

UNAPPROVED



THE COURT OF APPEAL

Record No.: 2021/264

Birmingham P.

Neutral Citation Number [2022] IECA 42

Edwards J.

Donnelly J.

BETWEEN/

ATTORNEY GENERAL

RESPONDENT

– and –

MARTIN WALL

APPELLANT

Preliminary Ruling of Ms. Justice Donnelly delivered this 24th day of February, 2022

Introduction

1. On the 11th October, 2021, the High Court made an order for the extradition of the appellant, following an extradition request from the Attorney General of the United States of America (“the USA”) dated the 22nd November, 2020 and accompanied by the Diplomatic Note from the Embassy of the USA dated the 2nd January, 2020. The appellant appeals against that decision. The parties agree that only two issues arise on this appeal:

- a) whether in respect of one of the offences for which his extradition is sought, there is correspondence with an offence in this jurisdiction; and
- b) whether the decision of the High Court was correct, based upon a number of arguments of fact and law, with regard to his findings that the appellant would not be subjected to inhuman and degrading treatment within a probation regime when extradited.

2. This judgment will deal conclusively with the issue of correspondence but will not, for the reasons stated herein, conclude this appeal on the second ground.

The offences for which extradition is sought

3. The appellant's extradition has been ordered in respect of three offences committed on or about the 12th January, 2011. These three offences were (i) utilising a computer on-line service to entice another person believed to be a child to engage in sexual conduct, (ii) of obscene internet contact with another person believed to be a child, and (iii) of criminal attempt to commit enticing a child for indecent purposes.

4. These offences were committed in the State of Georgia and were prosecuted by the relevant authorities in that state. The appellant had pleaded guilty to the offences in what is termed in the extradition request as a negotiated plea. He received a sentence of 15 years, which sentence was suspended on a number of conditions, one of which was that he attend at a Probation Detention Centre and carry out a minimum number of 240 days up to a maximum of 365 days there which he served. When released he was required to report to the probation officer, and on the 21st January, 2014 following the failure of the appellant to report as directed the arrest warrant was issued.

5. The extradition of the appellant has been ordered so he can be brought before a court in Georgia in relation to a hearing as to whether on the preponderance of the evidence he has violated a "special condition" of his probation. If he has, the court may, according to the extradition request, "revoke any portion of the remaining probation and sentence him to serve that period of time [12 years, 6 months and 11 days] in prison. The Court would also have the authority, even if it determined a probation violation had occurred, to return him to probation."

6. The facts on which the appellant was convicted reveal that he had not actually been in communication with a child, although he believed he was in such contact. He was in contact

with an undercover police officer who posed as a 13 year old female child. This Court is not concerned with an issue of entrapment.

Correspondence of Offences

7. Before a person can be extradited under the provisions of the Extradition Act, 1965 as amended (“the 1965 Act”), the act which constitutes the offence for which extradition is sought must correspond with an offence in this jurisdiction. The law on corresponding offences was not at issue in the appeal. The issue was solely whether the act which constituted the offence in the USA would “if committed in the State [...], would constitute an offence” (as per s. 10(3) of the 1965 Act).

8. In the High Court, the appellant argued that none of the offences corresponded with offences in this jurisdiction. On the appeal however, the appellant confirms that his only argument was that the first offence of utilising a computer on-line service to entice another person believed to be a child to engage in sexual conduct does not correspond to an offence in this jurisdiction. In particular, the appellant submits that the High Court Judge erred in finding correspondence with an offence under s. 8(1) of the Criminal Law (Sexual Offences) Act, 2017 (“the 2017 Act”). That offence provides as follows:

“8. (1) A person who by means of information and communication technology communicates with another person (including a child) for the purpose of facilitating the sexual exploitation of a child by that person or any other person shall be guilty of an offence and liable on conviction on indictment to imprisonment for a term not exceeding 14 years.”

