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**THE COURT OF APPEAL
CIVIL**

Neutral Citation No.: [2022] IECA 125

Record No.: 2021/264

**The President
Edwards J.
Donnelly J.**

BETWEEN/

ATTORNEY GENERAL

RESPONDENT

– and –

MARTIN WALL

APPELLANT

JUDGMENT of Ms. Justice Donnelly delivered the 31st day of May, 2022

Introduction

1. On the 24th February, 2022, this Court gave a preliminary ruling in which the appellant’s first ground of appeal on the issue of correspondence of offences was rejected, but further submissions were sought on his second ground concerning an alleged risk to the appellant of inhuman and degrading treatment if he was to be surrendered to the United States of America (“the USA”). The Court received further written and oral submissions and thereafter reserved judgment.

2. The facts of the case are set out in the preliminary ruling and will not be repeated here (save where context requires). That ruling referred to the decision of the Court of Justice of the European Union (“the CJEU”) in *ML and Generalstaatsanwaltschaft Bremen* (Case C-220/18 PPU) EU:C:2018:589 (“*ML*”). In that case, the CJEU addressed the issue of the extent

to which a court executing a European Arrest Warrant (“EAW”) had to assess conditions in all prisons in the issuing State in which the requested person might be detained (emphasis added). The present appeal concerns an extradition request made under the provisions of the Extradition Act, 1965 as amended (“the 1965 Act”). Undoubtedly, there is a difference in the presumption of good faith that operates in respect of extradition under Part II of the 1965 Act, and surrender under the European Arrest Warrant Act 2003 as amended (“the 2003 Act”). The Supreme Court in *Attorney General v. Davis* [2018] 2 IR 357 at p. 401 citing *Attorney General v. O’Gara* [2012] IEHC 179, confirmed that the presumption of good faith is weaker in extradition requests under the 1965 Act. In EAW cases, mutual trust and mutual recognition entail a high presumption of good faith in the requesting State’s commitment to the common values on which the European Union (“EU”) is founded, as stated in Article 2 of the Treaty on EU.

3. In the preliminary ruling, I said that the question of how far the presumption of good faith must be taken into account in measuring the risk of an event that may occur at an unspecified time in the future would benefit from further submissions by the parties. I stated that other issues might also arise thereafter, depending on the view the Court might take, and for reasons of good case management, submissions were sought on a number of additional matters. At the end of the preliminary ruling I outlined the following as matters upon which the Court required submissions:

- a) The extent to which the presumption of good faith might preclude a court from going beyond the fact that this appellant will spend at least some time in custody prior to any final decision.
- b) The extent to which the measurement of future risk is affected by the remoteness of the feared result together with the presumption of good faith on behalf of the requesting State.

- c) Whether the Court of Appeal can, of its own motion, seek further information (or assurances) from the requesting State as to future risk of the appellant facing inhuman and degrading conditions if extradited?
- d) If the Court may seek such information (or assurances), ought the Court to seek the following information:
 - i) What level of risk is there that this appellant would be released from custody to undergo further service of his sentence on Probation and subject to the Sex Offenders' Register?
 - ii) Will he be free to leave the State of Georgia ("Georgia") if he is sentenced to a period on Probation and subject to the Sex Offenders' Register?
 - iii) Could further information be provided as to the restrictions he will be required to abide by?
 - iv) To what extent may these restrictions be said to cause the circumstances of homelessness and poverty experienced by this appellant previously?
- e) If the Court is precluded from seeking such information (or assurances), does the Court have jurisdiction to remit the case to the High Court for the purpose of seeking these? If so,
- f) Ought the Court to so remit in the present circumstances?

4. In this judgment, I propose to commence by addressing those questions in the order listed, but I will only answer those questions necessitated by the conclusions reached on the earlier questions. At first it is necessary to address a point raised by the appellant at the continued hearing of this matter.

The Appellant's submission that the appeal must be allowed based upon the preliminary ruling

5. Counsel for the appellant's overarching submission at the continued hearing was that, resulting from the Court's findings in the preliminary ruling, the appeal had to be allowed. He placed reliance on the *dicta* at para. 33 of the ruling where the following was stated: "[it was] difficult to see the evidential basis for the trial judge's finding that [there being no requirement for him to remain in Georgia] was the most likely outcome". Counsel submitted that this was the basis on which the trial judge had made his decision and that this required that the appeal be allowed. This, he submitted, was the appellant's argument in the Court below and the argument he had made at the original hearing of the appeal. Counsel submitted that all he had to demonstrate was that there was a real risk that he would suffer inhuman and degrading treatment, and he had established that because it could not be said that it was most likely he would not be required to remain in Georgia.

