S27



# Supreme Court of Ireland Decisions



**Judgment**

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| **Title:** | The Attorney General -v- Davis |
| **Neutral Citation:** | [2018] IESC 27 |
| **Supreme Court Record Number:** | 30/17 |
| **Court of Appeal Record Number:** | 2016 419 |
| **High Court Record Number:** | 2014 3 EXT |
| **Date of Delivery:** | 27/06/2018 |
| **Court:** | Supreme Court |
| **Composition of Court:** | O'Donnell Donal J., McKechnie J., MacMenamin J., Dunne J., O'Malley Iseult J. |
| **Judgmentby:** | McKechnie J. |
| **Status:** | Approved |
| **Result:** | Appeal dismissed |

**THE SUPREME COURT**

**[Supreme Court Appeal No. 2017/30]**

**[Court of Appeal Record No. 2016/419]**

**[Record No. 2014/3 EXT]**

**O'Donnell J.**
**McKechnie J.**
**MacMenamin J.**
**Dunne J.**
**O'Malley J.**

**IN THE MATTER OF THE EXTRADITION ACT 1965, AS AMENDED**

**Between /**

**THE ATTORNEY GENERAL**

**Applicant/Respondent**

**-and-**

**GARY DAVIS**

**Respondent/Appellant**

**JUDGMENT of Mr. Justice William M. McKechnie delivered on the 27th day of June, 2018**

**Introduction**

1. Gary Davis (also referred to in this judgment as "the appellant") is an Irish citizen who suffers from Asperger's Syndrome. In January, 2014, the United States of America ("the U.S.") requested the surrender and extradition of Mr. Davis so that he can stand trial in that country on charges of conspiracy to distribute narcotics, conspiracy to commit computer hacking and conspiracy to commit money laundering. The charges are connected to Mr. Davis's alleged role as an administrator of an anonymous black market website, known as "Silk Road", which facilitated,*inter alia*, the sale of illicit drugs. Mr. Davis opposes his extradition to the U.S., and to that end he raised a number of objections, all of which were initially presented on his behalf before the High Court. None were successful, and by judgment and order dated the 12th August, 2016, McDermott J. directed the extradition of the appellant. His appeal against that judgment was dismissed by the Court of Appeal, which affirmed the original order.

2. The appellant now brings a further appeal to this Court. His essential ground of objection, which has been advanced in all courts, is that there is a real risk, given the severity of his mental disorder and the state of his psychological health, that pre-trial and/or post-conviction incarceration in the U.S. will cause his condition to deteriorate and could foreseeably put his life at risk. Thus he opposes his extradition on the basis of anticipated breaches of his right to life, his right to bodily integrity, and his right to be free from inhuman and degrading treatment, and also by reference to his right to respect for his private and family life.

**Background and Procedural History**

*Underlying Facts*

3. On the 5th December, 2013, following the filing of an indictment in the United States District Court for the Southern District of New York, United States Magistrate Judge James C. Francis IV issued a warrant for the arrest of Mr. Davis. It was alleged that he had committed the following offences:

- Count 1: Conspiracy to distribute narcotics in violation of 21 U.S.C. Â§841(h), 812, 841(a)(1), 841(b)(1)(A) and 846;

- Count 2: Conspiracy to commit computer hacking in violation of 18 U.S.C. Â§1030(a)(2) and 1030(b); and

- Count 3: Conspiracy to commit money laundering in violation of 18 U.S.C. Â§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h).

The maximum penalty in respect of each count is: life imprisonment in respect of Count 1; five years of imprisonment in respect of Count 2; and twenty years of imprisonment in respect of Count 3. If extradited to the U.S., it is probable that the appellant will be incarcerated pending his trial.

4. The offences in question are alleged to have occurred between the 6th June, 2013, and the 2nd October, 2013. It is claimed that Mr. Davis served as a site administrator of a website known as "Silk Road", an online black market notorious as a platform for selling illicit drugs. The site, which was shut down by the Federal Bureau of Investigation ("the FBI") in October, 2013 and again in November, 2014, existed as part of the dark web, a collection of thousands of websites that use anonymity tools to hide their IP addresses. Silk Road is said to have facilitated the sale and purchase of,*inter alia*, heroin, cocaine, crack cocaine, ecstasy, LSD and methamphetamines. Purchasers of illegal narcotics from the site paid using the cryptocurrency Bitcoin, with Silk Road's revenue being based on a commission of between 10% and 15% of sales revenue. Such commissions are stated to have earned the site tens of millions of dollars. The appellant, who is said to have operated under the pseudonym 'Libertas', is alleged to have been paid $1,500 per week for his services.

