THE SUPREME COURT
[Appeal No: 165 & 189 of 2010]

Denham J.
Fennelly J.
Finnegan J.

Between/

The Minister for Justice, Equality and Law Reform
Applicant/Respondent

and

Robert Rettinger

Respondent/Appellant

Judgment delivered the 23rd day of July, 2010 by Denham J.

1. In this appeal the Court has been asked to consider rights under Article 3 of the European Convention on Human Rights, referred to in this judgment as the "ECHR", and their effect on an application pursuant to a European Arrest Warrant for the surrender of a person to Poland to serve the balance of a prison sentence.

2. The Polish authorities issued a European Arrest Warrant seeking Robert Rettinger, the respondent/appellant, referred to in this judgment as "the appellant", which was endorsed by the High Court for execution in this jurisdiction on the 10th day of June, 2009. The appellant was arrested on the 13th August, 2009, and has been remanded in custody, with consent to bail, ever since.

3. The surrender of the appellant to Poland is sought so that he may serve the balance of a two year sentence which was imposed for the offence of burglary.

4. The appellant has served 203 days in pre-trial detention in Poland. He has been in custody in Ireland since the 13th August, 2009.

5. There was a delay in hearing the case in the High Court. The case was listed for hearing on the 1st December, 2009, but on that morning the appellant's solicitor applied successfully to come off record and a new legal team was appointed. Amended points of objection were served and the case was listed for hearing on the 13th April, 2010, when the matter proceeded. Judgment was delivered on the 7th May, 2010. On the 20th May, 2010, the High Court granted a certificate of leave to appeal to this Court.

Points of Law
6. Pursuant to section 16(12) of the European Arrest Warrant Act 2003, as amended, the High Court (Peart J.) certified the following two points of law as arising from this application:-

> *"(a) Where [an applicant] relies upon section 37(1)(a) of the European Arrest Warrant Act 2003 in order to prevent his surrender*

to a requesting State by reason of an apprehended breach of his rights under Article 3 of the European Convention on Human Rights and adduces evidence capable of establishing substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 were he to be surrendered, does the onus of proof then shift back to [the Minister] to adduce evidence in order to dispel any doubts as to the treatment [the applicant] would face if surrendered?

(b) Where [an applicant] relies upon section 37(1)(a) of the European Arrest Warrant Act 2003 in order to prevent his surrender to a requesting State by reason of an apprehended breach of his rights under Article 3 of the European Convention on Human Rights, is [the applicant] required to prove that there is a probability that, if surrendered, he will suffer treatment contrary to Article 3, or is it sufficient for him to show that, on the balance of probabilities, there is a real risk that he will suffer such treatment?"

High Court

7. In his judgment, [2010] 1EHC 206, the learned High Court judge stated:-

"It is inevitable that a respondent seeking to establish to the necessary standard of proof that in the future his rights will be breached if surrendered has a more difficult probative task than a person complaining of what has already occurred. But that inevitability must not be allowed to lower the standard by which this Court must examine the question. The averments made by the respondent and the material he has referred the Court to are probably the best the respondent could do. But in my view neither the respondent's own evidence nor the Orchowski findings are sufficient. The latter in particular speak to the position of that person and the conditions which he endured during his periods of imprisonment. It does not follow in my view that those conclusions can avail other persons who are sought for surrender to Poland.

This Court must be forward-looking in its considerations, and in that regard it is worth repeating that it is not known at this stage even which prison or other detention centre the respondent may be required to spend time if surrendered. Speculation as to what conditions he may have to experience in some prison somewhere in Poland, even if supported by the criticisms and shortcomings which have been identified in various reports and even cases before the European Court of Human Rights is insufficient to enable the respondent's objection to surrender to succeed."