6. This submission of the appellant can be rejected by recalling the central issue before the High Court and thus the issue on the appeal. That issue was whether the appellant was at real risk of being exposed to inhuman and degrading treatment should he be extradited to the USA for the purpose of a hearing on whether he has violated a "special condition" of his probation. It was not about whether he was likely to be required to stay in Georgia to serve time on probation there. A requirement to stay in Georgia to serve probation was however a necessary factor in the chain of events through which the appellant contended that he might be subject to inhuman and degrading treatment. It was only if he was required to serve probation time in Georgia that the chain of events, which the appellant submits would result in him being exposed to inhuman and degrading treatment, would all be able to occur. He would have to have no accommodation in which to live and be unable to find work. The Court would also have to adjudicate on whether the particular conditions to which he says he would be exposed in fact amount to inhuman and degrading circumstances.

7. At para. 37 of the preliminary ruling, the question of “where the establishment of real risk ends and speculation begins” was identified as the issue before the Court. Attention was then drawn in para. 37 to where this may arise on the facts of the present case:

“For example, accepting that the appellant is being sought for revocation of a sentence and will therefore at a minimum spend time in custody in Georgia pending the final determination of the sentencing court, are the subsequent steps that must occur before he could be exposed to the inhuman and degrading treatment simply too far removed from the consequences of the extradition to be considered by a court for the purposes of assessing the risk of being subjected to such treatment? After all, that will require a) the court to reject the recommendation of the prosecutor and resentence him either to full probation or to partial probation after serving time in custody, b) for the appellant to be unable to provide any address at all in...Georgia for release, c) for there to be no homeless shelter accommodation in which he can live, and, d) for him to be unable to find any work to sustain him.”

8. It is not the law that because this Court has concluded that on one aspect of the decision-making process the trial judge’s factual conclusion was incorrect, this Court must allow the appeal. The Court must decide whether the High Court judge could have been satisfied, on the facts presented to him, that there were “substantial grounds for believing that, if surrendered, there is a real risk of the respondent being subjected to a breach of his right to privacy or right not to be subjected to inhuman or degrading treatment or punishment, or any other fundamental right, so that this Court should refuse surrender.” Indeed, the High Court found a number of facts which were contrary to the appellant’s contention that there was such a risk. The first of these was that he was not satisfied that it will be or was likely to be impossible or would necessarily follow that due to the requirements of post-release supervision that the respondent will be at real risk of being rendered homeless and penniless. He said that the appellant was

able to obtain an address (even if it was one in which he did not intend to live). He also said that homelessness was multi-factorial in origin, and he noted that there was a passing reference by the respondent to substance abuse and attendance at AA meetings.

9. Moreover, the trial judge said he was not satisfied that the appellant would inevitably be driven into homelessness and poverty by reason of the system of probation and/or post-release supervision in Georgia. He was also not satisfied that any risk of future homelessness and/or poverty can be solely, or sufficiently, attributed to the system of probation and/or post-release supervision to the extent that same could be regarded as Georgia breaching his rights.

10. The trial judge made a number of very specific findings in which he rejected the appellant's claims that he was at real risk of being subject to prohibited conduct. The observation/finding in the preliminary ruling related to one finding only. The trial judge's rejection of the appellant's claims went much further than this finding. This Court is required to address those findings in the context of the overall issue as to whether the appellant is at real risk of being subject to inhuman and degrading treatment.

The presumption of good faith and assessment of downstream risks

11. The core of the appellant's objection to extradition is his contention that he is at real risk of being subjected to inhuman and degrading treatment when released from custody because of conditions of poverty and homelessness which will be forced upon him if he is subjected to probation supervision similar to that which he faced on release previously. As referred to above, quite a number of contingencies have to occur prior to that; the first being that he would be granted probation/parole release, and as a condition of which he would have to be required to remain in Georgia while under probation supervision. As will be seen, as this event, and the other events indicated, can only occur at some remove from any extradition to Georgia, I will use the (comparatively) neutral term "downstream risks" to describe them.

12. It is those downstream risks which prompted the following two questions in the preliminary ruling:

- a) The extent to which the presumption of good faith might preclude a court from going beyond the fact that this appellant will spend at least some time in custody prior to any final decision.
- b) The extent to which the measurement of future risk is affected by the remoteness of the feared result together with the presumption of good faith on behalf of the requesting State.

13. In making submissions on those questions, both the appellant and the Attorney General addressed the case of *ML*, each relying on different aspects of it. The appellant's interpretation of the case was that where "there is evidence of a possible systemic and ongoing violation", Article 3 ECHR mandates the requesting State to specify exactly (stressed by the appellant) where the requested person was going to be detained and to give specific assurances in relation to the conditions there. It could only be if the requested court is satisfied that there are no indications of any violations at that prison will general assurances of compliance with Article 3 be acceptable. The appellant, by analogy, submitted that there was no evidence here that he might not be subjected to a real risk of prohibited treatment if released to probation supervision, and therefore the systemic risks had not been negated. In those circumstances, extradition ought to be refused. The appellant contested the idea that there was any remoteness in the issue at all. The appellant had suffered these conditions previously, and the only issue was whether the appellant will be subjected to them again. The appellant submitted that if he is exposed to that system of post-release supervision for "sex-offenders", the only reasonable conclusion was that there exists a real risk of a future breach of his Article 3 rights. If the Court were however to permit a statutory request from the Minister for Justice and Equality for additional evidence

from the requesting State, the appellant engaged in the type of information that ought to be required.