5. During the course of its investigations into Silk Road, the FBI arrested a U.S. citizen, Ross William Ulbricht, whom it believed was the founder, owner and operator of the site. It is alleged that the appellant's involvement was identified from information extracted by the FBI from Mr. Ulbricht's seized computers. In February, 2015, Mr. Ulbricht was sentenced to life imprisonment without the possibility of parole for drug trafficking and other crimes associated with his operation of this site. That sentence was confirmed by the U.S. Court of Appeals for the Second Circuit in a judgment dated the 31st May, 2017.

6. On the 3rd January, 2014, the United States made a request to Ireland for the appellant's extradition; the request was received the same day. On the 9th January, 2014, the High Court issued a warrant for his arrest pursuant to section 26(1)(b) of the Extradition Act 1965, as amended ("the 1965 Act"). The appellant was arrested on foot of the warrant by Sergeant Martin O'Neill on the 13th January, 2014. He was conveyed to Bray Garda Station, where he was processed in the usual way, following which he was brought before the High Court. He was granted bail on certain conditions, and remains on continuing bail pending the conclusion of this appeal. As part of this judicial journey the case has been adjourned from time to time so as to facilitate the generation and exchange of the necessary documentation, including the appellant's papers supporting his objections to extradition and the appellate documents now relied upon.

*The Extradition Act 1965*

7. This is as convenient a juncture as any to set out the statutory provisions of relevance to this appeal. Those of immediate importance are found in section 29(1), (3) and (5) of the 1965 Act. They read as follows:

> "29.—(1) Where a person is before the High Court under section 26 or 27 and the Court is satisfied that—
>
> (a) the extradition of that person has been duly requested, and
>
> (b) this Part applies in relation to the requesting country, and

(c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions, and

(d) the documents required to support a request for extradition under section 25 have been produced,

the Court shall make an order committing that person to a prison (or, if he is not more than twenty-one years of age, to a remand institution) there to await the order of the Minister for his extradition.

…

(3) The Court, on making an order under subsection (1), shall—

(a) inform the person to whom it relates that he will not be surrendered, except with his consent, until after the expiration of fifteen days from the date of his committal and inform him also of the provisions of section 4.2Â° of Article 40 of the Constitution (which relates to the making of a complaint to the High Court by or on behalf of any person alleging that that person is unlawfully detained), and

(b) cause a certificate of the committal to be sent forthwith to the Minister.

…

(5) No appeal shall lie to the [Court of Appeal] from an order of the High Court under this section, except on a point of law."

After the passing of the Thirty-third Amendment of the Constitution and the enactment of the Court of Appeal Act 2014, a further appeal can be made to this Court where the threshold set out in Article 34.5.3Â° of the Constitution is satisfied. It is pursuant to these provisions that the subject appeal has arrived in this Court.

*The Judgment of the High Court*

8. The judgment of that Court was delivered by McDermott J. on the 12th August, 2016 ([2016] IEHC 497), after a lengthy hearing spanning over several days. It is unnecessary to consider in any great detail many of the issues addressed in the judgment, for they play no continuing role in the appeal before this Court. For completeness, however, the following should be noted. The learned judge was satisfied that the requirements of a valid extradition request under Part II of the Act were satisfied (paras. 14-15; all such references are to the judgment of the High Court). So too did he conclude that the offences specified in the warrant corresponded to offences contrary to Irish law (paras. 18-40). He rejected a submission by the appellant that the charges on foot of which extradition is sought are bad for duplicity (paras. 41-52). He also considered and rejected submissions that the appellant's extradition would breach the rule of specialty (paras. 53-64) and that the appellant would be exposed to a potential mandatory sentence in respect of Count 1 which would be unfair, disproportionate or unconstitutional if applied in this jurisdiction (para. 65). The learned judge was further satisfied that there was no substance to the appellant's argument that extradition should not be granted because the offences with which he is charged were allegedly committed

in Ireland (also para. 65).

