Neutral Citation Number: [2011] IEHC 252

THE HIGH COURT

2010 43 EXT

IN THE MATTER OF THE EUROPEAN ARREST WARRANT ACT 2003,

AS AMENDED

BETWEEN

THE MINISTER FOR JUSTICE AND EQUALITY

APPLICANT

- AND -

MAREK SIWY

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 22nd day of June, 2011

Introduction

The respondent is the subject of a European arrest warrant issued by the Republic of Poland on the 28th of July, 2009. The warrant was endorsed for execution in this jurisdiction by the High Court on the 5th of February, 2010. The respondent was arrested on the 13th of April, 2010, and brought before the High Court in accordance with s. 13 of the European Arrest Warrant Act 2003, as amended, (hereinafter referred to as "the Act of 2003"). The respondent 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 Act of 2003 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.

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 Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In addition the Court is required to consider in the particular circumstances of this case a number of specific objections to the respondent's surrender, namely, those pleaded at paragraphs VI & VII respectively of the Points of Objection filed on the respondent's behalf, which are in the following terms:

> "VI. If surrendered, the Respondent would face further lengthy delay in the prosecution of his case, and the imposition of pre-trial detention during that time, which would breach the Respondent's rights under Articles 5 and 6 of the European Convention on Human Rights. The Respondent is at real risk of a violation of these fundamental rights, and will rely on the recent observations of the European Court of Human Rights in respect of delay in Poland in *Kauczor v. Poland* (Application Number 45219/06, 3'd May, 2009). The risk is such that the Respondent's surrender to Poland is prohibited by section 37 of the European Arrest Warrant Act 2003 (as amended).
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> VII The Respondent will be placed in custody in the Polish prison system on his surrender to Poland, and will be imprisoned if convicted, such that surrender is prohibited by section 37 of the European Arrest Warrant Act 2003 (as amended) because of the inhuman and degrading conditions, including systemic overcrowding, in Poland's prisons which are such that:
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> > (a) there are substantial grounds for believing that the Respondent is at real risk of exposure to inhuman or degrading treatment, and overcrowding, if returned to Poland such that his surrender would violate the Applicant's duties under section 37(l)(a) of the European Arrest Warrant Act 2003 (as amended), Articles 3 and or 8 of the European Convention on Human Rights, and section 3 of the European Convention on Human Rights Act 2003;
> >
> > (b) the risk of the Respondent being exposed to inhuman or degrading treatment in Poland's prisons is such that his surrender would be in breach of the Applicant's duties and the Respondent's rights under the Constitution and therefore in breach of section 37(1)(b) of the European Arrest Warrant Act 2003 (as amended);
> >
> > (c) there are reasonable grounds for believing that were the Respondent to be surrendered to Poland that he would be subjected to inhuman or degrading treatment, such that his surrender would be in breach of section 37(l)(c) of the European Arrest Warrant Act 2003 (as amended).
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> The Respondent shall rely inter alia on the recent assessment by the European Court of Human Rights of the systemic overcrowding in Poland's prisons in its judgment in *Orchowski v. Poland* (Application Number 17885/04, 2211d October, 2009)."

In essence the respondent contends that in all the circumstances of the case his surrender is prohibited by Part 3 of the Act of 2003, and/or by the Framework Decision (including the recitals thereto).

Uncontroversial s. 16 issues

The Court has received an affidavit of Garda Michael O'Brien sworn on the 4th of May 2010 and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and which bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the person before it is the person in respect of whom the European arrest warrant was issued;
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> (b) the European arrest warrant has been endorsed for execution in accordance with s. 13 of the Act of 2003;
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> (c) the European arrest warrant in this case is in the correct form.
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> (d) the High 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 Act of 2003.

The respondent is wanted for prosecution in respect of one offence of murder contrary to article 148.1 of the Polish Penal Code, the particular circumstances of which are set out at paragraph 2 of Part E of the European arrest warrant. In that regard the issuing judicial authority seeks to rely upon paragraph 2 of Article 2 of the Framework Decision and the box relating to "murder/grievous bodily harm" has been ticked in Part E.1. of the warrant. It is clear from paragraph 1 of Part C of the warrant that an offence under article 148.1 of the Polish Penal Code carries a maximum penalty of imprisonment for life. In the circumstances, the minimum gravity requirement of Article 2 of the Framework Decision is met. Accordingly, correspondence with an offence under Irish law does not require to be demonstrated.

