



THE SUPREME COURT

[RECORD NO.: 17/22]

**MacMenamin J.
Charleton J.
Baker J.
Woulfe J.
Murray J.**

BETWEEN:

MINISTER FOR JUSTICE & EQUALITY

RESPONDENT

AND

FARAH DAMJI

APPELLANT

Judgment of Mr. Justice John MacMenamin dated the 15th day of June, 2022

Introduction

1. This is an appeal from the decision of Mr. Justice Paul Burns in the High Court, granting an order for the surrender of the appellant to the United Kingdom pursuant to a European Arrest Warrant dated the 29th July, 2020 (“the EAW”). The warrant in question was issued in the United Kingdom by His Honour Judge Gledhill, sitting at Southwark Crown Court, as the issuing judicial authority. The appellant objects to surrender on the grounds that she is a psychologically vulnerable person, and that, whilst she was in prison in the United Kingdom earlier, there was a failure to diagnose her condition accurately, and that, were she now surrendered, she would not receive the forms of therapy which she requires for her condition. She contends an order for surrender would contravene her rights under s.37(a) and (b) of the European Arrest Warrant Act, 2003, as amended (“the EAW Act 2003”), which prohibits surrender if such order would be incompatible with the State’s general obligations, under the ECHR, its protocols, any provision of the Constitution or, specifically, were the person to be surrendered, he or she would be tortured or subject to other inhuman and degrading treatment.

Background

2. The appellant was sentenced in the U.K. to five years’ imprisonment on the 19th August, 2016. The convictions were in relation to harassment and stalking-type offences. A

restraining order, issued at the same time, prohibited her from contacting or communicating with a significant number of persons identified in the order, including those involved in the prosecution of the case. Where necessary, this will be referred to as the "2016 conviction".

3. The appellant was later released on licence on the 9th October, 2019. By then, she had served more than half her sentence on foot of that 2016 conviction. Her release was subject to licence which stipulated that she not make contact with, or harass, certain persons involved in her 2016 conviction.
4. But when released in 2019, she breached these conditions, and engaged in harassment of two named prosecution witnesses from the 2016 proceedings. She was then prosecuted for breach of these conditions. Her trial began on the 17th February, 2020. She was present for the first three days, but then absconded before conviction and sentence.
5. The appellant was sentenced on one count to 9 months' imprisonment, and on the second count to 18 months. The sentences were to run consecutively, amounting to a total of 27 months' imprisonment. However, on the 18th December, 2020, these two sentences were reduced for reasons explained in a detailed judgment delivered by the Court of Appeal of England and Wales, Criminal Division ([2021] 1 Cr. App. R. 18). The outcome of the appeal was that the sentences were to run concurrently, so that the appellant faced a total sentence of 18 months.
6. After the appellant absconded, she arrived in this State. She was arrested here on the 17th August, 2020. She was detained in custody for 7 months, and thereafter released on bail. In the relevant warrant, the U.K. authorities requested her return to complete the balance of the custodial sentences imposed upon her in respect of the two breaches of the restraining orders. The operative sentences, therefore, are those pronounced by the Court of Appeal of England and Wales, Criminal Division on 18th December, 2020.
7. The appellant's objections to extradition were unsuccessful in the High Court ([2022] IEHC 72). Following that decision, she applied for a certificate for leave to appeal to the Court of Appeal. Under s.16(11) of the EAW Act 2003, such appeals are permitted only when the High Court judge grants leave to appeal. In this case, the judge refused to grant leave for reasons explained by him in an *ex tempore* judgment delivered on the 8th February, 2022.

Application for Leave to Appeal

8. The appellant subsequently applied for leave to appeal to this Court. She contended that it was appropriate for this Court to hear an appeal pursuant to the 33rd Amendment to the Constitution, as her case raised issues of "general public importance". On 23rd February, 2022, this Court (MacMenamin J., Dunne J., Hogan J.) ([2022] IESCDT 26), concluded that her application for leave to appeal to this Court did raise a single point of general public importance, namely, one as to the legal principles arising from the appellant's contentions as to the potential effect on her fundamental rights of alleged past

and future inadequacies in the mental health services provided in the prison system of the requesting state.

Issues

9. This judgment later considers the established legal authorities which arise, both under the Constitution, E.U. law, the Convention, and the neighbouring jurisdiction. In brief, the question is whether the appellant's fundamental rights, as a person, would be placed at serious risk by an order for her surrender.

10. It has been frequently observed that the court's approach to objections to arrest warrants is particularly fact-sensitive. Seen against that standpoint, the High Court judge's findings of fact, inferences and conclusions on evidence and the material before him, are of great significance. Much, but not all, of the argument in the appeal before this Court centred on an assessment of whether the High Court judge had erred in the weight which he gave to the material adduced in the light of the legal authorities and burden of proof, as set out in the legislation and case law. Of necessity, therefore, this judgment contains a rather extensive assessment of the evidence and material and the judge's conclusions. This Court has had regard to all the evidence, even though the judgment refers to only material passages from that evidence and deals only with those legal authorities which bear on the issues.

The Legal Framework

11. Articles 40.3.1 and 40.3.2 of the Constitution, E.U. law, the Charter of Fundamental Rights & Freedoms, and Article 3 ECHR, provide the essential legal framework. The appellant contends surrender would violate s.37(1)(c)(iii) of the European Arrest Warrant Act, 2003, which prohibits surrender if it would be incompatible with this State's duties under the Constitution and Convention.

Article 40.3

12. The constitutional provisions which arise are the fundamental rights protected in Article 40.3 of the Constitution. Under Article 40.3.1, the State guarantees in its laws to respect, and, as far as practicable, by its laws, to defend and vindicate the personal rights of the citizen. By Article 40.3.2, the State guarantees, in particular, by its laws, to protect, as best it may, from unjust attack, and in the case of injustice done, vindicate the *life*, person, good name and property rights of every citizen. In this instance, the appellant, an individual brought before the courts, is entitled to the same level of protection, whether or not she is a citizen of this State. The words "life" and "person" in Article 40.3.2 are emphasised as those protections later arise for consideration.

Article 3 ECHR

13. Article 3 ECHR, in turn, states, in absolute terms: –

"Prohibition of torture

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

Section 37 European Arrest Warrant Act, 2003

14. For this case, these rights provisions are given expression in the EAW Act 2003. Section 37 of the Act protects fundamental rights. Insofar as material, it provides that: –

"A person shall not be surrendered under this Act if –

(a) his or her surrender would be incompatible with the State's obligations under –

(i) the Convention, or

(ii) the Protocols to the Convention,

(b) his or her surrender would constitute a contravention of any provision of the Constitution ...

(iii) were the person to be surrendered to the issuing state -

...

(II) he or she would be tortured or subjected to other inhuman or degrading treatment."

The reference to "the Convention" is to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, and its protocols.

The Presumption

15. The legislation now also contains an evidential presumption. Section 4A of the 2003 Act, inserted by s.69 of the Criminal Justice (Terrorist Offences) Act, 2005, later substituted by the European Union (European Arrest Warrant Act 2003) (Amendment) Regulations 2021, S.I. No. 150/2021, provides that it shall be "*presumed that an issuing state will comply with the requirements of the relevant agreement, unless the contrary is shown*". Thus, the onus lies on an objector to surrender to adduce evidence to rebut the presumption that the issuing state will comply with the requirements of the relevant agreement.

The Framework Decision

16. Article 12 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) also provides for respect of fundamental rights, and of the principles contained in Article 6 of the Treaty on the European Union, and the Charter.