9. The grounds of objection of continuing relevance at this stage are those addressed at para. 66*et seq.*of the judgment; in short, these arguments relate to the apprehended consequences for the appellant's health if extradited. In this context he claims that he has exhibited symptoms of Asperger's Syndrome throughout adolescence and that he suffers from depression and has threatened to commit suicide if extradited. He anticipates being housed in a maximum security facility pending trial and following conviction, and believes that the conditions in such facility will place his health and life at great risk, particularly given his medical history. He submitted to the High Court that he would be subjected to an unlawful and unconstitutional sentencing process and a penal regime which, if applied in Ireland, would constitute a violation of his fundamental rights, and in particular his rights under Articles 38, 40.3 and 40.4 of the Constitution. He made related arguments in relation to anticipated breaches of his right not to be subjected to inhuman or degrading treatment, and to respect for his private and family life, which rights are protected by Articles 3 and 8 of the European Convention on Human Rights ("ECHR"), respectively. Again, it is the likely prison conditions in the U.S. which formed this basis for this objection.

10. The learned judge considered and set out at some length the applicable case law. He referred to*Finucane v. McMahon*[1990] 1 I.R. 165,*The State (C) v. Frawley*[1976] I.R. 365,*Minister for Justice, Equality and Law Reform v. S.M.R.*[2008] 2 IR 242,*Carne v. Assistant Commissioner Patrick O'Toole*(unreported, Supreme Court, 21st April, 2005),*Minister for Justice, Equality and Law Reform v. Johnston*[2008] IESC 11,*The Minister for Justice v. Stapleton*[2006] 3 IR 26,*Minister for Justice v. Altaravicius*[2006] 3 IR 148,*Attorney General v. O'Gara*[2012] IEHC 179,*Minister for Justice v. Rettinger*[2010] 3 IR 783,*Minister for Justice and Equality v. I.S.*[2015] I.E.H.C. 36, and, from the European Court of Human Rights,*Aswat v The United Kingdom*(App. No. 17299/12, judgment of the 16th April, 2013). The relevant legal tests are set out at paras. 67-88 of this judgment.

11. Evidence was given on behalf of Mr. Davis and the Attorney General in relation to the condition and mental health of the appellant, which evidence is referred to and summarised at paras. 97-103,*infra.*Having weighed up the conflicting reports from the medical and related experts, the trial judge accepted that a diagnosis for Asperger's Syndrome is appropriate (para. 114 of the High Court judgment). He did, however, express his misgivings about the complete absence of evidence that the appellant is in receipt of any ongoing medical treatment for depression involving suicidal ideation. The learned judge was not satisfied as a matter of probability that Mr. Davis suffers from depression accompanied by suicidal ideation of such a level and intensity that his trial on offences similar to the alleged offences could be stayed or prevented in this jurisdiction. McDermott J. noted that the appellant pleaded guilty to a very serious drugs offence in Ireland in 2015 and faced the prospect of a lengthy custodial sentence without any dramatic deterioration in his mental health. However, as some of the medical evidence suggested that it was the threat of removal from Ireland to face a prison sentence in the U.S. which gave rise to the possibility of a dramatic deterioration in mental health, involving a risk of suicide, it was necessary for the trial judge to consider the evidence as to how the appellant would be treated if extradited (on which see paras. 104-108,*infra*).

12. The main issue raised in respect of pre-trial detention was contained in the evidence of Mr. Herbert J. Hoelter on behalf of Mr. Davis, and was to the effect that the appellant would be housed in what is called the Special Housing Unit ("SHU") of the Metropolitan Correctional Center ("MCC") in New York. However, this assertion was vehemently disputed by evidence tendered on behalf of the U.S. It was pointed out that inmates can be so housed as part of administrative detention status, or by reason of disciplinary segregation designation. Assuming that the latter did not arise, the former could occur in

one of a number of situations, none of which are present in this case. Further, it was the evidence of a supervisory attorney with the Federal Bureau of Prisons and an associate warden attached to the MCC that, based on the information presently available, it would be likely that Mr. Davis would be housed in the general population unless some infringement of disciplinary regulations was being investigated or had taken place, or unless protective custody was otherwise sought. The appellant also made objections based on his likely post-trial detention conditions and treatment; again there was credible evidence in the other direction from the U.S. authorities intimately familiar with the federal prison system and the services available therein that the same would be appropriate to the present and any future needs of Mr. Davis.

