THE COURT OF APPEAL

(CIVIL)

Neutral Citation Number: [2017] IECA 50

RECORD NO. 2016/419

Birmingham J.
Mahon J.
Edwards J.

IN THE MATTER OF THE EXTRADITION ACT 1965, AS AMENDED

BETWEEN/

ATTORNEY GENERAL

RESPONDENT

- AND–

GARY DAVIS

APPELLANT

JUDGMENT of Mr. Justice Mahon delivered on the 28th day of February 2017

1. By order of the High Court (McDermott J.) on the 12th August 2016 the appellant was directed to be surrendered to the United States of America ("U.S.") after the expiration of fifteen days, subject to a stay in the event of an appeal to this Court which said stay remains operative pending the conclusion of this appeal.

2. The appellant filed a Notice of Appeal against the said order and the entire of the judgment of the learned High Court judge of the said date. At the opening of the appeal before this Court Mr. O'Kelly S.C. on behalf of the appellant limited the appeal to the third of three grounds stipulated in the Notice of Appeal. That ground is as follows:-

> *The effects of incarceration in the U.S., both pre trial and following sentence if convicted upon the appellant as a person with Asperger's Syndrome suffering from depression and anxiety.*
>
> > *(i) The learned trial judge erred in deciding that surrender of the appellant for extradition did not give rise to a real risk of a violation of his Article 40.3 rights under the Constitution and of his rights under Article 3 ECHR.*
> >
> > *(ii) The learned trial judge erred in deciding that the surrender of the appellant for extradition did not give rise to a real risk of a violation of his rights under Article 8 ECHR and his rights under Article 40.3.2 of the Constitution to the integrity of the human mind and personality.*

3. The U.S. has sought the extradition of the appellant to stand trial in that country on very serious offences, namely, count one, (Narcotics, Trafficking Conspiracy), count two, (Computer Hacking, Conspiracy) and count three, (Money Laundering, Conspiracy). The relevant indictment was filed in the United States District Court for the Southern Capital District of New York on the 5th December 2013. All the offences carry guideline prison sentences upon conviction of up to (in the case of count three), a potential prison sentence of nineteen years and seven months. If extradited to the U.S. it is probable that the appellant will be incarcerated pending his trial.

4. The appellant was arrested on foot of the Extradition Request from the U.S. on the 13th January 2014 and conveyed to Bray garda station where he was processed in the usual way. He was granted bail on certain conditions, and remains on bail pending the conclusion of this appeal or other order of this Court.

5. It is alleged that the appellant was an administrator of a website called "Silk Road", using the pseudonym "Libertas". The website is said to have facilitated the sale of illicit drugs including cocaine, crack cocaine, crystal and other illegal goods. Purchasers of illicit drugs from the website paid in "Bitcoins" and Silk Road's revenue was based on a commission of between 10% and 15% of sales revenue. Commissions earned by Silk Road are said to run to tens of millions of dollars. It is alleged the appellant was paid $1,500 per week for his services. In the course of its investigation of the Silk Road website, the FBI arrested a U.S. citizen, Ross William Ulbricht, whom it is believed is the owner and operator of the website. He stands charged with serious criminal offences in the U.S.. It is alleged that the appellant's involvement was identified from information extracted from Mr Ulbricht's seized computers.

The appellant's personal circumstances and medical history

6. The appellant is a twenty eight year old single man living with his parents at Willow House, Johnstown Court, Kilpedder in Co. Wicklow. He is the youngest of five children. The appellant has a poor employment history, is obsessed with computers and is described as a loner, naïve and immature.

7. In his report of the 21st January 2014 Prof. Michael Fitzgerald, Consultant Psychiatrist diagnosed Asperger's Syndrome depressive disorder and generalised anxiety disorder. In his view Asperger's Syndrome has been evident since childhood.

8. Prof. Simon Baron-Cohen, Professor of Development Psychopathology at Trinity College, Cambridge, confirmed Prof. Fitzgerald's diagnosis of Asperger's Syndrome. Prof. Barron-Cohen rated the appellant's Asperger's Syndrome as being very severe. He stated:-

> *"In my opinion, his Asperger Syndrome is very severe in that he struggles to live independently, depends to a great extent on his family, particularly his sister, and his Asperger Syndrome affects his social judgment so that he ends up in situations that could be misinterpreted by others to his determent. Most worrying are his levels of depression that as*

mentioned earlier are not uncommon secondary consequences of his Asperger Syndrome. This is not just at ordinary levels of sadness but are signs of serious mental ill health. As for how this might affect his ability to be extradited, it is clear that he feels extradition would be impossible and that extradition could precipitate a suicide attempt."

