

THE SUPREME COURT

Record No. 165 and 189 of 2010

**Denham J.
Fennelly J.
Finnegan J.**

BETWEEN:

**THE MINISTER FOR JUSTICE, EQUALITY
AND LAW REFORM**

APPLICANT/RESPONDENT

-AND-

ROBERT RETTINGER

JUDGMENT of Mr. Justice Fennelly delivered the 23rd day of July 2010.

1. The appellant complains that, if he is surrendered to Poland to complete a prison sentence, he faces a real risk that he will be subjected to inhuman and degrading conditions, prohibited by Article 3 of the European Convention on Human Rights (hereinafter "the Convention"). The European Court of Human Rights has condemned overcrowding in Polish prisons. The appeal raises, specifically in the case of Article 3 complaints, questions regarding the burden and standard of proof to be applied by the High Court when considering applications for surrender on foot of European Arrest Warrants.
2. On 23rd September, 2008 a Regional Judge at the District Court at Krakow issued a European Arrest Warrant seeking the surrender of the appellant to Poland for the purpose of serving the balance of a sentence of two years imprisonment which had been imposed on him on his conviction for burglary by the Regional Court of Krakow-Krowodrza on 2nd August 2007.
3. The warrant was duly endorsed by the High Court for execution on the 10th June, 2009. The appellant was arrested on the 13th August, 2009 and brought before the High Court. He has objected to his surrender and has remained in custody, with consent to bail, since that date.
4. The Minister's application was originally listed for hearing before the High Court on the 1st December, 2009. The appellant changed his solicitor and served amended points of objection. The application was listed for hearing on the 13th April, 2010. Judgment was delivered by Peart J on the 7th May.
5. Although other issues were originally raised in the High Court the challenge by the appellant to his surrender is, at this stage, limited to what he alleges are the overcrowded and inhumane conditions in Polish prisons and was set out in his Additional Points of Objection as follows:

“... the surrender of the Respondent to the Republic of Poland is prohibited by section 37 of the European Arrest Warrant Act 2003 because of the inhuman and degrading conditions, including systemic overcrowding, in Poland’s prisons which are such that:

- (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(1)(a) of the European Arrest Warrant Act 2003, 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;*
- (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(1)(c) of the European Arrest Warrant Act 2003.*

*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, 22nd October, 2009).”*

6. In his first affidavit, the appellant advanced general complaints that his surrender to Poland was prohibited by section 37 of the European Arrest Warrant Act, 2003 and by Article 40.3.2 of the Constitution. He referred to a Human Rights Report for the year 2008 from the US Department of State to the effect that *“conditions in prison and detention centres remained generally poor. Overcrowding and inadequate medical treatment were among the main problems.”*
7. He also referred to a report of the year 2009 said to be from Greifswald University and to have found *“Polish prisons conditions to be the worst in Europe”*. No such report has, however, ever been produced. The appellant made no reference, in that affidavit, to his own experience in Polish prisons, in pre-trial detention or otherwise.
8. The appellant expanded on his complaints in a second affidavit. He referred to the decision of the European Court of Human Rights in *Orchowski v. Poland* condemning Polish prison conditions. His affidavit contains the following specific allegations:
 - “(a) 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.

- (b) When I was last detained in Poland I was in Szczelce Opolskie in Slask, about 150 km from Kraków. 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 get our means 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 suffer 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."
9. While the Minister filed no replying affidavit in the High Court, and counsel for the appellant argued, therefore, that his evidence should be treated as uncontradicted, Peart J admitted into evidence two letters from a District Court Judge in Kraków. In a letter of 22nd March 2010, that judge explained that a person condemned to prison should be held "in prison which is located closest to his permanent place of residence". He said that there were three prisons located in Kraków and another three within less than 50 km. Since the appellant had a permanent place of residence in Kraków, he should be held in one of these." He added, however, that "to avoid overcrowding that person can be transferred to a prison located further" away. Such a decision, however, is made by the head of a prison and is outside the competence of a Polish court. In a second letter of 9th April 2010, the judge referred to the decision of the European Court of Human Rights (*Orchowski v Poland*), saying that it refers to overcrowding in prisons located in western or north-western Poland and that the appellant, if surrendered, would be held in a prison located in southern or south-eastern Poland. He concluded: "*Many of [the] detention centres or prisons in this part of the country have been renovated in the last few years and the living conditions have considerably improved.*" Presumably these letters were received in evidence pursuant to section 20 of the Act of 2003, as explained by this Court in *Minister for Justice, Equality and Law Reform v Sliczynski* (Supreme Court unreported 19th December 2008 [2008] IESC 73).
10. While Peart J saw no reason to cast doubt on the evidence of the appellant, he thought it another matter altogether for him to reach a conclusion which would mean that, until such time as prison conditions had improved in Poland, no person could be surrendered on a European Arrest Warrant to that State. In his view, the evidence "*could not be sufficient..... to establish to the required standard that if surrendered to Poland now there*

