

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND
DANIEL MULLAN

RESPONDENT

Judgment of Ms. Justice Donnelly delivered on the 14th day of December, 2018**1.0 Introduction**

1.1 The United States of America ("the U.S.A.") seeks the extradition of the respondent for the purpose of putting him on trial in U.S. Federal Court in respect of four alleged offences relating to child sexual exploitation or child pornography. It is alleged that the respondent engaged in the sexual exploitation of a child, the transportation of a minor with intent to engage in sexual activity and two counts of possession of child pornography.

1.2 The main points of objection to extradition are; the offences do not correspond with offences in this jurisdiction, his extradition will create a real risk of cruel and inhumane or degrading treatment due to his frail health and, the sentencing regime in the U.S.A. would expose the respondent to a breach of his fundamental rights. Other issues were also raised by the respondent and will be addressed in the course of this judgment.

2.0 The Extradition Act, 1965 and the Ireland- U.S.A. Treaty provisions

2.1 This application for the extradition of the respondent to the U.S.A. is governed by the Extradition Act, 1965 ("the Act of 1965") and the extradition treaty arrangements as between Ireland and the U.S.A.. The Attorney General submitted that the formal requirements of the Act of 1965 and the treaty provisions were usefully and conveniently set out by the High Court (Edwards J.) in *Attorney General v. O'Gara* [2012] IEHC 179. The Court agrees that is so and relies upon Edwards J.'s dicta on the legal provisions and required proofs.

3. The Formal Proofs for Extradition

3.1 Save for a single issue on the correspondence of the offences which shall be addressed later in this judgment, no other issue as regards non-compliance with formal proofs was raised by the respondent. The Court, in carrying out its duty under the provisions of the Act of 1965, is bound to consider whether the extradition is prohibited under the terms of the said Act.

Extradition to a Country to which Part II of the Act of 1965 applies

3.2 As Edwards J. has set out in *O'Gara*, a request for extradition can only be duly made if the requesting state is one to which Part II of the Act of 1965 applies. Having considered the relevant legislation and statutory instruments, I am satisfied that the U.S.A. is a country to which Part II of the Act of 1965 applies.

A person before the High Court under section 27 of the Act of 1965

3.3 The first condition that must be met, if the High Court is to commit a person to prison to await extradition, is that the person must be before the High Court under s. 26 or s.27 of the Act of 1965. This respondent is before the High Court under the provisions of s.27(1) of the Act of 1965. This arose in circumstances where the High Court, issued a warrant for the arrest of the respondent on the 14th day of October, 2017, following a request for his provisional arrest by the appropriate authorities in the U.S.A. dated 12th October, 2017.

3.4 The respondent was duly arrested on foot of the arrest warrant issued pursuant to s. 27 of the Act of 1965 and brought before the High Court on the 17th day of October 2017. The Court is satisfied that the respondent is before the High Court under s. 27 of the Act of 1965.

Extradition Duly Requested

3.5 The Court must be satisfied under s. 9 of the Act of 1965, that the request for surrender has been duly requested. Under s. 23, the request must be in writing from a diplomatic agent or by any other means provided in the relevant extradition provisions.

3.6 On the 10th October, 2017, a request for his extradition was made by United States of America. It was communicated to the Department of Foreign Affairs and Trade by the Embassy of the U.S.A. in Dublin and was dated 13th October, 2017. The integrated Washington Treaty provides that the request for extradition shall be made in writing and shall be transmitted with supporting documents through the diplomatic channel. In this case, the extradition has been transmitted through the diplomatic channel.

Section 26(1)(a) – Minister's Certificate:

3.7 The Minister certified on the 19th October 2017, pursuant to s.26(1)(a) of the Act of 1965, that the extradition request for the respondent had been duly made by and on behalf of the U.S.A. and received by him in accordance with Part II of the Act of 1965.

Section 25(a) – certified copy of U.S. warrant of arrest:

3.8 I am satisfied that Michael R. Maffei, Assistant U.S. Attorney, U.S. Attorney Office for the Eastern District of New York has exhibited to his affidavit of 2nd October, 2017, the certified copy of the arrest warrant for the respondent. This warrant is dated 7th September, 2017.

Section 25(c) – Relevant enactments:

3.9 I am satisfied that the relevant enactments are exhibited in the affidavit of Michael R. Maffei.

Section 25(d) – Description of the person claimed:

3.10 There is a photograph of the respondent exhibited to the affidavit of Michael R. Maffei. Furthermore, Mr Maffei has set out an extensive description of the person claimed. This sets out the respondent's date of birth as well as a person description. There is also a similar description of the respondent in the Diplomatic Note. The respondent accepted that he was the person described in the

extradition request. The Court is satisfied that s.25(d) has been complied with.