Notice of Appeal

8. The appellant has appealed from the judgment of the learned High Court judge. The notice of appeal filed stated that the appeal would be grounded on the following grounds, being that the learned High Court judge erred in law or in fact or on a mixed question of law and question as follows:-

(i) in holding that the appellant had failed to establish substantial grounds that if surrendered to the Republic of Poland there is a real risk that he would suffer treatment constituting a breach of his rights under Article 3 of the European Convention on Human Rights;

(ii) in failing to recognise the gravity of the risk that the appellant would suffer treatment constituting a breach of his rights under Article 3 of the

European Convention on Human Rights if surrendered to the Republic of Poland;

(iii) having established the existence of substantial grounds that, if surrendered to the Republic of Poland, there is a real risk the appellant would suffer treatment constituting a breach of his rights under Article 3 of the European Convention on Human Rights, in failing to require evidence to dispel the doubts raised by the appellant in that regard prior to making the order for the appellant's surrender to the Republic of Poland;

(iv) in holding that, in order to rely upon section 37(1)(a) of the European Arrest Warrant Act 2003 as amended in order to prevent his surrender, the appellant must show that it is probable that, if surrendered, he would suffer treatment amounting to a breach of his rights under Article 3 of the European Convention on Human Rights, as distinct from establishing substantial grounds that, on the balance of probabilities, there is a real risk that he will suffer such treatment;

(v) by reason of the foregoing, in failing to hold that the appellant should not be surrendered to the Republic of Poland pursuant to section 37 of the European Arrest Warrant Act 2003 as amended.

Notice to Vary

9. The Minister for Justice, Equality and Law Reform, the applicant/respondent, referred to as "the Minister" in this judgment, filed a notice to vary. The single ground of the notice to vary is:-

> *"(i) That the learned trial judge erred in law and in fact in holding that there was no reason to doubt what the [appellant] had stated with regard to the prison conditions in which he was held or to consider that he had exaggerated same."*

Law

10. The Court was referred to national law, the ECHR, and cases of the European Court of Human Rights, referred to in this judgment as "the ECtHR".

11. Section 37 of the European Arrest Warrant Act 2003 provides:-

> *"(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),*
>
> *(c) there are reasonable grounds for believing that—*

(i) the European arrest warrant was issued in respect of the person for the purposes of facilitating his or her prosecution or punishment in the issuing state for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation, or

(ii) in the prosecution or punishment of the person in the issuing state, he or she will be treated less favourably than a person who—

(I) is not his or her sex, race, religion, nationality or ethnic origin,

(II) does not hold the same political opinions as him or her,

(III) speaks a different language than he or she does, or

(IV) does not have the same sexual orientation as he or she does,

or

(iii) were the person to be surrendered to the issuing state—

(I) he or she would be sentenced to death, or a death sentence imposed on him or her would be carried out, or

(II) he or she would be tortured or subjected to other inhuman or degrading treatment."

12. The issues in this case arise out of the submission on behalf of the appellant that were he to be surrendered to Poland he would be subjected to inhuman and degrading treatment in prison.

13. Article 3 of the ECHR states that:-

> *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

14. In *Soering v. UK* (1989) 11 EHRR 439 the ECtHR described a test in a situation where an issue under Article 3 arises, at 391:-

> *"… the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."*

15. In *Mamatkulov Askaron v. Turkey* (No. 46827/99 and 46951/99), 4th February, 2005, the ECtHR restated the position at paragraph 71 as:-

"For an issue to be raised under Article 3, it must be established that at the time of their extradition there existed a real risk that the applicants would be subjected in Uzbekistan to treatment proscribed by Article 3."

16. In *Saadi v. Italy* (No. 37201/06) judgment of 28th February, 2008, the Grand Chamber of the ECtHR considered previous case law on Article 3 of the ECHR. In an important and relevant judgment it set out principles applicable in cases involving the removal of a person from a State. These were set out at paragraphs 128-133 and may be summarised as follows:-

"(i) the Court takes as its basis all the material placed before it or, if necessary, material obtained of its own motion;

(ii) the Court's examination of the existence of a real risk is necessarily rigorous;

(iii) it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it;

(iv) the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his personal circumstances;

(v) the Court has attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources, including the US State Department;

(vi) the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3, and, where the sources available describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence;

(vii) in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned;

(viii) if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court; accordingly, while it is true that historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive."