is a real risk that his Article 3 rights would be breached, and therefore that his surrender is incompatible with this states obligations under Article 3 of the Convention.” He noted that the prison to which the appellant would be sent was not known and considered that speculation as to the conditions he might experience was insufficient to enable his objection to surrender to succeed. Having rejected a number of other points of objection, which are no longer relevant, he made the order for surrender.

11. The standard to be applied in cases raising Article 3 complaints was a live issue in the High Court. Peart J acceded to an application that he certify, pursuant to section 16(12) of the Act of 2003, as amended by section 12 of the Criminal Justice (Miscellaneous Provisions) Act 2009, that his decision *“involve[d] a point of law of exceptional public importance and that it [was] desirable in the public interest that an appeal should be taken to the Supreme Court.”* The following are the certified points:

“(a) Where a respondent 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 applicant to adduce evidence in order to dispel any doubts as to the treatment the respondent would face if surrendered?”

“(b) Where a respondent 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 respondent 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?”

12. The grounds of appeal filed on behalf of the appellant replicate the certified points. I have found it convenient to refer to the latter as effectively encompassing the grounds of appeal. In substance this Court is asked to rule on the burden and standard of proof which the High Court should apply when considering an objection to surrender based on a complaint, pursuant to section 37 of the Act of 2003, of apprehended exposure to inhuman or degrading treatment in the issuing Member State. The Minister has filed a notice to vary challenging the finding of Peart J that he had no reason to doubt the appellant’s affidavit evidence regarding prison conditions in Poland.
13. The legal submissions of the appellant, presented by Mr. Anthony Collins, Senior Counsel, fell under two main headings. The first, based on two decisions of the European Court of Human Rights in particular, (*Soering v. UK* (1989) 11 EHRR 439; *Saadi v. Italy* Application No. 37201/06, 28th February, 2008) relates to the standard of proof required of a respondent to an application for surrender under the Act of 2003 who complains that, if surrendered, there is a prospect that he will be subjected to treatment prohibited by

Article 3 of the Convention. Such a respondent, Mr. Collins submitted, would be entitled to ask the court to prohibit his surrender if he established that there were substantial grounds for believing that he would face a *real risk*, if surrendered, of being subjected to torture (which is not alleged in this case) or to inhuman or degrading treatment or punishment in the issuing State. Secondly, Mr. Collins relied on the fact that, in its decision in *Orchowski v. Poland* (Application Number 17885/04, 22nd October, 2009), the European Court of Human Rights condemned conditions, specifically of overcrowding, in Polish prisons as amounting to inhuman and degrading treatment incompatible with Article 3 of the Convention. This decision, it was argued, was a “pilot judgment” of the court in a context where there were some 160 applications pending before the Strasbourg Court complaining of the systemic failure of Poland’s prison system to comply with Article 3 of the Convention. When the court of the executing Member State comes to apply the requisite standard of proof to the facts of an individual case, it was submitted that evidence of past ill-treatment or persecution is relevant as an indication of what is likely in the future. The Court should, in particular, have regard to the failure of the Polish authorities to avail of the opportunity to respond to the complaints made by the appellant by filing an affidavit in reply to his specific allegations.