Clearly, as the respondent has not yet been tried and is an unconvicted person who is wanted for prosecution, the question of an undertaking under s. 45 of the Act of 2003 simply does not arise.

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 Act of 2003 as being a state that has under its national law given effect to the Framework Decision.

Evidence adduced by or on behalf of the respondent, and related legal materials

The respondent has filed an affidavit sworn by him on the 17th of November, 2010. Certain of the averments contained therein were intended to support objections that are no longer being proceeded with and it is not proposed to review these. To the extent that it is now relevant the said affidavit contains the following averments as to matters of fact at paragraphs 3, 4, 6 and 7, respectively :

> 3. I was born on 4th October, 1980, in Pinczow, Poland, and am a citizen of Poland. I came to Ireland in February, 2007, because a Polish friend of mine told me there was work available on a construction site in County Cork. I came on 10th February, 2007, and I worked for several months as a general labourer on a construction site with Macklin Construction. My partner, Anna Tucznio, joined me from Poland after several months. We lived in 54 Caseltejane Court, Glenmire (sic), Cork. She continues to live there with our young son, Alan, who was born on 4th of March, 2010. After several months working as a labourer in 2007, most of the workforce were let go including me. I found a job about one month later as a van driver for a bakery and did this for about one year. I then worked as a kitchen porter at the Radisson Hotel, at Cork airport. I then found work as building labourer again, and then worked laying patios for an employer called Michael O'Brien. My partner, Anna, also worked in Cork until just before the birth of Alan. She worked at Monkey Maze in Glenmire.
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> 4. My partner and I were building a new life together in Ireland and were working hard and the arrival of Alan has been very special and important to us. Life was difficult in Poland. I had always lived in Poland prior to coming to Ireland. I came to the adverse attention of the Polish police in 2002 and 2006 in Krakow where I lived. In 2002 I was given a suspended prison sentence for an offence of fraud, and had to sign on at a police station three times a week. In 2006 I was given a suspended sentence for handling stolen property. When I came to Ireland I wanted to put this behind me, and when my partner joined me we were determined to work hard and to build a new life together."
>
> "6. If I am surrendered to Poland I believe that it will take a long time for my trial to be heard and that I will be detained on remand pending my trial because I will not be able to obtain bail because of the severity of the charge against me. My pre-trial detention could last several years. I say and am advised that the inordinate length of time of pre-trial detention, and the inhuman and degrading conditions of such detention, are well documented by the European Court of Human Rights, and have been condemned as violating the European Convention on Human Rights. Two such cases are referred to in the Points of Objection in my case. I say and believe that the conditions in Poland's prisons are extremely bad, and have been condemned by the European Court of Human Rights which has held that the conditions can amount to inhuman or degrading treatment and that there is a systemic problem in Poland's prison system which violates Article 3 of the Convention. If am returned to Poland, I am at real risk of being sent to a prison where I will be detained in conditions that are inhuman or degrading because of overcrowding, lack of proper sanitation, lack of privacy and the practice of keeping prisoners locked in their cell for 23 hours a day.
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> 7. I fear that I will be subjected to undue delay in custody if I am returned to Poland to such an extent as to breach my rights under Articles 5 and 6 of the European Convention on Human Rights. Further, I say that that there has already been an inordinate delay in respect of the offence alleged against me and I say respectfully that, in the absence of reasonable explanation, the prosecutorial delay is such that a trial would breach my rights under Article 6 of the European Convention on Human Rights, and that this issue of inordinate prosecutorial delay is one that can and should be determined by this Court because my surrender would destroy the life that my wife and I have built in Ireland and would violate our rights under Article 8 of the European Convention on Human Rights."

The respondent also relies upon a US State Department 2009 Human Rights Report on Poland, dated the 11th of March, 2010; a report of Helsinki Foundation for Human Rights (hereinafter the HFHR) commenting on replies prided by the Government of Poland to the list of issues raised by the UN Human Rights Committee, and an e-mail dated 23 March 2011 from a Dr Piotr K³adoczny of the HFHR. In addition counsel for the respondent relies upon the judgments of Denham J, and Fennelly J, respectively, in the Supreme Court case of *Minister for Justice, Equality & Law Reform v Rettinger* [2010] IESC 45; as well as the decisions of the European Court of Human Rights in *Orchowski v Poland* (E.Ct.H.R, 22nd October 2009, Application No 17885/04) and *Kauczor v Poland* (E.Ct.H.R, 3rd February 2009, Application No 45219/06).

