Neutral Citation Number: [2011] IEHC 204

THE HIGH COURT

2010 245/246/247/248/249 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT, 2003

AS AMENDED

BETWEEN/

THE MINISTER FOR JUSTICE AND LAW REFORM

APPLICANT

- AND -

MICHAL SEBASTIAN MAZUREK

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 13th day of May 2011

Introduction:

The respondent is the subject of five European Arrest Warrants issued by the Republic of Poland on the 15th of April, 2008; the 29th of April, 2008; the 10th of November, 2009; the 8th of December, 2009 and the 1st of June, 2010, respectively. All five warrants were endorsed for execution by the High Court in this jurisdiction on the 23rd of June, 2010.

The first, third and fourth warrants in time are conviction type warrants on foot of which the respondent is wanted in the Republic of Poland to serve sentences, alternatively the balance of sentences, outstanding in respect of various offences of which he has been convicted in Poland and which are particularised in those warrants. The second and fifth warrants in time are prosecution type warrants on foot of which the respondent is wanted so that he might be put on trial for the offence(s) particularised in those warrants.

The respondent was arrested by Garda Michael Barry at 22 Main Street, Youghal, Co Cork on the 3rd of September, 2010 but does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the 2003 Act") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the 2003 Act.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the 2003 Act, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In so far as specific points of objection are concerned, the Court is required to consider a number of specific objections to the respondent's surrender on foot of each of the five European Arrest Warrants. Some of these objections are common to all five cases, while others are case specific.

The following objection is common to all five cases:

> "The surrender of the respondent in respect of the said offence(s) to the Republic of Poland is prohibited by section 37 of the European Arrest Warrant Act 2003 because there are substantial grounds for believing that if the respondent were returned to the requesting country he would be exposed to a real risk of being subjected to inhuman and degrading treatment arising from the conditions in prison in Poland contrary to, *inter alia*, Article 3 of the European Convention on Human Rights."

In addition, the following case specific objections are pleaded:

> Re: Warrant No 1. of 5. – 15th April, 2008
>
> "The proposed surrender of the respondent on the conviction for "using violence" is in breach of section 38 (1) (a) of the Act of 2003 in that to correspond to an offence under Irish law, the "using violence" would have to be without lawful excuse and without consent of the injured party. The absence of lawful excuse and consent is not asserted. Though there may be some basis for inferring lack of consent, there is no basis for inferring absence of lawful excuse."
>
> Re: Warrant No 2. of 5. – 29th April, 2008
>
> "The proposed surrender of the respondent on the conviction as set out in the warrant is in breach of section 38 (1) (a) of the Act of 2003 in that:
>
> (a) to correspond to an offence under Irish law, the "cutting of a control cable" would have to be, *inter alia*, without lawful excuse and without the consent of the owner. The absence of lawful excuse and consent is not asserted. Though there may be some basis for inferring lack of consent, and there is no basis for inferring absence of lawful excuse.
>
> Re: Warrant No 4. of 5. – 8th December, 2009

"1. The surrender of the respondent is in breach of section 45 of the European Arrest Warrant Act 2003. The said convictions in:

Case reference XIX K 507/06: judgment of the District Court of Lublin, dated the 28th of April 2006, imposing a sentence of 1 year and 4 months for the offences of

(i) "demolishing jointing chamber manhole" incurring loss,

(ii) making a threat to kill,

respectively, were imposed *in absentia* without actual advance notification of the trial giving rise to the said convictions being given to the respondent. No undertaking pursuant to section 45 (b) (i) of the Act of 2003 has been furnished.

2. The proposed surrender of the respondent in respect of case reference ***XIX K 507/06***, on foot of the judgement of the 28th of April 2006, is in breach of section 38 (1) (a) of the Act of 2003 due to lack of correspondence in respect of a vital part of the judgment, namely, the offence of "demolishing a manhole" which offence is said to be "covered" by the said judgment. The said judgment of the District Court of Lublin dated the 28th of April, 2006 imposed a sentence of 1 year and 4 months for the offences of:

(a) "demolishing jointing chamber manhole" incurring loss,

(b) making a threat to kill."

Uncontroversial s. 16 issues

The Court has received an affidavit of Garda Michael Barry sworn on the 17th of November, 2010 and has also received and scrutinised copies of the European Arrest Warrants in this case. Moreover the Court has also inspected the original European Arrest Warrants which are on the Court's files and notes that they each bear this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

(a) the person before it is the person in respect of whom the five European Arrest Warrants with which it is presently concerned were issued;

(b) the five European Arrest Warrants in question have each been endorsed for execution in accordance with s. 13 of the 2003 Act;

(c) the five European Arrest Warrants in question are each in the correct form;

(d) subject to an adjudication and ruling on the issue raised by way of specific objection to the fourth warrant in time (i.e. European Arrest Warrant No 4. of 5. – dated 8th December, 2009) the respondent was not in any other case or instance tried *in absentia* such as to require an undertaking with respect to a re-trial;

(e) the Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005), to refuse to surrender the respondent under the 2003 Act;

(f) subject to an adjudication and ruling on the s.37 objection that has been raised in respect of all five warrants, and also subject to an adjudication and ruling on the case specific objections as to correspondence raised in respect of the first, second and fourth warrants respectively, the surrender of the respondent is not otherwise prohibited by Part 3 of the 2003 Act, or by the Framework Decision (including the recitals thereto).