9. The High Court held as follows on this issue at para. 19:-

“I am satisfied that had the respondent in this jurisdiction communicated with another person, whether a child or adult, by the same means and communicating the same content as he did when communicating with the detective on 12th January 2011,

that would constitute an offence contrary to s. 8(1) of the Act of 2017. It is not a prerequisite to an offence under s. 8(1) of the Act of 2017 that the communication be with a child. It is sufficient that the communication is with another person provided that the purpose of the communication is to facilitate the exploitation of a child. I have no doubt that the purpose of the communications from the respondent to the detective were for the purpose of facilitating the sexual exploitation of a child by the respondent. It is not necessary for the purposes of s. 8(1) of the Act of 2017 that sexual exploitation of a child be directed towards any named or particular child.”

10. The appellant accepts that s. 8 of the 2017 Act provides that “*it is not necessary [...] that sexual exploitation of a child be directed towards any named or particular child*”. Instead, he argues that this does not alter the requirement under s. 8(1) of the 2017 Act that the communication be directed at the sexual exploitation of a child. As there was no child on the present facts, the appellant could not have sexually exploited ‘a child’ and there was no offence committed on those facts in this jurisdiction.

11. I agree however, with the submission by counsel on behalf of the Attorney General that a communication which takes place between adults (such as in this case) is sufficient to establish the offence where the purpose of the said correspondence is that of facilitating the exploitation of a child. That was the purpose for which the appellant engaged in this conversation with what he believed to be a child. It matters not that he was not so communicating with a child because a) the section does not require that or b) that there was no child in existence. His own purpose was to facilitate the sexual exploitation of the child. This was part of the *actus reus*. He communicated with another person for the purpose of the facilitating the sexual exploitation of a child. I accept therefore that the trial judge was correct in ruling that s. 8(1) does not require or specify that it has to be a specific or particular child in

order that this is the purpose of the communication; it is the communication, with the stated purpose of exploiting a child, which forms the basis of the offending behaviour.

12. While it is not necessary to deal with the matter further, but I would say that even if the completed offence had not been carried out, the trial judge was entirely correct, for the reasons given by him in the course of his judgment, in holding that the alternative offence of attempting to commit the offence would also provide correspondence in those circumstances. The trial judge was entirely correct when he stated as follows at para. 34:-

“What is required to establish criminal liability for an attempt is not only that the defendant have a criminal intention but that he must commit sufficient acts towards the completion of the criminal act intended, such as brings his conduct within the parameters of the mischief which the offence seeks to punish. It may be that in certain extreme cases or hypothetical examples it will be difficult to determine whether a particular defendant has committed sufficient acts in that regard, but, in the vast majority of cases, it is likely that the trier of fact will be able to determine whether the attempt was a real attempt or merely an imaginary one. In terms of the present case, I am satisfied that the actions of the respondent went far beyond merely imagining criminal wrongdoing and constituted serious and significant acts to bring about the criminal offences.”

Provisions of Sex Offenders Register/inhumane and degrading treatment

13. The core of the appellant’s appeal was his contention that if extradited, he would be subjected to an unlawful and unconstitutional probation and sex offender’s regime because he would be subjected to inhuman and degrading treatment.

14. The circumstances in which that ground of appeal is advanced are slightly unusual because a) they are based upon his own experiences in Georgia when he was subjected to this regime b) they do not relate to the conditions of imprisonment but instead to the conditions in

which he would find himself if released to serve a post release period on probation, and c) his factual allegations as to his previous experiences have not been engaged with by the authorities in the USA. It is necessary to set out that factual background.

15. Having served the custodial part of his sentence as required, the appellant was released from the Probation Detention Centre and was immediately subject to a combined regime of probation and the sex offender's regime. The legal position was placed before the High Court on his behalf in the form of an affidavit and report of Ryan D. Langlois, an attorney practising in the state of Georgia. The High Court judgment details at para. 39 the relevant contents of that evidence, with comments thereon contained in brackets, as follows:-

“Mr. Langlois indicates that the state of Georgia has some of the harshest restrictions placed on sex offenders, with limitations placed upon where a convicted registered sex offender can live and work. In particular, it is an offence, punishable with 10 to 30 years’ imprisonment for a sex offender to reside ‘within 1,000 feet of a childcare facility, church, school or area where minors congregate’. Registered sex offenders are also restricted from working within 1,000 feet of such locations. Mr. Langlois sets out that, in the historic district of Savannah, it is virtually impossible to find any location where a registered sex offender could lawfully live or work (whether selecting the historic district of a town such as Savannah is the best example of the difficulty posed by the relevant Georgian legislation may be open to debate). Mr. Langlois indicates that most felony probation sentences, including that of the respondent, require the convicted person to waive their rights under the Fourth Amendment of the US Constitution (right to be free from search and seizure absent either a warrant or probable cause). This effectively allows law enforcement officers or probation officers to make unannounced home visits for the purpose of inspection to determine compliance. Residential and employment arrangements are approved by