17. Article 13 is still more specific. It prohibits surrender to a state where there is a "*serious risk that the person surrendered would be subjected to the death penalty, torture, or other inhuman or degrading treatment, or punishment, thereby violating Article 3 ECHR rights*". The law now governing surrenders between this State and the United Kingdom is also governed by S.I. No. 720/2020 - European Arrest Warrant (Application to Third Countries) (United Kingdom) Order 2020.

The Approach

18. Prior to assessing the High Court judgment, it may be useful to make some observations about the approach to be adopted in extradition cases concerning vulnerable persons. A

court will, of course, direct itself to the Constitution, where relevant E.U. law, and Convention jurisprudence. It is necessary to consider the whole picture of the material available, and not simply part of it. Where possible, a court should seek to identify clear evidence which may provide a basis for reaching conclusions as to whether or not there is a serious risk of an infringement to an objector's fundamental rights. It will, of course, be necessary to address any evidence adduced, or submissions made, on behalf of the respondent Minister. A court will ask itself what weight may be given to the material which has been placed before it, and will consider the question as to whether the material lends itself to findings of fact or firm conclusions, or whether, rather, what has been placed before the court is simply speculation or conjecture. In the case of vulnerable applicants, it is necessary to bear in mind that neither psychiatry nor psychology are exact sciences, nor work in absolutes. But nonetheless, to succeed, a person seeking to resist an order for surrender must be in a position to adduce material from which a court may reasonably conclude that, having regard to the presumption, there is, in fact a serious risk to the applicant's fundamental rights. In the event of some disagreement or discordance between one professional and another, a court should seek to identify the evidence upon which it is proceeding in order to reach its conclusion as to whether a surrender is lawful.

19. At its heart, this appeal concerns a number of central issues. The fundamental question, of course, is whether there is a serious risk that, in the event of surrender, the appellant's rights under the Constitution or Convention would be infringed. When considering Article 40.3.1 and 2, the Court will assess the broad protections to a person's "life" and "person". Under Article 3 ECHR, the focus must be whether an order for surrender would infringe on an objector's right to be protected against inhuman and degrading treatment, as expounded in the European Court of Human Rights' ("ECTHR") case law.

The High Court

20. The judgment under appeal sets out the background circumstances with considerable clarity. Unsurprisingly, it is fact focused. It was common case that the appellant was a person with particular and unusual mental health needs. Her contention was that her condition had been previously misdiagnosed whilst she was detained in prison in the United Kingdom, and that, in the event of surrender, her condition would likely deteriorate further if she was obliged to serve the balance of her sentence. What follows is a brief summary of the evidence, followed by a closer analysis.

Mr. Rogers' Psychiatric Reports

21. It is right that there should be a particular emphasis on reports from Mr. Graham Rogers, a consultant U.K. psychologist. I summarise it here. His reports set out the appellant's unhappy personal history and his conclusions as to the form of therapy which she needs: psychodynamic psychotherapy. But, he acknowledged, access to this form of treatment is difficult. More generally, he stated that there was a shortage of psychologists and psychiatrists treating prisoners in the U.K. The therapy for the appellant's condition would be lengthy, taking up to two or three years, and take place in a highly specialised field, where access to such treatment is not easy. For reasons which will become clearer, it is necessary to bear in mind the judge's observation that, following any surrender, the

precise length of the appellant's unserved sentence remained unclear, but that it might be anticipated it would be relatively short.

22. Much of the background material in the report was based on the appellant's own narrative of events in her childhood and early adulthood. That description sets out very significant problems she encountered in life.
23. The judge assessed two reports from Mr. Rogers. None of this was tested by cross-examination. His first report, dated 31st October 2019, is not specifically addressed to the issues in this appeal. In fact, that report was prepared with civil litigation initiated by the appellant in the English courts in mind. It predated the appellant's subsequent trial and conviction in 2020, and her later arrival in this State, and the initiation of these EAW proceedings. The report is, however, useful in setting out the appellant's background history, as she described it to Mr. Rogers, and her account of her earlier treatment in the United Kingdom prisons. While this judgment must be delivered in public, it seeks, insofar as possible, to protect the appellant's own private rights and her dignity. It is nonetheless necessary to go into some detail in order to understand Mr. Rogers' conclusions.
24. The appellant spent her childhood in Uganda. She and her family were forced to leave that country in 1972. She then lived in what were apparently very comfortable circumstances in the United Kingdom. Her father had a highly successful business. But she gave Mr. Rogers a detailed history of abuse and emotional deprivation.
25. The appellant went to live in New York in 1984. She encountered serious problems there. She later returned to the U.K. She got into trouble with the law.
26. Mr. Rogers' report contains a detailed critique of various efforts made to diagnose the appellant's condition, both before, and after she was in detention from 2014 onwards. This is to be seen against her general earlier history of domestic violence, sexual assaults, and self-harm. His conclusion was that the appellant was on the margins between Post Traumatic Stress Disorder (PTSD), and complex PTSD. He went on to state that, during her earlier imprisonment, the appellant had been consistently misdiagnosed and, even when later correctly diagnosed, had not received appropriate treatment. Mr. Rogers felt that when the prison authorities eventually accepted the diagnosis, they still did not act on the treatment proposed, when the appellant had been diagnosed with a personality disorder by one of the number of psychiatrists and psychologists involved at that time.
27. As mentioned earlier, Mr. Rogers' first report was commissioned by U.K. solicitors with civil litigation in mind. It contains quite stern criticisms of other health professionals who dealt with the appellant over a period of at least a decade. There is criticism of the way in which the appellant was, on her account, treated by the U.K. prison authorities, who deemed her a troublemaker, and who transferred her from one prison where she was detained to another. The report also contains background information concerning the appellant's extensive activity on social media over the years.

The Proposed Therapy

28. Mr. Rogers concluded that, whilst the treatment for complex PTSD was generally cognitive behavioural therapy, the position in the appellant's case was different. He took the view that, due to the longevity and complexity of her condition, the appellant requires a specialised form of therapy known as psychodynamic psychotherapy ("PDP"). This is a form of psychoanalysis, or in-depth treatment, designed to reach the unconscious content of a person's psyche resolving inner conflicts created by extreme stress or mental hardship.
29. The psychologist's report stated that he had discussed the appellant's case with a clinical supervisor and others engaged in the PDP field. Together, they considered that the process of engagement in this form of specialised therapy would probably require two or three sessions a week for the first three to six months, declining thereafter to once a week. He envisaged such a course of therapy might last two to three years. He felt such an intensive approach was necessary due to the longevity of the appellant's PTSD and its effects upon her emotional state. He considered the appellant would also require social support which, he thought, might be a difficult process. In this connection, it is to be noted that the appellant appears not to have close family relationships. Mr. Rogers' report was accompanied by an extensive C.V. and a detailed account of the methodology he employed in assessing the application at interview.