17. In *Orchowski v. Poland* (No. 17885/04), 22nd October, 2009, an important relevant case, the ECtHR stated the following in relation to prisoners' rights:-

"119. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. The Convention prohibits in absolute terms torture and inhuman or degrading

*treatment or punishment, irrespective of the victim's conduct (*Labita v. Italy *[GC], no. 26772/95, § 119, ECHR 2000-IV).*

As the Court has held on many occasions, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see Peers v. Greece*, no. 28524/95, §§ 67-68, 74, ECHR 2001-III;* Valašinas v. Lithuania*, no. 44558/98, § 101, ECHR 2001-VIII).*

120. Measures depriving a person of his liberty may often involve an inevitable element of suffering or humiliation. Nevertheless, the suffering and humiliation involved must not go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.

*In the context of prisoners, the Court has already emphasised in previous cases that a detained person does not, by the mere fact of his incarceration, lose the protection of his rights guaranteed by the Convention. On the contrary, persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Under Article 3 the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, 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 that, given the practical demands of imprisonment, his health and well-being are adequately secured. (*Valašinas*, cited above, § 102;* Kud³a v. Poland *[GC], no. 30210/96, § 94, ECHR 2000-XI).*

121. When assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant (see Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001-II). The length of the period during which a person is detained in the particular conditions also has to be considered (see among others* Alver v. Estonia*, no. 64812/01, 8 November 2005).*

122. The extreme lack of space in a prison cell weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were "degrading" from the point of view of Article 3 (see Karalevièius v. Lithuania*, no. 53254/99, 7 April 2005).*

*In its previous cases where applicants had at their disposal less than 3 m² of personal space, the Court found that the overcrowding was so severe as to justify of itself a finding of a violation of Article 3 of the Convention (see, among many others,*Lind v. Russia*, no. 25664/05, § 59, 6 December 2007;* Kantyrev v. Russia*, no. 37213/02, § 50-51, 21 June 2007;* Andrey Frolov v. Russia*, no. 205/02, §47-49, 29 March 2007;* Labzov v. Russia*, no. 62208/00, § 44, 16 June 2005).*

By contrast, in other cases where the overcrowding was not so severe as to raise in itself an issue under Article 3 of the Convention, the Court noted other aspects of physical conditions of detention as being relevant for its assessment of compliance with that provision. 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 (see, for example, Babushkin v. Russia*, no. 67253/01, § 44, 18 October 2007;* Ostrovar v. Moldova*, no. 35207/03, § 89, 13 September 2005, and* Peers v. Greece*, no. 28524/95, §§ 70-72, ECHR 2001-III) or the lack of basic privacy in his or her everyday life (see*, mutatis mutandis*,* Belevitskiy v. Russia*, no. 72967/01, §§ 73-79, 1 March 2007;* Valašinas*, cited above, § 104;* Khudoyorov*, cited above, §§ 106 and 107;* Novoselov v. Russia*, no. 66460/01, §§ 32, 40-43, 2 June 2005)."*

The ECtHR concluded that Mr Orchowski had been detained in conditions that were inhuman and degrading.

18. The ECtHR in *Orchowski* also addressed the issue of Poland's failure to improve prison conditions. As the case is pertinent to this appeal an extensive section of the judgment is set out below. This judgment addressed the issue of a systemic problem in the prisons in Poland and it stated:-

"147. In this context, the Court observes that approximately 160 applications raising an issue under Article 3 of the Convention with respect to overcrowding and consequential inadequate living and sanitary conditions are currently pending before the Court. Ninety-five of these applications have already been communicated to the Polish Government.