Department of Community Supervision officers and this is subject to inconsistency between such officers. The relevant Georgia legislation requires certain offenders, such as the respondent, to be placed on a publicly available registration list which includes the 'name; age; physical description; address; crime of conviction, including conviction date and the jurisdiction of the conviction; photograph, and the risk assessment classification level provided by the board and an explanation of how the board classifies sexual offenders and sexually dangerous predators'. This information is required to be available to the public and the sheriff's office is required to inform the public directly of any change to address or the presence of a registrant in the immediate community. It is stated that this may expose such an offender to possible vigilante violence. In the case of Chatham County, the publicly available database organises registered sex offenders by postal code and provides an interactive map indicating the residential locations of registered offenders. Mr. Langlois sets out the difficulties many offenders meet in petitioning to be removed from the sexual offenders' register. It appears that Georgian law allows the probation period to be as long as the maximum sentence provided for under the law and this leads to protracted periods of probation with a higher possibility of breaching same."

- 16.** The appellant swore an affidavit. The High Court judgment records the relevant evidence, with some comments thereon, at para. 38, as follows:-

"He avers that when it came to his release date in or around January 2013, he received a visit from his probation officer and was informed that he could not live within 1,000 feet of schools, churches, parks, swimming pools, day-care facilities and numerous other places. He avers that he was informed that he would not be released if the place where he intended to live did not meet the requirements. He indicates that another inmate offered him his home address which met the necessary requirements

and, having provided same, he was released (it should be noted that this appears to indicate that it is possible to obtain accommodation which does fall within the parameters of the prohibited areas). At hearing, it was indicated to the court that the respondent did not in fact take up residence at that address and he had not intended to do so. He avers that, after being released, he had nowhere to live (thus, it would appear to be the case that the respondent misled the relevant authority as to where he intended to stay and that he had accommodation compliant with the probation regime). On release, he stayed in a homeless shelter where he found conditions to be difficult. He avers that he has struggled with addiction issues and sought out the services of AA. He avers that he obtained employment but, on being obliged to inform his employer of his criminal history, he was immediately let go. He stopped attending AA meetings. He avers that he was required to attend weekly classes for sexual offenders at the cost of US\$40 but that he had no way of meeting this cost without employment. He avers that he attended the first of the classes for sexual offenders but complains as to the quality of same. He was required to undergo a mandatory polygraph test every six months at the cost of US\$300 as part of his treatment. He managed to obtain work through a temporary employment agency but was informed by his probation officer that the temporary employment agency did not fall within the sexual offenders' parole parameters. He underwent the polygraph test and states that he found same degrading, demeaning and insulting. He was also required to fill out a sexual history questionnaire which again he found to be insulting and felt public shaming in having to read out the answers he had provided of his sexual history questionnaire in front of other participants in the class. He applied to the probationary services to be allowed to transfer to Florida where his mother was living but this was denied. He avers that the maximum amount of time he was permitted to stay in a particular shelter was six months

and, after that, he obtained accommodation in an inner city shelter for one week. He avers that he was close to having no shelter and was advised by the probation services that he could sleep in a tent. He purchased a tent and sleeping bag and began sleeping in a 'campground' where conditions were unhygienic and dangerous. He avers that he did gain employment on a number of occasions but it was short-lived due to the onerous conditions of his parole. He avers that he felt his only options were that of suicide or returning to Ireland and he obtained a loan from a friend and travelled to Ireland."

