Gravity

The minimum gravity threshold is that set forth 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 twelve months. As in the case of offence no. 1 this is also an offence under s. 175(3) of the Latvian Criminal Law, carrying a potential penalty in the case of an adult of deprivation of liberty for a term of up to, but not exceeding, ten years. However, the respondent was again a minor on the date of this alleged offence. Once again by virtue of the combined effect of s. 7(4), s.65(2) and s.175 (3) of the Criminal Law of Latvia the applicable penalty in the case of a person who was a minor on the date of the crime is either up to five years deprivation of liberty, or up to two years deprivation of liberty. The minimum gravity threshold provided for in s. 38(1)(a)(i) is met in the circumstances, regardless of whether the applicable maximum potential penalty is five years or two years.

Offence No. 3:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

> "Jurijs Jermolajevs committed failing to inform if it is certainly known that serious criminal offence of committed, and namely:
>
> On November 6, 2006 at about 01:00 J. Jermolajevs, while being nearby the store "Saules veikals", Leilâ ielâ 44, Daugavpils, and certainly knowing that Dmitrijs Aleinikovs has committed the theft from abovementioned store, namely, serious criminal offence, failed to inform about that the respective authorities.
>
> Hence J. Jermolajevs committed the criminal offence provided for by the Section 315 of the Criminal Law."

In this instance the Court has been invited by counsel for the applicant to find correspondence with the offence in Irish law of withholding information contrary to s. 19 of the Criminal Justice (Theft and Fraud Offences) Act 2011 (hereinafter the "Act of 2011"). Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion. In that regard, s. 19(1) provides:

> "A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in—
>
> (a) preventing the commission by any other person of a relevant offence, or

(b) securing the apprehension, prosecution or conviction of any other person for a relevant offence,

and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána."

A relevant offence is defined broadly in accordance with ss. 2 and 3 of the Act of 2011, and Schedule 1 to that Act contains a long list of offences including offences under the Act of 2001.

The Court is satisfied that correspondence can be found with the candidate offence in Irish law.

Minimum Gravity

Once again, the minimum gravity threshold is that set forth 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 twelve months. In this instance the Court is concerned with an offence under s. 315 of the Latvian Criminal Law, carrying a potential penalty in the case of an adult of deprivation of liberty for a term of up to, but not exceeding, four years. However, the respondent was again a minor on the date of this alleged offence. In this instance, applying s. 7(4) of the Criminal Law of Latvia the offence is considered a "less serious offence". Under s.65(2) of the Criminal Law of Latvia "*the punishment of deprivation of liberty shall not be applied*" in the case of a minor. It seems that the penalty options available to a Latvian Court in such a case are confined to fines and other non-custodial penalties. In the circumstances, the minimum gravity threshold provided for in s. 38(1)(a)(i) is not met and it will not be possible for this Court to surrender the respondent in respect of this offence.

Offence No. 4:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

"Jurijs Jermolajevs repeatedly in the group of persons pursuant to prior agreement committed covert stealing (theft) of movable property of another by entering into the premises, and namely:

On November 29, 2006 at about 01:30 J. Jermolajevs in the group with G. Rakickis and pursuant to prior agreement by brick and piece of asphalt broke glass of two show-windows of the store "Saules veikals" located at Lielâ ielâ 44, Daugavpils and covertly stole from the shelves the property of SIA „Antaris":

- 2 boxes for 2.5 kg of wattles for amount of LVL 2.88 each, for total amount of LVL 5.76;

- 2 bottles of wine "Campo" for LVL 2,60 each, for total amount of LVL 5.20;

- 4 bottles of wine "Freegold" for amount of LVL 2.19 each, for total amount of LVL 8.76, in total property for amount of LVL 19.72.

Hence J. Jermolajevs committed the criminal offence provided for by the Section 175(3) of the Criminal Law."

The Court has been invited by counsel for the applicant to find correspondence in this instance with the offence in Irish law of criminal damage contrary to s.2 of the Criminal Damage Act 1991. Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion.

The Court is satisfied that correspondence can be found with the candidate offence in Irish law.

Minimum Gravity

Once again, as this involves an offence under 175(3) of the Latvian Criminal Law, and the respondent was a minor at the relevant time, by virtue of the combined effect of s. 7(4), s.65(2) and s.175 (3) of the Criminal Law of Latvia the applicable penalty is either up to five years deprivation of liberty, or up to two years deprivation of liberty. The minimum gravity threshold provided for in s. 38(1)(a)(i) is met in the circumstances.