(g) Without prejudice to (f), subject to the Court being satisfied as to correspondence in respect of the offences in first, second and fourth warrants respectively which are the subject of a specific objection based upon an alleged lack of correspondence on the which the Court must adjudicate, the requirements of s.38(1)(a) in relation to correspondence and minimum gravity are otherwise met in each instance.

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

The initial evidence adduced by or on behalf of the respondent

The respondent initially filed an affidavit sworn personally by him on the 12th of November 2010 in which he deals, *inter alia*, with prison conditions in Poland. The relevant portion of the affidavit is that between paragraphs 7 and 12 respectively, and it is in the following terms:

"7. I say that I was in prison in Poland at Poludniova Prison, Lublin, from the 18th of November 2005 until the 1st of March 2006 awaiting trial. There were 6 of us in a cell designed for a much smaller number -- probably 4 persons. I would estimate that the cell was 6 m long by 4 m wide -- 24 m² for all persons. There was one toilet only for the 6 persons behind a small partition which only offered limited privacy.

8. There was one sink in the cell and this was used for personal hygiene and also for washing our laundry. We were taken from the cells once a week to have a shower. We would then hang our laundry to dry in the cell. There was one window in the cell.

9. I was permitted one visit every month for one hour.

10. The cell was damp and the walls were wet. We cleaned the cell ourselves, despite our best efforts, with 6 men living in the cell, it remained dirty and smelled due to poor ventilation. There was constant cigarette smoke in the cell due to

prisoners smoking which added to the discomfort. Due in part to the cramped conditions, fights would erupt between the prisoners in the cell. I was not involved in any fights, but I found that the conditions exerted a severe strain on my mental health. I witnessed other inmates engage in self mutilation, apparently in response to the conditions of detention, though obviously such persons may have had other underlying mental health problems.

11. We were locked in the cell 23 hours a day and only had 1 hour's exercise in the yard every day.

12. The detention in these cramped, poorly ventilated conditions was demeaning, affected my mental health and was degrading. This was aggravated by the lack of sufficient exercise and access to fresh air and exercise area. I am concerned that if surrendered to Poland that I will be detained in similar conditions again. I am afraid that there is a real risk of being subjected to inhuman and degrading treatment arising from the conditions in prison in Poland. I am advised and believe that this would be contrary to, *inter alia*, article 3 of the European Convention on Human Rights."

In addition there is also an affidavit from the respondent's solicitor, Patrick Horan, sworn on the 23rd of March 2011. The relevant portion of his affidavit is contained between paragraphs 3 and 10 respectively, and it is in the following terms:

"3. I say and am advised that the European Court of Human Rights in the 'Orchowski v Poland' decision of the 22nd of October 2009 found that the prison conditions in which Orchowski was detained in Poland, constituted a violation of Article 3 of the European Convention on Human Rights.

4. The court's findings were based on conditions in Polish prisons which prevailed from 2000 until mid-2008. I say and believe from the information available to me that there has been no material change in the prison conditions referred to in the Orchowski case.

5. The Court stated in Orchowski *inter alia*, that Article 3 obliges a State to ensure that a detained person is so detained in conditions which (i) are compatible with respect for human dignity; (ii) that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and (iii) that given the practical demands of imprisonment, his health and well-being are adequately secured. The Court added that regard must be had to the length of detention and cumulative effects of the conditions of detention, when assessing those conditions.

6. The Court stated that such "... elements included, in particular, the availability of ventilation, access to natural light or air, adequacy of heating arrangements, compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, even in cases where a larger prison cell was at issue -- measuring in the range of 3 to 4 m² per inmate -- the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting".

7. The Court concluded that a combination of factors rendered his detention inhuman and degrading; a primary factor was overcrowding (namely less than 3 m² per inmate). The Honourable Court concluded that Mr Orchowski had for most of his detention, been afforded personal space of below 3 m² and, in addition to being obliged to take his meals inside his overcrowded cell, he was obliged to shower along with a group of strangers.