Section 25(b) – Statement of offences:

3.11 The statement of the offences is set out in the Diplomatic Note and (in greater detail) in the affidavit Michael R. Maffei – both in the body of the affidavit and in the superseding indictment exhibited to his affidavit. They are also set out in the affidavit of Cindy Wolff, as Special Agent with the Federal Bureau of Investigations. In the course of legal submission regarding the issue of correspondence, counsel for the respondent took issue with whether there was correspondence with offences in this jurisdiction. This matter will be dealt with under the heading correspondence of offences below.

Conclusion on formal proofs:

3.12 Subject to further consideration of s.25(b), the Court is satisfied that the formal proofs, for the purpose of the application for extradition, have been complied with by the applicant.

4. Correspondence of offences and sufficiency of detail

4.1 The Diplomatic Note contains a brief statement regarding the four alleged offences, together with a formal statement of each of the counts. That statement is supplemented by the Affidavit of Mr. Maffei and the Superseding Indictment exhibited therein as well as the affidavit of Cindy Wolff. A synopsis of the counts and the statement of facts are set out below.

4.2 Count 1: Sexual Exploitation of a Minor

Mr Maffei alleges that the respondent in or about and between January 1999 and December 2006 (dates are approximate) within the Eastern District of New York and elsewhere did knowingly and intentionally employ, use, persuade, induce, entice and coerce a minor to engage in sexually explicit conduct, for the purpose of producing one or more visual depictions of such conduct, knowing and having reason to know that such visual depictions would be transported and transmitted using a means and facility of interstate and foreign commerce and in affecting interstate and foreign commerce, which visual depictions were produced and transmitted using materials that had been mailed, shipped and transported in and affecting interstate and foreign commerce by any means including by computer, one or more cameras, cassette tapes, videotapes and DVDs. This conduct is contrary to Title 18, United States Code, Sections 2251(a), 2251(d) and 3551 and carries a maximum term of 20 years imprisonment.

4.3 Mr Maffei set out the legal components of the offence. His description of the charge states that to satisfy the burden of proof and convict the respondent, the U.S. government would have to establish beyond reasonable doubt; (1) that the victim was under the age of eighteen; (2) that the defendant used, employed, persuaded, induced, enticed or coerced the victim to take part in sexually explicit conduct for the purpose of producing a visual depiction of that conduct; and (3) that the defendant knew or had reason to know that the visual depiction would be mailed or transported in interstate or foreign commerce or that the visual depiction was produced using materials that had been mailed or transported in interstate or foreign commerce.

4.4 Mr Maffei avers that the U.S. government will establish each of the required elements. This is contended on the basis that on the 13th June, 2017 a witness, known as Witness 1, who personally met the respondent in the past, was present at the FBI offices in New York. Mr Maffei avers that Witness 1 has known the respondent for 30 years, was a former family friend and informed the FBI agents that when he was 15 or 16 years of age and living in Florida, U.S.A., the respondent picked him up from school, took him to a hotel, paid him \$100 and then the respondent videotaped Witness 1 engaging in a sexual act.

Count 2: Transportation of a Minor with Intent to Engage in Sexual Activity

In or about December 1999, within the Eastern District of New York and elsewhere, the respondent did knowingly and intentionally transport an individual who had not yet attained the age of 18 years with the intent that the individual engage in sexual activity for which any person can be charged with a criminal offence. This conduct is contrary to Title 18 United States Code, Sections 2423(a), 2427 and 3551 and carry a maximum term of 15 years imprisonment.

4.5 Mr Maffei set out the legal components of the offence. He avers that in order to meet the burden of proof regarding the transportation of a minor with intent to engage in sexual activity the U.S. government would have to prove beyond reasonable doubt; (1) that the defendant knowingly transported the victim in interstate or foreign commerce; (2) that the defendant transported the victim with the intent that the victim would engage in illegal sexual activity; and (3) that victim was less than eighteen years old at the time.

4.6 Mr Maffei avers that the U.S. government will establish each of the required elements. Mr Maffei states that a witness, known as Witness 2, told law enforcement authorities that the respondent started sexually abusing him. This sexual abuse occurred at the respondent's own home in New York and during trips the respondent took him on to Florida, Amsterdam and London. Mr Maffei alleges that the sexual conduct involved the respondent videotaping Witness 2 performing sexually explicit conduct. Further, Mr Maffei alleges that Witness 2 was present in the room with the respondent when he engaged in negotiations to sell child pornography. Mr Maffei avers that after local police in New York searched the respondent's home address, they found numerous videos of the respondent engaged in sexually explicit conduct in locations such as Elmont in New York in addition to those locations alleged by Witness 2. Furthermore, Mr Maffei reports that a review of Witness 2 passport by U.S. law enforcement authorities has corroborated the travel alleged by Witness 2.