Mr. Rogers' Second Report of 8th March 2021

30. Mr. Rogers furnished the Irish Central Authority with a further report dated 8th March, 2021. This was prepared with these extradition proceedings in contemplation. By then, the U.K. authorities had given an assurance that, on surrender, the appellant would be assessed by a G.P., that all her medical notes would be made available to the G.P. and, that, if necessary, she would be referred for appropriate treatment.
31. In his second report, Mr. Rogers dealt with access to mental health generally in U.K. prisons. He expressed doubt that, in the event of a surrender order, an offer made by the U.K. prison authorities of access to a G.P. when returned to prison would be adequate in the appellant's case. He repeated his view that the appellant had been the victim of a history of misdiagnosis, and that other professionals within the U.K. prison system had struggled to reach a diagnosis concerning her. He expressed the strong view that the appellant did not have a personality disorder. However, he also expressed the view that the situation regarding access to psychologists and psychiatrists in the U.K. prisons, was slowly "improving".
32. A key part of his report dealt with the constitutional and/or Convention issues. Mr. Rogers concluded that, given the opportunities previously open to the U.K. prison authorities to identify and intervene, their previous failures to accurately diagnose her, and then having ignored the recommended treatment, the prospect of appropriate treatment would be a cause of "some concern". He considered the question of her surrender as "problematic", in particular arising from difficulties in obtaining access to psychologists, to be viewed against a background of the problems encountered by the U.K. prison authorities during the Covid-19 crisis. The question considered later is whether these conclusions, viewing the whole picture, are sufficient to satisfy the evidential threshold applicable. These

somewhat guarded views should be contrasted with the strength of the evidence adduced before the Court of Appeal of England and Wales in *Lauri Love v. The Government of the United States of America* [2018] 1 WLR 2889, discussed later.

Dr. Seán Ó'Domhnaill

33. The appellant also cited a report from Dr. Seán Ó'Domhnaill, a consultant psychiatrist in Dublin. This report was dated the 20th October, 2020, and was commissioned while the appellant was represented by a different solicitor in these proceedings. Dr. Ó'Domhnaill's expertise is in the diagnosis and treatment of neuro-developmental complexes. These arise where neuro-developmental disorders, such as autism, are inherent in other conditions such as hyperkinetic disorder.
34. In his report, he stated that he was the only recognised neuro-developmental specialist on the island of Ireland. This report, based on a three-hour interview, also contained a detailed description of the appellant's previous interactions with psychologists, psychiatrists, and psychotherapists.
35. Like Mr. Rogers, Dr. Ó'Domhnaill outlined the appellant's own description of her difficult background, and also described her present activities in Ireland, where she was editing a Prisoners' Rights magazine, and engaging in the sale of art.
36. The documentation before the Court also included some correspondence, in which U.K. official authorities expressed reservations on whether the appellant's account, as tendered to Dr. Ó'Domhnaill, was accurate.
37. As a psychiatrist who had experience of working in the U.K., Dr. Ó'Domhnaill opined that the alleged failure in diagnosis of the appellant's condition in Britain was due to training problems which are present both in Britain and Ireland. He did not know of anyone else who treated such complex cases.
38. Having referred once to Mr. Rogers' report, Dr. Ó'Domhnaill made no further reference to it. He expressed the view that the problem with psychiatrists and psychologists is "*that they don't read each other's records. If we read each other's research findings, we would learn more quickly*". He concluded that the appellant had a severe generalised anxiety as her baseline. The report contains extensive reference to autism spectrum disorder and ADHD or hyperkinetic disorder. But it does not indicate concurrence with Mr. Rogers' findings. In fact, with respect to both professionals, the conditions he diagnoses appear to differ from those of Mr. Rogers. But, even if there was an overlap, the same concern arises: Is the evidence sufficiently strong to justify an order refusing surrender.

Dr. Pratish Thakkar

39. The judge also had before him a report from a Dr. Pratish Thakkar, a clinical forensic psychiatrist at Rampton High Security Hospital in the U.K. This report was dated the 24th September, 2021. It, too, was prepared for the purposes of the appellant's civil proceedings in the United Kingdom, which are brought against the Central and North West London NHS Foundation Trust.

40. Dr. Thakkar made a diagnosis of complex post-traumatic stress disorder. In his view, the appellant should have received extensive therapy at the time of her prior incarceration in prison whilst in the United Kingdom.

The Appellant's Evidence

41. The appellant deposed by affidavit that, whilst in this State, she had received counselling from the Rape Crisis Centre, arising from an alleged sexual assault which occurred in Ireland. This was being investigated by An Garda Síochána.
42. She deposed that when she was released from jail in Ireland, she received counselling. But whether this was focused on the diagnosis upon which she now based her objection to return, or counselling with the Rape Crisis Centre- arising from the alleged sexual assault- was unclear. There is no evidence that, whilst in Ireland, Ms. Damji received or sought to access any specialised counselling or therapy for her underlying condition, or earlier when she was at liberty in the United Kingdom, between the time of Mr. Rogers' first report on 31st October, 2019, and her second trial in February, 2020.
43. In addition to a narrative of the material adduced, the judgment dealt with a series of unusual occurrences which occurred during the course of the High Court proceedings.

Postponements of the High Court Judgment

Listing for 17th January, 2022

44. The evidence before this Court indicated the appellant's vulnerabilities. But her conduct at the trial in England was the subject of some adverse comment by the trial judge. The reports also state the appellant was an intelligent person. She was also, clearly, in a position to instruct her lawyers as to the conduct of this case.
45. This EAW case was first listed for judgment on the 17th January, 2021. It was then adjourned on medical grounds for one week. But two days later, on the 19th January, 2021, the appellant sought to adduce a further affidavit exhibiting a letter from a U.K.-based barrister who was advising regarding the review of the continued prosecution of the extradition proceedings. This was apparently a precursor to the initiation of judicial review proceedings in England against the U.K. authorities for the continued prosecution of the extradition proceedings on the grounds that the appellant apparently faced serving only a purported 40 remaining days of her sentence, and bearing in mind her possible eligibility for remission perhaps less than that, having regard to time served in custody. The U.K. barrister advised that, should the United Kingdom authorities fail to respond with an agreement to discontinue the extradition proceedings in this State, then the appellant would herself commence judicial review proceedings in the United Kingdom. But there was no indication that such judicial review proceedings were actually brought in the U.K. I pause to make the point that, if the appellant, in fact, faces just 40 remaining days imprisonment, this would raise an issue as to the potential impact, if any, of her not being able to access psychodynamic therapy, which Mr. Rogers says is not easy to obtain, even for persons living in the community.

46. Burns J. held that he did not regard this new matter as sufficient to change any of his earlier rulings on the issues argued before him, or to constitute a fresh reason for refusing surrender. He pointed out that, as matters stood, upon surrender, the appellant would only face a short period of incarceration, and then be released on licence. He also noted that the appellant had been arrested in this State on the 17th August, 2020, but the possibility of proceedings challenging the extradition process in the United Kingdom had only been raised sixteen months after her arrest. The judge observed that, on release, the appellant would be free to pursue her civil litigation against the U.K. authorities concerning her alleged mistreatment and misdiagnosis in prison.
47. He also pointed out he had received no evidence that would indicate that surrender to the United Kingdom would pose an insurmountable difficulty regarding an alleged serious sexual assault which was currently being investigated by An Garda Síochána.

24th January, 2022

48. When the matter was again called on for judgment on the 24th January, 2022, the appellant was apparently unable to attend court for Covid-19-related reasons. But when the matter was further re-listed for judgment on the 31st January, 2022, counsel on behalf of the appellant had, by then, been instructed to hand into the court further material relating to prison conditions in the United Kingdom, and the risk of self-harm. These documents were entitled "Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to December 2021"; and "The Fifth Report of the House of Commons Justice Committee on Mental Health in Prison" published on the 29th September, 2021.
49. The judge noted that both of these reports highlighted the fact that there was an unmet need for mental healthcare services in prisons in the United Kingdom. But they also acknowledged that there had been an improvement in mental healthcare provision, although some of these facilities were still not adequate. The report also highlighted deficiencies and failings in meeting the mental healthcare needs of prisoners upon their release and re-integration into the community. The judge was not persuaded that this additional material should alter the conclusions which he had already reached.
50. While I make no finding on this late introduction of material, it raises the question as to whether some, at least, of this material could and should have been adduced at the full extradition hearing. The judge would have been within his rights to disregard it. As it happened, he exercised his discretion to accept it, and dealt with it. He was correct in concluding that what was adduced belatedly was of no real assistance to the appellant's case.