9. The diagnosis of Asperger's Syndrome made by Prof. Fitzgerald and Prof. Baron-Cohen is disputed by Prof. Harry Kennedy, Consultant Forensic psychiatrist and Executive Clinical Director of the Central Mental Hospital who examined the appellant on behalf of the Chief State Solicitor.

Discussion

10. In the course of his judgment the learned trial judge considered in a very comprehensive manner the various medical opinions before declaring himself satisfied that a diagnosis of Asperger's Syndrome was appropriate. He stated (at p. 69):-

"I am satisfied having considered the evidence and the reasons set out in their respective reports to accept the evidence of Prof. Fitzgerald and Prof. Baron-Cohen, notwithstanding the misgivings of Prof. Kennedy, that a diagnosis of Asperger's Syndrome is appropriate. I accept this evidence in the knowledge that most of the material is self-reported and a number of unexplained inconsistencies have been identified by Prof. Kennedy."

11. The learned trial judge did however note that there was a lack of any recorded medical history or medical treatment for Asperger's Syndrome or indeed any other mental illness prior to the commencement of these extradition proceedings. There was no evidence that the appellant was under the active treatment of a psychiatrist or a psychologist.

12. The learned trial judge commented as follows at p. 70 in his judgment:-

"I am not satisfied that the medical evidence establishes as a matter of probability that Mr. Davis presently suffers from depression accompanied by suicidal ideation of such a level and intensity that his trial on offences similar to the alleged offences could be stayed or prevented in this jurisdiction. He is not "unfit to plead". He pleaded guilty to a very serious offence in 2015 and faced the prospect of a lengthy custodial sentence in the Circuit Court without any dramatic deterioration in his mental health. It is not claimed that he does not comprehend the charges or is unable to give instructions in these proceedings or in respect of the charges laid in the United States. The respondent's case essentially is that if the Court makes an order extraditing him to the United States he will not be able to cope by reason of Asperger's Syndrome and because of depression and severe anxiety with pre-trial and post conviction incarceration and has expressed the view that he will choose to commit suicide in those circumstances."

13. The focus of this appeal is on the appellant's condition of Asperger's Syndrome and the contention that as a person suffering from this condition and associated mental illness he was at risk of being subjected to inhuman and degrading treatment if incarcerated within the U.S. prison system. His overall medical condition and his inability to cope with the pressures and restrictions imposed by prison life would further be exacerbated by his enforced and long term separation from his immediate family on whom he greatly depends in his day to day living.

14. The learned trial judge considered evidence as to how the U.S. prison system would deal with an individual suffering from Asperber's Syndrome. Mr. Herbert J. Haelter, Chief Executive and Co-Founder of the National Sentence on Institutions and Alternatives (NCIA), and who has a wide experience of the federal prison service and federal sentencing procedures in the U.S. stated that, if extradited, the appellant would be immediately placed in custody and transferred to the MCC, a maximum security prison in Lower Manhattan, New York. There, because of the offences charged, the diagnosis of Asperger's Syndrome, the fact that he was a foreigner and that the case was high profile would see the appellant lodged in a Special Housing Unit in the MCC. This would subject him to extreme prison conditions, including an isolation cell for twenty two to twenty three hours per day, limited opportunities for visits and telephone calls, no access to e-mail or computers, exposure to bullying and violence from prison gangs, a lack of proper medical treatment, over crowding and invasive body searches and the use of restraints when being moved around the complex or to and from court. He estimated that the appellant would remain between six and eighteen months at the MCC before his trial.

15. Mr. Adam Johnson, Supervisory Attorney with the Federal Bureau of Prisons assigned to the MCC, rejected many of the suggestions made by Mr. Haelter. He said that while awaiting trial the appellant would be removed from the general prison population, that he would have access to recreational facilities and that he would not necessarily be denied access to a computer. Dr. Elisa Miller, Chief Psychologist at the MCC stated in her affidavit that the appellant would be screened by psychology staff within twenty four hours of arrival at the centre. His mental health status would be evaluated and he would have access to full time psychological services at that location. She expressed her satisfaction that the appellant's mental health condition could be successfully managed at the Centre, and in the U.S. prison system generally.

16. Dr. Anthony Bussanich, the Clinical Director at the MCC, stated that the medications currently prescribed for the appellant would be available to him at the Centre.