17. In response to that information, the USA transmitted through the appropriate channels an unsigned letter from the Office of the District Attorney Eastern Judicial Circuit of Georgia. This letter is in part somewhat high-handed; offering views on what crime "should likely be unlawful in Ireland" and stating emphatically that "extradition does not contravene Articles 38, Article 40.3 and 404 of the Constitution of Ireland." The only direct response to the evidence put forward by the appellant was as follows:-

- a) Making the observation that "[w]ithout any foundation whatsoever, Mr. Langlois, admitted to the Georgia Bar October 2018 [...] proclaim[ed] himself an expert witness 'on various human rights issues affecting those accused in the criminal justice system in the United States, the state of Georgia, and Chatham County, Georgia.'"
 - (1) makes no measurable contribution to accepted goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or
 - (2) is grossly out of proportion to the severity of the crime.
 Whether a punishment is cruel and unusual is not a static concept, but instead
- b) Stating that both the Georgia and the federal constitutions categorically prohibit

chances in recognition of the evolving standards of decency that mark the progress of a maturing society.”

- c) Stating that “[o]nce respondent completes his sentence in Georgia, he is no longer duty bound to reside here and can return to Ireland where the Irish sex offender registry may be less stringent. It will be my recommendation to the court that Respondent’s probation be revoked in an amount of time that is fair and just under the circumstances and that any period of time that remains on probation following revocation, if any, be terminated. Both the Georgia and federal constitutions protect Respondent from ‘inhuman and degrading treatment.’”

18. As can be seen there was no engagement with the factual allegations made by the appellant in his affidavit as to how he was propelled into poverty and homelessness as a result of the combination of loss of his home/savings as a consequence of his offending and his inability to keep employment even when it could be obtained and his consequential homelessness in what may be termed abject conditions where the only solution offered to him by his probation officer was “to buy a tent”.

The legal test

19. Both parties approached the case on the basis that the *Rettinger principles* (*Minister for Justice, Equality and Law Reform v. Rettinger* [2010] 3 I.R. 783) applied to objections to extradition under the 1965 Act based upon a claim that if extradited, the requested person would face a real risk of being subjected to inhuman and degrading treatment; a position recently endorsed by the Supreme Court in *Attorney General v. Davis* [2018] 2 I.R. 357. Citing previous case law, the Supreme Court (McKechnie J.) said that in assessing where there was a real risk that a proposed extraditee would be subject to torture or inhuman and degrading treatment, the aim was to measure risk by “*a fact-specific inquiry conducted in part against known facts and*

in part against further events” (para. 89). The matters for consideration will inevitably be particular to the person concerned and may range over an extensive area “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.”

20. It will be recalled that the *Rettinger principles* require the court to examine whether there is a real risk in a rigorous examination and that the burden rests upon a respondent to adduce evidence capable of proving that there are substantial grounds for believing that if returned the respondent would be exposed to a real risk of being subjected to the prohibited treatment. In some cases, including *Attorney General v. Davis*, there is a suggestion that the word “substantial” is interchangeable with “reasonable” in assessing the weight of the grounds required to achieve the test.

21. In carrying out its enquiry, the court must proceed on the basis of a presumption that a requesting State will act in good faith and that they will respect the fundamental rights of the proposed extraditee (a weaker presumption however than in European Arrest Warrant cases). It is open to a requesting State to dispel any doubts by evidence, but this does not mean that the burden has shifted.

22. The court should examine the foreseeable consequences of sending a person to the requesting State. A mere possibility of risk is insufficient.

The specific risk of inhuman and degrading treatment

23. It is important to bear in mind that the risk of inhuman and degrading treatment relied upon by the appellant is the risk that he may be released back into the community to serve any remaining portion of his sentence on probation and subject to the sex offender’s regime which would leave him living in conditions of such abject poverty and homelessness where the risk of violence was constant that it would amount to inhuman and degrading treatment.

24. The appellant relied upon the decision of the European Court of Human Rights in *M.S.S. v. Belgium and Greece* (App. No. 30696/09, Grand Chamber, 21st January, 2011). That case concerned the conditions to which asylum seekers in Greece at that time were subjected. These conditions related both to initial custody but also importantly where asylum seekers, usually single men, were often forced by circumstances to illegally occupy public spaces in complete destitution, with no sanitary facilities, in permanent fear of being attacked and robbed and with no real hope of being able to find work. The ECtHR referred to the applicant's status as an asylum seeker "*and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection*" and noted the "*broad consensus at an international and European level concerning this need for special protection*" in reaching their conclusion that in respect of his living conditions in Greece, there was a violation of Article 3. The Court was also aware however that the realm of prohibited treatment situations could be expanded to include a situation where a person was left in "*extreme poverty*". They referred to the applicant in that case as living in "*the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live.*" The Court considered he had been:-

"the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention."