Offence No. 5:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

"Jurijs Jermolajevs committed intentional destruction and damage of the property of another, and namely:

On November 29, 2006 at about 01:30 J. Jermolajevs and G. Rakickis thrown brick and piece of asphalt into show-windows of the store "Saules veikals" located at Lielâ ielâ 44, Daugavpils, consequently intentionally destroying and damaging the property of SIA "Antaris":

- broke glass of two show-windows for total amount of LVL 138.76,

destroyed and damaged:

- 2 bottles of wine "Comte Tolosan" for amount of LVL 2.29 each, for total amount of LVL 4,58;

- 2 bottles of wine "Kagor Bostavan" for amount of LVL 2.81 each, for total amount of LVL 5.62;

- 1 bottles of wine "Cabernet" for amount of LVL 2.44;

- 3 bottles of wine "Polacio del conde" for amount of LVL 1.95 each, for total amount of LVL 5.83;

- 2 bottles of wine "Pal. Crianza" for amount of LVL 2.85 each, for total amount of LVL

5.70;

- 1 bottle of wine "Don solis" for amount of LVL 1.41;

- 4 bottles of wine "Frie Gold" for amount of LVL 2.19, for total amount of LVL 8.76;

- 4 bottles of wine "Friegold Rose" for amount of LVL 2.19 each, for total amount of LVL 8.76;

- 2 bottles of wine "Soldel Mediteraneo Muskatel" for amount of LVL 2.19 each, for total amount of LVL 4.38;

- 2 bottles of wine "La Cartuja" for amount of LVL 2.64 each, for total amount of LVL

5.28;

- 3 bottles of wine "Cabernet Chardone" for amount of LVL 2.44 each, for total amount of LVL 7.32.

Hence in total was destroyed and damaged the property for amount of LVL 198.86.

Hence J .Jermolajevs committed the criminal offence provided for by the Section 185(1) of the Criminal Law."

The Court has been invited by counsel for the applicant to find correspondence in this instance with the offence in Irish law of criminal damage contrary to s.2 of the Criminal Damage Act 1991. Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion. However, the Court is satisfied that correspondence can be found with the candidate offence in Irish law.

Minimum Gravity

Once again, the minimum gravity threshold is that set forth 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 twelve months. In this instance the Court is concerned with an offence under s. 185(1) of the Latvian Criminal Law, carrying a potential penalty in the case of an adult of deprivation of liberty for a term of up to, but not exceeding, four years. However, the respondent was again a minor on the date of this alleged offence and this raises the same issues as arose in the case of offence no. 3 above. Applying s. 7(4) of the Criminal Law of Latvia the offence is considered a "less serious offence". Under s.65(2) of the Criminal Law of Latvia "*the punishment of deprivation of liberty shall not be applied*" for a less serious offence where it was committed by a person who was a minor at the time. The penalty options available to a Latvian Court in such a case are seemingly confined to fines and other non-custodial penalties. In the circumstances, the minimum gravity threshold provided for in s. 38(1)(a)(i) is not met and it will not be possible for this Court to surrender the respondent in respect of this offence.

Offence No. 6:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

"Jurijs Jermolajevs repeatedly committed covert stealing (theft) of movable property of another associated with entering into the premises, and namely:

Within time period as of February 26, 2007, 16:10, till February 27, 2007, 09:20 J. Jermolajevs repeatedly, while being in Daugavpils, Cietokðòa ielâ 60, in trading premises "HANZA" of SIA "Ditton Nams", implementing intention related with stealing of movable property of another, freely entered into point of sale No.113 through its shutters, hence entering into the mentioned point of sale, and there covertly stole from counters the following property of the victim A. Andrejevs:

- playing computer for children „SONY PLAYSTATION 2" for amount of LVL 120.06;

- two joysticks of playing computer for children „SONY PLAYSTATION 2", value of one -LVL 12.04, for total amount of LVL 24.08;

- four memory cards of playing computer for children „SONY PLAYSTATION 2", value of one - LVL 4.90, for total amount of LVL 19.60,

and then escaped along with stolen articles.

In total J. Jermolajevs stole property of the victim A. Andrejevs for total amount of LVL 163.74.

Hence J. Jermolajevs committed the criminal offence provided for by the Section 175(3) of the Criminal Law."

The Court has been invited by counsel for the applicant to find correspondence with the offence in Irish law of theft contrary to s. 4 of the Act of 2001; alternatively with burglary, contrary to s. 12 of the Act of 2001. Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion.

The Court is satisfied that correspondence can be found with both candidate offences in Irish law.

Minimum Gravity

Once again, as this involves an offence under 175(3) of the Latvian Criminal Law, and the respondent was a minor at the relevant time, by virtue of the combined effect of s. 7(4), s.65(2) and s.175 (3) of the Criminal Law of Latvia the applicable penalty is either up to five years deprivation of liberty, or up to two years deprivation of liberty. The minimum gravity threshold provided for in s. 38(1)(a)(i) is met in the circumstances.