14. The Attorney General submitted that the fundamental approach of the CJEU in surrender cases was that it is the position in which a requested person will find himself immediately upon his return which is of relevance and that this approach ought to be adopted by this Court in this extradition appeal. The future potential outcomes after the parole violation hearing are too remote for the consideration of this jurisdiction. This was particularly so in the present case where there was a recommendation that a further custodial period rather than probation is required.

15. In assessing the presumption of good faith in extradition cases, the Attorney General relied upon the case law which placed the onus on the requested person to establish substantial grounds for the refusal to extradite, *per Attorney General v. Skripakova* (Unreported, Supreme Court, 24th April, 2006). The Attorney General relied on a substantial passage from the decision of the Supreme Court (Murray C.J.) in *The Minister for Justice, Equality and Law Reform v. Altaravicius* [2006] IESC 23, in submitting that there is a significant weight to be attached by the courts to the principle of good faith in the context of an extradition request, and that the high level of confidence is of significance in extradition cases. It was accepted that the presumption was not at such a high level as applies in the EAW context (*Attorney General v. Davis* and *Attorney General v. O’Gara*). It was noted that the *Rettinger* principles, *per The Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IESC 45 (“*Rettinger*”) applied to extradition cases, *per Attorney General v. Piotrowski* [2014] IEHC 540).

Analysis

16. The Supreme Court stated in *The Minister for Justice, Equality and Law Reform v. Altaravicius* that:

“...it is undoubtedly the case that extradition arrangements, whatever their form, between this country and other States have been applied by the Courts on the presumption that those States have complied or will comply in good faith with their obligations under the relevant Treaty or statutory provisions governing those arrangements. Generally speaking extradition arrangements and the like are based on reciprocity and mutuality. Each country enters into such arrangements on the presumption that the other country will comply with their requirements and apply them in good faith. In *Ellis -v- O’Dea* (No. 2) [1991] I.R. 251 at [p.]262 McCarthy J. stated ‘The making of the extradition arrangements presupposes that the Government and the Oireachtas are satisfied, amongst other things, that, an Irish citizen being extradited to the United Kingdom, as in this instance, or to any other State with which Ireland has such arrangements, will not have his constitutional rights impaired’. In *Wyatt -v- McLoughlin* [1974] I.R. 378 at [p.]390 Finlay J., as he then was, stated ‘...I am satisfied that I am entitled to have regard to the fact that an Extradition Act is necessarily the consequence,...of an agreement between two sovereign states reposing confidence in each other, and I should not in the first instance, suppose that the court and other authorities of the country by which extradition is sought are using deceit so as to secure the apprehension of the plaintiff’.”

17. All extraditions are premised therefore on two States reposing confidence in each other. In general, it can be said that this extends to both the information provided by the requesting State, and to the general protections of fundamental rights that will be afforded to an individual if extradited to that State. The presumption that the requesting state will act in good faith in an extradition request under the 1965 Act is weaker than in a surrender request under the 2003 Act, and thus the presumption may more easily be rebutted. However, as McKechnie J. in *Attorney General v. Davis* stated, the burden remains on the requested person.

18. The principles on which a court in this jurisdiction must act in cases of surrender under the 2003 Act were authoritatively set out by the Supreme Court in *Rettinger* and have become known as the *Rettinger* principles. In a case where a requested person claims that he will be at real risk of being subjected to inhuman and degrading treatment on extradition, the burden is on him to adduce evidence that there are substantial/reasonable grounds for so believing that if he is returned he will be exposed to a real risk of being subjected to such prohibited treatment. The *Rettinger* principles, themselves a reflection of principles in the leading European Court of Human Rights (“ECtHR”) case of *Saadi v. Italy* (App. No. 37201/06) (2009) 49 EHRR 30 apply to extradition requests as well as to EAWs. This was most recently stated by the Supreme Court in the case of *Attorney General v. Davis* where, having considered whether there was a difference between the *Rettinger* principles and those gleaned from *Saadi v. Italy*, McKechnie J. said:

“Accordingly, it is the...*Rettinger*...principles, as subsequently explained and adapted in *Attorney General v. O’Gara*...and *Attorney General v Marques* [2015] IEHC 798...in relation to extradition to the U.S, which form the applicable test in an [A]rticle 3 situation: the question, as stated, is whether the evidence establishes that there is a real risk that, if surrendered and extradited, the proposed extraditee will be subjected to torture or inhuman or degrading treatment. This test applies where the objection raised is based on what is prohibited by that provision, [...] As one can never be definite regarding future events, the aim of the exercise is to measure risk. This requires a fact-specific inquiry conducted in part against known facts and in part against future events. The matters for consideration will inevitably be particular to the person concerned and may range over an extensive area; likewise in relation to the prison conditions, and perhaps even in respect of the legal and judicial regimes of his intended

destination. The exercise so conducted should and must be as thorough as the facts and circumstances demand.”