Counts 3 and 4: Possession of Child Pornography

4.7 The final two counts are that of possession of child pornography and as such can be examined together. Mr Maffei avers that on the first count; on or about and between the 17th January, 2014 and 17th August, 2017 (approximate dates), the respondent did knowingly and intentionally possess matter containing one or more visual depictions of minors engaging in sexually explicit conduct, including photographs, videos, cassette tapes, films, images and videos in digital format on hard drives, floppy disks, CD Roms and DVDs which were seized on or about 17th August, 2017 in Melville, New York. These visual depictions had been mailed, shipped and transported using a means and facility of interstate and foreign commerce.

4.8 Mr Maffei avers that on the second count; on or about the 17th January, 2014 and the 15th June, 2017 (both dates approximate) within the Eastern District of New York, the respondent did knowingly and intentionally possess matter containing one or more visual depictions of minors engaging in sexually explicit conduct, including photographs, videos, cassette tapes, films, images and videos in digital format on hard drives, floppy disks, CD Roms and DVDs which were seized on or about 15th June, 2017 in Elmont, New York. These visual depictions had been mailed, shipped and transported using a means and facility of interstate and foreign commerce. Both of these counts amount to conduct is contrary to Title 18 United States Code, Section 2252 and as indicted carry a maximum term of

20 years imprisonment.

4.9 Mr Maffei set out the legal components of the offence. He avers that in order to meet the burden of proof regarding the possession of child pornography, the U.S. government would have to prove beyond reasonable doubt that the respondent knowingly possessed child pornography found at each location separately.

4.10 Mr Maffei avers that the U.S. government will establish each of the required elements. Mr Maffei states that Witness 1 who had become curious if the respondent still had the videotape he had made of the Witness 1 engaging in a sexual act, went to the respondent's home in Elmont, New York. Mr Maffei states that Witness 1 had viewed between 6 and 8 videotapes, of which most contained images of Witness 1 and the respondent engaging in sexual activity with boys. Mr Maffei states Witness 1 estimates that the videotapes are from the 1980s to the 1990s. Witness 1 allegedly found a box of photographs in the respondent's residence which allegedly contain nude images of boys around the age of 16. Mr Maffei states that during a lawful search of the respondent's home in Elmont, New York on the 16th June, 2017, authorities found a massive collection of child pornography of which was homemade and featured the respondent engaged in sexually explicit conduct with minor boys.

(A) The law on correspondence of offences

4.11 Both parties were largely in agreement as to the law on correspondence of offences. Under the relevant provisions of s.10 of the Act of 1965, extradition shall be granted only in respect of an offence which is punishable under the laws of the requesting country and of the State by imprisonment for a maximum period of a least one year or by a more severe penalty. Section 10 subsection 3 provides that "[a]n offence punishable under the laws of the State" means, (a) an act, that, if committed in the State on the day on which the request for extradition is made, would constitute an offence...."

4.12 The Supreme Court, in the case of *Attorney General v. Dyer* [2004] 1 IR 40, clarified that it is not an equivalence of the juristic elements of the offence that the court must enquire into, rather "the correspondence inquiry depends on the facts alleged in the warrant." Therefore, this Court must examine the acts alleged and not the definition of the offence under the law of the requesting state.

(B) The offences offered as corresponding offences:

(i) Sexual Exploitation of a Child

4.13 Counsel for the applicant offered two offences as the corresponding offences in Irish law; section 5 of the Child Trafficking and Pornography Act, 1998 ("the Act of 1998") and section 5A of the Act of 1998..

4.14 Section 5 of the Act of 1998 creates offences of producing or distributing child pornography. Section 2 of the Act of 1998 defines a child as being "a person under the age of 18 years".

Section 5(1) of the Act of 1998 states:

"5.—(1) Subject to sections 6 (2) and 6 (3), any person who—

(a) knowingly produces, distributes, prints or publishes any child pornography,

(b) knowingly imports, exports, sells or shows any child pornography,

(c) knowingly publishes or distributes any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, prints, publishes, imports, exports, sells or shows any child pornography,

(d) encourages or knowingly causes or facilitates any activity mentioned in paragraph (a), (b) or (c), or

(e) knowingly possesses any child pornography for the purpose of distributing, publishing, exporting, selling or showing it,

shall be guilty of an offence ..."

4.15 Section 5A of the Act of 1998 states:

"5(A) (1) A person who (a) causes, incites, compels or coerces or (b) recruits, invites or induces,

a child to participate in a pornographic performance, or gains from such participation, shall be guilty of an offence."

4.16 Counsel for the respondent argued that one aspect of difference between the Irish offences and the U.S. offences was the fact that all the U.S. offences required proof of some type of involvement in interstate or foreign commerce or transportation. However, the applicant argued that this difference does not alter the consideration of correspondence as it simply indicates that additional matters, not required by Irish law, must be proven under U.S. law. The applicant contended that the issue for the court was whether the acts described, if they occurred here, would be criminal.