14. The Minister, as respondent on the appeal, submits that the burden of proof was on the appellant to produce sufficient cogent evidence that, if surrendered, he was likely to be subjected to inhuman or degrading treatment. He describes this as a “heavy onus”. The Minister cites a number of decisions of this Court in support of these contentions. They are: *Minister for Justice, Equality and Law Reform v Stankiewicz* ([2009] IESC 79, unreported, Supreme Court, 1st December, 2009); *Minister for Justice, Equality and Law Reform v Stapleton* [2008] 1 I.R. 669; *Minister for Justice, Equality and Law Reform v Sliczynski* (Supreme Court unreported 19th December 2008 [2008] IESC 73); *Attorney General v Park* (Supreme Court unreported 6th December 2004). The Minister also cites the decision of Peart J of 27th March 2007 in *Minister for Justice, Equality and Law Reform v Busjeva* [2007] IESC 341, where the respondent raised complaints concerning prison conditions in Lithuania. According to the Minister, the High Court there held that clear and cogent evidence of same would be required.
15. Section 37 of the Act of 2003 prohibits the surrender of a person who is able to bring himself within its provisions. The section allows any provision of the Convention to be invoked by a person resisting surrender, but makes special provision for complaints of risk of exposure to inhuman or degrading treatment. The section 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.*

16. Save for the omission of any express reference to “punishment,” Section 37(1)(c)(iii)(II) is based on the wording of Article 3 of the Convention, which provides that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A court is obliged to refuse an application for the surrender on foot of a European Arrest Warrant of a person to another Member State of the European Union if “*there are reasonable grounds for believing that*” the person sought would be subjected to “*inhuman or degrading treatment.*” It will be necessary to return to the significance of the use of the formulation, “would be.”

17. The Court is invited, in the present appeal, to consider for the first time the standard of proof which it and consequently the High Court must apply in European Arrest Warrant cases when a person facing surrender complains of the danger of being subjected, if surrendered, to inhuman or degrading treatment in the issuing Member State.
18. I do not accept the contention advanced on behalf the Minister that the cases cited at paragraph 14 provide the answer. Of those cases only *Busjeva* concerned an objection based on evidence of risk of exposure to such treatment. *Stankiewicz* raised the question whether the respondent had “fled” the issuing Member State (a matter considered in *Minister for Justice, Equality and Law Reform v Tobin* [2008] 4 I.R. 42). *Stapleton* was a case of a long-delayed prosecution, where the question was whether there would be a fair

trial in the issuing Member State; *Brennan* concerned an alleged difference in the sentencing principles of the respective Member States; *Park* was a case under the Extradition Act, 1965; insofar as any issue of burden of proof was considered, the Court held that the procedure was *sui generis* and inquisitorial. In *Busjeva*, Peart J held that *“the respondent would have to show a real risk that she would suffer inhuman and degrading treatment or punishment if surrendered,”* but that *“clear and cogent evidence must be established...”* Thus, *Busjeva* is the only authority touching on a complaint of risk of exposure to ill-treatment contrary to Article 3 of the Convention.

19. The High Court and this Court on appeal has been invited by the appellant to prohibit his surrender pursuant to section 37 of the Act of 2003. The High Court may not make an order for surrender which would *“be incompatible with the State’s obligations...under the Convention...”* More specifically and though the section does not expressly refer to the Convention from which the words are taken, it must not take place if *“there are reasonable grounds for believing that... were the person to be surrendered to the issuing state..... he or she would be tortured or subjected to other inhuman or degrading treatment.”* The Oireachtas here gives precise statutory effect to part of the wording of Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Oireachtas here legislated so as to give effect to the objectives of the Convention. An Irish Court must not surrender to another Member State a person who can show that there are reasonable grounds for believing that he will be subjected to inhuman or degrading treatment. The section requires no more than that there be reasonable grounds. It does not require proof on the balance of probability.