Offence No. 7:

The underlying facts as set out in the warrant

The circumstances of this alleged offence as set out in the warrant are:

> "Jurijs Jermolajevs repeatedly committed covert stealing (theft) of movable property of another associated with entering into the premises, and namely:
>
> Within time period as of March 14, 2007, 17:00, till March 15, 2007, 09:00 J Jermolajevs repeatedly, while being in Daugavpils, Rîgas ielâ 26, where is located office of SIA "Latgales reklâma", implementing his intention related with stealing of movable property of another by means of key adapting entered into the advertising unit premises of abovementioned office and covertly stole from there property of SIA "Latgales reklâma", namely, two PC monitors SAMSUNG LCD 720 N 17 (No.MJ17H9FLA03670, No. MJ17H9FLA04031), value of one monitor - LVL 118.64, for total amount of LVL 237.28, and then escaped along with the stolen articles.
>
> Hence J. Jermolajevs committed the criminal offence provided for by the Section 175(3) of the Criminal Law."

The Court has been invited by counsel for the applicant to find correspondence with the offence in Irish law of theft contrary to s. 4 of the Act of 2001; alternatively with burglary, contrary to s. 12 of the Act of 2001. Notwithstanding paragraph 2 of the Points of Objection, counsel for the respondent did not oppose this suggestion.

The Court is satisfied that correspondence can be found with both candidate offences in Irish law.

Minimum Gravity

Once again, as this involves an offence under 175(3) of the Latvian Criminal Law, and the respondent was a minor at the relevant time, by virtue of the combined effect of s. 7(4), s.65(2) and s.175 (3) of the Criminal Law of Latvia the applicable penalty is either up to five years deprivation of liberty, or up to two years deprivation of liberty. The minimum gravity threshold provided for in s. 38(1)(a)(i) is met in the circumstances.

The section 37 objections – prison conditions

Evidence adduced by the respondent

The Court has had produced to it an affidavit sworn by the respondent on the 31st July, 2012, in which he deposes:

> "4. I am 23 years of age and I am originally from Latvia. At the time of the alleged offences set out in the Warrant, I had been living in Latvia and I had been thrown out of home by my alcoholic father. Also at this time my mother had left Latvia to start a new life in Ireland She sent money back to my father for my care however he absorbed this money for his own use and I was left to fend for myself.
>
> 5. Ultimately when I turned 18 in 2007, my mother was able to book a flight for me to join her in Ireland. Since then I have resided with my mother, brother and step-father and we are now a family unit and we reside at 3 The Crescent, Athlumney Abbey, Navan, County Meath.
>
> 6. I say that my mother left Latvia in 2005 and moved to Ireland. She currently works for Lir Chocolates at their factory located at Navan, County Meath and has worked there for the past seven years. I say that my step-father left Latvia in 2004.He also works at the Lir Chocolate Factory on a full time basis and has worked there for the past seven years. I say that I only have one sibling, namely my brother Vitalijs who is twenty one years of age. Both my brother and I are seasonal it workers at the Lir Chocolate factory. I am actively seeking work and I am to commence studying Computer and English in September.
>
> 7. I have now been resident in Ireland for a total of five years and my family and I have made Ireland our home and. I have no ties in Latvia. I do not have contact with my biological father who is an alcoholic and who remains living in Latvia. I say that it is my hope to remain in Ireland with my family, who are settled here. Further to return me to Latvia would deprive my family of my company, care and emotional support and in particular my mother whom I am extremely close too and who is suffering a serious illness in the form of Chronic Hepatitis C. In this regard I refer to a letter from Abbey House Medical, upon which marked with the letters "JJ1" I have signed my name prior to the swearing hereof.
>
> 8. I say that I have no previous convictions in Latvia or in Ireland and I have never been to prison. I am concerned that my fundamental human rights will be breached should I now be surrendered to Latvia. I say and am so informed my Latvia lawyer Ms. Valentina Kepente that should I be returned I will be detained at Daugavgriva prison. She advises that the prison conditions at that prison "*contravene the dignity of the person, makes the person suffer and may breach the person's physical and moral strength*" I beg to refer to a copy of the said letter upon which marked with the letters "JJ2" I have signed my name prior to the swearing hereof.
>
> 9. I further refer to the Ombudsman of Latvia's report of his inspection of Daugavgriva prison where he found; poor ventilation, a lack of natural light, poor artificial light, issues of overcrowding, privacy issues and hygiene issues. He held as of the 11th of November 2011 that conditions at present in quarantine wards are inconsistent with Article 3 of the European Convention prohibiting inhuman and degrading treatment. I also refer to the complaint of Robert Zherebkov wherein his complaint of degrading conditions at Daugavgriva Prison was upheld by the Rezekne District Court. I beg to refer of a copy of said documents which pinned together and marked with the letters "JJ3" I have signed my name prior to the swearing hereof.
>
> 10. I say that the U.S. State Department 2011 Human Rights Report for Latvia, states that; "*the conditions in prisons remain poor and do not meet international standards*". Further it referred to the findings of the Council of Europe's Committee for the Prevention of Torture based on a visit to Latvia's prisons in 2011, where it found "*inadequate privacy in living spaces and bathrooms; lack of heat, inadequate sanitary facilities, lack of hot water, inadequate places to sit, inadequate work and educational facilities and inadequate access to open space and fresh air*". I beg to refer to a copy of the said report upon which marked with the letters "JJ4" I have signed my name prior to the swearing hereof.