4.17 It is the view of this court that the focal point for assessing correspondence must be to ask whether the conduct in question, if committed, in Ireland would be a criminal offence. Interstate commerce is an added factor that must be proved in the U.S.A. Such a component or similar type component is not required to make the conduct alleged to have been committed a crime if committed in this jurisdiction. The facts alleged in Count 1 are that he caused, incited, coerced or induced a child to engaged in sexually explicit conduct for the purpose of producing visual depictions of it. Such conduct would amount to an offence under s. 5 of the 1998 Act as well as an offence under s. 5A of the 1998 Act if committed in this jurisdiction.

(ii) Transportation of a Minor with Intent to Engage in Sexual Activity

4.18 Counsel for the applicant offered section 3 of the 1998 Act as being a corresponding offence which contains the offence of child trafficking. Section 3(5) of the 1998 Act:

"traffics means, in relation to a child-

- (a) procures, recruits, transports or harbours the child, or
- (i) transfers the child to,
 - (ii) places the child in the custody, care or charge, or under the control, of, or
 - (iii) otherwise delivers the child to, another person.
- (b) causes the child to enter or leave the State or travel within the State,
- (c) takes custody of the child or takes the child-
 - (i) into one's care or charge, or
 - (ii) under one's control,
- or
- (d) provides the child with accommodation or employment."

The substantive offence is created in section 3(1) in the following terms:

"3(1) A person who traffics a child for the purpose of the sexual exploitation of the child shall be guilty of an offence and shall be liable upon conviction on indictment-

- (a) to imprisonment for life, or a lesser term, and
- (b) at the discretion of the court, to a fine."

Section 3(5) goes further and states:

"sexual exploitation" means, in relation to a child —

- (a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,
 - (b) the prostitution of the child or the use of the child for the production of child pornography,
 - (c) the commission of an offence specified in the Schedule to the Sex Offenders Act 2001 against the child, causing another person to commit such an offence against the child, or inviting, inducing or coercing the child to commit such an offence against another person,
 - (d) inducing or coercing the child to engage or participate in any sexual, indecent or obscene act,
 - (e) inviting the child to engage or participate in any sexual, indecent or obscene act which, if done, would involve the commission of an offence against the child, or
 - (f) inviting, inducing or coercing the child to observe any sexual, indecent or obscene act, for the purpose of corrupting or depraving the child,
- and "sexually exploits" shall be construed accordingly"*

4.19 In light of the facts alleged against this respondent and set out above, this Court concludes that it is self-evident the conduct set out therein, would if committed in this jurisdiction amount to an offence contrary to s. 3 of the 1998 Act. In this count there is an allegation of international transportation or trafficking. Even without that the definition of trafficking in this jurisdiction would encompass the conduct alleged. In all the circumstances, correspondence has been established.

(iii) Counts 3 and 4; Possession of Child Pornography

4.20 Counsel for the applicant offered section 6 of the Act of 1998 as being a corresponding Irish offence which contains the offence of child pornography. Section 6(1) of the Act of 1998:

- "6(1) Without prejudice to section 5(1)(g) and subject to subsections (3) and (4) , any person who —*
- (a) knowingly acquires or possesses child pornography, or
 - (b) knowingly obtains access to child pornography by means of information and communication technology,
- shall be guilty of an offence..."*

4.21 In light of the facts alleged, this Court concludes that the conduct set out in count 3 and 4 would amount to an offence under the said Act of 1998 if committed in this jurisdiction. Correspondence has therefore been established. The fact that in the U.S.A. it is a requirement to prove interstate or foreign transportation or commerce is irrelevant for the purpose of establishing correspondence.

(C) Minimum Gravity

4.22 The requirement of minimum gravity must be met in respect of each offence before extradition can be ordered for that offence i.e. they must be offences where they are punishable by imprisonment for a maximum period of at least one year or by more severe penalty in the U.S.A. and in this State. As set out above the minimum gravity of one year sentence of imprisonment has been met in the U.S.A.. In this jurisdiction the minimum gravity requirement is also reached; the offence of producing or distributing child pornography carries a maximum sentence of 14 years; the offence of possession of child pornography carries a maximum sentence of 5 years; the offence of child trafficking carries a maximum sentence of life imprisonment.

4.26 The Court is satisfied therefore that the requirements of minimum gravity have been met in respect of each offence.

(D) Compliance with s. 25(1)(b) – a statement of each offence

4.27 Article VIII para 3 (b) of The Integrated Washington Treaty, requires a statement of the “pertinent facts” of the case, indicating as accurately as possible the time and place of commission of the offence. Under the terms of s. 25(1)(e) of the Act of 1965 as amended, the extradition request is required to be supported by any other document required under the relevant extradition provisions”. As the Washington Treaty requires a statement of the pertinent facts this is a document required under the Act of 1965.