19. A point to note is that McKechnie J. referred to the fact that some authorities use “substantial grounds” (the language of *Saadi v. Italy*) while other authorities use “reasonable grounds” (the language of legislation). He opined that, given the difficulty in obtaining evidence, he preferred the latter although there may be no difference between the two. Of particular significance to the issue in the present case is the fact that McKechnie J. identified the aim of the exercise as being to measure risk: measuring the downstream risks to this appellant is therefore vital.

20. The *Rettinger* principles state that a requesting State may dispel any doubts by evidence, but this does not mean that the burden has shifted. The principles emphasise that a court has to be forward-looking in assessing the foreseeable consequences of sending the person to the requesting State, and that the mere possibility of ill treatment is not sufficient.

21. Turning the focus now to the case of *ML*, the judgment reveals the emphasis that the CJEU placed on its emerging jurisprudence where issues of a prospective breach of fundamental rights are raised. Beginning with the decision in *Aranyosi and Căldăraru* (Joined Cases C-404/15 & C-659/15 PPU) EU:C:2016:198, and expanded further in the case of *Minister for Justice (Deficiencies in the System of Justice)* (Case C-216/18 PPU) EU:C:2018:586, the CJEU set out the steps that a court must take before it could refuse surrender on such grounds. The trigger for those steps is objective, specific, reliable and updated information that there are systemic deficiencies in respect of the fundamental human rights protection at issue in the requesting State. It is then necessary for the court to determine whether there are substantial grounds for believing that the requested person is at risk. Under the provisions of Article 15 of the Framework Decision 2009/299/JHA of 26 February 2009 (“the Framework Decision”), the executing court must request of the issuing judicial authority

information concerning the conditions in which the requested person may find himself. This type of judicial dialogue is similar to that opportunity to be given to the Minister (by returning to the issuing state for information) to dispel any doubts, as set out in the *Rettinger* principles.

22. The trigger for seeking further information from a requesting state is not “evidence of a possible systemic and ongoing violation”, as the appellant, in submissions, interpreted the CJEU as stating. On the contrary, the jurisprudence of the CJEU is abundantly clear that the principle of mutual trust and recognition does not permit of a refusal to surrender save in exceptional circumstances. It is only where evidence is presented that is objective, reliable, specific and properly updated, concerning the detention conditions within the prisons of the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, will there be a requirement to enter into the second step of seeking information as to the conditions in which the requested person will be held (emphasis added). That is a high burden which must be based upon evidence of particular weight. It is far from the situation posited by the appellant in his submissions, *i.e.* that of “possible” violations. Apart from not being an accurate reflection of the two-step procedure set out by the CJEU, the submission does not reflect the intention of the *Rettinger* principles, which, as stated, apply to extradition requests under the 1965 Act. Those principles addressed the burden on the requested person and the nature of the material to which the court may attach importance.

23. As to the evidence proving systemic or generalised deficiencies, the CJEU jurisprudence places significant emphasis on the requirement that it be “objective, reliable, specific and properly updated” (para. 60 *ML*). The type of evidence referred to by the CJEU are decisions of the ECtHR (pilot judgments of the ECtHR may be particularly important), reports of the institutions of the EU, reports of the Committee on the Prevention of Torture, reports of other independent international human rights organisations and governmental

sources. In *Rettinger*, it is stated that the court may attach importance to independent human rights organisations (such as Amnesty International) and to governmental sources, including USA State Department country reports (para. 16).

24. The appellant in this case chose to rely upon the evidence of an attorney from Georgia in relation to claims of the risk of inhuman and degrading treatment (which went beyond the risk of homelessness); his expertise was criticised by the Office of the Georgian District Attorney. The expert referred in footnotes to two legal articles but did not exhibit these. Interestingly, one article which was apparently published in the Harvard Civil Rights-Civil Liberties Law Review is entitled “Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective”, thus indicating the prevalence of challenges to at least some aspects of the sex offender provisions. The second is entitled “Georgia Law Creates Homeless Sex Offender Colony” which was published online by “prisonlegalnews.org” in 2010. The evidence, which is sparse and not from any organisation of the type mentioned in the case law, is certainly not up to date. This, unfortunately, is an aspect of the approach of the appellant, which has been to look back at his own experience as proof in itself of the risk he faces in the future.

25. Of course, the *Rettinger* principles, in extradition cases, do not apply in the context of the mutual recognition of judicial decisions and instead apply at a state-to-state level. The role of the court is limited and, in this State, requests for further information must be made by the Minister. Section 26(3) of the 1965 Act provides that if the Minister is of the opinion that the information communicated to her in pursuance of the extradition request insufficient, she may request the requesting state to furnish such further information as she thinks proper. Those provisions would be relevant if this Court were to decide that further information is required.