13. The appellant's other major concern related to what mental health services, including drug medication, might be available at the MCC. Again, Mr. Hoelter advised that in his view these would not be adequate to meet the medical and psychiatric requirements of a person in the position of Mr. Davis. Once again however, evidence was given by the other side, first, that the specific medication which Mr. Davis is presently on is on the approved list of medications for that centre and, secondly, that such facilities are available and would be afforded in accordance with medical, psychiatric and psychological advice given following an individual evaluation of his condition.

14. Having weighed this evidence, McDermott J. concluded as follows in respect of the appellant's objections relative to his rights to bodily integrity, to family and private life, and not to be subjected to inhuman or degrading treatment; although of some length it is necessary to recite the relevant passages:

> "143. The practice and procedures which will be applied to the [appellant] on arrival at MCC and before designation to a particular prison if sentenced following conviction were fully described to the court. They are calculated to identify, address and take reasonable account of the difficulties he may experience because of depression, anxiety and [Asperger's Syndrome] during any period of imprisonment. The clear purpose is to provide reasonable care and, when appropriate, treatment (including medication) while he is in custody. The court is satisfied to accept the evidence given by officials of the United States Federal Bureau of Prisons and Mr Turner as an Assistant United States Attorney on these matters. The court also regards this evidence as a solemn assurance to the court by the Government of the United States that all reasonable and necessary care and treatment will be given to the [appellant] during all periods of imprisonment while in the United States.
> 144. The court also notes that there has been very little engagement by the [appellant] with the psychiatric services in this jurisdiction. Apart from a few visits to his general practitioner and a continuing prescription for anti-depressant medication, the [appellant] has not found it necessary to seek any professional help or therapy from Prof. Fitzgerald. The first engagement with Prof. Fitzgerald was in advance of his sentencing hearing in January 2014. Prof. Baron Cohen believes that the [appellant's] removal from home and Ireland and imprisonment in the United States is a very serious matter and may precipitate a suicide attempt. However, apart from the medication no other treatment has been availed of or required. I have taken this into account in assessing the evidence of risk to which extradition may expose the [appellant] but I am not persuaded that it gives rise to a real risk of a violation of the [appellant's] Article 40.3 rights.

Article 3

145. I am not satisfied that the [appellant] has established that there are substantial grounds for believing that if extradited to the United States he will be exposed to a real risk of being subjected to treatment of an inhuman or degrading nature by reason of the conditions of confinement to which he will be subject and/or the fact that he has [Asperger's Syndrome] and suffers from depression and generalised anxiety with thoughts of self-harm and suicide prompted and exacerbated by a fear of isolation and separation if imprisoned in the United States. The court is satisfied that whether detained in the MCC or in any other federal prison if convicted and sentenced, he will have access to mental health services wherever he may be imprisoned.

146. … I am not satisfied that the evidence in this case establishes a history, or present state, or treatment of mental disorder of a similarly serious level or intensity as that exhibited in [*Aswat v The United Kingdom*(App. No. 17299/12, judgment of the 16th April, 2013)] nor is there any real risk that the [appellant] would be considered for imprisonment in a similar maximum security facility. The court is satisfied that the United States authorities will act to protect his mental and physical health and take appropriate steps to address any symptoms of depression or continuing anxiety by appropriate treatment (including medication) and take such steps as are appropriate and necessary to accommodate him safely as a person with [Asperger's Syndrome] within the prison system.

Article 8

147. The [appellant] submits that his extradition is contrary to his right to respect for his private life and family under Article 8 because of the serious threat that imprisonment in a United States prison and removal from his home and family poses for his health in that there is a real possibility that due to his [Asperger's Syndrome]and mental ill-health he will self harm or commit suicide.

148. The removal of a person from his home and country are a normal incident of extradition and cannot be sustained as a ground of objection. It is clear that removal involves an interference with family rights which has been recognised as proportionate and in the interests of a democratic society and in particular, the pursuit and the bringing of fugitives to justice. The court must attach significant weight to this public interest having regard to the very serious nature of the conspiracy charges contained in the warrant and the fact that they encompass an international series of alleged criminal trade transactions involving the use of computers and large quantities of drugs, money and other illicit goods.