20. The courts are obliged by section 2 of the European Convention on Human Rights Act, 2003 to interpret the provisions of the Act of 2003 *“so far as is possible, subject to the rules of law relating to such interpretation and application..... in a manner compatible with the State’s obligations under the Convention provisions.”* Even without that provision, the legislative choice of wording taken directly from Article 3 would constitute a strong indicator of an intention to give effect to the interpretation adopted by the European Court of Human Rights.
21. The Convention and Strasbourg case-law recognise the legitimacy of extradition and deportation provisions in national law (Article 5(1)(f) of the Convention; *Soering*, cited above, paragraph 85). Nonetheless, a state’s responsibility under the Convention may be engaged when it is deciding to deport or to extradite a person to another country where the person’s Convention rights are at risk. In *Soering*, the Court expressed the matter as follows:

“... 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, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”(paragraph 91)

In *Saadi*, the Court added that *“in such a case Article 3 implies an obligation not to deport the person in question to that country.”(paragraph 125).*

22. In addition, where Article 3 is in fact engaged, it has to be recognised that, in accordance with the consistent case-law, the prohibition of all inhuman or degrading treatment, not merely torture, is absolute. It is not subject to any proportionality or balancing test. In *Saadi*, the United Kingdom made an unsuccessful attempt as intervener to persuade the Court to alter or clarify its approach in cases concerning a threat from international terrorism. In such cases, it submitted that stronger evidence should have to be adduced to prove the existence of a risk of ill-treatment in the receiving country (see paragraphs 117 to 123). The Court ruled at paragraph 127:

“Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.....” (See also Soering, paragraph 88).

23. The Court, while accepting that it could not *“underestimate the scale of the danger of terrorism today and the threat it presents to the community,* reiterated that that fact *“must not, however, call into question the absolute nature of Article 3.”* (paragraph 137). It rejected the argument of the United Kingdom Government, stating:

“Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment.”

24. The inevitable consequence of the principle of absoluteness is that 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. This does not mean that there is any underlying conflict between the Convention and the Framework Decision. As is stated in recital 10, *“[t]he mechanism of the European arrest warrant is based on a high level of confidence between member states.”* The normal presumption is, as I said in my judgment in *Stapleton*, cited above at page 689, the courts, *“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 rights and fundamental freedoms.’”* The amended version of Article 6 now in force does not affect this principle. Recital 13, however, declares that:

"No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

25. Furthermore, Article 1.3 provides:

"This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and legal principles as enshrined in Article 6 of the Treaty on European Union."

26. It is fair to note that Peart J did not question the right of the appellant to resist his surrender to Poland provided he could establish that *"there is a real risk that his Article 3 rights would be breached, and therefore that his surrender is incompatible with this state's obligations under Article 3 of the Convention."* He did not, however, accept that the appellant had established this proposition *"to the required standard."* It is to the question of the appropriate standard that the two certified questions are addressed. The first question asks whether the onus of proof shifts back to the Minister once the respondent to the application *"adduces evidence capable of establishing substantial grounds"* for his complaint. The second asks whether the burden of proof required him to show, as a matter of probability, that he would (meaning "would probably") suffer treatment prohibited by Article 3 or whether it would be sufficient for him to show, also as a matter of probability, that *"there is a real risk that he will suffer such treatment."*

27. A partial answer to these questions can be found in the very wording of section 37(1)(c) of the Act of 2003. According to the section, it is sufficient to establish that *"there are reasonable grounds for believing that"* the person would be *"subjected toinhuman or degrading treatment."* The European Court in *Soering* spoke of *"substantial grounds for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment..."* Each test focuses, firstly, on the quality of the evidence or *"grounds"* and, secondly, on the level of risk. In practice, the two elements are closely connected and will, in many cases, merge into a single test. The subject-matter of the enquiry is the level of danger to which the person is exposed. There is no discernible difference between *"reasonable grounds"* and *"substantial grounds."* It is equally clear that 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."* The 13th recital to the Framework Decision speaks of *"serious risk;"* the term *"real risk"* is consistently used by the European Court in its case-law, including *Soering* and *Saadi*. It is appropriate to the seriousness of the subject matter. It would be absurd to require a person threatened with expulsion to a state where he may be exposed to inhuman or degrading treatment, not to mention torture, to prove that he would probably suffer such treatment. It must be sufficient to establish *"real risk."*

28. The European Court expressly dealt with this issue as part of its reasons for rejecting the proposals of the United Kingdom Government in *Saadi* that it should modify its case-law. It said at paragraph 140:

"The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is "more likely than not". On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3..."