4.28 It is not necessary to show every piece of evidence in the possession of the requesting state. The statement of the pertinent facts is all that is required. (See *Attorney General v Damache* [1015] IEHC 339 at para 4.3.4). The request for extradition concern allegations of sexual crimes which have been allegedly perpetrated by the respondent on children ranging from the sexual exploitation of a child to the transportation of a child to being in possession of child pornography. The respondent’s alleged involvement is set out. The Court accepts, and there is no evidence to the contrary, that this has been done “as accurately as possible.”

4.29 The Court is satisfied that in relation to each count on which extradition is sought, there is a sufficient statement of what is alleged against the respondent to enable this Court to carry out its functions under the Act of 1965. The detail is sufficient to allow the Court to consider whether the acts correspond with offences in this jurisdiction. The details are also sufficient to enable this respondent to know precisely why he has been arrested and to permit him to challenge his extradition.

5. Sections 15, 20 and 21 of the Act of 1965

5.1 The respondent objected to his extradition on the basis that it was prohibited by reason of s. 15 of the Act of 1965 as amended in circumstances where the alleged offences are also offences under the law of the State.

Section. 15 reads:

s.15(1) "Extradition shall not be granted for an offence which is also an offence under the law of the State if-

(a) the Director of Public Prosecutions or the Attorney General is considering, but has not yet decided, whether to bring proceedings for the offence against the person claimed, or

(b) proceedings for the offence are pending in the State against the person claimed."

5.2 The respondent did not any evidence before the Court to demonstrate that the Director of Public Prosecutions or the Attorney General were considering bringing a prosecution, or that a prosecution in the State was pending against him. Indeed, the contrary position had already been established (see *Mullan v The Director of Public Prosecutions Ireland & Anor* [2018] IEHC 585). Any complaint under s. 15 based upon this claim is rejected.

5.3 The respondent also complained that, because there was no consideration given to his prosecution, there was a breach of s. 15 of the Act of 1965. The fact that no consideration has been given to prosecution in this jurisdiction is not a ground for refusing to extradite a requested person. In the circumstances, the Court rejects this submission that the respondent’s extradition is prohibited under s. 15 of the Act of 1965.

5.4 The main claim of the respondent under was that by failing to consider him for prosecution in this jurisdiction, the power of the Minister to refuse his extradition pursuant to s. 15(2) of the Act of 1965 was no longer operable. Section 15(2) provides:

"Extradition may be refused by the Minister for an offence which is also an offence under the law of the State if the Director of Public Prosecutions or the Attorney General has decided either not to institute or to terminate proceedings against the person claimed in respect of the offence."

5.5 Section 15(2) of the Act of 1965 does not create a bar to surrender. It is a matter which operates, where appropriate, subsequent to a decision by the High Court to commit him to prison to await his surrender. This point of objection is therefore rejected.

5.6 At point 9 of his points of objection, the respondent objected to extradition as follows:

"The United States has perpetrated covert acts of rendition, in that it has transported arms and armed personnel through Shannon airport and has carried out officially sanctioned acts of torture including "water-boarding" in relation to detainees and on that basis is not a country to which extradition should be ordered."

5.7 No evidence was placed before the Court dealing with any of these points. No evidence or submission was made as to how these claims, even if true, could affect this particular respondent. In so far as the respondent raises generalised points which are not specific to his circumstances, this point of objection is rejected as unfounded.

5.8 It is possible to interpret this point of objection, especially as it refers to rendition, as being an objection based upon s. 20 and s.21 of the Act of 1965. Section 20 of the Act of 1965 deals with the rule of specialty and s. 21 deals with re-extradition to a third country. Both of these sections prohibit extradition unless provision is made “by the law of the requesting country or by the extradition agreement” that either the person will not be proceeded against or punished except in very specific circumstances or the person will not be re-extradited to a third country save in very specific circumstances.

5.9 Article XI of the Integrated Washington Treaty provides for recognition of the rule of specialty in the manner as set out in s. 20 of the Act of 1965. Therefore, the respondent’s extradition is not prohibited under s. 20 of the Act. Article XI of the Treaty also deals with re-extradition to a third country and prohibits such re-extradition except on the specific conditions as set out in s. 21 of the Act of 1965. The respondent’s extradition is similarly not prohibited under s. 21 of the Act of 1965.

6. Fundamental Rights Issues

(A) Objections based upon a claim of breach of fundamental rights

6.1 The respondent claims that his extradition to the U.S.A. is prohibited on the ground that to surrender him would amount to a disproportionate interference with both his personal rights and family life contrary to Article 40 and Article 41 of Bunreacht na

hÉireann as well as Article 8 of the European Convention on Human Rights. The respondent also claims that his surrender to the U.S.A. would violate his right not to be subjected to cruel and inhuman or degrading treatment due to the substandard medical treatments or lack thereof available in U.S. detention facilities contrary to Article 3 of the European Convention on Human Rights. Further, the respondent argued that the criminal justice system in the U.S.A. would violate his right to a fair trial contrary to Article 6 of the European Convention on Human Rights. Finally, the respondent made a complaint regarding his arrest. This complaint was based upon what was submitted was an existing plan to deport him but which could not be carried out as he was an Irish citizen.