The Court has carefully considered each of the exhibits to the respondent's said affidavit.

In the letter of advice from the respondent's Latvia lawyer Ms. Valentina Kepente it is stated that:

> "In 2010 the Ombudsman of the Republic of Latvia received 67 written submissions on the inhuman and degrading treatment and conditions in prisons. In paragraph 56 of the report of 2010, it is stated that the failure to provide conditions in accordance with the requirements of human rights is a problem in all Latvia's prisons. The judgement of the European Court of Human Rights in the case of Bazyak v. Latvia of the 19th of October 2010, once again emphasised that Latvia has serious problems in compliance with the prohibition on torture. In paragraph 57 of the Ombudsman's report it is stated that in 2010 the majority of complaints concerning prison conditions were received from the Daugavgriva prison and the Riga Central prison. Nothing changed in 2011. On the 11th of November 201l the Ombudsman of the Republic of Latvia provided an opinion on the requirements of human rights at Daugavgriva Prison. The opinion concluded that at present the conditions for quarantine in prison cells are considered to be incompatible ' with the prohibition on inhuman and degrading treatment laid down in Article 3 of the European Convention. The conditions of the prisoners contravene the dignity of the person, makes the person suffer, degrade him and may breach the person's physical or moral strength. The Rezekne District Court case no. A420525811 on the 14th of March 2012 upheld the complaint of prisoner Robert Zherebkov of degrading conditions at Daugavgriva Prison.

The Report of the Ombudsman of the Republic of Latvia dated the 11th November, 2011, also exhibited by the respondent, is indeed critical of prison conditions generally in Latvia, and makes many recommendations for improvements. However, while conditions were considered to be poor overall, including "residential prison cells", the only part of the prison inspected, specifically Daugavgriva Prison, that was considered so bad as to be inconsistent with article 3 of the Convention were conditions in its "quarantine wards."

The other country of origin information exhibited is not particularly recent, (Latvia Show Report to UN Committee against Torture, 2007 and the U.S. State Department Human Rights Report on Latvia 2010 and therefore may be somewhat out of date; but they are consistent in reiterating the opinion that conditions in prisons and detention centres in Latvia are poor and that upon inspection they were considered not to meet international standards. However, the U.S. State Department Report does contain the following:

> "Prison and Detention Center Conditions
>
> Conditions in prisons and detention centers remained poor and did not meet international standards. The government permitted monitoring visits by the ombudsman and other independent human rights observers, and such visits occurred during the year.
>
> During the year prison authorities opened five investigations into cases of the violent deaths of prison inmates. In three of these cases, investigators found that the victims committed suicide. Investigations in the other two cases continued at year's end.
>
> The ombudsman's office, NGOs, and prisoners continued to complain that prison facilities were seriously inadequate. These complaints echoed many of the conclusions of the 2007 report of the Council of Europe's Committee for the Prevention of Torture (CPT) based on a visit in the same year. The CPT found that in prisons for men, 20 prisoners were typically held together in dormitory-style rooms. Complaints included inadequate privacy in living spaces and bathrooms, severely dilapidated physical plants, lack of heat, inadequate sanitary facilities, lack of hot water, inadequate places to sit, inadequate work and educational opportunities, and inadequate access to open space and fresh air.
>
> As of December, the ombudsman's office received 50 complaints about poor conditions in detention facilities, compared with 50 complaints in 2009. The State Police received seven complaints about poor conditions in detention centers.
>
> In July the ombudsman's office found that prisoners throughout the system did not have adequate access to healthcare services. The report specifically criticized the government's 2009 decision to reduce healthcare in prisons. In November the new minister of justice announced publicly that improvement of prison conditions would be a priority for his ministry.
>
> In 2008 a group of maximum-security prisoners brought a claim in the Constitutional Court alleging inadequate outdoor exercise time. The LPA asserted that it was not possible to give the group outdoor time for security reasons. The Constitutional Court agreed with the prisoners and ordered the government to make changes to prison facilities necessary to allow the prisoners outdoor time by January 2011. The LPA made the required changes and complied with the order by the end of the year.
>
> In 2009 a group of prisoners filed a complaint with the Constitutional Court, alleging that a LPA decision to cut prisoners' food rations violated their rights. The Constitutional Court agreed and ordered the prison administration to increase rations. The prison administration complied with the order in June.
>
> As of December the Ministry of Justice reported that 6,790 persons were held in the prison system, which had a total capacity of 7,970 persons. Of these, 2,034 were detainees awaiting trial or the outcome of their appeals and 4,756 were convicted inmates. Detainees and convicted inmates were generally held together. Male prisoners were held in 10 prisons throughout the country.
>
> The prison population also included 91 juvenile males. Most of these prisoners were held at a separate juvenile facility, which was equipped with a school funded by the state. At the end of the year 42 juveniles were held in regular adult prisons. Although the Ministry of Justice stated such cases were temporary and rare, the ombudsman's office expressed concern that during pretrial detention some juveniles were held for long periods at adult facilities, where they were isolated and had no access to education. Conditions, especially sanitary facilities, at the juvenile facility for males remained very poor. However, in September the prison administration broke ground on a new building at the juvenile prison designed to bring conditions there in line with international standards.
>
> The prison population included 417 women, held in a separate women's prison. The country's few juvenile female prisoners were held in a separate wing of the women's prison. The ombudsman's office considered the physical conditions at the women's prison to be better than at other facilities, and generally adequate.
>
> During the year the Ministry of Justice began several projects to improve conditions in prisons. These included building renovations, a project to digitalize prison records and modernize information technology systems, and a program to bring