26. In *ML*, the CJEU emphasised that the focus must be on the risk to the particular individual and not simply the systemic defects. That approach has been reiterated, and indeed

amplified, in more recent decisions of the CJEU (e.g. *X and Y v. Openbaar Ministerie* (Joined Cases C-562/21 PPU & C-563/21 PPU) EU:C:2021:100). The *Rettinger* case and subsequent Irish case law dealing with extradition requests under the 1965 Act also require the focus to be on the individual. As Denham J. said in *Rettinger*, quoting from *Saadi v. Italy*, “where the sources available describe a general situation, an applicant’s specific allegations in a particular case require corroboration by other evidence”. Fennelly J., in *Rettinger*, having pointed out that it was the prison conditions which the respondent would face that were in issue, referred to the fact that the reports demonstrated that statistics demonstrated that only 2000 out of a total prison population of 80,000 were affected by the impugned conditions.

27. The CJEU in *ML* stated that it followed from the specific and precise assessment that the executing authority was required to make that it could not concern general conditions of detention in all the prisons of the requesting state that the individual might be detained. The CJEU stated that recourse to the step of requesting supplementary information was to be had only in exceptional circumstances and could not be used to obtain information as to the prisons that the person might be detained in (emphasis added). The CJEU said that as a general rule, prisoners could be held in any prison in the territory of a State and that transfers could take place because of unforeseen events unrelated to the requested individual. With specific reference to the EAW procedure, the CJEU said that these considerations are borne out by the objectives of the Framework Decision, which were for a simplified and more effective system of surrender, and the CJEU referred to the relevant time limits. The CJEU held that an obligation to assess all the conditions of detention to which an individual might be exposed was clearly excessive and could substantially delay surrender. Consequently, in view of mutual trust and in light of the time limits for surrender, the executing authorities were solely required to assess the conditions of detention in the prisons which, according to the information available to them, is actually intended that the person concerned will be detained, including on

a temporary or transitional basis. The CJEU held that the compatibility with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is, in accordance with the case law of the CJEU, a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State. In that case, the CJEU held that, even though the information had not been provided by the issuing judicial authority, it was common ground that the requested person, if surrendered, would initially be held in Budapest prison for a period of one to three weeks, and then transferred to Szombathely prison, but it was not inconceivable that he might subsequently be transferred to another place of detention. The CJEU said that it was only conditions of detention in those prisons that had to be assessed.

28. Having considered the submissions of the parties, the assistance to be gained from *ML* may well be limited. The decision is, unsurprisingly, focused on the Framework Decision concerning surrender under an EAW. Nonetheless, it does premise the limitation on the extent of the examination of all prisons on the principle of mutual trust and emphasises the importance of the focus on the effect of surrender on the individual.

29. As we have seen, even under the *Rettinger* principles, the focus in extradition cases must be on the treatment to which the individual is at risk of being exposed. There is no requirement to dispel every risk, it is only where, on substantial grounds, a real risk to the individual of being subjected to inhuman and degrading treatment, has been demonstrated, that a court must refuse extradition. Mutual trust under the Framework Decision is a higher standard than the presumption of good faith (reciprocity and mutuality) that exists in extradition arrangements. Nonetheless, that lower level of good faith must apply; indeed, this concept can be understood as the basis for the statement in the *Rettinger* principles that the mere possibility of ill treatment is not sufficient. The *Rettinger* principles also require a court to focus on the

foreseeable consequences of the return, bearing in mind the general situation there and the personal circumstances of this appellant.

30. The appellant urged upon the Court that the real risk had been demonstrated here; there was, he submitted, no evidence that he was not at risk of being subjected to a lengthy period of probation supervision. The appellant then submits that “[t]he actual and precise conditions which [he] would be subjected to, if released on probation supervision would, as can be ascertained from his previous experience, expose him to a real risk of inhuman and degrading treatment”, and “[a]bsent any evidence to the contrary, ...the Court should allow his appeal and decline to sanction his extradition.”

31. As referred to previously, those submissions do not take into account that it is not the risk that he may be subjected to probation supervision that is the real concern of the Court; it is the risk he will be subjected to the inhuman and degrading treatment in the future that must be assessed. Moreover, two aspects of the *Rettinger* principles are particularly apt to mention in the context of these submissions of the appellant. In the first place, the court assessing the conditions must engage in a rigorous examination of the facts, and secondly, the relevant time that is decisive for decision-making is the time of the High Court proceedings. Furthermore, as *per Saadi v. Italy*, “historical facts are of interest only in so far as they shed light on the current situation and the way in which it is likely to develop”. In other words, a court must carry out a rigorous examination of the evidence in assessing the real risk of the individual concerned being exposed to inhuman and degrading treatment, should the requested person be returned. In this appeal, it is for the appellant to satisfy this Court that the High Court’s conclusion that there was no real risk of him being exposed to inhuman and degrading treatment was wrong. It is not sufficient to demonstrate that one part of its assessment was incorrect.

32. What does this mean for the assessment of the facts in the present case, wherein the risks are downstream from events that will occur after any extradition?