149. It is submitted that the consequences of the [appellant's] proposed extradition would be very severe and will give rise to "exceptionally injurious and harmful consequences" for the [appellant] which are disproportionate to the legitimate aim pursued of bringing him to justice. Even if the court were satisfied to accept the level of risk to his life or health suggested on behalf of the [appellant], I am satisfied that it is of a nature that will be

> adequately addressed in the United States. Though it is clear that family support outside prison, in the community and at home is the best way to deal with his vulnerabilities and that his separation from family will be difficult for him and his family, nevertheless, the evidence is that appropriate assessment, care and if necessary, treatment is available within the prison system. All information concerning the [appellant] will be made available to the authorities concerning his [Asperger's Syndrome], depression and anxiety and any expressions of suicidal intent. The court is satisfied that the American prison officials will take all necessary measures to protect him. The court is not satisfied that the [appellant's] surrender is, in the circumstances, a disproportionate measure or will breach his rights to respect for his health or family life under Article 8."

15. Accordingly, McDermott J. made an order directing that the appellant be detained in Cloverhill Prison "until the Minister for Justice and Equality shall otherwise order in accordance with Part II of the [1965] Act", subject to a stay in the event of an appeal.

*The Judgment of the Court of Appeal*

16. Mr. Davis appealed that judgment to the Court of Appeal. Although he initially raised three grounds of objection, he subsequently limited his appeal to the third of those grounds. It again concerned the effects of incarceration in the U.S., both pre-trial and post-trial, on the appellant as a person with Asperger's Syndrome suffering from depression and anxiety. In particular, Mr. Davis alleged that the learned trial judge had erred in finding that his surrender for extradition did not give rise to a real risk of a violation of his rights under Article 40.3 of the Constitution and Articles 3 and 8 of the ECHR.

17. The judgment of the Court was delivered by Mahon J. (Birmingham and Edwards JJ. concurring) on the 28th February, 2017 ([2017] IECA 50). Much of the judgment is given over to recitation of the evidence given before the High Court and the trial judge's findings in relation to same. As regards the relevant factors and test when considering the request for extradition, Mahon J. referred to several authorities in the area, including*Minister for Justice v. Rettinger*[2010] 3 IR 783,*Attorney General v. O'Gara*[2012] IEHC 179,*Minister for Justice, Equality and Law Reform v. Machaczka*[2012] I.E.H.C. 434,*Minister for Justice and Equality v. I.S*. [2015] I.E.H.C. 36 and*Attorney General v. Marques*[2015] IEHC 798. He also referred to the judgment of the European Court of Human Rights in*Ahmad v. United Kingdom*(2013) 56 EHRR 1 (judgment of the 10th April, 2012).

18. Despite having set out the evidence, the arguments and submissions at length, the Court's principal reason for dismissing the appeal was based on a separate and discrete ground, namely, that as section 29(5) of the 1965 Act restricts the right of appeal to one based on a point of law, it does not permit an appeal against a fact or facts as found by the trial judge. Mahon J. referred to*Fitzgibbon v. The Law Society of Ireland*[2015] 1 I.R. 516, where the judgments delivered in the case discussed the scope of various categories of statutory appeal, including an "appeal on a point of law". Applying that decision, the judge held at paras. 37-40 of his judgment that the subject matter of Mr. Davis's appeal was not based on a point of law:

> "37. In the instant case, the learned trial judge's lengthy and very comprehensive judgment set out in detail evidence relating to the appellant's personal circumstances, his medical condition (and, in particular, his diagnosis of Asperger's Syndrome which he accepted as being correct), the life style routine of a prisoner within the U.S.

> Federal prison system both while on remand and as a convicted prisoner, the provision of care and medical assistance to prisoners with medical conditions and other matters. Evidence heard by him was not all one-way. Conflicting medical and other evidence required a more detailed examination of the relevant factors than might otherwise have been the case, and it is apparent that the evidence was indeed subjected to a close analysis."

19. Having quoted the findings of the High Court in relation to the alleged breaches of Articles 3 and 8 ECHR (set out at para. 14,*supra*), the learned judge concluded as follows:

> "39. I am satisfied that the primary submission made by the respondent is entirely valid, (see para. 32). The decision of the learned trial judge (in so far as it relates to the ground of appeal pursued) is based on a fact or facts found by him following a detailed and thorough consideration of evidence and information, including medical evidence and evidence relating to the U.S. federal prison system. This appeal effectively invites the court to reach a different conclusion on the same evidence to that of the High Court.
>
> 40. That being so, this appeal seeks to review the judgment and order of the High Court in a manner which is not permitted in law. The subject matter of the appeal is not based upon a point of law. Arguably, the other original grounds of appeal may have satisfied that point of law pre-condition, but these were not proceeded with, and, I believe, wisely so."