8. I beg to referred to the 'Report of the Human Rights Defender on the Activities of the National Preventative Mechanism in Poland in 2009' (hereinafter referred to as 'NPM') published in May 2010, a copy of which, upon which marked with the letters PH1, I have signed my name prior to the swearing hereof. In particular, I beg to refer to pages 114 -- 128 thereof and I say that the NPM visited 16 prisons in Poland over the period 18th January, 2009 to 31/12/09. The said visits focused on both the living conditions and medical care in existence at each prison.

9. In particular I say and am advised that the findings of the NPM revealed, *inter alia*:

(i) At page 115, the conditions of the residential premises at the Prison situated at Plock, Poland, visited between the 17th and 19th March 2009 were found to be overcrowded and there was a lack of full separation of sanitary facilities and cramped conditions in some cells.

(ii) At page 117, it was noted that in the prison in Kozieglowy, visited on the 27th and 28th of May 2009, walls and ceilings were found to be damp and mouldy and that was no efficient ventilation system.

(iii) At page 118, the solitary confinement room at the prison in Szutm, visited between the 25th and 26th of May 2009, had not been renovated in spite of the recommendation of the Human Rights Defender in September 2007 and the cells found to be filled with stench from the sewage system, while the walls were dirty and ruined.

(iv) At page 127, it was noted by the NPM, that in some cases smoke from the use of tobacco was reaching prisoners' cells as in the prison in Wojkowice, visited on the 7th and 8th of October 2009.

(v) The directors of almost all establishments visited by the NPM in 2009 complained about a lack of sufficient funds required to carry out the necessary renovations.

10. I say and believe that in light of the above and the experience of the respondent in prison in Poland, the current conditions in Polish prisons mean that substantial grounds exist for believing that if the respondent is surrendered, he faces a real risk of being subjected to treatment which is in violation of Article 3 of the European Convention on Human Rights and I therefore pray this Honourable Court to refuse the orders of surrender sought."

Additional information from the issuing judicial authority re prison conditions.

The applicant in his role as the Irish Central Authority requested certain additional information from the issuing judicial authority arising out of the s.37 objection raised in respect of each of the five European Arrest Warrants in this case in the light of the affidavits filed by or on behalf of the respondent. Under a covering letter of the 14th of January 2011 the issuing judicial authority forwarded information confirming that the respondent had indeed been in a Pre-Trial Detention Institution in Lublin in the period from 18.11.2005 to 01.03.2006. However, it was also asserted that the respondent did not file any complaints concerning the conditions in which he was detained during that period of pre-trial detention. Further, it is claimed that inspections carried out during this period by the

"penitentiary Judge" did not reveal "any infringements in this scope". The material forwarded included a letter dated the 12th of January, 2011 from the Director of the Pre-Trial Detention Institution in Lublin, one Lt Col Zbigniew Migal, enclosing two documents for the information of the issuing judicial authority viz (i) the official note of "Junior Ensign Edyta Kurkowska, Junior Inspector of Human Resources -- Organisational Department of Pre-trial Detention Institution in Lublin", and (ii) photocopies of extracts from the reports of the penitentiary judge of the Pre-Trial Detention Institution in Lublin for the relevant years. However, in the first instance only the letter dated 12th of January, 2011from Lt Col Migal was forwarded by the issuing judicial authority to the applicant. The accompanying enclosures were not forwarded.

The letter from Lt Col Migal dated the 12th of January 2011 states, *inter alia*,

> "I inform that as follows from the official note of junior ensign Edyta Kurkowska, junior inspector of human resources -- organisational department of pre-trial detention institution in Lublin, Michal Sebastian Mazurek did not file any complaints about administration of this Detention Institution during the years 2005 -- 2006 (the years when he stayed in this unit). It should also be mentioned that the result of the inspection of the penitentiary judge of this unit in the years 2005 and 2006 allowed to state that the Pre-Trial Detention Institution in Lublin functions properly, going by legalism and performing the penitentiary tasks properly and as a result of this achieving good results in the social rehabilitation process of convicts.
>
> With the above-mentioned it should be stated that all charges of Michal Mazurek are completely groundless."

Arising out of a further request for additional information from the applicant to the issuing judicial authority, the enclosures that had been initially omitted were duly forwarded to the applicant under the cover of the letter from the issuing judicial authority dated the 11th of February 2011. The contents of these documents, to which it is not necessary to refer to in detail, is as represented in Lt Col Migal's of the 12th of January 2011. In relation to the inspection reports these consisted of a report following an inspection of the Pre-Trial Detention Institution in Lublin carried out in the period from the 11th to the 14th of September 2006 by a penitentiary inspector of the Lublin Provincial Court, a Judge Artur Achtymowicz and a similar report carried out in the period from the 5th to 6th of September 2005, again by a penitentiary inspector of the Lublin Provincial Court. On this occasion it was conducted by Judge Daniela Sieñko. According to each of the reports in question the penitentiary judge considered *inter alia* "the living standards of prisoners". Neither report contains any adverse finding concerning "the living standards of prisoners". Moreover, in both years the prison was found to be "functioning properly" "correctly fulfilling the penitentiary tasks" and "gaining good results in the rehabilitation process of the convicts".