(i) The U.S Criminal Justice System and Fair Trial Rights

6.2 The respondent objected to extradition on the basis that the criminal justice system in the U.S.A. would breach his fundamental rights contrary to Article 6 of the European Convention on Human Rights. Specifically, the respondent alleged that the existence of plea bargain deals within the U.S. criminal justice system could effectively force the respondent into pleading guilty. Counsel for the respondent argued that this risk was particularly high given the maximum sentences in respect of the offences allegedly perpetrated by the respondent. This point of objection has not been substantiated with evidence or by reference to any legal authority. It has not been substantiated that there is a real risk that the respondent's fundamental rights would be breached by his exposure to the U.S. criminal justice system. The Court rejects this point of objection as being without substance.

(ii) The Respondent's Medical Conditions

6.3 The respondent submitted that there were substantial grounds to believe he was at real risk of being subjected to cruel and inhuman or degrading treatment in custody in the U.S.A. should he be extradited in light of his medical conditions. The respondent also relied upon his medical condition in submitted that his right to respect for his personal rights would be violated. As the facts are intertwined, the Court will deal with the evidence first and then refer to the putative breach of his Article 3 and Article 8 rights under the European Convention on Human Rights.

Evidence

6.4 his evidence put before this Court was that the respondent suffered from a range of medical conditions including:

- a. Blindness;
- b. Inability to walk;
- c. Morbid obesity;
- d. Chronic lower vertebral compression and excruciating and constant pain;
- e. Chronic venous engorgement of the legs;
- f. Atrial fibrillation;
- g. Chronic infection and autoimmune compromise;
- h. Peripheral neuropathy;
- i. Psoriasis;
- j. Hypothyroidism;
- k. Macular degeneration;
- l. Chronic Cardiac Failure;
- m. Anxiety;
- n. Cellulitis.

6.5 The evidence the respondent relied upon was quite scant in relation to these medical conditions. The evidence consisted mainly of a series of medical notes and some very brief reports. At no point did the authors of the reports engage with the effect extradition would have on his conditions. There was no evidence as to conditions in U.S Federal prisons, or why or how it was suggested that he would not be treated humanely or with dignity there. Furthermore, the above list may have overplayed the nature of his conditions slightly. He certainly has severe difficulties with his eyes and with mobility but from at least some of the reports he appears to have some vision and at least an ability to walk small distances with the assistance of a walking frame. It is clear that he has a number of medical conditions for which he needs considerable care.

In this case, although under no obligation to do so, the U.S. authorities placed evidence before this Court. Ms Janet Bunts from the U.S. Regional Health Services Administrator, United States Department of Justice, Federal Bureau of Prisons, Northeast Region received a copy of the respondent's medical reports submitted to this Court in addition to the respondent's affidavit and addressed medical provision in U.S. Federal prisons.

Ms Bunts states that the Bureau of Prisons (BOP) has implemented a 'Medical Care Level Classification' system. The Care Classification system is aimed at enhancing the BOP's ability to manage inmate healthcare effectively by matching inmates with those institutions that best meet their medical needs while at the same time achieving optimal use of the BOP's healthcare resources. Ms Bunts states that BOP's goal in implementing the Care Level system is to assign inmates with greater medical needs to those facilities with more comprehensive on-site medical resources and to provide more effective and efficient access to healthcare for each inmate.

6.6 Ms Bunts further confirms that each BOP facility, regardless of the level of care, has a Health Services Department, typically staffed with a physician(s) and several mid-level providers such as physician assistants, nurse practitioners, along with technical and administrative staff. Most Health Services Departments conduct 'sick call' four or more days per week for the entire inmate population.

6.7 Further, Ms Bunts avers that the official BOP designation process is initiated only after BOP have conducted a medical assessment of the needs of inmates. Additionally, BOP utilises Federal Medical Centres (FMCs) to provide continuing care to inmates who require inpatient care, which has seven of these centres throughout the U.S.A.. Additionally, Ms Bunts states that each BOP institution contracts with medical centres in the local vicinity so as to provide specialist medical treatment as required by inmates. As part of

the care practice, each BOP institution has the ability to assign inmates to chronic care clinics and Ms Bunts avers that the respondent (if extradited) would be likely designated to the Cardiac Neurology and General chronic care clinics. Finally, Ms. Bunts avers that based upon the information provided to her and her knowledge of the BOP's medical resources, the BOP will be able to provide appropriate care for the respondent should he be sentenced to a term of incarceration and committed to the custody of the Bureau of Prisons.