Moreover, the seriousness and the structural nature of the overcrowding in Polish detention facilities have been acknowledged by the Constitutional Court in its judgment of 28 May 2008 and by all the State authorities involved in the proceedings before the Constitutional Court, namely the Prosecutor General, the Ombudsman and the Speaker of the Sejm*, (see paragraph 85 above), and by the Government (see paragraph 146 above).*

The statistical data referred to above taken together with the acknowledgements made by the Constitutional Court and the State authorities demonstrate that the violation of the applicant's right under Article 3 of the Convention originated in a widespread

problem arising out of the malfunctioning of the administration of the prison system insufficiently controlled by Polish legislation, which has affected, and may still affect in the future, an as yet unidentified, but potentially considerable number of persons on remand awaiting criminal proceedings or serving their prison sentences (see mutatis mutandis Broniowski v. Poland *[GC], no. 31443/96, §§ 189, ECHR 2004-V).*

The Court concludes that for many years, namely from 2000 until at least mid-2008, the overcrowding in Polish prisons and remand centres revealed a structural problem consisting of "a practice that is incompatible with the Convention" (see mutatis mutandis Broniowski v. Poland*, cited above, §§ 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).*

148. 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, §§ 192).*

149. The Court observes that the Constitutional Court in its judgment of 26 May 2008 obliged the State authorities to bring the situation concerning the overcrowding of detention facilities in Poland into compliance with the requirements of the Constitution, namely with the relevant provisions prohibiting, in absolute terms, torture and inhuman and degrading treatment. The Constitutional Court observed in particular, that apart from the indicated legislative amendments the authorities had to undertake a series of measures to reorganise the whole penitentiary system in Poland in order to, ultimately, eliminate the problem of overcrowding. It was also noted that, in parallel, a reform of criminal policy was desired with the aim of achieving a wider implementation of preventive measures other than deprivation of liberty.

150. In this connection, it must be observed that recently in the case of Kauczor v. Poland *(see* Kauczor v. Poland*, no. 45219/06, § 58* et seq*, 3 February 2009), the Court held, referring to the conclusions of the Committee of Ministers of the Council of Europe, that the excessive length of pre-trial detention in Poland revealed a structural problem consisting of a practice that was incompatible with Article 5 § 3 of the Convention. The Court observes that the solution of the problem of overcrowding of detention facilities in*

Poland is indissociably linked to the solution of the one identified in the Kauczor *case.*

151. The Court also notes that for many years the authorities appeared to ignore the existence of overcrowding and inadequate conditions of detention and, instead, chose to legitimise the problem on the basis of a domestic law which was ultimately declared unconstitutional (see paragraph 85 above). As was observed by the Polish Constitutional Court in its judgment of 26 May 2008, the flawed interpretation of the relevant provision, which through its imprecision allowed for an indefinite and arbitrary placement of detainees in cells below the statutory size of 3 m² per person, sanctioned the permanent state of overcrowding in Polish detention facilities.

In the Court's opinion, such practice undermined the rule of law and was contrary to the requirements of special diligence owed by the authorities to persons in a vulnerable position such as those deprived of liberty.

152. On the other hand, the Court takes note of the fact that the respondent State has recently taken certain general steps to remedy the structural problems related to overcrowding and the resulting, inadequate conditions of detention (see paragraphs 89-91 above). By virtue of Article 46 of the Convention, it will be for the Committee of Ministers to evaluate the general measures adopted by Poland and their implementation as far as the supervision of the Court's judgment is concerned. However, the Court cannot but welcome these developments and considers that they may ultimately contribute to reducing the number of persons detained in Polish prisons and remand centres, as well as to the improvement of the overall living and sanitary conditions in these facilities. They cannot, however, operate with retroactive effect so as to remedy past violations. However, as already noted by the Constitutional Court (see paragraph 85 above), in view of the extent of the systemic problem at issue, consistent and long-term efforts, such as the adoption of further measures, must continue in order to achieve compliance with Article 3 of the Convention.