The measurement of risk

33. A court is obliged, in the words of McKechnie J., to “measure risk”. The following considerations are relevant to that measurement:

- a) the measurement of risk must take place in the framework that has been identified;
- b) there is a presumption of good faith on the part of the requesting state;
- c) the burden is on the requested person to rebut that presumption;
- d) he or she does not have to show probability;
- e) the standard is that of real risk of being subjected to the prohibited treatment, which entails demonstrating on substantial/reasonable grounds that real risk exists;
- f) the risk must be of the risk of future events;
- g) historical facts are only of interest in so far as they shed light on the current situation;
- h) courts may attach importance to findings of international human rights tribunals, human rights organisations, and governmental sources;
- i) the possibility of ill treatment is not sufficient;
- j) a requesting country may dispel doubts by evidence, but that does not shift the burden; and,
- k) it is not necessary to eliminate all risks prior to making an order for extradition as it is only where the risk is real that extradition must be refused.

The real risk to this appellant

34. The starting point is the agreed position of the parties: that the appellant is sought for a hearing on whether he has violated his probation. If he has, the court in Georgia may “revoke any portion of the remaining probation and sentence him to serve that period of time [12 years, 6 months, 11 days] in prison.” The parties agree that immediately on return he will be in custody. Thereafter, the parties’ positions start to diverge. The Attorney General says that, if

found to have violated parole, the appellant will receive a prison sentence and, in line with the intended submission of the Georgian District Attorney, his probation be revoked for a certain period and thereafter he would be free to leave the USA. The appellant submits that this may be an intention of the prosecution, but the matter is in the hands of the court, and there remains a real risk that he will be required to stay in Georgia.

35. The expert evidence of Mr. Ryan Langlois, Attorney, adduced on behalf of the appellant, is that it is likely (at one point he says it is highly likely) that the outcome of his return is that he will be sentenced to custodial time, and will serve it in a named Detention Center or a state prison facility within the state. It was also stated that he could be remanded for the entire length of the custodial period. I do not think there is any real doubt but that the appellant will, if considered to have violated his parole, be sentenced to a period of custody, and I do not take the appellant seriously to contend otherwise. If there is a risk that he will not be required to serve prison time if found liable for having violated his parole, that risk is a small one. The contested issue before this Court has been what is likely to occur at the end of any sentenced prison time (short of being required to serve the entire period). As set out in the preliminary ruling, it cannot be said that the *most likely* outcome of the court hearing on the violation of parole is that he would receive a definite sentence of imprisonment and thereafter be free to leave the USA. While it is the intention of the prosecution not to seek any such term on probation, there is, at least, a real risk that he may be required to serve part of his sentence on parole and under probation supervision. Such a finding does not have the conclusive quality for which the appellant contends, but instead it is a step in the rigorous examination required of the evidence the appellant presented to the High Court.

36. While the appellant's historical experiences of homelessness and poverty during his probation supervision period were undoubtedly dreadful, the fact that he had to endure them in the past does not, of itself, reach the threshold for finding that his extradition must be refused

because there is a real risk that he will be subjected to inhuman and degrading treatment should he be extradited. Instead, the High Court and this Court on appeal, are required to be forward-looking in the measurement of risk. Previously, the path to the appellant finding himself in those circumstances started with him giving an address to the probation authorities in which he did not intend to reside. The High Court judge found, however, as a fact, that it was possible to provide an address which would have been suitable to the probation services. That possibility still exists. Thus, there is at least the possibility that the appellant will be able to find an address that satisfied the probation service, but this time one in which he intends to reside.

37. Even then, the appellant was not rendered instantly homeless when released from prison. The release from custody did not immediately subject him to the requirement to live in a tent in the homeless “campground” in conditions of fear and squalor which form the basis of his claim of the risk of inhuman and degrading treatment. Instead, the appellant lived for six months in a homeless shelter, until he had to leave, and then resided in another hostel for the maximum period of one week. The appellant’s reliance on homeless shelters was because of his stated inability to either obtain employment or, if obtained, to retain that employment, because of what he said were the conditions of parole, namely the requirement that it not be in proximity to various establishments or youth facilities.

38. Mr. Langlois stated on affidavit that Georgia sex offender laws were some of the harshest in the USA. He also said that the statute was a catalyst for homelessness amongst sex offenders. In relation to the requirement not to live within 1000 feet of a church, he noted that it was difficult to find any location in the historic district of Savannah (a large residential and commercial area of the city of Savannah) that was not within 1000 feet of the church. The personal evidence of the appellant and the submissions on his behalf featured the difficulties associated with finding employment in this historic district.

39. At the oral hearing, a member of the Court, in an echo of the High Court judge's observation as to the question of whether the historic district of Savannah was the best example of the operation in Georgia of the sex offenders' legislation, asked whether he was restricted to living in Savannah or if he could live elsewhere in Georgia. Counsel's evidence was to say that he had "no basis to say that he couldn't. Equally there was no evidence before the Judge in the Court below to say that he could". Counsel instead referred to the evidence that the appellant had done everything he could to try to live by the rules but ended up living in a tent. Unfortunately, that approach to evidence does not reflect the burden that remains on the person seeking to resist extradition to adduce evidence of the substantial grounds for believing that they are at a real risk. A lack of clarity as to the legal provisions that the appellant submits will result in him being subjected to inhuman and degrading treatment detracts from his case rather than assists it.