Article 3

6.8 The applicant submitted and it is accepted that the correct approach to be taken, when analysing the impact of medical conditions on Article 3 rights that might arise from the respondent's extradition, was the Supreme Court's decision in *Attorney General v Davis* [2018] IESC 27. In that case the Supreme Court concluded that whether one applies the tests in *Minister for Justice and Equality v Rettinger* [2010] 2 IR 783, *Attorney General v O'Gara* [2012] IEHC 179 or *Attorney General v Marques* [2015] IEHC 798 on the one hand, or the principles ascertainable from the jurisprudence of the ECtHR on the other, there was little practical difference. At paras 85 and 86, McKechnie J. observed:

"The test set out by Denham J. in Rettinger was expressly said by her to be adopted in its entirety from the principles set out by the ECtHR in Saadi v Italy (App. No 37201/06) (2009) 49 EHRR 30. Her judgment was also heavily influenced by the judgment in Orchowski v Poland (App No 1788/04, European Court of Human Rights, judgment of the 22nd October, 2009). Rettinger in turn informed the subsequent case law in this jurisdiction. The appellant has relied solely on Ahmad v. United Kingdom in his written submissions, but the principles laid down in that case and the ECtHR's analysis of the facts are in fact entirely consistent with the approach which the Irish courts have taken to the issue. Indeed Ahmad v. United Kingdom was considered and cited by Donnelly J. at paragraphs 9.23-9.24 of her judgment in Marques.

86. *The only additional observations I would make are more in the nature of clarification than qualification:*

- Some authorities say that "substantial grounds" must be established such as would give rise to a real risk; others say "reasonable grounds". Given the difficulty of obtaining credible evidence which is current at the time of hearing, I would prefer the latter, though in substance there may be no difference between the two.*
- A respondent does not have to show that if returned he would or probably would suffer a violation of his Article 3 rights: a real risk thereof is sufficient.*
- Neither the objectives of the Framework Decision nor those underpinning the Washington Treaty can defeat an established risk of ill-treatment."*

6.9 It is also of some relevance that, in *Attorney General v Davis* [2018] IESC 27, the respondent adduced significant and substantial evidence in relation to his medical condition. Notwithstanding the same, the court in that case considered that the evidence did not go so far as to establish that extradition would give rise to a breach of his fundamental rights.

6.10 The respondent has made a complaint that his rights will be breached under Article 3 of the European convention on Human Rights. He also claimed "without prejudice to the generality of the foregoing and/or that the respondent is in frail health, his extradition would contravene his right to liberty and his right to bodily integrity and/or his other personal rights and/or would otherwise expose him to conditions that constitute cruel and inhumane or degrading treatment or punishment."

6.11 The respondent made no submission as to how cruel and inhumane or degrading treatment or punishment was a standard different to that covered under Article 3. The Court will treat it as the same. Similarly, the respondent made no submission as to how his right to bodily integrity or "his other personal rights" were to be assessed differently. This Court does not therefore understand there to be any relevant distinction and will deal with the matter in accordance with Article 3 considerations. Finally, the reference to his right to liberty was not pursued. The Court fails to see how any issue of right to liberty arises merely because a person alleges ill-health. This part of the point of objection is rejected *in limine*.

6.12 In the view of the Court, the medical ill-health of the respondent is a fact that has been established by the evidence. The extent of that ill-health is not such as prevents him from being incarcerated. He has been in custody in this State for a considerable period and his conditions have been treated. There are no substantial grounds for believing that he is at real risk of being exposed to inhuman and degrading treatment solely as a result of being incarcerated because he is suffering from those conditions.

6.13 The burden is on the respondent to reach the standard of substantial grounds to show that there is a real risk that because of conditions in U.S. prisons that he will be subject to inhuman and degrading treatment there as a result of his incarceration. The respondent has not presented any evidence, either by affidavit or by reference to reports or decisions from reputable tribunals or international bodies to show that he would be at such a risk. On that basis the Court rejects the respondent's claim that to extradite him because of his medical conditions would amount to a violation of his rights under Article 3 of the European Convention on Human Rights.

6.14 Furthermore, the Court has received from the U.S. authorities, information that is cogent and persuasive as to the conditions that exist in U.S. Federal prisons. That information, although not necessary in the context of the decision, puts beyond any possible doubt, that his medical conditions can be accommodated within the U.S. prison system. The evidence demonstrates that he would not be subject to inhuman and degrading treatment because of his medical conditions.

Article 8

6.15 In making a determination as to whether Article 8 prohibits extradition the Court must make a fact specific assessment of the public interest in extradition and the private interests of the respondent. This is necessary because the Court must consider if the extradition is necessary in the sense that there is a pressing social need for such extradition. The Court assesses the proportionality of the extradition as against the requested person's circumstances.