Finally, the applicant sought to put before this Court a letter on behalf of the issuing state addressed to the Irish Central Authority and dated the 17th of December 2010. This letter has previously been produced to this court in other European Arrest Warrant cases in which a section 37 objection has been raised by the respondent based upon prisoners in Polish prisons allegedly being subjected to inhuman or degrading conditions. Indeed, the court has previously considered this letter and placed reliance upon it in its decision in *Minister for Justice, Equality & Law Reform v Sawczuk* [2011] IEHC 41. The letter is in the following terms:

> "The Government of the Republic of Poland would like to assert that in accordance with article 91 section 1 of the Polish Constitution, the European Convention on Human Rights is a directly binding law, which means that all governmental institutions of Poland, including the Central Board of Prison Service and Courts, are obligated to act in accordance with all of its provisions, including Article 3. At the same time any person who feels that their rights have been violated, is entitled to seek legal remedies available under Polish law.
>
> All judges must take into account relevant legislation on penalties relating to imprisonment or other measures depriving a person of liberty. These provide that all forms of punishment, punitive measures, security and preventative, shall be carried out in a humane manner, respecting the dignity of the prisoner. Torture and inhumane or degrading humiliating treatment and punishment are prohibited (Articles 4, 102 and 103 of the Executive Penal Code).
>
> Regulations in relation to conditions in prison cells and daily food norms must be followed. These specify that the residential area in a cell for a convicted person shall not be less than 3 m². (An area smaller than 3 m² is only admissible under exceptional circumstances, clearly defined by law. This cannot be less than 2 m²). A report by the Directorate-General of the Prison Service shows that as of the 10th of December 2010 population density in correctional facilities and detention centres nationwide is 97.3%. (The data is available on http://sw.gov.pl/pl/o-sluzbie-wiezienne l/statvstyka/statvstyka-biezaca/ and is updated regularly). In accordance with standards set out, the cells are equipped with appropriate furnishings, providing all prisoners with a separate place to sleep in, adequate hygiene conditions, supply of air and appropriate seasonal temperature, with adequate lighting for work and reading.
>
> There are relevant provisions nutritional requirements, calorific value, nutritional elements, vegetable provisions etc. A prisoner gets three meals a day and beverages, including at least one hot meal per day, taking into account a prisoner's age, employment, religious and cultural requirements. Dietary requirements of prisoners with health problems are met following doctor's prescriptions."

Further evidence adduced by the respondent

The respondent sought, and was granted, leave to file a supplemental affidavit (sworn on the 5th day of April 2011) for the purposes of responding to the additional information supplied by the issuing judicial authority. He says the following at paragraphs 3 to 6 inclusive thereof:

> "3. I refer to an e-mail dated the 27th of January 2011 from the Chief State Solicitor in the within proceedings which in turn enclosed, *inter alia*, the following:
>
> Letter from the Ministry of Justice in Poland dated the 17th of December, 2010.
>
> I say and am informed that in a nutshell, this letter purports to indicate that as of the 10th of December, 2010, prison conditions in Poland are not inhuman or degrading.
>
> (The letter of the 17th of December 2010 is then exhibited as MM1).
>
> 4. I say that the above letter states *inter alia* that "as of 10th of December, 2010, the population density in correctional facilities and detention centres nationwide is 97.3%". I say that when you look at the Polish prison service official website

however, (www.sw.gov.pl) and at the breakdown of that statistic, it is clear that it is an average figure. By way of example, the Polish prison population between the 18th of February 2011 and the 25th of February 2011 was stated to be at 99.5%. However, for what appears to be the prison population at Lowicz Prison referred to above, occupancy rates of 76.7%, 110.3% and 96.8% are given (apparently for subdivisions of the prison). I beg to refer to a printout from the Polish prison website …

(The printout is then exhibited as MM2)

5. As a result of the above, I say and believe that the above statements that occupancy is less than 100% is misleading in that it suggests that overcrowding is no longer a problem. I say that it is obvious that overcrowding still is a problem in Polish prisons, even on the information provided by the Polish prison service itself.

6. I say that there is a real risk that I will suffer inhuman and degrading treatment if surrendered to Poland due to the prevailing prison conditions. I therefore pray that this honourable Court to refuse the order for surrender sought…"

Further additional information.
In it's judgment in *Sawczuk* this Court, referring (*inter alia*) to the letter of the 17th of December, 2010, expressed the view that:

> "The Court has been impressed by the level of detail supplied, by the references to the data sources unpinning the claims made, by the fact that the relevant data is in the public domain and may be accessed via the internet, and by the up to date nature of the information in question, and in the circumstances has no hesitation in attaching considerable weight to it."