153. The Court is aware of the fact that solving the systemic problem of overcrowding in Poland may necessitate the mobilisation of significant financial resources. However, it must be observed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention (see among others Nazarenko v. Ukraine*, no. 39483/98, § 144, 29 April 2003) and that it is incumbent on the respondent Government to organise its penitentiary system in such a way that ensures respect for the dignity of detainees, regardless of financial or logistical difficulties (see*Mamedova v. Russia*, no. 7064/05, § 63, 1 June 2006). If the State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, it must abandon its strict penal policy in order to reduce the number of incarcerated persons or put in place a system of alternative means of punishment.*

154. Lastly, the Court takes note of the civil courts' emerging practice which allows prisoners to claim damages in respect of prison conditions. In this connection, the Court would like to emphasise the importance of the proper application by civil courts of the principles which had been set out in the judgment of the Polish Supreme Court of 26 February 2007.

The Court observes, nonetheless, that a civil action under Article 24 of the Civil Code, in conjunction with Article 445 of this code, may, in principle, due to its compensatory nature, be of value only to persons who are no longer detained in overcrowded cells in conditions not complying with Article 3 requirements (see paragraphs 108-109 above).

The Court would in any event, observe that a ruling of a civil court cannot have any impact on general prison conditions because it cannot address the root cause of the problem. For that reason, the Court would encourage the State to develop an efficient system of complaints to the authorities supervising detention facilities, in particular a penitentiary judge and the administration of these facilities which would be able to react more speedily than courts and to order, when necessary, a detainee's long-term transfer to Convention compatible conditions."

Submissions

19. It was submitted on behalf of the appellant that:-

(a) In carrying out its duty of rigorous scrutiny, the trial Court can, if necessary, obtain its own material in order to assess the degree of future risk.

(b) It is in principle for an applicant to adduce evidence capable of proving that there are substantial grounds for believing that if extradited he would be exposed to a real risk of being subjected to treatment contrary to Article 3, where such evidence is adduced, it is for the Government to dispel any doubts about it.

(c) Where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the ECHR enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned.

Counsel for the appellant submitted that on the basis of (b) above, the answer to the first certified question is "yes".

Applying the facts of the case it was submitted on behalf of the appellant that:-

(a) If surrendered to Poland the appellant will be detained in a Polish prison.

(b) Poland does not dispute that, during his last period of detention, the appellant suffered conditions in Szczelce Opolskie, in Slakas, that appear to amount to inhuman or degrading treatment.

(c) It is clear from the *Orchowski* judgment, and is not disputed, that the systemic failings in Poland's prison system are such that 'consistent and long-term' reforms are needed in order for compliance with Article 3 of the ECHR to be achieved and that, until such time as there is compliance, an unknown, but potentially considerable number of persons, are at risk from the malfunctioning of the system.

(d) No assurance has been given by the Polish authorities that the appellant will not be detained in conditions that are inhuman or degrading.

(e) No evidence has been tendered by or on behalf of the Polish authorities to show that conditions in its prison system have improved following the findings of the European Court of Human Rights in *Orchowski* and *Sikorski*.

(f) It is submitted that, absent clear proof of a substantial amelioration in the prison conditions in Poland, the appellant has discharged the onus of demonstrating that he will be at risk of suffering inhuman or degrading treatment if returned to Poland to serve the remainder of the sentence imposed upon him. He has established substantial grounds for believing that there is a real risk that he will be detained in conditions that amount to inhuman or degrading treatment in Poland. In line with Stevens J's reasoning in the US Supreme Court judgment in *Cardozo Fonesca*, *supra*, that a 'one in ten chance' constitutes a real risk, by reference to the facts subtending this application, there are substantial grounds for believing that the respondent is at such risk of inhuman or degrading treatment in Poland's prison system.

In the alternative, it was submitted:-

(a) The appellant, as a member of a social group, i.e. prisoners, in respect of which there are serious reasons to believe in the existence of a practice which exposes the group to ill-treatment, i.e. the systemic failing in Poland's prisons, the protection of Article 3 of the ECHR enters into play.

(b) In such circumstances, it is for the Polish authorities to give an assurance that the appellant will not be subjected to inhuman or degrading treatment, and no such assurance has been forthcoming.