20. Additionally, however, the learned judge also went on to hold that "even if this court was empowered to review the learned High Court judge's findings of fact and [his] decision based thereon, I would not reach a different conclusion than that of the High Court" (para. 41). Accordingly, the Court of Appeal dismissed Mr. Davis's appeal and ordered that steps be taken to effect his surrender and extradition to the U.S.

**Issues**

21. By determination dated the 13th March, 2017 ([2017] IESC DET. 31), the appellant was granted leave to appeal the decision of the Court of Appeal to this Court. Leave was granted in relation to the following three points of general public importance:

> "(a) Whether issues of fact can ever be regarded as issues of law pursuant to section 29 of the Extradition Act 1965, and in what circumstances such an issue of law might arise out of fact [**Issue One**];
>
> (b) Whether the State is obliged to protect vulnerable persons suffering from mental illness under the Constitution within the context of an extradition application and the circumstances under which that duty is engaged so that an extradition request should not be granted [**Issue Two**];
>
> (c) Whether in this case the condition of Gary Davis is so severe in fact that, as a matter of law, he may not be extradited to the United States of America [**Issue Three**]."

22. As will become apparent from the submissions next referred to, and the discussion

which follows, there is in reality little distance between the parties in relation to questions one and two. Each has in many respects relied on the same authorities. The Attorney General accepts that there are some situations in which issues of fact can be regarded as issues of law for the purposes of section 29 of the 1965 Act, and also that there are some circumstances in which the courts may be obliged to vindicate a person's constitutional and Convention rights by refusing to permit extradition in a given case. As such it will be seen that the contest arises not at the level of principle, but rather in respect of the application of these principles to the particular facts of Mr. Davis's case.

**Submissions**
**The Appellant's Submissions**

*Issue One*

23. Mr. Davis submits, by reference to*People (AG) v. Conmey*[1975] I.R. 341 (as followed in,*inter alia, Holohan v. Donohue*[1986] I.R. 45 and*Hanafin v. Minister for the Environment*[1996] 2 I.R. 321), that a statutory provision excepting some decisions of the High Court from the appellate jurisdiction of the Supreme Court, or seeking to confine the scope of such appeals, must be "clear and unambiguous". In light of this interpretative requirement and given the practice of the Superior Courts when dealing with*habeas corpus*applications in cases of this nature (see paras. 49-50*infra*), it is claimed that the restriction in section 29(5) of the Act is a limitation that applies solely to the matters set out in section 29(1)(a)-(d) thereof; the court is otherwise free to inquire into any other matter going to the legality of one's extradition.

24. Mr. Davis also says that given the intrinsic nature of extradition law, limiting an appeal to a "point of law" does not significantly impinge on the jurisdiction of the appellate court because many of the issues which arise involve mixed questions of fact and law, as distinct from questions of primary fact*per se.*He lists some fifteen examples of such "mixed" questions, including whether an offence is extradictable, political, military, or revenue related; where the offence was committed; the application of the doctrine of*ne bis in idem*and of the Rule of Specialty; and whether sufficient evidence that the person sought has committed the offence has been produced. Many of these issues, which incidentally are specified defences provided for in the 1965 Act, and others, involve the exercise of judgment and the application of some legal text, criteria or rule to a given set of facts. All of these situations, it is said, should be regarded as issues of law.

25. In further support of this general argument, Mr. Davis states that an appeal "on a point of law" frequently arises out of legislative schemes, where such right is from a decision of a specialist tribunal, administrative body or government minister acting in the exercise or performance of some statutory function. The courts are sometimes called upon to determine the scope of such appeals, which must be done in the overall context of the decision under review (Mark de Blacam,*Judicial Review*(3rd Ed, Bloomsbury Professional, 2017), Chapter 59). Due respect to the decision-maker is often called for in this regard. However, in any substantive hearing under the Extradition Act, the High Court has no greater expertise than the Supreme Court such as would call for any particular deference by this Court to the assessment made by the trial judge.