The Duration of the Sentence Imposed

51. But it should be said that the unusual events in this case were not confined to one side. Unfortunately, at an early stage, the Irish Central Authority was given inaccurate information as to the meaning and effect of the order of the Court of Appeal of England and Wales Criminal Division. Earlier correspondence suggested that her appeal to the English Court of Appeal had failed, and that the appellant still faced the full sentence

imposed at first instance. This misapprehension was incorrect, but fortunately was corrected later.

Intended Treatment in the Event of Surrender

52. The High Court judge took a number of steps to obtain full assurances on how the appellant would be treated in prison in the event of an order for her surrender. He referred to a letter obtained from the U.K. authorities, which contained an assurance endorsed by the Director General of the U.K. Prison & Probation Service that the appellant, upon her surrender, would be assessed by a General Practitioner in the prison, and that all medical reports, including those of Mr. Rogers and Dr. Ó'Domhnaill, would be made available to the General Practitioner. The Director stated that, while such G.P. might, or might not, be an expert in the diagnosis or treatment of complex mental health needs, he or she would refer the appellant to such other specialists as were deemed necessary. The U.K. issuing authority also confirmed that the prison where the appellant would be detained would provide access to adequate medical facilities, both in relation to her psychological needs, and also the risk of Covid-19.

Legal Representation at the Trial

53. The High Court judge requested details in relation to the appellant's legal representation throughout her trial for the offences of breach of the restraining order in relation to two persons involved in the 2016 conviction, as well as particulars of the victim statement made by a witness. This material, including a direct statement from one of the victims, was also obtained.

The Judge's Central Findings

54. Mr. Rogers' and Dr. Ó'Domhnaill's reports require more detailed consideration. Burns J. commented that he found it a little difficult to discern Dr. Ó'Domhnaill's precise diagnosis, but that he appeared to conclude that the appellant should be treated for ADHD, with high-level anxiety and possibly hyperkinetic disorder, along with co-morbid ASD (autism spectrum disorder).
55. He observed that, from the reports available to him, it was clear that the professionals differed as to the nature of the appellant's mental health needs. It was not for him to direct or require the United Kingdom authorities to accept one diagnosis over another. Nor was it for the High Court in this State to require the issuing state to provide a specific treatment to the appellant. The risk that a person, upon surrender, might not receive one particular form of treatment over another could not, in and of itself, mean that surrender would be incompatible with the State's obligations under the ECHR or the Constitution. This was particularly so in light of the fact that there was actually a difference of opinion between professionals as to diagnosis or treatment, in circumstances where the recommended treatment was of a very specialised nature and limited in its availability both inside and outside of prison. It was not argued that the trial judge erred in his finding regarding distinctions between Mr. Rogers' and Dr. Ó'Domhnaill's reports.
56. The judge commented that, like legal systems, prison health services and conditions differ from one state to another. But such differences in themselves could not be a reason to refuse surrender. What the appellant had to establish was that there were substantial

reasons for believing that, if surrendered, there was a real risk that she would be detained and subject to conditions not simply sub-optimal, but, rather, which amounted to inhuman or degrading treatment, thereby violating her Article 40.3 rights to integrity of the person's psychological wellbeing and rights under Article 3 ECHR.

57. The judge's reasoned conclusion on this, the ultimate question facing him, requires to be set out in full detail: –

"60. Can it be said that, despite the medical facilities and services available, and despite the assurances given, the likely unavailability of psychodynamic psychotherapy would render the conditions of the respondent's detention inhuman and degrading? I think not. It is almost inevitable that detention in prison will limit the nature and extent of health services to which a person might otherwise be able to avail of if they were in the general community, on a public or private basis. Provided one has the resources, while free in the community, one might engage any number of medical specialists and undergo any number of treatments or therapies. However, when detained one clearly cannot expect or demand a similar approach to health services. Persons in detention are entitled to reasonable access to adequate medical care. What is reasonable or adequate will vary from person to person, depending upon their medical needs, but also depending upon the medical care available to persons in the general community who are not in custody. As Mr. Rogers points out in his report dated 8th March, 2021, there is a general shortage of properly qualified mental health professionals in the UK national health system generally. This is reflected in the prison health system and is slowly improving."

58. The judge then held, in terms: –

"61. I am not satisfied that there are substantial grounds for believing that there is a real risk that, if surrendered, the respondent's conditions of detention would amount to inhuman or degrading treatment in breach of Article 3 ECHR or in breach of her right to bodily integrity or any other rights under the Constitution."

59. The judgment considered the submission that the respondent had suffered violation of her fundamental human rights in the past in the U.K. and therefore the Court should refuse surrender, based on that, and the evidence as to future treatment. But the judge was not satisfied that the respondent's submission in this regard was supported by such cogent and objective evidence to justify this Court in determining that the respondent's fundamental rights would be breached or are at real risk of being breached if she was surrendered. His conclusion was based on the material outlined earlier.

60. The judge pointed out that s.4A of the Act of 2003 provided for a presumption that an issuing state will comply with the requirements of the Framework Decision, unless the contrary is shown. He held the presumption in s.4A of the Act of 2003 had not been rebutted. Leaving the presumption aside, he noted that the U.K. was a party to the ECHR and has incorporated the Convention into its domestic law.

61. Burns J. concluded: –

"63. Ultimately, bearing in mind the wording of s. 37 of the Act of 2003, this Court has to determine whether surrender of the respondent would be incompatible with the State's obligations under the ECHR, the protocols thereto, or would contravene a provision of the Constitution. I am satisfied that the surrender of the respondent is not incompatible with the State's obligations in that regard and would not contravene any provision of the Constitution."

62. The judge did not consider that the "late material" regarding alleged inadequacy and dysfunction of mental health services available to women prisoners in the U.K. was of sufficient force to militate against an order for surrender. He noted the appellant's activities in advocating and campaigning for reform within the prison system, including involvement with a magazine that gave a voice to women in the criminal justice system.

63. It may or may not be of some significance that the judge observed that the appellant had deposed that she had been on suicide watch whilst in detention in this State prior to being admitted to bail. However, he noted evidence from the Governor of Mountjoy Female Prison, where the appellant had been detained for that period, as "flatly refuting such claims" (para. 81).

Issues before the Court

64. Applying the dicta of McCarthy J. in *Hay v. O'Grady* [1992] 1 I.R. 210, we must first ask ourselves whether the High Court judge erred in any of his findings of fact, inferences based on findings of fact or evidence, or the weight he gave to the evidence. It is a tribute to the appellant's legal team that the court was referred to some thirty-one legal authorities, as well as other texts, focusing on those in this State, the CJEU, the ECtHR and the neighbouring jurisdiction.