Or,

(c) The appellant has adduced evidence capable of proving that there are substantial grounds for believing that if extradited he would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the ECHR, such that it is for the Minister to dispel any doubts about it.

(d) At the hearing before the trial court the Minister adduced no evidence from any source to dispel these doubts, notwithstanding that the Polish authorities had been contacted regarding this application.

(e) Had assurances been offered by the Polish authorities in respect of the appellant's future detention (which is not the case, despite the opportunity to do so), the trial Court would have been under a duty to scrutinise such assurances carefully and satisfy itself that they would be met: *Chahal v. United Kingdom*, (No. 22414/93), 15th November, 1996, paragraph 92 and 105.

Thus counsel on behalf of the appellant submitted that the appeal should be allowed and that the order sought by the Minister authorising the appellant's surrender to Poland should be refused.

20. Counsel for the Minister submitted that there was no evidence that the appellant's rights would be breached if he is surrendered to Poland. That such evidence as has been adduced is not sufficient to displace the onus of proof to the executing authority. The executing state may assume that the issuing state will respect the human rights of the person sought. The European arrest warrant procedure is based on mutual recognition of judicial decisions and cooperation and on a high level of confidence between member states. It would only be, it was submitted, in a particular case, if it was established that surrender would lead to a denial of fundamental or human rights, that it should be refused. It was submitted that the appellant had failed to so establish in the High Court as a matter of fact.

Decision

21. The first issue to be determined on this appeal is the appropriate test to be applied by the Court in the circumstances.

22. Part 3 of the European Arrest Warrant Act 2003, as amended, provides situations where surrender is prohibited. Section 37 states that a person shall not be surrendered under this Act if his surrender would be incompatible with the State's obligations under the ECHR or its protocols. Thus national law mandates that a person not be surrendered if his surrender would be incompatible with the State's obligations under the ECHR or its protocols. Article 3 of the ECHR provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Consequently, a court hearing an application to surrender is required to consider and apply this mandate. A court is required to consider the law of, and arising from, Article 3 of the ECHR, and relevant case law of the ECtHR, within the context of the Constitution and the law.

23. In deciding on the appropriate test to be applied by the Court, in relation to the issue arising on Article 3, assistance may be obtained from consideration of cases decided by the ECtHR.

24. Thus in *Soering v. UK* (1989) 11 EHRR 439, the ECtHR referred to the responsibility of a state under the Convention (and relevant to this case) where substantial grounds have been shown for believing that the person concerned, if surrendered, faces a real risk of being subjected to inhuman or degrading treatment or punishment in the requesting state.

25. This concept of "a real risk" is referred to in other case law of the ECtHR.

26. The matter was addressed expressly in *Saadi v. Italy*, as set out earlier in this judgment. I would adopt and apply the principles stated in *Saadi*.

Principles

27. Thus I would apply the following principles:-

(i) A court should consider all the material before it, and if necessary material obtained of its own motion.

(ii) A court should examine whether there is a real risk, in a rigorous examination.

(iii) The burden rests upon an applicant, such as the appellant in this case, to adduce 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.

(iv) 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.

(v) The court should examine the foreseeable consequences of sending a person to the requesting State.

(vi) 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.

(vii) The mere possibility of ill treatment is not sufficient to establish an applicant's case.

(viii) The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this Court an application could be made, under the rules of court, seeking to admit additional evidence, if necessary.

28. The above test should be applied in an application such as this.

29. It does not appear that the learned trial judge applied such a test. In all the circumstances, I would remit the matter to the High Court so that the application may be determined in accordance with this test.

30. (i) In considering the application, the High Court should consider all the material before it and, if necessary, material sought by its own motion.

(ii) The High court should examine whether there is a real risk, in a rigorous examination.

(iii) The burden rests upon the appellant to adduce evidence capable of proving that there are substantial grounds for believing that if he is returned to Poland he would be exposed to real risk of being subjected to treatment contrary to Article 3 of the ECHR. However, the requesting State may present evidence to dispel doubts.