26. On the correct meaning of the phrase "point of law" in section 29(5) of the 1965 Act, reference is made to the decision of Clarke J., as he then was, in*Fitzgibbon v. Law Society*, and to the judgment of the UK Court of Appeal in*Instrumatic Ltd v. Supabrase Ltd*[1969] 1 W.L.R. 519. There Lord Denning M.R. said that a provision providing for an appeal on a point of law from a statutory body will be interpreted "widely and liberally". A similar view was taken by Auld L.J. of the Court of Appeal in*Nipa Begum v. Tower*

*Hamlets LBC*[2000] 1 WLR 306, where he said that a section providing for an appeal "on any point of law arising from" the decision gave the appellate court a power akin to that of judicial review exercisable in the High Court, including the power to quash a decision on the ground of irrationality. Therein the learned judge also approved a statement to the effect that the court ought to guard against "any artificial narrowing of the right of appeal on a point of law, which is clearly intended to be a wide and beneficial remedy."

27. In conclusion on this issue, the appellant submits that this Court enjoys full appellate jurisdiction on the particular discrete issue of whether his extradition would be contrary to the Constitution or the State's obligations under the ECHR, but that if such appeal should be limited to a point of law then the matter under appeal does in fact raise points of law for consideration by this Court.

*Issue Two*

28. Mr. Davis points first to case law regarding our own prison system, including*Mulligan v. Governor of Portlaoise Prison*[2013] 4 I.R. 1 (per MacMenamin J.),*Kinsella v. Governor of Mountjoy Prison*[2012] 1 I.R. 467 and*Connolly v. Governor of Wheatfield Prison*[2013] IEHC 334 (both per Hogan J.). These cases establish that prisoners must not be exposed to inhuman or degrading treatment or to endangerment of their health. It is also clear that prisoners' fundamental rights, such as the right to bodily integrity, must be protected.

29. Secondly, he also quotes extensively from the jurisprudence of the European Court of Human Rights, mostly in the context of pure domestic incarceration. He refers to*Khudobin v. Russia*(App. No. 59696/00, judgment of the 26th October, 2006) ("*Khudobin*"),*Xiros v. Greece*(App. No. 1033/07, judgment of the 9th September, 2010) ("*Xiros*") and*Topekhin v. Russia*(App. No. 78774/13, judgment of the 10th May, 2016) ("*Topekhin*"). In particular, however, he cites*Taddei v. France*(App. No. 36435/07, judgment of the 21st December, 2010) ("*Taddei"*), where, for the reasons set out in that judgment, the ECtHR held that the Article 3 rights of the prisoner had been violated. He also highlights*Khudobin,*where the Court at paras. 90-93 summarised the position of prisoners with mental illness. These cases are further referred to later in this judgment.

30. The appellant goes on to argue that it is clear that similar interests are engaged where the extradition of a citizen is being considered, in that an order to that effect may lead to pre-trial detention and post-trial imprisonment. In such cases the requested State must make a forward-looking assessment of the conditions which the prisoner is likely to face, rather than conducting a historical review of the adequacy of conditions that have in fact been imposed. In this regard he refers to*Ahmad v. United Kingdom*(App. No. (*inter alia*) 24027/07, judgment of the 10th April, 2012), where the Court at paras. 166-179 gave a detailed analysis of this issue, including the circumstances where extradition may be stayed or even refused entirely. Moreover, at paras. 200-203 it reiterated, in this context, the general principles governing detention as derived from its case law, including that as cited above. In*Ahmad*the Court considered that matters such as the place and duration of detention could give rise to concerns as to the compatibility of extradition with the rights protected under the Convention.

*Issue Three*

31. Mr. Davis commences his submissions on this ground by identifying what findings of the High Court might properly be regarded as findings of primary fact. He instances, first, the judge's view that his depression and suicidal ideation were not of such an intensity as to prevent a trial proceeding in this jurisdiction and, secondly, his conclusion that Mr. Davis is unlikely to be detained pre-trial in the Special Housing Unit at the MCC. Such findings were based on the learned judge's assessment of the evidence presented. The

appellant contrasts this with what he refers to as the learned judge's "unduly deferential" assessment of the mental health services provided by the Federal Bureau of Prisons. He says that sufficient weight was not given to the concerns validated by independent reports regarding the quality and delivery of mental health services in U.S. prisons; in particular, he submits that the evidence showed that what treatment might be available is focused on crisis intervention to manage depression and suicide risk, as opposed to the continuing needs of a person with his condition.