However, in that case there was no specific criticism by the respondent of the data presented on the associated internet site, to which the letter reader is referred and, by inference, invited to consult. In the present case, however, the respondent suggests that recourse to a mean or average percentage occupancy figure in respect of all Polish prisons may present a misleading picture and that for the true picture in each region and sub-region of Poland, and in each individual prison, it is necessary to "drill down" into the raw data as tabulated in the table which is available on the said internet site, a copy of which is exhibited MM2 with the respondent's supplemental affidavit. Further, the respondent through his counsel, Mr Munroe, has further complained that the internet table is not only published in Polish with no translation but that it also contains unexplained abbreviations for which there is no decoding legend. He argued that in the circumstances the Court ought to exercise caution in attempting to interpret the data contained in the internet table, and he urged upon the Court that while parts of the table might, with the benefit of the translation of column headings and narrative text, prove self explanatory, other parts of it utilising the aforementioned unexplained abbreviations would never be self explanatory. He urged upon the Court that it was not entitled to speculate as to the meaning of relevant abbreviations and that unless the Court was in a position to comprehensively understand the table in question it should not place any reliance upon it for fear of misinterpretation, and the doing of an injustice.

Having carefully considered Mr Munroe's said submissions, particularly those in regard to the potential dangers associated with attempting to interpret the data presented in tabular form on the website in question in the form in which it is currently presented, this Court decided of its own initiative to make an Order pursuant to s. 20(1) of the 2003 Act requesting yet further information from the issuing state concerning the explanation and decoding of abbreviations used in the internet table published on the website in question, and translation of column headings and narrative text within, and associated with, the said table. The s.16 hearing in this matter was then adjourned pending receipt of the requested additional information.

The Court's request was duly responded to by the issuing judicial authority in a letter to the applicant dated the 11th of April 2011 in the following terms:

> "In reply to the letter of 6. 04. 2011 in the case relating to Polish citizen Michal Sebastian Mazurek, and born on the 20. 11. 1983 -- Circuit Court in Lublin, 4th Penal Division informs that pursuant to content of article 100 of Penal Executive Code the convict serves the sentence in the penal facility which is located, as much as it is possible, nearest to the place of his residence, transfer of the convict to another facility can take place only upon justified reasons. Considering the above, this Court is not able to indicate the penal facility in which Michal Mazurek will be put after surrender precisely, as it will take place pursuant to the indications of the penitentiary committee, but it will be at penal facility within Lublin region most likely.
>
> I enclose the printout from the www site of National Portal of Prison Service (www. sw.gov.pl) with information on population in living departments in penitentiary units -- the state for 1.04 of this year with translation of headings and notations -- the similar printout presenting the state for 25.02 of this year was enclosed to your letter.
>
> I also inform them that the symbols of types of facilities included in the printouts mean:
>
> T A -- pre-trial detention facility;
>
> P-1 -- penal facility of closed typed for the persons serving their sentence for the first time;
>
> P-2 -- penal facility of semi-open type for the persons serving their sentence for the first time;
>
> P-3 -- penal facility of open type for the persons serving their sentence for the first time;
>
> R-1 -- penal facility of closed typed for the penitentiary recidivists;
>
> R-2 -- penal facility of semi-open typed for the penitentiary recidivists;
>
> R-3 -- penal facility of open typed for the penitentiary recidivists;
>
> M-1 -- penal facility of closed typed for the juveniles;
>
> M-2 -- penal facility of semi-open typed for the juveniles;

M-3 -- penal facility of open typed for the juveniles;

t -- therapeutic departments”

As promised, a translation of headings and narrative text within the Internet table was also provided. The general heading to the document was translated as follows (with formatting and layout preserved):

Information on population

of living departments

of penitentiary units

On 01.04.2011

BIS-03401- 14/11/804

One does not include the following to the capacity and population of the units:

isolation cells

cells and departments for "N"

infirmaries

hospitals

houses for the mother and the child

departments of temporary lodgings

Actual population 25.03.2011 01.04.2011 Increase total

The headings in the main part of the table were then translated and, with the benefit of the translation, the mode of presentation of the data is readily apparent.