40. There is another aspect of the appellant's expert evidence report that merits some comments. Mr. Langlois devotes an entire section to the apparent legislative intent of the Bill, which it is said was to drive offenders such as the appellant out of Georgia. He cites words of the Georgia State House majority leader. He says that aspects of the legislative provisions have been successfully challenged by organisations such as the American Civil Liberties Union, but, as the appellant's case demonstrates, the statute remains largely intact. If the intent is to force offenders out of Georgia, it seems unusual that the appellant was not allowed to leave to live in Florida. Indeed, it can also be said that this attitude might feed into whether or not he would not now be allowed to return home after serving whatever proportion of the outstanding sentence is imposed upon him. This is not a finding that he will be allowed to leave Georgia, but just an observation that the factors which are likely to be considered in the hearing on the alleged breach of probation are varied. In the circumstances, this adds to the uncertainty as to what the final outcome of the sentencing process for the appellant will be.

41. The question of whether the appellant can challenge these conditions in Georgia was raised in the course of the appeal. The information before the High Court from the Office of the District Attorney of Georgia, which was given by way of response to a request from the Minister for further information, demonstrates that, in the Constitution of Georgia, like the Constitution of the USA, there is a prohibition on “cruel and inhuman punishments” which, from the information, is said to prohibit torture and inhuman and degrading treatment. Mr. Langlois, in his affidavit, raises the possibility of challenges to the type of restrictions that the appellant faced in the past, which ultimately, the appellant claims, led to him becoming homeless and living in the “campground”. He may have difficulties with accessing legal assistance to challenge these conditions. The CJEU in *ML* held that a subsequent judicial review of detention conditions in an issuing State, although an important development which can be taken into account when assessing overall conditions in which a person may be held, is not, of itself, capable of averting a risk that a person may be subject to prohibited treatment. That approach talks of a subsequent judicial review but does not address the possibility that such a review may exist to rule out prospective implementation of inhuman and degrading conditions. In other words, if a prisoner fears that the release conditions imposed upon him will violate these norms, this is not a subsequent review, but is one which is prospective in nature. The existence of the constitutional prohibitions on cruel and unusual punishment and the general existence of judicial review for this type of legislation are only tangentially relevant to the overall assessments of the conditions. I do not consider the possible existence of a specific challenge to these provisions as relevant to the facts of this case; the Court must assess whether the downstream risks of homelessness amount to the establishment on substantial grounds of a real risk of being subjected to the prohibited treatment. At most, its importance, albeit marginal, lies in the fact that the requesting State and jurisdiction prohibits cruel and unusual punishment and permits legal challenges to such punishment. This supports the overall

proposition that the existence of the extradition agreement between Ireland and the USA is premised on each State reposing confidence in the other.

42. From the foregoing, it cannot be gainsaid that the risk of being subjected to inhuman and degrading treatment in this case is neither immediate nor even proximate to any return of the appellant to the USA by extradition. At most, what can be said is that the appellant might at some point in the future end up homeless and living in a campground in Georgia in conditions of poverty, squalor and fear that may amount to inhuman and degrading treatment. Those are downstream risks that may never happen to him. It would take a particular chain reaction of a series of events to occur, which themselves can only be assessed at the level of risk or possibility (rather than probability), before the ultimate downstream risk of homelessness might come to pass.

43. All of those risks must be assessed in the context that the factual landscape has changed significantly since the appellant was first sentenced. He is now facing a period in custody if he is found to have breached his parole. Furthermore, the High Court was given information that the District Attorney intends to recommend that he serve an amount of time that is fair and just, and that any period of time, if any, that remains following revocation of parole be terminated. While this has not been established as necessarily a likely outcome, it is a factor that must be considered in the assessment of the downstream risks.

44. If the appellant is released and required to stay in Georgia to serve out any remaining time on parole, it is not clear that he would be required to stay in the historic district of Savannah. That is the district where according to the evidence, there were difficulties of avoiding living within 1000 feet of a prohibited space like a church. Other cities in Georgia may provide more opportunities for living in accommodation that is acceptable to the probation service. On the last occasion, the appellant was able to provide an address that was suitable, but in which he had no intention to live. This demonstrates that it is possible to obtain an

address, and there is at least a possibility that the appellant would be able to find such a suitable address in which he could reside. The possibility of being accommodated in homeless shelters, although far from ideal, would also mitigate against the risk of being required to live in a tent in a campground. The ability to obtain employment will mitigate against his risk of homelessness, and although there are clear difficulties because of the conditions on his parole, it is not a certainty that he will not be able to find such employment. Added to the above as the High Court judge alluded, the cause of homelessness can be multi-factorial and risks may arise from other matters. The High Court judge referred to the addiction issues to which the appellant had alluded in his affidavit. The appellant is correct that there is no evidence of any direct link of such addiction issues having led to his homelessness; that the causes of homelessness are often multi-factorial in origin cannot be disputed. The reference to the multi-factorial causes of homelessness was a minor factor in the findings of the High Court and is also a minor factor here. The appellant did provide a link, through his evidence and through Mr. Langlois (however sparse his report was), between the requirements of his parole and ending up homeless; the concern here, however, is the measurement of the future risk of that arising.