its administrative controls into line with international standards. The prison administration also began new training programs for prison employees.

The Latvian Center on Human Rights reported poor conditions at the Olaine detention center for illegal immigrants in Riga.

In general, prisoners had reasonable access to visitors. The prison administration allowed prisoners and detainees to observe religious practices with some limitations, including security-related restrictions on religious articles kept in cells and dorm rooms. However, a group of prisoners filed a claim with the Constitutional Court challenging these restrictions. A decision was pending at year's end.

Authorities allowed prisoners and detainees to submit complaints to judicial authorities. Prisoners may submit complaints without censorship and may request investigation of credible allegations of inhumane conditions. The ombudsman's office raised no concerns in this area. Authorities generally investigated credible allegations of inhumane conditions and documented the results of such investigations in a publicly accessible manner. Ministry of Justice and other government officials investigated and monitored prison and detention center conditions.

The government generally permitted independent monitoring of prisons and detention centers by international and local human rights groups. In December 2009 a CPT delegation inspected prisons in Daugavpils, Jekabpils, and Jelgava. [As of year's end, the CPT had not publicly released its report.]

The ombudsman's office consistently monitored conditions at prisons and detention facilities. Although various NGOs argued the ombudsman's office was not aggressive enough in this area, it effectively advocated better conditions in some cases, especially involving juveniles."

Moreover, a summary of the decision of the European Court of Human Rights (hereinafter "the ECtHR") in *Bazjaks v Latvia* (Application no. 71572/01, 19th October, 2010) was also exhibited. (The Court has since obtained the full judgment). While the ECtHR found breaches of the applicant's (Bazjak's) rights under article 3 of the Convention, it did so on the basis of conditions in Daugavgriva Prison as they were established to be during the period when Mr. Bazjaks was there, i.e., between the 11th January 2001 and the 26th January 2002, particularly but not exclusively with reference to overcrowding and lack of personal space.

Additional information

The Court has been furnished with a letter dated the 20th of September 2012 from the Republic of Latvia Department of Imprisonment Institutions, in which it is stated (inter alia):

"In Latvia currently are 12 imprisonment institutions, where liberty deprivation sentences are executed in closed, partially closed and in opened prison, as well in correctional institution for under-age persons.

The living conditions of prisoners in all prisons of Latvia correspond to requirements of Article 77 of the Sentences Execution Code, Article 19(4) of the Law on Procedures Regarding Keeping Persons in Custody and of other legal acts of Latvia. Living space for one prisoner shall be no less than 2.5 m2 for convicted males, 3 m2 for convicted under-age persons and females, as well as arrested persons, but in one-man cells no less than 9 m2

Currently imprisonment institutions are not overpopulated. On September 17, 2012 in imprisonment institutions with 7970 places were 6232 imprisoned persons.

For needs of prisoners in imprisonment institutions there are canteens, showers, saunas, shoe and clothes workshops, hairdressing saloons etc. Each prisoner is provided with individual bed, bed accessories, hot food three times per day and accessories of personal hygiene. All prisons have premises for short and long term visits, where is possible to meet with relatives and other persons.

Energy and heating supply facilities of all imprisonment institutions are in good condition and are operated according to the effective legal acts.

All prisoner's living cells and units are equipped with all living core elements: daylight during a daytime, artificial light during a night, air temperature is not lower than +18°C, ventilation is provided as well.

For entering of natural light the living cells and units of imprisonment institutions are equipped with opening windows and they usually consist of two parts. These parts of windows may be opened, ensuring entering of additional daylight. For improvement of natural light availability in some imprisonment institutions within allocated funding the windows are being replaced with larger ones.

Ceilings of living cells and units are equipped with lighting elements. For night lighting are used electric bulbs. Lighting elements and their parts functions 24 hours and constantly arc maintained in working condition. The equipment is systematically checked. The living cell usually is equipped with two fluorescent lamps. Number of bulbs in living cells depends on space of living cell. In one fluorescent lamp are installed two bulbs. They power is from 36 W till 60 W depending on type of bulbs (for example: L36 x/640). Lamp light with flow stability factor is mainly foreseen for general lighting. It means that it provides artificial light instead of natural light and ensures visibility. In a daytime light is switched on/off upon request of imprisoned persons.