Name of the unit	Sex	Type of unit	Capacity	Number of detained	% of popul.
TOTAL					

The names of the various regions were then translated as follows:

“In the column: Name of the unit:

OKREG BIALOSTOCKI – BIALYSTOCK REGION

OKREG BYDGOSKI – BYDGOSZCZ REGION

OKREG GDAÑSKI – GDAÑSK REGION

OKREG KOSZALIÑSKI – KOSZALIN REGION

OKREG KRAKOWSKI – KRAKOW REGION

OKREG LUBELSKI – LUBLIN REGION

OKREG LÓDZKI – LÓD REGION

OKREG OLSZTYÑSKI – OLSZTYN REGION

OKREG OPOLSKI – OPOLE REGION

OKREG POZNAÑSKI – POZNAÑ REGION

OKREG RZESZOWSKI – RZESZÓW REGION

OKREG SZCZECIÑSKI – SZCZECIN REGION

OKREG WARSZAWSKI – WARSZAWA REGION

OKREG WROCLAWSKI – WROCLAW REGION”

Further, previously unexplained abbreviations used within the column headed *type of unit* were then explained:

> "AŒ –Pre-trial detention facility
>
> ZK – Penal facility
>
> OZ – external department"

It was further explained that in the column headed "sex" the abbreviations used may be decoded as follows:

> *"In the column: sex:*
>
> M – male, K – female"

An occasional entry that might appear in the columns headed "capacity" "number of detained" and "% of popul." was also explained as follows:

> *"In the columns: capacity, number of detained and % of popul.:*
>
> ZAWIESZONY – SUSPENDED"

Finally, a legend which routinely appears at the end of the table was decoded and translated as follows:

> "PS -- therapeutic department for people with non-psychotic mental disorders or mentally disabled
>
> NR -- therapeutic department for people addicted to stupefacient or psychotropic substances
>
> AL -- therapeutic department for people addicted to alcohol
>
> FN -- therapeutic system for blind people
>
> Oœr.diagnost -- Diagnostic centre
>
> Z -- convicted men who are necessary for service of the unit who stay in AŒ or ZK reserved for women."

The s. 37 objections

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

> "A person shall not be surrendered under this Act if—
>
> (a) his or her surrender would be incompatible with the State's obligations under—
>
> (i) the Convention, or
>
> (ii) the Protocols to the Convention
>
> (b) ……..
>
> (c) there are reasonable grounds for believing that—
>
> (i) …….
>
> (ii) ……..
>
> (iii) were the person to be surrendered to the issuing state—
>
> (I), ……or
>
> (II) he or she would be tortured or subjected to other inhuman or degrading treatment."

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

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

In my judgment in *Minister for Justice, Equality & Law Reform v Sawczuk* [2011] IEHC 41 I reviewed in some detail the law relating to objections under s. 37 based upon an alleged real risk of ill-treatment contrary to Article 3 of the Convention. I do not propose to repeat that exercise. It is sufficient to state that the following principles can be distilled from the authorities:

> - "The normal presumption is" (per Fennelly J in *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45) "the courts of the executing member state, when deciding whether to make an order for surrender must proceed on the assumption that the courts of the issuing member state will, as is required by Article 6.1 of the Treaty on European Union, "respect … human rights and fundamental freedoms"." (per Fennelly J in *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 I.R. 669);

- However, "by virtue of the absolute nature of the obligation imposed by Article 3 of the European Convention on Human Rights and Fundamental Freedoms, which provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*", the objectives of the system of surrender pursuant to the Council Framework Decision on the European Arrest Warrant cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3." (per Fennelly J in *Rettinger*);

- The two foregoing principles are readily reconcilable and they do not imply that "there is any underlying conflict between the Convention and the Framework Decision." (per Fennelly J in *Rettinger*);

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

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

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

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

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

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

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

In the present case the respondent has put evidence before the Court concerning his personal experience of overcrowding, undignified and, he contends, inhumane and degrading conditions while on remand in Poludniova Prison, Lublin, from the 18th of November 2005 until the 1st of March 2006. His evidence is partially corroborated by the additional information put before the Court by the applicant which confirms that he was indeed a remand prisoner in Poludniova Prison, Lublin at the relevant time. However, the issuing judicial authority does accept that the prison conditions he describes were as he has stated. His claims have been characterised as "groundless" but in fairness to the respondent the Court is inclined to accept as being fair comment a submission made on his behalf by his counsel, Mr Munroe, to the effect that there has been no real engagement with the specifics of the respondent's allegations. The high water mark of the evidence adduced in reply, certainly in so far as the historical complaint is concerned, is that Mr Mazurek made no complaints at the time, and that during both 2005 and 2006 respectively the prison in question was inspected by a penitentiary judge who considered *inter alia* "the living standards of prisoners" and that neither report contains any adverse finding concerning "the living standards of prisoners". Moreover, in both years the prison was found to be "functioning properly" "correctly fulfilling the penitentiary tasks" and "gaining good results in the rehabilitation process of the convicts".