25. In the High Court, the trial judge was of the view that the case of *M.S.S. v. Belgium and Greece* was not of much assistance because the respondent did not fall into a special category of vulnerable persons recognised by international or domestic law. The basis for his decision however, was that the evidence did not meet the test as to risk. The judgment made certain

findings about the evidence in so far as the trial judge said he was not satisfied that “*it will be, or is likely to be, impossible to meet such requirements [of the probation scheme], or that it must necessarily follow that, due to such requirements, the respondent will be rendered or is at a real risk of being rendered, homeless and penniless.*” The trial judge referred to the fact that a fellow inmate had been able to provide him with an address that would have been compliant and also to other factors such as substance abuse on his part and noted that circumstances of homelessness and poverty may be multi-factorial in origin.

26. In so far as the High Court judgment made reference to the right to privacy and Article 8 ECHR, the appellant confirmed that his appeal was not based upon an Article 8 claim.

27. At the hearing of the appeal, the Attorney General submitted that the decision in *M.S.S. v. Belgium and Greece* was correctly distinguished by the trial judge as being case specific to asylum seekers. However, the State submitted that the facts that were at issue in the present case were far from the facts which had applied in the *M.S.S. v. Belgium and Greece* case. This was not a case where the appellant was being required to live in a tent according to the conclusions of the trial judge. Counsel submitted that a system which required a sex offender to reside at a distance from children might survive scrutiny, but it may be likely that a system which would not permit a person to live in any kind of measurable amount of comfort or safety would not be found to be constitutional. The primary argument of the Attorney General therefore was that the appellant had not reached the evidential burden to establish that he was at such a risk and that the trial judge had been right in his conclusions that the appellant’s case was speculative.

28. It is important to look at the primary basis upon which the High Court ruled against the appellant’s Article 3 claim. The trial judge held:

“[45] *It is clear that what is intended on the part of the prosecuting authorities in the state of Georgia is that, upon his surrender, the respondent will have his*

probation revoked for a certain period, meaning that he will go into detention and thereafter will be free to leave the USA. In such circumstances, the respondent will no longer be required to remain in the state of Georgia after his release. It cannot be accepted for certain that the sentencing judge will go along with any recommendation made by the District Attorney's Office, and so such an indication from the District Attorney's Office cannot have a decisive impact upon the decision of this Court. However, it appears to me that this is the intended, and most likely, outcome of the respondent's surrender.

[46] At present, the respondent is sought in order to impose upon him a further period of detention and what may happen thereafter appears to me to be a matter of speculation. There is no basis for refusing surrender on grounds that the conditions of the respondent's detention will be such as to amount to a breach of his fundamental rights. I consider speculation as to what might be the position which the respondent will face upon his subsequent release as too uncertain to ground a refusal to surrender."

29. The appellant submits that this was an entirely incorrect conclusion which had no basis in the evidence. The Attorney General however relies on the findings of the trial judge in submitting that the reliance placed by the High Court on the letter from the Georgia prosecutor was entirely proper. The Attorney General submits that the purpose of the surrender was for the re-imposition of the sentence, and that it was likely that the appellant would not be subjected to any further period of probation thereafter.

30. Counsel for the Attorney General also relies upon the consistent findings by the courts in this jurisdiction that the burden on a requested person to provide evidence that leads the Court to find that there are grounds to refuse surrender on the basis of inhuman and degrading treatment contrary to Article 3 was a heavy one. He relied upon the case of *Attorney General*

v. Rory P. Doyle aka West [2010] IEHC 212 where Peart J. held that the expert report provided was not sufficiently cogent or grounded in evidence to allow the Court make such a finding with respect to prison conditions. Peart J. had distinguished the cases of *Attorney General v. POC* [2007] 2 I.R. 421, and *Finucane v. McMahon* [1990] 1 I.R. 165 where extradition was refused saying that there were “*cases where there was cogent and convincing evidence of future probability that constitutional rights would be breached upon extradition. That is in stark contrast to what has to be regarded as mere generalised speculation by Mr McAndrew, albeit speculation based on his experience as a prison officer at various and high levels within the Florida prison service*”

31. Counsel for the Attorney General submitted that the information placed before the Court was not sufficiently forward facing as to the risk for this specific appellant and the trial judge was correct in finding that any forward facing risk was speculative in nature.