29. The appellant relies also on a decision of the United States Supreme Court in a refugee case, *Immigration and Naturalisation Service v Cardozo Fonesca* 480 U.S. 421, dealing with a claim "of well-founded fear of persecution." The court adopted a test of "reasonable possibility" of persecution. The Court cited a test established by its earlier decisions, namely that:

"so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility."

But that case was concerned with the interpretation of the US Immigration and Nationality Act, which distinguished between a "clear probability" and a "well-founded fear" test. A standard of "reasonable possibility" is different from and apparently lower than "real risk," which is the consistent requirement of the European Court of Human Rights and, therefore, preferable.

30. The conclusions I have reached in paragraph 24 above provide a clear answer to the second of the questions certified by the High Court. It was not necessary for the appellant to prove in the High Court that he would suffer inhuman or degrading treatment if surrendered to Poland. It was enough for him to establish reasonable or substantial grounds for believing that there would be a real risk of such treatment.
31. The task of this court on the present appeal is to decide whether the High Court applied the correct standard in assessing the evidence before it. The European Court, in *Saadi*, said that it would "take as its basis all the material placed before it or, if necessary, material obtained *proprio motu*" and that "examination of the existence of a real risk must necessarily be a rigorous one." (paragraph 128). It is, however, the ensuing paragraph which bears most directly on the question now before this Court:

"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."

32. The first of the certified questions closely follows the language of this passage. I do not think that there is any particular mystery about it. In particular, I do not believe that the passage which I have quoted from *Saadi* establishes some principle about the shifting of

the burden of proof different from what would happen in the ordinary way in an Irish court. The last sentence of the paragraph is, admittedly, open to misunderstanding. It suggests that, where *“such evidence is adduced”* it will be a matter for the Government *“to dispel any doubts about it.”* The evidence which can give rise to such a requirement is, however, earlier defined as the evidence showing *“substantial grounds for believing”* that there is a *“real risk”*. The Court has already stated, at paragraph 125, quoted at paragraph 21 above, that in that situation the person must not be deported. In other words, any requirement that the Government “dispel doubts” if that is to be described as a shifting of the burden of proof only arises when the person opposing surrender has discharged the primary burden which rests on him or her by producing evidence of sufficient substance that, if uncontradicted, would oblige the court to refuse to surrender him. In this context, the notion of “substance” includes credibility. In a particular case, a judge may regard the silence and failure to respond to specific allegations as significant and may persuade him of the truth of the allegations, but that is a question of assessment of the plausibility and weight of the evidence. Evidence of the mere possibility of ill-treatment is not enough; evidence should be related to the specific situation of the person opposing surrender. In *Saadi*, the European Court dealing with the admittedly different situation of an allegation of prevalent torture if the applicant were to be deported to Tunisia said:

“At the same time, it has been held that 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 3and that, where the sources available to it describe the general situation, an applicant’s specific allegations in a particular case require corroboration by other evidence.”

33. It is neither possible nor appropriate to prescribe too narrowly the way in which a judge should assess the evidence, whose quality necessarily varies enormously. The credibility of any evidence will depend on all the circumstances of the individual case. In the final analysis, it is a matter for the judge to decide whether the necessary substantial grounds have been established for believing that there is a real risk of ill-treatment contrary to Article 3. He does not have to be convinced that ill-treatment would probably occur. There is no shifting of the burden of proof in the absence of evidence of substantial grounds. The judge may, however, regard the failure of the Minister to respond to evidence produced as significant. In that situation, he may reasonably expect the Minister to produce some evidence.
34. Before turning to the specific allegations in the present case, it should be noted that not all allegations of ill-treatment would be regarded as amounting to “inhuman or degrading treatment” contrary to Article 3: a certain minimum level must be reached. It has to be borne in mind that the appellant is a person who, if surrendered to Poland, will have to serve the balance of a sentence of imprisonment lawfully imposed on him. The European Court explained in *Saadi* at paragraphs 134 and 135 that:

“According to the Court's settled case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim

In order for a punishment or treatment associated with it to be “inhuman” or “degrading,” the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment ...”