45. When viewed in the round, the appellant's case is that, because he endured appalling conditions as a result of his homelessness in the past, and because there is a risk that he will suffer them again in the future, he had provided sufficient proof to the High Court to come within the threshold for establishing that his extradition ought to be refused on grounds relating to inhuman and degrading treatment. His view is that this establishes the real risk that he will suffer the prohibited treatment. On the contrary, the evidence does not establish that there is a real risk that the appellant might suffer that treatment in the future; it establishes a possibility of ill treatment. The risk is remote: a chain of events, each link of which is uncertain, must take place before that risk can be said to be a real one. Some of the risk may possibly be

ameliorated by actions on the part of the appellant; he can put arrangements in place to secure accommodation prior to leaving custody, as he did on the last occasion. The risk is also lesser than it was on the last occasion, because it is clear that the intention is that he will serve time in custody; the emphasis at his original sentence hearing was as to his serving the sentence in the community while under probation supervision. Moreover, while it cannot be said that the evidence reaches the state where it can be said that he is likely not to have to serve probation time in Georgia, the risk is certainly lowered by the intention of the prosecution to recommend that any remaining time be terminated. How many of the difficulties relate solely to residing within the historic district of Savannah, and not to the rest of that city, or even other cities of Georgia, is a question that has not been fully resolved.

46. The presumption of good faith, even though of a lesser order of magnitude than the mutual trust that exists between Member States of the EU, does not require a court to discount every possible risk that an appellant will suffer inhuman and degrading treatment. A requesting State ought not to be asked therefore to discount every possible risk that might befall a requested person. Where there is evidence that a requesting State (and indeed the particular jurisdiction of that requesting State) has in place constitutional provisions that prohibit treatment of an inhuman and degrading nature, and also allow for judicial review of punitive sanctions, that is part of the overall circumstances that a court in this jurisdiction can take into account in assessing the overall risk. Naturally, if a real risk of being subjected to prohibited treatment is established, the Court cannot take account of the possibility of subsequent judicial review. The fact that the risk at issue is very much downstream from the actual return of the requested person however, gives a somewhat greater relevance to those protections.

47. Overall, therefore, the risk to this appellant of ending up in precisely the same set of circumstances that occurred on the last occasion is too remote to constitute substantial or reasonable grounds which establish a real risk that he will be subjected to inhuman and

degrading treatment if returned to the USA as a result of this request for extradition. For that reason, the information before this Court, which was information before the High Court, is sufficient to determine that the appeal ought to be dismissed, as no real risk to the appellant has been established. For those reasons also, it is not necessary to consider the helpful submissions from both sides as to how an appellate court in an extradition case ought to deal with a situation where that court assesses that the information before the High Court was inadequate to make a final assessment on the real risk to a violation of the fundamental rights of the requested person.

Conclusion

48. In the preliminary ruling, the question as to where real risk ends and speculation begins was raised as an issue for the Court to address. That question raised the issue of how to measure risk. The *Rettinger* principles form the bedrock of that analysis. Those principles have been applied to extradition requests and have been refined in the course of their application to the facts of the specific cases that have come before the courts. The tools for measuring risk include the presumption of good faith and the imposition of a burden on the person sought to be returned to establish on substantial/reasonable grounds that a real risk of being subjected to prohibited treatment on return exists at the time of the first instance decision-making. A possibility of ill treatment is not sufficient.

49. The appellant has not demonstrated that the trial judge was in error in finding that the appellant was not at real risk of being subjected to inhuman and degrading treatment if he is returned to the USA for the purpose of a hearing into whether he has violated his parole. The impugned risk is a risk that, at the end of any period in custody to which the appellant may be sentenced, he will be required to remain in Georgia under probation supervision, and will, as a consequence of the conditions of parole, end up living in squalor and fear in a tent in a campground. Even if it is accepted that living in a campground in the circumstances in which

the appellant found himself (and the Court expresses no conclusion on that), the risk that he might end up in such a similar situation is too remote from the return by way of extradition to demonstrate substantial/reasonable grounds for believing that there is a real risk that he will be subjected to inhuman and degrading treatment on his return. Another way of saying this is stating that the appellant's demonstration of the possibility that he may be subjected to inhuman and degrading ill treatment is not sufficient to demonstrate that he is at real risk of such ill treatment. In those circumstances, it is not necessary to answer the further questions that were raised in the preliminary ruling.

50. The appeal is dismissed.