However, this Court does not know, and has not been told, against what standards, if any, "the living standards of prisoners" were gauged or measured by the inspecting penitentiary judge. In that regard, two further facts relied upon by the respondent cannot be gainsaid. First, the inspections in question predated the ECHR judgment in *Orchowski v Poland,* delivered of the 22nd of October 2009, in which Polish prison conditions prevailing between 2000 and 2008 were severely criticised, particularly with reference to overcrowding, and in which it was found that the prison conditions in which Mr Orchowski was detained constituted a violation of Article 3 of the European Convention on Human Rights. Secondly, the report of the Human Rights Defender on the activities of the National Preventative Mechanism in Poland in 2009, exhibited in the affidavit of Mr Horan, suggests that as late as 2009 situations or circumstances had been witnessed by representatives of the Human Rights Defender that could be considered inhuman treatment or punishment.

In the summary of the Human Rights Defender's report contained in chapter 8 of the document, it is stated:

> "In the course of the activities of the National Preventative Mechanism in Poland conducted in 2009, no instances of torture were found in the territory of the Republic of Poland. During the visits, the representatives of the Human Rights Defender witnessed, however, situations or circumstances that could be considered inhuman treatment or punishment, or that could lead to such unacceptable forms of treatment.
>
> The main comments and recommendations formulated after the visits regarded the living conditions in such places of detention as as: penitentiary establishments, centres for foreigners applying for refugee status or asylum, rooms within the Police organisational units for detained persons or Police emergency centres for children."

In the chapter of the report specifically dealing with the living conditions in the visited penitentiary establishments the rapporteurs note a widespread need for renovation works. Instances of overcrowding were also observed and it is noted in respect of one particular prison visited in Plock that "the living conditions of inmates were undoubtedly hard", due, in particular, "to the technical conditions and appearance of numerous cells and baths, the lack of full separation of sanitary facilities and cramped conditions in some cells. It was emphasised that the accumulation of such inconveniences may lead to deeming them inhuman or degrading." These were not isolated findings. The report raises similar concerns in respect of a significant number of other penitentiary institutions that were also visited for the purposes of the same report.

By the same token it must also be stated that not every penitentiary institution in Poland was visited. Moreover, although the full list of institutions visited is set out in Appendix 1 to the report it does not appear that any penitentiary institution within the Lublin region was visited. Further, the body of the report makes no specific reference to, and offers no criticism of, any penitentiary institution report within the Lublin region. Further, it is fair to say that the general tenor of the report was to record a gradually improving situation, albeit that it was also felt that improvements were not being implemented at a sufficiently rapid pace to allay all concerns.

The Court is satisfied that the respondent has, in this particular case, placed sufficiently cogent evidence before the Court to place it on its enquiry as to whether or not 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, notwithstanding that the normal assumption on which the Court would proceed, were it not for such evidence, would be that the issuing member state will respect human rights and fundamental freedoms, as is required by Article 6.1 of the Treaty on European Union .

Having said all of that, the respondent's evidence in this case relates to times past. It is historical and this Court must be forward looking in its assessment. The most up to date information is that contained in the letter of the 17th December, 2010 which must be read in conjunction with the most up to date data available from the website given in the letter, namely that of the National Portal of the Polish Prison Service. In this particular case, the most up to date information available as of the date of the hearing was data updated to the 25th of February 2011. Moreover, with the benefit of the additional information dated the 11th of April 2011 the Court can now fully understand and decode all aspects of the table provided.

The position as of the 25th of February of this year was that the actual prison population nationally in Poland was 80,938 which figure represents an occupancy of 99.5% of capacity. However, when one drills down to the Lublin Region, which is the region within which the respondent is most likely to be detained if surrendered, there was an actual prison population within that region of 4,326 which figure represents an occupancy of 98.7% of capacity. Further drilling down into the data reveals that there are eight penal facilities of various types within the Lublin region (excluding one diagnostic centre), all of which accept male prisoners. The occupancy of one (a pre-trial detention facility) is as low 78.3% while of another (a semi-open facility for recidivists) is as high as 123%. The latter figure is aberrational compared with all of the others, but is not of great concern given the "semi-open" character of the institution in question. However, the occupancy in all of the other cases is in the range between 90%-100% plus or minus 10 % either way. In the Court's view this is well within what must be considered as an acceptable margin of appreciation. The Court does not consider that any prison institution whose occupancy figures come within that range could be regarded as being so overcrowded as to give rise a "real risk" of living conditions amounting to inhuman or degrading treatment.

Leaving aside the specifics of the case, the Court should reiterate the view previously expressed in *Sawczuk* that it is impressed, and reassured, by the willingness of the issuing state to provide detailed statistics, on a constantly updated basis, via the internet, concerning the occupancy of it's prisons. More than anything this represents tangible evidence of a determination on the part of the issuing state to address the overcrowding issues in its prisons which have justifiably been the subject of criticism in the past. The very transparency and openness of their approach on this issue engenders confidence that the well documented overcrowding issue that unquestionably existed in the past is now being, and will continue to be, seriously addressed.