35. An additional point of general importance is that the time for assessment of the risk of subjection to ill-treatment contrary to Article 3 is the time at which the court has to consider surrendering the person. In *Saadi*, at paragraph 133, the European Court said:

“With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion. However, if the applicant has not yet been extradited or deported when the Court examines the case, the relevant time would 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 in which it is likely to develop, the present circumstances are decisive.”

36. The case of *Orchowski v. Poland* was not, of course, concerned with extradition or surrender. Mr. Orchowski was a Polish citizen with much experience of conditions in Polish prisons. His central complaint was related to overcrowding. In particular he complained that he had been detained in cells allowing space of less than 3 m² per person. He also complained of being allowed only one hour of outdoor exercise per day. I do not think it necessary, in the present case, to go into detail about *Orchowski v. Poland*. The European Court adopted the minimum standard of 3 m² per prisoner laid down in Polish law. The Court dealt in great detail with prison conditions in Poland for the period from 2000 to 2008, noting in particular that the Polish Constitutional Court had itself condemned the widespread inadequate prison conditions. The Court concluded that it had been established that the applicant had been detained in overcrowded prison conditions and that there had been a violation of Article 3 of the Convention. The appellant attaches particular importance to the fact that the judgment in *Orchowski v. Poland* was what is called a “ pilot judgment,” that it recorded that there were some 160 pending applications before the court regarding Polish prison conditions and that the European Court undoubtedly recorded the existence of a serious systemic problem in Polish prisons. It can certainly be accepted that the Court found that overcrowding in Polish prisons had, during the relevant period been widespread and probably systemic.

37. At the same time, it is important to recall that the present case must relate to the conditions which the appellant will face if surrendered to serve the balance of his sentence in Poland. The judgment in *Orchowski v. Poland* was delivered on 22 October 2009. It

deals with conditions from the year 2000 until mid-2008. The judgment recorded and welcomed (paragraph 152) the fact that Poland had recently taken general steps to remedy the structural problems related to overcrowding and the resulting inadequate conditions of detention. For example, the Polish government produced evidence that the rate of overcrowding was at 8.1% in September 2008 and at 4% in June 2009.

38. The appellant has also placed before the court a 2009 Human Rights Report on Poland from the US Department of State, dated 11th March 2010. While the report records that prison conditions in Poland remained poor and overcrowded, the statistical material regarding the number of prisoners detained in cells with space less than 3 m² per person would appear to be of the order of 2000 out of a total prison population of more than 80,000.
39. I turn, finally, to consider the order which this Court should make on the appeal. As I have explained, the court has not previously ruled on the standard of proof which should be applied in a case where the risk of ill-treatment contrary to Article 3 is raised. The existing case law has not addressed this issue. This court has not previously had to consider the implications of the cases of *Soering* or *Saadi* for the European Arrest Warrant regime and certainly has not had to consider the implications of the decision of the European Court in *Orchowski v. Poland*. While the learned High Court judge took note of the concept of “*real risk*”, it is not clear what standard of proof he applied, save that he ascribed to counsel for the appellant an acknowledgement of the need for “*cogent and compelling evidence*,” which recalls his reference to “*clear and cogent evidence*” in *Busjeva*, cited above. He referred in the present case to the “*necessary standard*” and believed that he should not “*lower that standard*”. He was also, understandably, concerned with the implication that, pending the improvement of Polish prison conditions, no person could be surrendered to that State. The fact that he acceded to the application that he certify questions as being of exceptional public importance demonstrates his concern as to the appropriate standard of proof. As we have seen, the appropriate standard is “*substantial grounds for believing...*” that the person “*would be exposed to a real risk*” of ill-treatment. In these circumstances, I believe that the entire application should be remitted to the High Court for reconsideration in the light of the appropriate standard of proof, as explained by this Court.
40. The time for consideration of the existence of “*real risk*” is the time of likely surrender to Poland. Consequently, it will be open to the High Court to receive further evidence. It should, in particular, be possible to clarify the conditions in which the appellant will be imprisoned, if surrendered to Poland.
41. I agree that, for the reasons given in the judgment which has been delivered by Denham J, the Notice to Vary should be dismissed.
42. On that basis, I would allow the appeal and remit the entire matter to the High Court.