The Appellant's Case

65. I now summarise the appellant's case. Her counsel does not make any case in relation to the *physical conditions* to which she would be exposed in a United Kingdom prison, were she surrendered. Through her counsel, she submits, rather, that, as a result of a sad history of sexual assaults as a child and adult, and other traumatic events, she is a person with significant psychological vulnerabilities. She has outlined her history to a number of psychologists and psychiatrists. She has received varying diagnoses of her condition over the years. Health professionals have concluded variously that the appellant suffered from complex post-traumatic stress disorder, from a neuro-developmental complex disorder, or from borderline personality disorder. Her case is that her condition would not be adequately treated were she surrendered to the United Kingdom, as there are deficiencies in the mental health treatment accessible by prisoners in the United Kingdom, and that she would have no prospect of accessing the highly specific therapy which has been recommended for her specifically by one consultant psychologist, Mr. Graham Rogers.

66. It has already been mentioned that the appellant's claims are also the subject of civil proceedings which are pending before the English courts. That litigation is, in part, based

on material obtained from health professionals, including Mr. Rogers, which was also adduced in these extradition proceedings. Amongst the substantial documentation adduced, the Court has been provided with an "Amended Particulars of Claim", in proceedings brought in the County Court at Central London. These set out her claim in considerable detail. Briefly, it is alleged that, whilst previously detained in custody in the United Kingdom from the year 2014 onwards, the appellant received deficient treatment for her condition and, as a result, that fact in itself caused her psychological damages, thereby reinforcing the trauma which she experienced in her childhood and young adulthood.

67. Counsel for the appellant sought to define the issue as being the anticipated psychological and subjective impact of imprisonment on the appellant, a person with psychiatric needs and vulnerabilities. Relying primarily on Mr. Rogers' reports, he submitted that the appellant has been diagnosed with post-traumatic stress disorder, having been previously diagnosed with a neurodevelopmental complex, and before that with borderline personality disorder. Counsel contended that the U.K. reports submitted in evidence indicated deficiencies in the mental health treatment accessible by prisoners in the United Kingdom. He argued that, if imprisoned there, the appellant would have no prospect of accessing the medical treatment which had been recommended for her. This case was advanced against a background where counsel made the case that, when previously imprisoned in the U.K. between 2015 and 2019, his client had been misdiagnosed with a borderline personality disorder, and had not received adequate treatment, as a consequence of which, he submitted, the prison system had caused her psychological damage and reinforced trauma experienced in her childhood and youth.
68. Counsel contended on the appellant's behalf that the High Court judge did not attach sufficient weight to the evidence which had been adduced before him, specifically that of Mr. Rogers and Dr. Ó'Domhnaill. He submitted that, taken in conjunction with the evidence as to earlier failures in diagnosis, this demonstrated that the test, demonstrating a serious risk that the appellant's constitutional and Convention rights would be infringed was satisfied.

Assessment of the High Court Judgment

69. The next question, perhaps the most fundamental, is whether the judge's conclusions were warranted. The High Court judge analysed the four reports referred to. Were his conclusions supported by the material?
70. It is true that, although it predated the appellant's 2020 conviction and these proceedings, the first report of the 31st October, 2019 can be seen as allowing the High Court, and now this Court, to take a "historic view" as to how the appellant had been treated for significant periods of her detention which dated from 2014. Such background can assist in arriving at a "forward looking" test, assessing future risk. However, it must be said that Mr. Rogers stated, in terms, that the availability of mental health facilities was "slowly improving". Dr. Ó'Domhnaill's report contained material relating to his previous experience of working in the United Kingdom.

71. Dr. Thakkar's report is of assistance, in the sense that he does arrive at a diagnosis of complex post-traumatic stress disorder, and that he is of the view that the appellant should have received extensive therapy while in custody from 2014 onwards.
72. But, while all this material is undoubtedly of some help, it is necessary to bear in mind the evidential burden facing the appellant. The law proceeds on the basis of mutual trust between State parties. (See *Attorney General v. Davis* [2018] 2 I.R. 357, referred to below). The law also provides for a presumption of compliance by State parties, in this case including the United Kingdom.
73. It is true that Mr. Rogers, in his second report, expresses hesitation as to whether general practitioners, not experienced in the mental health area, would be expert in the assessment of mental health needs. In that report, which post-dates that of Dr. Ó'Domhnaill, Mr. Rogers adheres to his view as to the appellant's condition, which is, to a degree, borne out by Dr. Thakkar's report. The question is whether, taken individually or collectively, the evidence adduced meets the evidential burden.
74. The high watermark of the appellant's case must be seen on the basis of Mr. Rogers' views in relation to the accessing of the form of treatment which he recommends. It is here that the second report is particularly relevant. Mr. Rogers expressed the view that accessing regular mental health treatment by NHS professionals was "problematic" due to the shortage of professionals available, which was a matter outside the control of the prison system. But, perhaps more significantly, he also expressed the view that there was a shortage generally of clinical psychologists and therapists in the United Kingdom. More specifically still, there was a shortage of psychodynamic psychotherapists, and that the waiting times were a problem "both in and out of prison". He was of the view that accessing such treatment has been rendered more difficult as a result of privatisation.
75. But when it came to the question of serious risk to the appellant's rights, Mr. Rogers, in his second report, was very guarded. He stated that the opportunities open to the prison authorities to identify and intervene with Ms. Damji's complaints, and their failure to diagnose them, and then to ignore the treatment assessment, led him to conclude, or acknowledge, "*some concern*". I infer this relates to some concern in the light of a potential order for surrender. He also went on to express the view that, in fairness to the prison authorities, more recently when he had recommended treatment there was evidence that this was "*beginning to happen, not with all but with many, though the range of treatment options was limited*". As reported to him from solicitors and prisoners, the position was slowly improving. Later, in the same report, he stated that he considered that change was underway under the current leadership of the U.K. prison system.
76. What does the whole picture show, bearing in mind the appellant's unfortunate life experience?
77. First, Mr. Rogers fairly comments that accessing the form of therapy which he recommends for the appellant is difficult, whether or not an individual is in prison, *or at liberty*.

78. Second, as the courts in this State have been made aware, the appellant has initiated legal proceedings concerning her past treatment. Seen in the light of the legal authorities, and past experience, what treatments she might receive in the future in the event of surrender would be a matter for the U.K. authorities. It is a matter of conjecture.
79. Third, it is not clear on the evidence whether, even if at liberty, the appellant would be in a position to access the form of treatment or therapy recommended. The cost is significant, although not exorbitant.
80. Fourth, the question of access to that therapy over a period of two to three years must be seen in light of the fact that it appears common case that the appellant will face only a short term of further imprisonment, though just how short is presently unclear.
81. Fifth, in the light of the general difficulties in obtaining the form of therapy suggested, it is not clear whether the fact that the appellant would have to serve an additional period of imprisonment would actually make any difference to her ability to access psychodynamic psychotherapy, as it appears unlikely that she would be able to immediately access an early appointment to commence the specialist treatment even if she were at liberty.
82. Sixth, all these considerations are to be seen against a background where it would appear there is a lack of consensus between the professionals, bearing in mind that Mr. Rogers' second report post-dates that from Dr. Ó'Domhnaill. Dr. Ó'Domhnaill makes one reference to Mr. Rogers. He makes no reference to Mr. Rogers' proposed course of psychodynamic therapy, but simply comments that Mr. Rogers' report is "extensive". Later, Mr. Rogers did not make any reference in his second report to Dr. Ó'Domhnaill's report. Whether or not Mr. Rogers did actually see Dr. Ó'Domhnaill's report is, in this sense, immaterial. What is relevant is that, on the face of things, there was no indication that the health professionals were *ad idem* on their findings, or on the course of therapy which was necessary. This is also to be seen by way of contrast to the evidence in *Lauri Love v. The Government of the United States of America* [2018] 1 WLR 2889, referred to later.
83. But, even taking Mr. Rogers' report as the high point of the appellant's case, can it be said to satisfy the significant evidential burden which arises in this European Arrest Warrant case? Put another way, does the evidence establish that, in the event of surrender, the fact that the appellant would have to serve the balance of her sentence would put Ms. Damji's constitutional or Convention rights at serious risk of being infringed?