Night lighting is ensured by 24 - 40 W incandescent lamps with cool white-blue light. Night light is switched on from 22:00 till 06:00. Lamp with one bulb (for example: 1 reflector bulb R63 220/40W) is installed in wall above doors approximately two meters from floor. Additionally is installed bulb with light reflector for more intensified lighting flow.

Ventilation in living cells and units of the imprisonment institutions may be ensured naturally or artificially (forced ventilation). The natural ventilation is ensured through room openings, for example, doors, windows and other openings. Each living cell is ensured with sufficient ventilation system, that regulates reducing of relative humidity in the living cell, input of fresh air and recirculation (output to ventilation system). Installed equipment is functioning as supply (air - fresh air, recirculation air, intake air or infiltration air, that is supplied to the room) and output (air leaving the room) system with electric engine deployed in one ventilation chamber.

Food to the imprisoned persons in imprisonment institutions is ensured according to the requirements of the Rules of the Cabinet of Ministers of December 19, 2006 No. 1022 "Rules on standards of material provision for nurture and living needs of imprisoned persons". Nurture of imprisoned persons is arranged by closed-type canteen of imprisonment institutions which operates in accordance with provisions provided for by the Law on Food Circulation. Products are ordered and provided on the grounds of daily menu and number of imprisoned persons, taking into consideration established food norms. In general food ensures imprisoned persons with needed energy, most important mineral substances and vitamins, imprisoned persons may be provided also with additional needed nutrients. Additionally imprisoned persons are allowed to buy food and essentials in the shop of imprisonment institution.

Health care to the imprisoned persons in imprisonment institutions is provided according to Article 78 of the Sentences Execution Code, Article 22 of the Law on Procedures Regarding Keeping Persons in Custody and Rules of the Cabinet of Ministers (further referred as "Rules") No. 199 of March 20, 2007 "Rules on health care for arrested and convicted persons in the investigation prison and liberty deprivation institutions".

The Paragraph 2 of the given Rules provides for that "Imprisoned persons in prison shall be granted free of charge the following:

2.1. primary heath care, other than planned dentistry;

2.2. emergency dentistry aid;

2.3. secondary health care to be provided in emergency situation, as well as secondary health care, which is provided by prison's physicians according to the specialization;

2.4. medications, which are most effective and cheapest in terms of costs, assigned by prison's medical

The provisions of these Rules are complied with in all imprisonment institutions of Latvia.

In imprisonment institutions to prisoners is available both outpatient treatment, which is provided to prisoners by medical units of imprisonment institutions, and stationery medical care to be provided in emergency situations, except medical care to psychiatric patients and patients who suffers from tuberculosis - in such case stationary health care is provided also on planned basis. Stationary health care for patients who suffers from tuberculosis (70 beds) and psychiatric patients (30 beds) funded from budget of the Department is provided by Latvia Prison's Hospital (further referred as "Prison's Hospital") in Olaine, where are ensured also medical examinations (laboratory, X-ray equipment, dentistry, EKG etc.).

In each prison is Medical Unit. Medical Units and Prison's Hospital are registered in public register of medical institutions of the Republic of Latvia and are certified pursuant to the mandatory requirements applicable to medical institutions of the Republic of Latvia.

After placement in imprisonment institution prisoners are subject to medical examination. In investigation prisons are carried out prophylactic X-ray scanning of chest for early detection of tuberculosis and diagnosis of other diseases, as well as examination for hiv/aids.

All prisoners are subject to prophylactic examination once in a year, namely, medical examination, filling out of special questionnaires for early diagnosis of tuberculosis, prophylactic X-ray scanning etc. Data of prophylactic examination are recorded in medical file of outpatient.

Imprisoned persons have rights to be treated in other medical institutions out of imprisonment institutions at their own expenses, as it is provided for by the Rules, nevertheless transportation and security expenses are paid from Department's funding.

The mentioned rights are equivalent to rights which enjoys all inhabitants of Latvia in cases when they want;

- to benefit health care services in medical institution pursuant to priority procedure;

- to benefit health care services, provision of which to the patients shall be against full payment;

- to take examinations and treatment in another medical institution.

For social rehabilitation purposes each imprisonment institution has sport halls, training classrooms, chapels etc. The imprisoned persons each day constantly are involved into activities out of cells and units. The imprisoned persons have possibility to exercise sport both in gym-hall and at the outdoor field. The imprisonment institution arranges for prisoners also other activities as much as possible, for example, concerts, sport activities, joint works, as well as seeks cooperation possibilities with companies regarding creation of new jobs for imprisoned persons.

The prisoners, who want to work, are given such possibility. In imprisonment institutions the prisoners are employed in maintaining service and also by companies, who have created jobs for them. Prisoners who are serving sentence in opened prisons are employed in companies located out of prisons territory.