Analysis

32. The logical first question for the Court to decide is whether the judge was correct in holding that it was speculative that the appellant would be subjected to this regime of probation. If it was speculative then the appellant has not established by cogent and convincing evidence that he was at real risk of facing that which he submits transgresses into the sphere of prohibited inhuman and degrading treatment. It can be observed that the letter from the Georgia prosecutor transmitted *via* the diplomatic channels was not expressed to be an undertaking. It was simply a statement of what recommendation was intended to be made to the Court by the prosecutor. The presumption of good faith would require the courts in this jurisdiction to respect this as a genuine statement of the intention of the prosecutor. The statement did not claim however that such a recommendation was likely to be accepted, or would usually be accepted, by a court in Georgia. It certainly seems from the totality of the evidence before the High Court, that it was well within the power of the sentencing court to insist that he remain

on probation for any proportion of the probation not served. Moreover, the only evidence before the High Court was that in the past the appellant was required to serve his probation in Georgia as he was refused permission to live in Florida with his mother despite his destitute circumstances.

33. The trial judge quite rightly accepted that the sentencing judge may not go along with any such recommendation of the prosecutor. He was correct to say that the indication of the District Attorney could not have a decisive impact on the decision of the High Court. The trial judge then held that it was both the intended and *most likely* outcome that he would not be required to remain in Georgia after his release. While that outcome might be intended by the prosecution, I find it difficult to see the evidential basis for the trial judge's finding that this was the most likely outcome. No evidence was given for example, by way of statistics or even of the opinion of the prosecutor, as to how often those recommendations were adopted. To reach a conclusion as to likelihood is something which requires an assessment of foreign law; a court in this jurisdiction can only make that assessment on evidence of that foreign law.

34. From the contrary perspective, the evidence in the original request referred to the power of the court "to revoke any portion of the remaining probation and sentence him to serve that period of time in prison" and that the "Court would also have the authority, even if it determined a probation violation had occurred, to return him to probation." That was confirmed by the evidence of Mr. Langlois. Indeed, the letter from the District Attorney's Office, by implication, confirmed that being required to serve a period on probation after a portion of the probation has been revoked was a live legal issue provided for in the Georgia legal system; hence the requirement for the recommendation. Thus, there was no basis in the evidence for finding that the most likely result was he would not serve any further probation time; at most, all that was confirmed was that the prosecutor would recommend no further probation.

35. As we have seen the test is not a test of likelihood but an assessment of whether there is a real risk of being subjected to the impugned conditions. The trial judge on occasion in his judgment referred to the test as one of real risk but on others appeared to use the test of likelihood which would bring in a test of probability; more likely than not. It would not be a correct overall interpretation to take from the judgment that the trial judge misunderstood the test. I think the reference in the judgment to “most likely” is immediately followed by the finding that the appellant’s contention as to what may happen is “speculation”. In that sense the appellant had not reached the high threshold required of him; if the evidence was truly speculative it could not reach the cogent and convincing standard that has been required in terms of an assessment of a future risk.

36. What this Court must ask itself is whether it can truly be said that it is a matter of speculation as to what may be imposed on this appellant? Furthermore, even if one accepted he was likely to face custody initially, could it be said to be truly speculative that he would not be subject to the impugned conditions of probation and the sex offender registry requirement which would require him to remain in Georgia in conditions of abject poverty (as he described them)?

37. I consider that this raises the question as to where the establishment of a real risk ends and speculation begins. 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 the State of 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.

38. In the context of the European arrest warrant scheme, a question which raised the extent to which the court must examine and reject the real risk of the requested person being subjected to inhuman and degrading treatment in any or all of the prisons within the requesting State, resulted in a firm answer by the Court of Justice that going beyond the immediate prison to which a person was returned was contrary to the principle of mutual trust. In *M.L. and Generalstaatsanwaltschaft Bremen (Case C-220/18 PPU)* EU:C:2018:589, the Court of Justice held at para. 87 that:-

“Consequently, in view of the mutual trust that must exist between Member States, on which the European arrest warrant system is based, and taking account, in particular, of the time limits set by Article 17 of the Framework Decision for the adoption of a final decision on the execution of a European arrest warrant by the executing judicial authorities, those authorities are solely required to assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. 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 referred to in paragraph 66 of this judgment, a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State.”