Legal Issues

84. The Court was referred in argument to constitutional, E.U. law, and also to Convention authorities, as well as *Lauri Love*, to which reference will be made later. I deal with the Constitution first. As this Court observed in *Simpson v. The Governor of Mountjoy Prison* [2020] 3 IR 113, the question of prison conditions has been the subject of much consideration by the ECtHR. This renders it understandable that, in a prison conditions

case, there might be reference to what the ECtHR had to say on the principles applicable in the case of such conditions. But it is necessary to bear in mind a fundamental point. This is not a simple “prison conditions” case, but, rather, one brought under the EAW Act, 2003. I do not say there is a “high” evidential threshold, but it is undoubtedly a substantial threshold, especially bearing in mind the evidential presumption referred to earlier.

85. In *Simpson*, this Court warned against any tendency to engage in a simplistic equating of constitutional and ECHR protections. There will be areas where there will be a very high degree of concordance, but others where a court must have regard to distinctions. But, as *Simpson* postulated, it is possible to consider that the protection under Article 40.3.1 and Article 40.3.2 goes quite far. The derived right to bodily integrity, and integrity of the person, identified in *Ryan v. Attorney General* [1965] I.R. 294, may also protect rights to psychological wellbeing on the part of an individual prisoner. (cf., in particular, the judgment of O’Donnell J. at para. 11).
86. The fact that a person is serving a sentence, or facing extradition whilst in custody, does not mean that their constitutional rights are abrogated (*The State (Susan Richardson) v. Governor of Mountjoy Prison* [1980] ILRM 82). In *Simpson*, this Court held that there was a constitutional obligation to vindicate the “*person of the citizen*”, which could entail more than a prohibition of physical intrusion, and which could also be seen as a protection of an individual’s psychological wellbeing.
87. But there is no constitutional authority of our courts holding that there is an absolute duty to provide the best medical treatment, irrespective of circumstances, to a prisoner. The constitutional obligation is, rather, to provide medical treatment which would be as good as reasonably possible, in all the circumstances of the case. (See *The State (C) v. Frawley* [1976] I.R. 365.) Just as there can be no obligation on this State to provide the best medical treatment, irrespective of circumstance, so also the Constitution cannot place a high obligation on a requesting state in an extradition matter, where the same duty would not involve providing the same treatment to the community.

Analysis under Article 40.3

88. In the circumstances of this case, it is necessary to consider the constitutional protection. Two questions arise. First, has it been shown that there is a serious risk to the appellant’s constitutional rights? Second, and specifically, accepting the appellant’s narrative and Mr. Rogers’ conclusions, has it been shown that an absence of cognitive therapy for any remaining period of the appellant’s detention would, in the circumstances described earlier, be characterised a denial of her rights under the Constitution? All this must be seen in light of the entirety of the evidence.
89. There is much in the appellant’s narrative that would evoke sympathy. But I am not persuaded that, even taken at its height, the evidence establishes that there is a serious risk that the appellant’s protections under Article 40.3.1 and Article 40.3.2 would be infringed.

90. It must be said that there is a lack of clarity about what form of therapy the appellant undertook for her underlying condition whilst at liberty. Yet there is no evidence that the appellant availed of the therapy recommended by Mr. Rogers from October, 2019 onwards, up to her conviction at the end of 2020. There is no evidence that she was prevented from availing of this, or any, form of therapy for financial reasons. Mr. Rogers has said that the treatment will last two or three years. It might well be argued that her ability to avail of this form of treatment would depend on the outcome of her civil claim. But the question nonetheless arises as to whether it can be said that the absence of such therapy, over and above the foreseeable consequences of imprisonment, poses a serious risk of psychological harm to the appellant.
91. In my view, the learned High Court judge was correct in his conclusion. The material does not go sufficiently far to address this vital issue. The appellant must meet a significant threshold. Mr. Rogers' evidence does not go the requisite distance to establish that there is a *serious risk* of the type coming within a constitutional protection.
92. I think the appellant's difficulty goes further. What is being proposed is a form of treatment which is quite rare, and, apparently, is not often available in the community, even to persons at liberty, in the United Kingdom or Ireland. I acknowledge that, in other circumstances, a case might be made that the removal by way of extradition of a person in receipt of a very rare form of treatment, where life is at stake, might potentially raise issues under Article 40.3. But that is not the case here. In fact, the evidence falls considerably short of showing that the absence, for a given time, of the therapy, would be inhuman or degrading, even interpreted in a broad way.
93. In order to establish a likely infringement of a constitutional right, there would have to be cogent, coherent evidence, sufficient to meet the significant evidential threshold. A court must be satisfied that an objector is at a serious risk of their constitutional rights being infringed. The evidence here does not meet that threshold.

Rettinger and Davis

94. I turn next to two authorities where this Court has considered the circumstances in which surrender may be prohibited under Article 3 ECHR. *Minister for Justice, Equality & Law Reform v. Rettinger* [2010] 3 I.R. 783 provides authority for the proposition that surrender should not be ordered where there is a real risk that such an order would give rise to a breach of an applicant's Article 3 ECHR rights. That judgment makes clear that a trial court should consider all the material before it, including, if necessary, that obtained of its own motion. It should examine whether there is a real risk of an Article 3 breach in a rigorous examination. In *Rettinger*, this Court remitted the matter to the High Court for further hearing, emphasising the burden on a person potentially subject to an order to adduce *evidence* capable of proving that there are substantial grounds for believing that, if surrendered, such a person would be exposed to a real risk of treatment contrary to Article 3. In the process, it would be necessary also to consider evidence that might dispel that contention, as well as considering the foreseeable consequences of sending a person to the requesting state.

95. More recently, this Court had to address the question as to whether extradition would be ordered in the context of a vulnerable person. In *Attorney General v. Davis* [2018] 2 I.R. 357, the Court reiterated the State's obligations under the Constitution and the ECHR to guard against violations of fundamental rights. While the presence of a mental illness, or other disabling condition, was relevant to the consideration of the issues, the same duty, involving the same rigorous inquiry, exists in any case. The object is to measure risk by conducting a fact-specific inquiry, partly against known facts, and partly against future events. But the judgment in *Davis*, delivered by McKechnie J., again emphasises the same evidential threshold. It must be established by evidence that, in the event of extradition, the objector would be exposed to a real risk of being subject to treatment contrary to Article 3, or equivalent fundamental rights under the Constitution. There is a presumption that a requesting state would act in good faith and respect the fundamental rights of a person the subject of extradition. As *Davis* points out, the presumption might be weaker in respect of states outside the European Arrest Warrant system, but it nonetheless remains applicable. It was for a proposed objector to rebut the presumption. The basis for the presumption was the principle of mutual trust, reciprocity, and confidence, which went to the heart of bilateral or multi-lateral extradition arrangements entered into by the State on the international plain.