17. Having considered this evidence, the learned trial judge stated as follows:-

"There is also a heavy burden on prison officials before and after conviction to assess and monitor prisoners committed to their care and custody who are at risk. However, I am satisfied on the evidence that procedures are in place for the evaluation and assessment of persons arriving at the MCC and during the course of their detention there in respect of their mental health and any treatment that may be required in respect of medication or otherwise including threats of self harm or suicide."

18. The learned trial judge went on to consider post conviction imprisonment. He again considered the views expressed by Mr. Haelter and in particular his view that the appellant would suffer more severely than others within the prison system because of his Asperger's Syndrome and depression, and the considerable potential for misunderstandings because of inappropriate responses and engagement by the appellant with people whom he encountered within the prison system. A different view was expressed by Mr. Ralf Miller, a Senior Designator at the Federal Bureau of Prisons Designation and Sentence Computation Centre (DSCC). He said that the prison system classified prisoners based on the level of security and supervision required, and took account of needs in the areas of education, vocational training, individual counselling and mental / medical health treatment.

19. Noting that it was not the case that those suffering from Asperger's Syndrome and / or depression cannot be imprisoned in Ireland or extradited simply because of that diagnosis, the learned trial judge stated:-

"It is not the law that a person suffering from Asperger's Syndrome and/or depression cannot be imprisoned in this

jurisdiction or extradited to a third country or within the European Union simply because imprisonment would give rise to changes in environment or disturbance in routine or removal from family. These factors may cause enormous upset to the family of the proposed extraditee and will likely be regarded (as in this case) as undesirable by his diagnosing psychiatrist or psychologist. This may inform the type of regime to which he should be subjected or the length of a sentence to be imposed. However, I accept the evidence from the MCC personnel concerning the likely procedure, assessment, and conditions of confinement to which Mr. Davis will be subjected if extradited. I do not consider that the evidence establishes that the high threshold of ill-health and risk to life required to justify a refusal to extradite on those grounds and the potential violation of the rights to health, bodily integrity or life has been reached."

20. In *Minister for Justice v. Altaravicius* [2006] 3 I.R. 148 and *Minister for Justice v. Stapleton*, the Supreme Court recognised that extradition arrangements, whether with Member States of the European Union or jurisdictions outside the Union, imply a level of mutual political trust and confidence in the legal systems of the cooperating States.

21. The issue relating to objections to surrender based on fundamental rights whether they arise under the Constitution or rights assured under the European Convention on Human Rights in respect of an extradition to the United States was considered by Edwards J. in *A.G. v. O'Gara* [2012] IEHC 179. He stated:

"…a default presumption does arise in extradition cases that the other country will act in good faith and that it will respect a proposed extraditee's fundamental rights. As Fennelly J. has pointed out in Stapleton the making of bilateral extraction arrangements implies at least some level of mutual political trust and, at the judicial level, confidence in the legal systems of the co-operating states. However, in conventional extradition cases the presumption is much weaker and is much more easily rebutted than is the presumption that arises under the European arrest warrant system. This is because the whole European arrest warrant system is built and predicated upon the notions of mutual trust and confidence between member states, and mutual recognition of judicial decisions, and there is a continuing and ongoing commitment to abide by these principles as expressed in the recitals to the Framework Decision, including recital 12 thereto which expressly states that the Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union. Moreover, though it is by no means perfect, there is. by virtue of the fact that all member states operating the European arrest warrant system are signatories to the Convention, a greater common understanding between the States operating the European arrest warrant system of what constitutes an individual's fundamental rights, and what is required to be done to defend and vindicate those rights. Such is the level of mutual trust and confidence in other member states who are parties to the European arrest warrant system that the Oireachtas has given statutory effect to the presumption that arises -in s.4A of the European Arrest Warrant Act 2003 (as inserted by s.69 of the Criminal Justice (Terrorist Offences) Act 2005). S.4A provides that "It shall he presumed that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown" Neither the Extradition Act 1965, nor the Washington Treaty, contains a comparable provision. That is not to say that no presumption at all arises, but as the Court has stated it is very much weaker and more easily rebutted than is the case under the European arrest warrant system.