Of course, the respondent's fears, based upon his historical personal experience, also relate to aspects of prison conditions other than overcrowding. However, the contents of the letter of the 17th of December 2011, which have not been contradicted, provides the Court with adequate reassurance concerning the size of residential cells, their equipment with appropriate furnishings, issues such as the provision of a separate place for prisoners to sleep in, the provision of adequate hygiene conditions, supply of air and appropriate seasonal temperature, and adequate lighting for work and reading.

The Court is also reassured by the information, which has not been contradicted, that as of the 17th of December 2010 at least, the dietary needs of prisoners in Polish prisons are regulated concerning nutritional requirements, calorific value, nutritional elements, vegetable provisions etc. The information is that a prisoner gets three meals a day and beverages, including at least one hot meal per day, taking into account a prisoner's age, employment, religious and cultural requirements. The Court is also told that dietary requirements of prisoners with health problems are met following doctor's prescriptions.

Perhaps the greatest reassurance of all stems from the information that the European Convention on Human Rights is a directly binding law in Poland, which means that all governmental institutions of Poland, including the Central Board of Prison Service and Courts, are obliged to act in accordance with all of its provisions, including Article 3, and that any person who feels that their rights have been violated, is entitled to seek legal remedies available under Polish law. The fact that the *Orchowski* case was brought, and was ultimately successful before the ECHR (which requires previous exhaustion of domestic remedies) demonstrates that aggrieved persons can invoke their Convention rights, both before the Polish Courts and the ECHR, and ultimately secure vindication of them.

Accordingly, in all the circumstances of this case the Court is not satisfied that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR. In the circumstances the court is not disposed to uphold the objections in each case based upon s. 37 of the 2003 Act.

The correspondence issues

Re: Warrant No 1. of 5. – 15th April, 2008

In this court's view correspondence is clearly demonstrated in respect of the single charge which is the subject of this warrant with the offence under Irish law of attempted robbery contrary to common law, and also with the offence of s. 2 assault. The respondent complains that the particulars recited fail to specify that what was done was done "without lawful excuse". The Court is satisfied that, contrary to what is asserted, there is a clear basis for inferring absence of lawful excuse in circumstances where the facts alleged include subjecting the victim to blows on the head, knocking him over and kicking him all over his body. .

Re: Warrant No 2. of 5. – 29th April, 2008

Once again, in this instance the complaint is that the particulars recited fail to specify that what was done was done "without lawful excuse". However, the Court is again satisfied that in this instance correspondence is clearly demonstrated in respect of an offence

of attempted theft alternatively criminal damage contrary to s. 2 of the Criminal Damage Act, 1991. The Court is again satisfied that, contrary to what is asserted, there is a clear basis for inferring absence of lawful excuse in circumstances where the facts alleged assert that what was done was done "with the intention of a wilful taking for appropriation purposes" and that he failed to achieve his objective by virtue of being "caught red handed".

Re: Warrant No 4. of 5. – 8th December, 2009

Finally, it is unnecessary to address the correspondence issues raised in relation to the offences in this warrant relating to file no XIX K 507/06 because the respondent was tried *in absentia* in respect of these offences without due notification of his trial, and no s. 45 undertaking is forthcoming. In the circumstances the respondent cannot be surrendered in respect of these offences and the Court must sever them from this warrant. There is no objection as to correspondence with respect to the remaining offences, i.e. those relating to file no XIX K 899/05.

The absence of an s.45 undertaking with respect the offences tried *in absentia*

As indicated above, this relates to the warrant of the 8th of December, 2009, i.e. the fourth warrant in time, in so far as it concerns the offences in this warrant relating to file no XIX K 507/06. Because the respondent was tried *in absentia* in respect of these offences without due notification of his trial, and no s. 45 undertaking is forthcoming, he cannot be surrendered on foot of these offences. However, the offences in question are capable of being severed from the warrant and the Court will do so.

Duplication between the second warrant in time and the fifth warrant in time.

It is common case that both the second warrant in time and the fifth warrant in time seek the rendition of the respondent for an offence relating to file reference IV K 677/06 and in that respect there is duplication. Clearly it would be inappropriate to make two orders for the respondent's surrender in respect of the same offence. Accordingly, there being nothing to prevent severance of that offence from the fifth warrant in time, the Court will adopt that course and order the offence relating file reference IV K 677/06 to be severed from that warrant, i.e. the European Arrest Warrant dated 1st of June 2010.

Conclusion

Subject to the severance orders indicated above, the Court is disposed to make s. 16 Orders and to surrender the respondent to the issuing state on foot of all five European Arrest Warrants.