CJEU Case Law

96. I turn next and briefly to the judgments of the CJEU. In *Aranyosi and Caldaru*, C-404/15 and C-659/16 PPU, the Court of Justice held that, when there are deficiencies which may be systemic or generalised, and which may affect certain groups of people, or may affect certain places of detention, the executing judicial authority must determine specifically and precisely whether there are substantial grounds to believe that the individual concerned in a European Arrest Warrant issued for the purposes of "... executing a custodial sentence" will be exposed, because of the conditions of his or her detention in the issuing state to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, in the event of surrender to the member state. That judgment points out that, if necessary, an executing judicial authority must request supplementary information to be provided by the issuing judicial authority. The executing judicial authority should postpone its decision on surrender until it obtains such supplementary information as allows it to discount the existence of such a risk. It can be said that this was precisely the procedure adopted by the learned trial judge in this case.
97. *ML v. Generalstaatsanwaltschaft Bremen*, Case C-220/18 PPU is authority for the proposition that the mere fact that a person in the issuing state may have a legal remedy in that state does not rule out a real risk that a person in respect of whom a warrant has been issued may be subject to inhuman or degrading treatment within the terms of Article 4 of the Charter.
98. In *Dorobantu*, Case C-128/18, the Court of Justice held that it was necessary to take into account all the physical aspects of the conditions of detention in the prison in which it is actually intended that a person will be detained, such as personal space. The court again

emphasised that the fact that there may be a legal remedy in the issuing state could not rule out the existence of a real risk of inhuman or degrading treatment.

99. I do not think any of these judgments assist the appellant. They are to be viewed in the light of the quality of the evidence referred to, and the evidential burden which devolves on the appellant. In this case, the judge did seek supplementary information, in light of the fact that some information provided was somewhat confusing. The fact that there might be a legal remedy can only be seen in light of whether there is evidence of serious risk. The evidence does not establish this.

ECtHR Case Law

100. There are, then, the ECtHR authorities. There is here an issue of characterisation. This is not a simple "prison conditions" case but, rather, an extradition matter, where it is said the appellant's Convention rights are engaged. Historically, the ECtHR jurisprudence established that, in the case of removal from the State, there was a "high threshold", and that only in very exceptional cases would a Convention protection affect the rights of a member state to control entry into, and entitlement to remain, in the state.
101. In *N v. United Kingdom* [2008] 47 E.H.R.R. 39, the ECtHR held that Article 3 does not place an obligation on a contracting state to alleviate disparities in health care between a requesting state, and an issuing state, through provision of free and unlimited health care to all aliens, without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the contracting states. While the ECtHR jurisprudence may have evolved later, it is necessary to bear in mind the principle that the Court will only intervene in exceptional cases.
102. *Soering v. United Kingdom* (1989) 11 E.H.R.R. 439, is cited by the appellant as authority for the presumption that, were the applicant to face trial on a charge of capital murder, it would give rise to a violation of Article 3. It is not relevant to this case, other than to show that, in principle, extradition matters can give rise to ECHR considerations.
103. *Kudla v. Poland* (2002) 35 E.H.R.R. 11, concerned whether there was a breach of Article 3 in the case of an applicant who had suffered from chronic depression, had twice attempted to commit suicide in prison, and had been diagnosed as having a personality or neurotic disorder, and a situational depressive reaction. The ECtHR accepted that the very nature of the applicant's psychological condition made him more vulnerable than the average detainee, and that his detention may have exacerbated to a certain extent his feeling of distress, anguish, and fear. The court bore in mind that, while the applicant was kept in custody, there was a psychiatric opinion that continuing detention could jeopardise his life, because of the likelihood of attempted suicide. However, on the basis of the evidence before it, the ECtHR did not find that the applicant had been subject to ill-treatment attaining a sufficient level of severity to come within the scope of Article 3 of the Convention. This was a prison conditions case.
104. *Stanev v. Bulgaria* (2012) 55 E.H.R.R. 22, like *Kudla*, was a prison conditions case. It concerned an applicant diagnosed with schizophrenia, who was later declared unfit to

work. Two of his relatives requested that proceedings be issued which led to a social worker being appointed as his guardian. The guardian arranged for him to live in a social care home for adults with mental disorders. The applicant was not informed of the arrangement. He was subject to very considerable limitations on his freedom. His pension was transferred to the care home to meet his living costs. He made a number of applications to court to vary the terms of his guardianship. It was not an extradition case. It is very different from the facts of this case.

105. *Blokhin v. Russia*, App. No. 47152/06, 23rd March 2016, concerned a minor placed in juvenile detention for 30 days as a form of preventative detention. Again, I do not think that it is material to the instant appeal.
106. *Wenner v. Germany* (2017) 64 E.H.R.R. 19 was, undoubtedly, an instance where the ECtHR concluded that the respondent state had failed to provide credible and convincing evidence showing that the applicant in detention had received comprehensive and adequate medical care at a level comparable to that which the state authorities had committed themselves to provide to persons at liberty where drug substitution treatment was available (cf. *Frawley*, referred to earlier). But, like the other ECtHR authorities, the issue of the sufficiency and cogency of the evidence on this point militates against it being a useful authority from the appellant's point of view.
107. More relevantly, in *Paposhvili v. Belgium*, App. No. 41738/10, 13th December 2016, the ECtHR did hold that there may, however, be "very exceptional cases" within the meaning of its earlier judgment in *N v. The United Kingdom*, which may raise an issue under Article 3. *Paposhvili* related to the removal of a seriously ill person, where substantial grounds had been shown for believing that he, although not at imminent risk of dying, would face a real risk on account of the absence of appropriate treatment in the receiving country, or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health, resulting in intense suffering, or to a significant reduction in life expectancy. The court concluded that such a situation corresponded to the high threshold for the application of Article 3 of the Convention in cases which involved the "removal of aliens suffering from serious illness" (para. 183). This, of course, represented something of an evolution of the law, compared to the strict adherence philosophy which had been previously pronounced in *N v. The United Kingdom*. But the circumstances of the instant case are quite distinct. I am not convinced the evidence in this case is in any way comparable to *Paposhvili*.
108. In *Roman v. Belgium*, App. No. 18052/11, 31st January 2019, the Grand Chamber, as well as making certain observations relating to the deprivation of liberty, also observed that the detention of a person who is ill in inappropriate physical and medical conditions may, in principle, amount to treatment contrary to Article 3 (para. 144). The court highlighted the particular vulnerability of detainees with mental disorders. It observed that a lack of appropriate medical care for persons in custody was capable of engaging a state's responsibility under Article 3. It was not enough for such detainees to be examined and a diagnosis made; instead, it was essential that proper treatment for the

problem diagnosed should also be provided by qualified staff. Logically, where such treatment could not be provided in a place of detention, it must be possible to transfer the detainee to a hospital, or to a specialised unit (para.148).