Additional information relied upon by the applicant
The applicant relies upon 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, as well as in *Minister for Justice, Equality & Law Reform v Mazurek* (Unreported, High Court, Edwards J., 13th May, 2011) and other cases. 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.
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> 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).
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> 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-wieziennel/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.
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> 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."

In addition the applicant relies upon a table downloaded from the website URL mentioned in the said letter (the address of the web portal of the Polish National Prison Service) updated to the 25th of March 2011 (the case opened before this Court on the 29th of March 2011) containing detailed statistics and other information relating to the capacity of, and actual the prisoner populations within, the various prisons located throughout Poland. This document showed the prisoner population nationally to be at 99.7% of capacity. Moreover, the table contains significant underlying detail concerning the situation at both regional and local level. The data contained therein is to be interpreted in accordance with this Court's judgment in *Mazurek* and with due regard to further additional information dated the 11th of April, 2011 which is reproduced in full in the *Mazurek* judgment.

With respect to the pre-trial detention issue, the applicant also relies on yet further additional information provided by the issuing state in response to a s.20 (1) request made by this Court on the 29th of March 2011 requesting details concerning whether a person in the respondent's position would be entitled, if surrendered, to apply for bail and also concerning the anticipated or likely length of pre-trial detention in the event of such a person being denied bail. The said additional information is contained within a letter dated the 1st of April, 2011 from the District Public Prosecutor in Cracow on behalf of the issuing state addressed to the Irish Central Authority. The relevant material is in the following terms:

> "Pursuant to Art 250§1 of the Polish Penal Code, a detention awaiting trial of a suspect can occur only on the basis of a decision of an independent Court, which assesses the validity of using this measure, taking into consideration all the facts of the case under examination, and in particular decides whether it is not sufficient to apply non-detention measures, including a financial security (bail). The court also decides on the possible prolongation of the period of detention awaiting trial.
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> The suspect has the right to appeal the decision on their detention (and on the prolongation of the detention period) to the court of higher instance.
>
> The suspect also has the right to petition for quashing the detention awaiting trial or replacing it with another measure, e.g. a financial security (bail). The suspect Marek Siwy did not file a motion for applying a financial security in his case.
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> The period of Marek Siwy's detention awaiting trial in the preparatory proceedings (i.e. before the commencement of the trial) will be specified by the Court, after the suspect is surrendered to Poland.
>
> As the actions related to evidence in the preparatory proceedings (case), in which Marek Siwy is a suspect, have been accomplished, it is assumed that the period of detention awaiting trial will not be long."

The objection based upon Polish prison conditions

Much of the first day of the hearing, i.e. the 29th of March 2011, was devoted to the argument based upon Polish prison conditions, and specifically the contention that if the respondent were to be surrendered to the issuing state there is a real risk that he would be subjected to conditions that would breach his rights under Article 3 of the European Convention. The argument was based upon the judgment and ruling of the E.Ct H.R. in the *Orchowski* case, and the submission that the judgment in that case, which was said to be a "pilot judgment", had made it clear that a minimum cell space of 3m² should be available to each prisoner and that anything less than that would give rise to a violation of the prisoner's rights under article 3 of the Convention. It was urged that the documents relied upon by the applicant indicated a significant basis for on-going concern, and that even the information from the Polish Prison Service suggested that in some instances prison populations were at levels in excess of 100% of their capacity, and that it could be inferred from that that some prisoners were being accommodated with less than 3m² available to them.