22. The implications for a rendition application of a breach of article 3 of the ECHR was considered by the Supreme Court in *The Minister for Justice v. Rettinger* [2010] 3 I.R. 783. That was a European arrest warrant case. However, it was held by Edwards J in *A.G. v. O'Gara* that *"the Rettinger principles"* could be applied, with appropriate modifications, to conventional extradition requests. He suggested that they could be re-cast, with the necessary modifications, to read as follows in the case of a extradition request by the United States of America:-

(i) The objectives of the [Washington Treaty] cannot be invoked to defeat an established real risk of ill-treatment contrary to Article 3;

(ii) The subject matter of the court's enquiry is the level of danger to which the person is exposed;

(iii) 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 in a rigorous examination. However, the mere possibility of ill treatment is not sufficient to establish an applicant's case;

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

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

(vi) 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 Convention. On the other hand, the requesting State may present evidence which would, or would not, dispel the view of the court;

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

(viii) The court may attach importance to reports of independent international human rights organisations.

23. In *The Minister for Justice and Equality v. RPG* [2013] IEHC 54, a case in which surrender on foot of a European arrest warrant was being resisted on Article 8 grounds, Edwards J reviewed a very large number of Irish, English and European cases concerning how Article 8 should be applied, particularly in the rendition or extradition context, and distilled from that review a number of guiding principles. These were later applied by him in a case involving a person with mental health difficulties, namely *The Minister for Justice and Equality v. IS* [2015] IEHC 36, to which we were referred by the respondent in this case. The principles identified by Edwards J number nineteen in total, and it is useful notwithstanding their length to recite them in the context of this judgment:-

"1. The test imposed by Article 8(2) ECHR is not whether extradition is on balance desirable but whether it is necessary in a democratic society;

2. There is no presumption against the application of Article 8 ECHR in extradition cases and no requirement that exceptional circumstances must be demonstrated before Article 8 grounds can succeed;

3. The test is one of proportionality, not exceptionality;

4. Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;

5. In conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;

6. Rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;

7. In the required balancing exercise, the public interest must be properly recognized and duly rated;

8. The public interest is a constant factor in the horizontal sense, i.e. , it is a factor of which due account must be taken in every case;

9. However, the public interest is a variable factor in the vertical sense, i.e., the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;

10. No fixed or specific attribution should be assigned to the importance of the public interest in extradition, and it is unwise to approach any evaluation of the degree of weight to be attached to the public interest on the merits of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. That said, the public interest in extradition will in most cases be afforded significant weight;

11. The gravity of the crime is relevant to the assessment of the weight to be attached to the public interest;

12. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the court is required to adopt a different approach to Article 8 ECHR rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case;

13. Delay may be taken into account in assessing the weight to be attached to the public interest in extradition;

14. In so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a proportionate measure, both in terms of the legitimate aim or objective being pursued, and the pressing social need which it is suggested renders such interference necessary;

15. It is self-evident that a proposed surrender on foot of an extradition request will, if carried into effect, result in the requested person being arrested, possibly being detained in custody in this State for a period of time pending transfer to the requesting state, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial), and/or may have to serve a sentence in the requesting state. Such factors, in and of themselves, will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will be of little avail to the affected person;

16. Article 8 ECHR does not guarantee the right to a private or family life. Rather, it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both the legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and in breach of the affected individual's rights under Article 8;

17. It will be necessary for any court concerned with the proportionality of a proposed extradition measure to examine with great care, in a fact specific enquiry, how the requested person, and relevant members of that person's family, would be affected by it. In particular, it will be necessary for the Court to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person;

18. Such an exercise ought not to be governed by any predetermined approach or by preset formula; it is for the court seized of the issue to decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise;

19. The demonstration of exceptional circumstances is not required to sustain an Article 8 ECHR type objection because, in some cases, the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected persons or persons, rather than on the circumstances giving rise to those consequences."

24. A case very much to point is that of *AG v. Marques* [2015] IEHC 798 which concerned an application for extradition to the U.S. of an individual who was an Asperger's Syndrome sufferer and who claimed, *inter alia*, that confinement in the U.S. federal prison system would amount to inhuman and degrading treatment. (The case was subsequently appealed to this court but only on a ground which is not relevant to this appeal).

25. In *Marques*, there was, as in the instant case, an issue as to the accuracy of the diagnosis of Asperger's Syndrome. The learned trial judge (Donnelly J.) however accepted that Mr. Marques suffered from that condition. In *Marques* very much the same arguments were made as in this appeal, including the contention that a foreigner with Asperger's Syndrome incarcerated in a U.S. prison would face very significant difficulties in such an environment and that the U.S. federal prison system could not adequately cope with such an individual, and there was a risk of suicide present, as there is in the case of this appellant.