Additionally imprisonment institutions provide to prisoners psychological cave and services of social workers. Prisoners may attend individual consultations with such specialists.

The representatives of the Ministry of Justice of the Republic of Latvia, experts of Ombudsman Office of the Republic of Latvia, as well as employees of State Children Rights Protection Inspection regularly visit the imprisonment institutions, meets with administration and prisoners. During such visits are discussed issues related with further development of imprisonment institutions, complying with human rights in imprisonment institutions etc.

J. Jermolajevs according to the Law on Procedures Regarding Keeping Persons in Custody initially will be placed into investigation prison on the grounds of regional competence (depending on location of person directing the proceedings).

After entering into legal force of the court judgment (decision) or as of the day when court judgment (decision) will be

sent for execution, J. Jermolajevs according to the provisions of Sentences Execution Code of Latvia within ten days will be transferred to the liberty deprivation institution for serving of imposed liberty deprivation sentence.

The type of liberty deprivation institution to J. Jermolajevs will be laid down pursuant to the provisions set out by Article 7 of the Criminal Law "Classification of the Criminal Offences" and Article 504 "Sentence Execution Regime in Closed Prisons" or Article 50" "Sentence Execution Regime in Partially Closed Prisons" or Section 506 "Sentence Execution Regime in Opened Prisons" of the Sentences Execution Code of Latvia. In its turn the specific liberty deprivation institution where J. Jermolajevs will start serving of imposed liberty deprivation sentence will be laid down according to the Article 131 "Criteria for Deployment of Convicts" of Sentences Execution Code of Latvia."

The Law

The starting point in respect of any rights based objection must be the presumption in s.4A of the Act of 2003, which states:

> "It shall be presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown"

The requirements of the Framework Decision in regard to fundamental rights are in recitals 12 and 13, respectively, to that instrument. They state:

> "(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union [OJ C 364, 18.12.2000, p. 1.], in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.
>
> This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.
>
> (13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

The position is, therefore, that this Court must, by virtue of s. 4A of the Act of 2003, presume that the issuing state will respect and have due regard to the respondent's fundamental rights in the event of him being surrendered. This presumption may of course be rebutted.

The principles contained in recitals 12 and 13 of the Framework Decision find reflection in s. 37 of the Act of 2003. In the particular circumstances of this case, the Court is concerned primarily with s. 37(1)(a) and s. 37(1)(b). These provisions 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) of the Act of 2003 provides that the "Convention" referred to is the European Convention on Human Rights and Fundamental Freedoms, 1950, as amended, and the "Protocols" referred to are the protocols to that Convention listed in the same subsection.

This Court in it's judgment in *Minister for Justice, Equality and Law Reform v Mazurek*, [2011] IEHC 204 (Unreported, High Court, Edwards J., 13th May, 2011), and more recently in it's judgments in *Minister for Justice, Equality and Law Reform v Wlodarcyzk* [2011] IEHC 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) and *Minister for Justice, Equality and Law Reform v Machaczka* [2012] IEHC 434 (Unreported, High Court, Edwards J., 12th October, 2012), 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 convention rights, and in particular a person's rights under article 3 of the Convention.

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

> - "The normal presumption is" (per Fennelly J in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45) "the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "respect ... human rights and fundamental freedoms"." (per Fennelly J in *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 I.R. 669);
>
> - However, "by virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*", the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant cannot be invoked to defeat an established real risk of ill treatment contrary to Article 3." (per Fennelly J in *Rettinger*);
>
> - The two foregoing principles are readily reconcilable and they do not imply that "there is any underlying conflict between

the Convention and the Framework Decision." (per Fennelly J in *Rettinger*);

- The subject matter of the court's enquiry "is the level of danger to which the person is exposed." (per Fennelly J in *Rettinger*);

- "it is not necessary to prove that the person will probably suffer inhuman or degrading treatment. It is enough to establish that there is a "*real risk*" (per Fennelly J in *Rettinger*) "in a rigorous examination." (per Denham J in *Rettinger*). However, the mere possibility of ill treatment is not sufficient to establish an applicant's case. (per Denham J in *Rettinger*);

- A court should consider all the material before it, and if necessary material obtained of its own motion. (per Denham J in *Rettinger*);

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

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

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

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

The Court's Decision on the article 3 based s. 37 objection.

I am not satisfied that the evidence adduced by the respondent in support of his contention that there are substantial grounds for believing that if surrendered to the Republic of Latvia he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention is sufficiently cogent to rebut that which is presumed in s. 4A of the Act of 2003. While it is clear that in recent years the physical infrastructure associated with Latvian prisons was found by various reputable agencies to be in need of renewal, and also that prisoners were found to have been housed in sometimes uncomfortable conditions that are certainly sub-optimal, and below international standards, they do not seem to have been generally regarded in recent years as being so bad as to amount to a breach of article 3 of the Convention, save in isolated cases (the quarantine cells, but not the residential cells, in Daugavgriva Prison in 2011) such as that of Mr Robert Žerebkovs.