The case was not concluded on the 29th of March 2011 for two reasons. First, in relation to the pre-trial detention issue, the Court decided to make the s.20 (1) request for additional information to which I have previously referred. Secondly, in relation to the prison conditions issue, in the *Mazurek* case which at that point stood adjourned on a part-heard basis, the Court had made, and was awaiting a response to, another s. 20(1) request requesting the explanation and decoding of abbreviations used in the internet table published on the website referred to in the letter of the 17th of December 2010, and translation of column headings and narrative text within, and associated with, the said table. (The response to this request was contained in the letter of the 11th of April 2011 to which the Court has previously referred.) Having regard to these circumstances the present case was also adjourned on a part heard basis to await a response to the outstanding s. 20(1) request, and the conclusion of, and delivery in due course of the Court's judgment in *Mazurek*, which, it was anticipated, might have implications for the case at hearing. Accordingly, this case was adjourned part heard to the 3rd of May 2011.

When this case was resumed on the 3rd of May 2011 counsel for the respondent informed the Court that in the light of the Court's judgment in *Mazurek*, and the up to date data in the table published, and regularly updated, on the website of the Polish prison service, his client was no longer proceeding with his objection based upon prison conditions.

The Court is therefore satisfied to rely upon the presumption that the Polish state will respect the respondent's rights under Article 3 of the Convention and will not accommodate him in overcrowded prison conditions or otherwise subject him to inhuman or degrading treatment while he is in prison. In circumstances where the respondent can put insufficient evidence of a cogent nature before the Court to cause it to look behind the assurances given in the letter of the 17th of December 2010 and/or the data provided on the website of the Polish prison service, the Court is satisfied that the presumption in question has not been rebutted.

Accordingly, the sole remaining point of specific objection was that based upon anticipated pre-trial detention.

The objection based upon anticipated pre-trial detention
The argument that there is there is a real risk that the respondent may be subjected to excessively long and arduous pre-trial detention, and that his rights under the Convention, and particularly under Article 5§3 of the Convention, may be breached by the issuing State on account of that, is based largely on the country of origin information to which the Court has previously referred, and the judgment of the E.Ct H.R in *Kauczor v Poland.*

Article 5§3 of the Convention provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The Court was specifically referred to paragraphs 55 to 60 inclusive of the judgment in *Kauczor*, and it is appropriate to quote the passages in question:

> "55. Before examining the claims for just satisfaction submitted by the applicant under Article 41 of the Convention, and having regard to the circumstances of the case, the Court considers it necessary to determine what consequences may be drawn from Article 46 of the Convention for the respondent State.
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> Article 46 of the Convention provides:
>
> > "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
> >
> > 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."
>
> 56. In this context, the Court observes that it has recently delivered a considerable number of judgments against Poland in which a violation of Article 5 § 3 on account of the excessive length of detention was found. In 2007 a violation of that provision was found in thirty-two cases and in 2008, the number was thirty-three. In addition, approximately 145 applications raising an issue under Article 5 § 3 of the Convention are currently pending before the Court. Nearly ninety of these applications have already been communicated to the Polish Government. The latter number comprises some sixty applications which were communicated within the last twelve months with a specific question as to the existence of a structural problem related to the excessive length of pre-trial detention.
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> 57. It is to be noted that this issue has been recently considered by the Committee of Ministers in connection with the execution of judgments in cases against Poland where a violation of Article 5 § 3 of the Convention was found. In its 2007 Resolution the Committee of Ministers concluded that the great number of the Court's judgments finding Poland in violation of Article 5 § 3 of the Convention on account of the unreasonable length of pre-trial detention revealed a structural problem (see paragraph 34 above). Similarly, the Council of Europe Commissioner for Human Rights raised that issue in his Memorandum to the Polish Government of 20 June 2007 (see paragraph 35 above).
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> 58. The 2007 Resolution taken together with statistical data referred to above (see paragraphs 28 and 56 above) demonstrate that the violation of the applicant's right under Article 5 § 3 of the Convention originated in a widespread problem arising out of the malfunctioning of the Polish criminal justice system which has affected, and may still affect in the future, an yet unidentified, but potentially considerable number of persons charged in criminal proceedings.
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> 59. Thus, in many similar previous cases in the recent years the Court has held that the reasons relied upon by the domestic courts in their decisions to extend pre-trial detention were limited to paraphrasing the grounds for detention provided for by the Code of Criminal Procedure and that the authorities failed to envisage the possibility of imposing other preventive measures expressly foreseen by the Polish law to secure the proper conduct of the criminal proceedings (see among many other examples *Jablonski v. Poland*, no. 33492/96, § 83, 21 December 2000; *Jarosław Jakubiak v. Poland*, no. 39595/05, §§ 37-45, 3 June 2008 and *Kucharski v. Poland,* no. 51521/99, §§ 60-63, 3 June 2008). Moreover, while the relevant provisions of the domestic law define detention as the most extreme preventive measure, it appears that it is

applied most frequently by the domestic courts (see paragraphs 25 and 28 above).