31. In this case such evidence includes, at this time:-

(a) The affidavit evidence of the appellant. In his supplemental affidavit the appellant deposed:

> *"If I am surrendered to Poland, I could be sent to any prison in the country in order to complete my sentence. As a consequence, I believe that I am at a real risk of being 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.*
>
> *When I was last detained in Poland I was in Szczelce Opolskie in Slask, about 150 kilometres from Krakow. The conditions were very harsh. There were 6 people in my cell which was designed for a far smaller number. There was very little room in the cell. There was an open toilet in the cell with just a curtain. There was no privacy. It was demeaning and disgusting. We were only allowed out of the cell for one hour a day. We ate our meals in our cells. We were only permitted to shower once a week, and then showered together with a group of inmates numbering in total between 12 and 24 persons. I believe that almost all inmates suffered mental problems, and required medical assistance either during their time in detention or shortly afterwards, because of the conditions of extreme overcrowding and lack of proper sanitation and exercise. It was not really possible to complain about the conditions in prison. If you did complain, you faced physical punishment from the prison officers and could be put in isolation. People were afraid to complain in prison, I cannot face the prospect of being returned to a prison in Poland because of the appalling conditions."*

(b) Two letters from the District Court judge in Krakow are in the papers before the Court.

(c) The *Orchowski* case. The *Orchowski* case is relevant to the appellant's case. It is clear that for many years, from 2000 until at least mid-2008, overcrowding in Polish prisons and remand centres was incompatible with the ECHR – as found by the Polish Constitutional Court and the ECtHR. Further, by its judgment the Polish Constitutional Court has obliged Poland to bring the prison system into compliance with the Constitution. The ECtHR has welcomed the fact that Poland has taken general steps to remedy the problems. However, in view of the extent of the systemic problem, the ECtHR noted that consistent and long term efforts must continue to achieve compliance with Article 3. Having referred to the issue of resources, the ECtHR stated that, if Poland was unable to ensure that prison conditions comply with the requirements of Article 3 of the ECHR it must abandon its strict penal policy in order to reduce the numbers imprisoned or put in place an alternative means of punishment.

(d) There is no adequate evidence of the current situation in relation to the process of remedying the problems in the prisons.

(e) International Documents.

The Court may consider relevant international documents. In this case, for example, the U.S. Department of State, 2009 Human Rights Report: Poland, (11th March, 2010) was produced. Prison and Detention Centre conditions were considered. It was stated that prison and detention centre conditions remained poor and did not meet international standards. It was stated, for example, that under Poland's criminal code, the minimum cell size is three square metres (32 square feet); however, in practice this standard was often not met.

It may well be that more up to date documents may be furnished to the court.

(f) In addition, further evidence may be before the court.

Notice to Vary
32. The Notice to Vary is relevant to the affidavit of the appellant. The Minister filed a Notice to Vary with a single ground, namely, that the learned trial judge erred in law or fact in holding that there was no reason to doubt what the appellant had stated with regard to the prison conditions in which he was held or to consider that he had exaggerated same.

I would dismiss the Notice to Vary. The appellant deposed of his experiences when in prison in Poland. He was not cross-examined. Nor was any adequate evidence put before the Court by the requesting state of the conditions of its prisons. In all the circumstances it was open to the learned trial judge to make this determination. The weight which a court would give to such a determination depends on all the circumstances of the case.

Time spent in custody
33. From the papers before the Court it appears that the appellant is being sought to be surrendered to Poland to serve the balance of a two year sentence for burglary. He was in pre-trial detention in Poland for 203 days. In addition, he has been in custody in Ireland since last August.

I would request counsel to address this situation with a view to the matter being considered by a court.

Conclusion
34. I conclude that the appropriate test to be applied is as stated in this judgment. I would remit the matter to the learned trial judge to apply this test.

In addition, I wish counsel to address the issue of the length of time which the appellant has been in custody in Poland and Ireland.