It is important to remember that it has been held by the ECtHR in the case of *Saadi v Italy* (2009) 49 E.H.R.R. 30 that:

> "1. According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Price v. the United Kingdom*, (2002) 34 E.H.R.R. 53 at [24]; *Mouisel v. France*,(2004) 38 E.H.R.R. 34 at [37];;and *Jalloh v. Germany* (2007) 44 E.H.R.R. 32)at [67].
>
> 2. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labitav. Italy* (2008) 46 E.H.R.R. 50 at [120]).
>
> 3. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in art.3 between this notion and that of inhuman or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering (see *Aydin v. Turkey* (1998) 25 E.H.R.R. 251 at [82] and *Selmouni* (2000) 29 E.H.R.R. 403 at [96].)."

It is not at all clear that in 2012 when the warrant was issued, or today in early 2013, the conditions in Latvian prisons, individually or cumulatively, would result in ill-treatment of prisoners at the level of severity required to constitute ill-treatment that is inhuman or degrading. The respondent in this case has no personal experience of Latvian prisons and his approach does not appear to be based on any very specific apprehension, e.g., risk of mistreatment by prison guards, physical prison conditions, inadequate medical treatment, overcrowding, inter-prisoner violence etc. While there have been problems in the past in each of these areas the information both from the US State Department Report 2010, and from the Latvian Prison Service itself suggests that the issuing state is engaging with the criticisms that have been made and that the situation is improving. It is clear from the U.S. State Department report, and it is born out by the Ombudsman's Report, and the ruling of Rezekne District Court in Mr Robert Žerebkovs case that it is possible for prisoners and detainees to submit complaints to judicial authorities concerning allegations of inhumane conditions, that these will be treated seriously, and investigated, and that the prisoner will be afforded a remedy if the complaint is upheld. This is very encouraging. Moreover, the Latvian government permits independent monitoring of prisons and detention centres by international and local human rights groups which is also encouraging.

It must also be borne in mind, as was stated by Latham L.J. in *Miklis v. Lithuania*, [2006] E.W.H.C. 1032 (Admin) (and with whose views on this I have previously expressed concurrence in other judgments) that:

> "It is … 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."

In my view there is nothing in the present case to suggest that Mr Jermolajevs is specifically vulnerable, or that he has any special characteristic which would particularly expose him to human rights abuse. The evidence in the present case, while sufficient to have created some initial doubts in the mind of the Court, is not sufficiently cogent overall to displace the presumption arising by virtue of s. 4A of the Act of 2003 that the issuing State will respect the respondent's fundamental rights in the event of him being surrendered. Moreover, such doubts as the Court had initially have been dispelled by the evidence provided by the issuing state in the additional information dated 20th of September, 2012. In the circumstances the Court is not disposed to uphold the s.37 objection in so far as it concerns prison conditions. There are not, in the court's view, substantial grounds for believing that the respondent would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention if surrendered to the Republic of Latvia.

The section 37 objection – article 8 issue
The Court has carefully considered the affidavit evidence of the respondent concerning the roots that he has put down in this country, his personal and family circumstances, and his mother's medical situation. I have arrived at the view that these circumstances do not outweigh the public interest in the rendition of the respondent. There is no question but that the surrender of the respondent will adversely impact on the family life of the respondent himself as well as other members of his family, including his mother, brother and stepfather. However, article 8 does not guarantee family life. It guarantees "respect for family life". To surrender the respondent would not be a disproportionate measure in the circumstances of this case, and therefore would not amount to a breach of the respondent's article 8 rights or those of his family members. The bar is set very high with respect to non-surrender on article 8 grounds. It would require to be established by very strong evidence that the proposed interference with the family lives of those concerned would be disproportionate to (i) the strong public interest in extradition and ensuring as a general objective that fugitives from justice are denied safe havens and are returned to the state that seeks them for the purpose of prosecution or to serve a sentence, and (ii) the legitimate aim of the issuing state of ensuring that this fugitive in particular is returned to face the criminal process in his state of origin, for this Court to conclude that to do so would disrespect his right to family life, and the cognate rights of his family members. The evidence in this case does not begin to approach the strength of evidence that is required to sustain an objection on article 8 grounds.

In the circumstances the Court is not disposed to uphold the s.37 objection in so far as it concerns alleged disproportionate interference with the right to respect for family life as guaranteed in article 8 of the convention.

Conclusion:
The Court is not obliged to regard the surrender of the respondent as being prohibited by Part 3 of the Act of 2003. In the circumstances, being otherwise satisfied that the requirements of s. 16(1) of the Act of 2003 are met, I am disposed to make an order directing the surrender of the respondent in respect of offences 1, 2, 4, 6, and 7, respectively, to such person as is duly authorised by the issuing state to receive him. The Court is not satisfied to surrender the respondent in respect of offences 3 and 5 respectively.