60. The Court thus concludes, as the Committee of Ministers did, that for many years, at least as recently as in 2007, numerous cases have demonstrated that the excessive length of pre-trial detention in Poland reveals a structural problem consisting of "a practice that is incompatible with the Convention" (see *mutatis mutandis Broniowski v. Poland* [GC], no. 31443/96, §§ 190-191, ECHR 2004-V; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 229-231, ECHR 2006-...; *Bottazzi v. Italy* [GC], no. 34884/97, § 22, ECHR 1999-V with respect to the Italian length of proceedings cases).

61. In this connection, it is to be reiterated that, where the Court finds a violation, the respondent State has a legal obligation under Article 46 of the Convention not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. The respondent State remains free, subject to monitoring by the Committee of Ministers, to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII, and *Broniowski v. Poland* cited above).

62. It is true that the respondent State has already taken certain steps to remedy the structural problems related to pre-trial detention (see paragraphs 27 and 30-33 above). The Court welcomes these developments and considers that they may contribute to reducing the excessive use of detention as a preventive measure. However, as already noted by the Committee of Ministers (see paragraph 34 above), in view of the extent of the systemic problem at issue, consistent and long-term efforts, such as adoption of further measures, must continue in order to achieve compliance with Article 5 § 3 of the Convention."

The Court's attention was also drawn to the following passage at page 4 of the US State Department 2009 Human Rights Report on Poland, dated the 11th of March, 2010:

"Pre-trial detention was a serious problem that contributed to overcrowding and deterioration of detention facilities. But all have a 40-hour detention period before authorities must file charges, an additional 24-hours for the Court to decide whether to order pretrial detention. Detainees must be informed promptly of the charges, it is a functioning bail system and most detainees were released on bail. Detainees have the right to canvass and the government provides free counsel to the individual. Defendants and detainees have the right to consult with an attorney at any time. Detainees may be held in pretrial detention for up to three and a half months and may appeal the legality of their arrest. The court may extend pre-trial detention every 6 to 12 months but the total time in detention may not exceed two years. However, in practise detention frequently extended beyond two years in certain complex cases the court may petition the Supreme Court for an extension beyond two years."

The Court considers that it should adopt the same approach with respect to the claim of exposure to a real risk of excessive pre-trial detention based upon Article 5§3 of the Convention as it would in the case of a claim of exposure to a real risk of being subjected to inhuman or degrading treatment based upon article 3. I reviewed the relevant principles in my judgment in *Mazurek* and summarized them as follows:

" ….the following principles can be distilled from the authorities:

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

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

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

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

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

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

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

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

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

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

Applying those principles to the circumstances of the present case the Court is satisfied that, although sufficiently cogent evidence was placed before the Court to cause the Court to enquire into the matter, the additional information contained in the letter of the 1st of April 2011 provides this Court with a sufficient level of reassurance to enable it to conclude that at this time a real risk does not exist that the respondent's rights under article 5§3 of the Convention will be breached. In particular the Court is reassured by the information that the evidence gathering that would normally have to be done during the preparatory stage of the proceedings has "been accomplished" and that on that basis "the period of detention awaiting trial will not be long." Further, the fact that *Kaucznor* was a pilot judgment, and one in which the Polish state was expressly reminded of its obligations under Article 46 of the Convention, and required to address certain clearly identified systemic deficiencies in relation to the use of pre-trial detention, gives this Court further confidence for believing that Mr Siwy's Article 5§3 rights will in fact be respected by the issuing State.

In all the circumstances of the case the Court is not disposed to uphold the objection based on an apprehended real risk of violation of the respondent's rights under the Convention, and in particular his rights under Article 5§3 thereof, if he is surrendered.

Conclusion

The Court is satisfied that the respondent's surrender is not prohibited by Part 3 of the Act of 2003, or by the Framework Decision (including the recitals thereto). The Court is therefore satisfied to surrender the respondent to the issuing State.