6.16 In assessing the public interest, O'Donnell J. stated in *Minister for Justice and Equality v. JAT (No. 2)*:-

"An important starting point, in my view, is that considerable weight is to be given to the public interest in ensuring that persons charged with offences face trial. There is a constant and weighty interest in surrender under an EAW and extradition under a bilateral or multilateral treaty. People accused of crimes should be brought to trial. That is a

fundamental component of the administration of justice in a domestic setting, and the conclusion of an extradition agreement or the binding provisions of the law of the European Union means that there is a corresponding public interest in ensuring that persons accused of crimes, in other member states or in states with whom Ireland has entered into an extradition agreement, are brought to trial also. There is an important and weighty interest in ensuring that Ireland honours its treaty obligations, and if anything, a greater interest and value in ensuring performance of those obligations entailed by membership of the European Union. All agreements are based on broad reciprocity and there is, therefore, a further interest and benefit in securing the return to Ireland for trial of persons accused of crimes, or the return of sentenced offenders. There is also a corresponding public interest in avoiding one country becoming, even involuntarily, a haven for persons seeking to evade trial in other countries."

6.17 Although there is a public interest in extradition in every case, it is not a factor that has a constant weight. Each case must be assessed individually. Factors such as the gravity of the offence or delay may affect the weight to be given to the public interest.

6.18 In this particular case, the alleged crimes involve very serious sexual crimes perpetrated on children as well as the serious crime of possession of child pornography. In the requesting state they carry significant penalties of imprisonment.

6.19 Serious offences of violence bring with them a particularly high public interest. O'Donnell J. in *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17 identified a clear distinction between the necessity for extradition in the public interest that may apply in cases involving serious violence as against other types of crime. Therefore, even where extradition may interfere very significantly with personal and family rights, the public interest in extraditing the requested person will be higher where the crime alleged is one of serious violence.

6.20 In light of all the above matters, namely alleged involvement in sexual crimes perpetrated on children and the maximum sentences available for those offences these must be considered serious offences. They are offences of substance and significance.

6.21 In considering both the gravity of the alleged offences and the public interest in extraditing the respondent, it can be seen that on all counts whether taken individually or separately there is a high public interest in his extradition. I do not consider that there has been any delay that would affect that high public interest in his extradition.

6.22 On the side of his private life, the respondent has put forward very little. His life was based primarily in the U.S and perhaps other jurisdictions (but not Ireland) in the more recent time before his imprisonment in this jurisdiction. He has no ties to this jurisdiction and was hoping to leave this jurisdiction once his earlier prison sentence expired. His medical conditions are the main points that he offered as a ground that would render it disproportionate to extradite him. The Court is satisfied that given the high public interest in his extradition and the clear ability to manage his complaints in a prison setting there is no violation of the respondent's right to respect for his personal life should he be extradited. The Court therefore rejects this point of objection to his extradition.

(iii) The Arrest of the Respondent

6.23 The respondent's counsel submitted that there were initial plans to deport the respondent and it was only when it was established that he was an Irish citizen that the application for the provisional request was made. This submission was based upon an averment by the respondent to the effect that his extradition followed a failed deportation by which it was intended to engineer his prosecution in the U.S.A.. In submissions, counsel stated that there was no real urgency about the provisional request but subsequent to the discovery of his Irish citizenship there was an accelerated interest in securing his extradition. However, the respondent did not adduce evidence to support his contention in this regard. Even if there had been a plan to deport the respondent however, the Court is satisfied that the urgency is established. Clearly the case was that the respondent was planning on leaving the jurisdiction upon his release from prison. If there was a misunderstanding as to his status that meant the extradition process became urgent when the true situation was realised.

6.24 Moreover, even if there was a point to be made about the inappropriate provisional request for his extradition, that point should have been made at the stage when he was arrested or at the very least in the immediate aftermath. The provisional arrest ceases when the Minister's certificate is produced.

6.25 It has not been established that there is any adverse consequence to him of the procedure adopted. Furthermore, even if what is urged on his behalf is correct, this is not a situation where there has been a deliberate and conscious violation of any right. No act of deportation took place, instead an application for his extradition has been made. There has been no deliberate and conscious violation of his rights in the manner of the *State (Trimbole) v Governor of Mountjoy* [1985] IR 550. Overall it is clear that no issue of any substance has been raised under this heading. This Court rejects this objection.

7. Conclusion

7.1 The Court is satisfied that the statutory proofs for extradition in this case have been met. The Court is also satisfied that all the conditions for extradition have been met. For the reasons set out above, the Court has rejected all the points of objection to the respondent's extradition.

7.2 Having considered all the documentation and having heard submissions, the Court is satisfied in accordance with section 29 of the Act of 1965 that:

- (a) the extradition of the respondent has been duly requested, and
- (b) Part II applies in relation to the requesting country, and
- (c) the extradition is not prohibited by Part II or by the relevant extradition provisions, and
- (d) the documents required to support a request for extradition under section 25 have been produced.

7.3 The Court will proceed to make an Order committing the respondent to a prison there to await the order of the Minister for his extradition.