26. In the course of her lengthy judgment in *Marques*, Donnelly J. stated (at para 9.21):-

> *"In Attorney General v. Damache I considered, in detail, the law relating to the prohibition on extradition on the grounds relating to inhuman and degrading treatment whether that be under the ECHR or the Constitution. In short, if there are substantial grounds for believing that there is a real risk that Mr. Marques will be subjected to inhuman and degrading treatment in the Requesting State the court must refuse extradition. There is an evidential burden on Mr. Marques to adduce evidence capable of proving that these substantial grounds exist. It is open to a Requesting State to dispel any doubts by evidence – that is not a shifting burden. The real risk should be examined rigorously."*

27. At para 9.33, Donnelly J. said:-

> *"…In this case, the test is not whether the surrender will cause Mr. Marques' Asperger's syndrome to deteriorate (and of course the court hopes it will not) or indeed even whether there is a real risk that his condition will deteriorate. The test is whether there is a real risk in the circumstances of the case that surrender would breach his rights i.e. to life, to bodily integrity and not to be subjected to inhuman or degrading treatment. In the same way as a person in this jurisdiction who has a mental illness, such as a major depressive disorder, schizophrenia, autism or an anxiety disorder, that may be negatively impacted by imprisonment, is not immune from imprisonment, so also a person with these conditions is not immune from extradition. The court must consider the person's medical condition, the adequacy of the medical care that may be provided and the advisability of maintaining the detention measures."*

28. She continued (at para 9.34):-

> *"…What may be different for him in the USA is that he will be far from home and without the support of his mother and father who pay him weekly visits at present. His ability to manage this separation may be compromised as he had limited capacity to form other social contacts. Dr. Wright said that this is a real and unfortunate consequence of imprisonment, particularly at a distance from home, and not specific to those with Asperger's syndrome. In my view, it is a factor that is more likely to apply to Mr. Marques than to a person without Asperger's syndrome. That is far from saying that there is a real risk that his rights will not be respected. A difficulty with separation from others does not amount to a finding that one's right are, or will be, violated."*

29. Donnelly J. rejected the point of objection that there was a real risk that due to the prison conditions generally applicable in U.S. federal prisons, (and with specific regard to his Asperger's syndrome) that Mr. Marques would be subjected to inhuman or degrading treatment or that his right to bodily integrity, protection of the person and to human dignity, as were his constitutional and ECHR rights, would be infringed. She stated:-

> *"It has not been established that within the US federal prison system there is a systemic problem that gives rise to cause for concern for the health of Mr. Marques as a person who has a specific vulnerability, namely Asperger's syndrome. The US authorities have established that they have a constitutional obligation to provide adequate health care to its inmate population (as averred to in the affidavit of Mr. Christopher Adams). I also accept the evidence of Dr. Ong that Mr. Marques' condition is manageable within the Bureau of Prisons and that the Bureau is currently providing treatment to persons with Asperger's syndrome and similar conditions. Overall it cannot be said that the adequacy of the medical care that will be available to Mr. Marques on extradition gives rise to concerns of risk to life, bodily integrity or inhuman and degrading treatment."*

30. In the ECtHR judgment in *Babar Ahmad and Others v. United Kingdom* (10th April 2012) it is stated:-

> *"The Court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 of the Convention and that the lack of appropriate medical care may amount to treatment contrary to those provisions … In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 had, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. The feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder calls for increased vigilance in reviewing whether the Convention has (or will be) complied with. There are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical conditions of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant…"*

31. In *The Minister for Justice, Equality and Law Reform v. Machaczka* [2012] IEHC 434, Edwards J. said (at para 146):-

> *"However, in terms of the legal issues which the court has to decide, the critical question which requires to be addressed is not whether the respondent will commit suicide if he is surrendered (the Court profoundly hopes that he will not, but accepts that he is at very serious risk of doing so), but, rather, whether there is a real risk in the circumstances of the case that to surrender him would breach his rights i.e. his right to life, to bodily integrity and not to be subjected to inhuman or degrading treatment – in other words to be treated with human dignity."*

32. The primary contention made on behalf of the respondent is that s. 29(5) of the Extradition Act 1965 (as amended) restricts the right of appeal to one based on a point of law, and therefore does not permit an appeal against a fact or facts so found by the trial judge on evidence heard by him. Section 29(5) of the Extradition Act 1965 (as amended) provides as follows:-

> *"29(5) No appeal shall lie to the Supreme Court from an order of the High Court under this section except on a point of*

law."

33. By virtue of the provisions of 74 of the Court of Appeal Act 2014 the reference to the "Supreme Court" is to be construed as a reference to the Court of Appeal.