39. The European arrest warrant system is of course entirely different being based upon the high degree of mutual trust in other Member States of the Union which is founded upon common values of *inter alia*, respect for fundamental rights and fundamental legal systems.

The presumption of good faith here is weaker (*Attorney General v. Davis* p. 401 citing *Attorney General v O’Gara* [2012] IEHC 179). There is however evidence that Georgia and the USA, in their Constitutions, do not permit “cruel and unusual punishment”.

40. I view this 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, to be one that would benefit from further submissions by the parties. In particular I would like to have the benefit of focused written submissions on this issue, especially by reference to the relevance, if any, of the decision in *M.L. and Generalstaatsanwaltschaft Bremen* would be a great assistance to the Court.

41. There are other issues however which may arise depending upon the conclusion reached by this Court having heard those submissions on the analysis of future risk. Even though I have not made a final determination as to whether the circumstances in which this appellant found himself would amount to inhuman and degrading treatment such as to engage State responsibility, I am of the view that, for reasons of good case management, it would seem appropriate to deal with all of these issues together. It is therefore helpful to receive submissions in respect of all these matters at the same time.

42. One such further issue is the jurisdiction of this Court as an appellate court hearing an appeal in an extradition matter and whether the court can, of its own motion seek further information from the requesting State. Another is the extent of the information that may be required before a decision ought to be finally made on this issue. Finally, if the Court were unable to seek such information, the question arises as to whether the Court could or ought to remit the matter to the High Court to seek such information.

43. The approach to those issues must take into account that extradition proceedings are not adversarial proceedings but are *sui generis* and somewhat akin to an inquisitorial process. As Murray C.J. said in *Attorney General v Parke* [2004] IESC 100 at paras. 69-70:

“The role of the trial judge in an application for an order of extradition is unique. The hearing is not a criminal trial, in the adversarial sense where the State must prove the guilt of the accused beyond all reasonable doubt. Nor is it a civil case between two parties. It is a unique procedure where the court holds an inquiry as to whether the criteria set out in the Extradition Act, as amended, has been met. Further, this law has been established against the back drop that the State has entered into an agreement with the requesting State that there be extradition arrangements between the two States. Thus these cases are founded on the comity of nations and the comity of courts.

I am satisfied that there is a duty on a trial judge in an extradition case to make such inquiries of counsel as are relevant”.

44. The parties ought also to have regard to the approach of the Supreme Court in *Attorney General v. Davis* (para. 115) where McKechnie J. said in relation to the manner in which the Supreme Court addressed the question of the extent of the appeal in that case. McKechnie J. stated at para. 115:

“In the ordinary course, it would be sufficient for this Court to hold that the findings made by the trial judge, and the conclusions that he reached, were open to him on the evidence. Typically, provided such findings are sustainable, this Court will not intervene, even where it might take a different view on the evidence. Rather unusually, the third question upon which the appellant was granted leave in this case appears to call for a de novo assessment of his objections to extradition based on article 3 ECHR, notwithstanding the fact that he raised no 'point of law' for the purposes of his appeal to the Court of Appeal and indeed that he again failed to identify any such point before this court. As has been pointed out above, this is not a typical function of this court and this is not a manner of review that will readily be engaged in, but such was the

manner in which the case was argued by the parties. Thus the court has reconsidered the evidence in full. Though this course would not be open where witnesses had given oral testimony, clearly disadvantaging this court in its review, such reassessment was possible here in light of the fact that all of the evidence in the case was on affidavit. This court was thus in no worse a position than the High Court was to assess such evidence.”

45. The matters that I consider ought to be addressed in further submissions by the parties are as follows:-

- 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 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?

46. This matter will be listed on the 25th February in the Case Management List for Directions as to submissions.

47. As this ruling is being given electronically I am authorised to say that Birmingham P. and Edwards J. agree with this ruling.