109. But *Rooman* is a detention conditions case. The evidence in this case falls short of establishing a serious risk that, for the apparently short period of her remaining sentence, the appellant would be denied rights to protection against inhuman and degrading treatment, when the treatment recommended by Mr. Rogers is not apparently readily available to the community at large in the United Kingdom.
110. While the ECtHR jurisprudence may be taken as having evolved in *Paposhvili*, it must nonetheless be borne in mind that this is an extradition case, where, historically, by reference to *N v. The United Kingdom* – and presently there is still – to put matters at a minimum, a substantial evidential threshold, especially bearing in mind the presumption of compliance on the part of the issuing state. The evidence is insufficient, and not consistent. The jurisprudence of the ECtHR does establish that a prisoner is entitled to the same level of medical treatment as should be provided to a person at liberty (*Wenner*). There may be circumstances where the denial of appropriate treatment to an ill prisoner can amount to circumstances where Article 3 will be engaged. If a prisoner is denied adequate treatment, such a person should be removed to a facility where treatment will be available (*Rooman*).
111. In *Strazimiri v. Albania* (2020) 71 E.H.R.R. 8, the court held, if a person is suffering from a serious mental illness, such as paranoid schizophrenia, it may be insufficient for medical reports to be produced, and medication to be provided, if an individualised therapeutic plan is not drawn up. But the question in this case, as in those considered by the ECtHR, must hinge on there being cogent *evidence* of a serious risk that an individual's Article 3 ECHR rights would be infringed. That evidence has not been adduced in this case.

Love v. United States

112. Here, it is helpful to draw a contrast on the type of evidence on which a court may act. In *Lauri Love v. The Government of the United States of America & Anor* [2018] 1 W.L.R. 2889, the evidence *established* that the applicant suffered from three major conditions, those being Asperger's Syndrome, depression, and eczema. There was *evidence* in the U.K. Magistrates Court that, in the event of extradition to the United States, there would be a consequent risk of serious deterioration in the applicant's mental and physical health, and risk of suicide. The Court of Appeal of England and Wales had regard to the fact that, if convicted and sentenced in the United Kingdom, it would be possible that the applicant's risk of suicide would be far lower due to the support of his family, though incarceration would undoubtedly be more problematic for him than many other prisoners. That situation does not arise here.
113. In *Love*, the court (Lord Burnett of Maldon LCJ., and Ouseley J.) had before it the record of the evidence of Professor Baron-Cohen, who had diagnosed the appellant's Asperger's Syndrome as being a "very severe disability", causing him to become so absorbed in his interests that he neglected other areas of his life, including his health, to the point that he

had become physically unwell. The applicant had talked openly about feeling suicidal, triggered by the threat of extradition. The risk of suicide was "very high" (paras. 75 and 76). The applicant had stated clearly that he would rather commit suicide than be extradited. The evidence was that this risk would be present both while the applicant was in the United Kingdom, should extradition be enforced, and/or whilst in transition to the United States. Prison would be the entirely wrong place for a person with his disabilities and vulnerable mental health because he could not cope socially, and his previously very severe depression would be highly likely to recur.

114. On the basis of that evidence adduced before a District judge, the Court of Appeal of England and Wales was in a position to conclude that the applicant had a concrete method of committing suicide in mind, so that the requesting state could not control his destiny; rather, it would be in his own hands. He had clinical levels of severe anxiety and depression. His eczema was partly stress-related and exacerbated by his mental health. His depression would worsen were he extradited, and he would be a suicide risk if imprisoned in the United States.
115. The contrast between the quality of the evidence available in *Love*, and that available in this case, is striking. In *Love*, there was consistent, clear, evidence of not one, but two experts: Professor Baron Cohen, the Professor of Developmental Psychopathology at the University of Cambridge, and Professor Kopelman, Emeritus Professor of Neuropsychiatry. They were largely *ad idem*; the one area of distinction being only as to the level of depression. On that basis, the appeal court was in a position to conclude that the evidence was not conjecture, that it established that the appellant's extradition to the United States would be oppressive by reason of his physical and mental condition, and that the measures which might have to be taken for his protection, had he been extradited, might themselves have had a serious adverse effect on his very vulnerable and unstable mental and physical wellbeing.
116. In this case, the two experts, that is, Mr. Rogers and Dr. Ó'Domhnaill, are not *ad idem* on diagnosis. There is a difference between them. While there is relevant material as to alleged past treatment and misdiagnosis in Mr. Rogers' reports, it is, as yet, untested in evidence. As to the future, there is a significant degree of conjecture or speculation. Even at its high point, the evidence does not meet the evidential threshold to show that an order would involve a denial of fundamental rights. The therapy proposed is rare, and not easily available. There is no evidence that the appellant ever undertook this therapy while at liberty, and the evidence that she would even have access to the therapy whilst at liberty in the future is problematic. The material fell short of establishing what is necessary, especially in light of the apparent differences in opinion in the medical reports. It was presumably open to the appellant's psychological and psychiatric professionals to identify areas of consensus, but they did not do so. The appellant is not a person with a serious life-threatening condition. She apparently faces a short remaining sentence, to be seen by contrast with the two to three year course of therapy envisaged. A court is under a duty to carry out a rigorous enquiry as to whether there is a real risk that the person's Article 40.3.1 and 40.3.2 constitutional, Charter, or Article 3 ECHR rights would be

infringed. The High Court judge did carry out such an assessment. He considered the entire picture and the cogency of the evidence in the light of the principles applicable, including the presumption. He was entitled to come to the conclusions he did. The frailty in this case is evidential. I would not interfere with the High Court findings.

117. Whether or not criticisms could be made of the appellant's earlier treatment cannot be determined in these proceedings. It is not possible to conclude on the evidence that either the appellant's past or potential future treatment is of a type which would lead this Court to conclude that constitutional or Convention rights would be put at serious risk. *Love and Davis* illustrate that there must be cogent evidence of a real or substantial risk to an objector's Article 3 ECHR rights in order for a court to consider refusal.

Decision

118. The case is here considered under the Constitution, E.U. law, and the ECHR. The appellant's lawyers have advanced the case with great force. No stone has been left unturned; no relevant point omitted.
119. But there is no basis for concluding that the High Court judge erred in his findings. All of the judge's inferences were fairly based on the material adduced before him. One cannot quite escape an impression that the appellant's case might be reduced to the proposition that the judge should have accepted Mr. Rogers' reports as being determinative in relation to the appellant's constitutional or Convention rights. But that cannot be the test. And, when closely considered, his reports actually fall significantly short of determining the issue as to whether the appellant would be placed at real or serious risk in the event of an order for surrender being made.
120. Under the Constitution, E.U. law, and the Convention, the assessment of vulnerable people, either while in detention, or subject to EAW procedures, should be rigorous. The duties of the court require no less. But, in carrying out the assessment, the term "reasonable treatment" can, for this purpose, only be seen as that to which State authorities in an issuing state have committed themselves to provide for the community as a whole. It is not open to a person facing surrender to identify one highly specialised form of therapy, not easily obtained even by members of the community at liberty, and on that basis contend that their surrender should be refused. The evidence in this case does not establish that the appellant, facing the possibility of serving a short remaining sentence, would be denied reasonable and required treatment, such as would violate her rights under the Constitution, E.U. law, or the ECHR.

Conclusion

121. It must be said that much of the material in the appellant's narrative would evoke sympathy. The High Court judge observed that, while an individual was free in the community, one might, provided one had the resources, engage a number of medical specialists, or undergo any number of treatments or therapies, but that, when detained, one could not expect or demand a similar approach to health services in an issuing state. This was correct. Insofar as this judgment records allegations against mental health services in the prison, or in the U.K. generally, I would venture to suggest that such

problems are not confined to any one health system. It was for the appellant to show that an order for surrender would place her fundamental rights under Articles 40.3.1 and 2, and Article 3 ECHR, at serious risk, in the event of such order being made. In my judgment, the appellant has not discharged the burden of proof which devolved upon her as a person objecting to extradition.

Order

122. The order of the High Court must be upheld. I would affirm the decision of the High Court. All arrangements for the execution of the order made will be a matter for that court.