34. In this regard the court was referred to the case of Fitzgibbon *v. The Law Society of Ireland* [2014] IESC 48, and in particular the judgment of Clarke J. In that case the appellant, a solicitor, had appealed pursuant to s. 11 of the Solicitors (Amendment) Act 1994 to the High Court against certain findings and sanctions made by the respondent's complaints and the Clients Relations Committee. An issue arose as to the extent of the appeal which could be taken to the Supreme Court. In the course of his judgment Clarke J. considered the different categories of appeal that existed within our legal system. He categorised them as being:-

> *"(a) A de novo appeal;*
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> *(b) an appeal on the record;*
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> *(c) an appeal against error, and*
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> *(d) an appeal on a point of law."*

35. Clarke J. noted that there is an established jurisprudence as to what the term "appeal on a point of law" means. He referred, with approval, to the principles summarised by McKechnie J. in *Deely v. Information Commissioners* [2001] 3 I.R. 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act 1997:-

> *"There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is in accordance with established principles, confined as to its remit, in the manner following:-*
>
> > *(a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;*
> >
> > *(b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;*
> >
> > *(c) it can however, reverse such inferences, if the same were based on the interpretation of documents and should do so if incorrect; and finally;*
> >
> > *(d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision…"*

36. In the course of his judgment, Clarke J. stated:-

> *"In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision-maker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the Court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."*

37. In the instant case, the learned trial judge's lengthy and very comprehensive judgment set out in detail evidence relating to the appellant's personal circumstances, his medical condition (and, in particular, his diagnosis of Asperger's Syndrome which he accepted as being correct), the life style routine of a prisoner within the U.S. Federal prison system both while on remand and as a convicted prisoner, the provision of care and medical assistance to prisoners with medical conditions and other matters. Evidence heard by him was not all one-way. Conflicting medical and other evidence required a more detailed examination of the relevant factors than might otherwise have been the case, and it is apparent that the evidence was indeed subjected to a close analysis.

38. Having considered that evidence, the learned trial judge made the following findings:-

> *"145. I am not satisfied that the respondent has established that there are substantial grounds for believing that if extradited to the United States he will be exposed to a real risk of being subjected to treatment of an inhuman or degrading nature by reason of the conditions of confinement to which he will be subject and / or the fact that he has Asperger's Syndrome and suffers from depression and generalised anxiety with thoughts of self harm and suicide prompted and exacerbated by a fear of isolation and separation if imprisoned in the United States. The court is satisfied that whether detained in the MCC or in any other Federal prison if convicted and sentenced he will have access to mental health services wherever he may be imprisoned.*
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> *146. ..The court is satisfied that the United States authorities will act to protect his mental and physical health and take appropriate steps to address any symptoms of depression or continuing anxiety by appropriate treatment (including medication) and take such steps as are appropriate and necessary to accommodate him safely as a person with Asperger's Syndrome within the prison system."*
>
> *149. ..The court is satisfied that the American prison officials will take all necessary measures to protect him. The court is not satisfied that the respondent's surrender is, in the circumstances, a disproportionate measure or will breach his rights to respect his health or family life under Article 8."*

Conclusion

39. I am satisfied that the primary submission made by the respondent is entirely valid, (see para. 32). The decision of the learned trial judge (in so far as it relates to the ground of appeal pursued) is based on a fact or facts found by him following a detailed and thorough consideration of evidence and information, including medical evidence and evidence relating to the U.S. federal prison

system. This appeal effectively invites the court to reach a different conclusion on the same evidence to that of the High Court.

40. That being so, this appeal seeks to review the judgment and order of the High Court in a manner which is not permitted in law. The subject matter of the appeal is not based upon a point of law. Arguably, the other original grounds of appeal may have satisfied that point of law pre-condition, but these were not proceeded with, and, I believe, wisely so.

41. However, even if this court was empowered to review the learned High Court judge's findings of fact and her decision based thereon, I would not reach a different conclusion that that of the High Court. In so stating I wish to emphasise that I in no way seek to diminish or trivialise the very real concerns and worries of the appellant and his family as he faces the prospect of extradition to the U.S. and being imprisoned there. Such a prospect would be daunting for an individual in robust mental health let alone someone coping with a significant mental health condition such as the appellant.

42. It is to be hoped that the extent to which the issue relating to the appellant's diagnosis of Asperger's Syndrome has been debated and considered in these proceedings, and the assurances provided by the U.S. authorities will reduce those concerns to an appreciable degree.

43. For the reasons stated I would dismiss the appeal.