32. The appellant argues that, evaluated correctly, the services described by the U.S. constitute*prima facie*evidence of there being a real risk that, if convicted, the standard conditions of imprisonment in a medium security facility would of themselves constitute inhuman or degrading treatment. Similar conditions can be expected during the pre-trial period, at a time when he is an innocent man. The duty of this State to vindicate personal rights is especially onerous when one of its own citizens is the subject matter of the extradition request.

33. Mr. Davis then refers to his Asperger's Syndrome, which is a permanent disorder, and his associated conditions. These are likely to deteriorate, perhaps even severely. Imprisonment for a person like him, particularly abroad, involves an elevated degree of punishment, and an intensification of the inevitable suffering which he would endure. When one adds in the real heightened risk of suicide, the protection of the core concepts of personality and human dignity are seriously compromised.

34. The appellant claims that these concerns are sufficiently real and foreseeable that there is an onus on the U.S. to dispel them, and that the evidence tendered in these proceedings has been insufficient to do so. Mr. Davis points out that there was no acceptance by the requesting authority that he does in fact suffer from Asperger's Syndrome; that it did not rebut the evidence regarding the deterioration of his condition and suicide risk; that there was no evidence as to how the requesting authority's standard prison rules and procedures will be relaxed or modified to accommodate his condition; that there was no evidence as to where geographically in the U.S. he would be imprisoned if convicted, which is relevant to the issue of family visitation; and that there was no evidence of special accommodation of the additional special needs of a foreign national suffering from Asperger's Syndrome.

35. Mr. Davis submits that the questions posed by the Court seek to identify the threshold of severity that is required for the Court to decline to back an extradition in this case. There is no easy scale of suffering that can be laid down. However, there are a number of strong indicators in his case, all of which have been outlined in the evidence. He concludes that even if it is accepted that one cannot be sure regarding future events, nonetheless as between an acceptable and an unacceptable outcome the citizen is entitled to have the protection of his interests take precedence.

**The Respondent's Submissions**

36. The Attorney General makes the point at the outset that as the questions posed by this Court can readily be answered by reference to a small number of seminal judgments, quoted by both sides, there is very little difference between the parties as to what the appropriate legal tests and principles are. That said, however, he complains that the appellant has made little attempt to engage with or even identify what legal issues are in contest, as the authorities cited by him are for the most part cited in the abstract and in any event are not in dispute. He goes on to say that the appellant has not identified with clarity or specificity what findings were apparently wrongly arrived at, or why, nor has he attempted to articulate how the judgment of the Court of Appeal is erroneous in point of law. In reality, it is claimed that the Court of Appeal has been ignored even though it is

the judgment of that court which is under review. Furthermore, objection is taken to many of the arguments made, as these are now being advanced for the first time. It is impermissible for the appellant to ignore or disregard the proceedings as they have occurred to date.

*Issue One*

37. The first aspect of Issue One asks whether issues of fact can ever be regarded as issues of law pursuant to section 29 of the Extradition Act 1965. The Attorney General answers simply: yes. Like the appellant, he adopts as correct the analysis of "an appeal on a point of law" set out in*Fitzgibbon v. The Law Society,*which authority, in fact, he relied upon before the Court of Appeal in order to demonstrate that the issues raised by the appellant could not be so classified.

38. Applying that assessment to the second aspect of Issue One, namely, in what circumstances might an issue of law arise out of a finding of fact, the Attorney General submits that this may happen in a number of different circumstances, examples of which are later referred to in this judgment. The respondent goes on to state, however, that Mr. Davis has never argued that the conclusions reached by the High Court correspond with any such circumstance; instead, he has simply asserted that it would have been open to the High Court to come to a different conclusion on the facts and that it should have done so. The appellant has maintained that approach before this Court without making any attempt to identify any findings which may amount to errors of law. Accordingly, the Court of Appeal was correct to dismiss the appeal on the basis that it had merely been invited to reach a different conclusion to that of the High Court on the same evidence.

39. As to the appellant's "new" argument (para. 23, supra) concerning the scope of an appeal in an extradition case which concerns issues of fundamental rights rather than the formal aspects of the process, it is pointed out that this novel submission was never raised before the Court of Appeal. In any event, the Attorney General submits that this point is easily answered. First, the terms of section 29(5) and the restriction on the right of appeal arises in respect of the committal order made under section 29(1). The respondent submits that it is difficult to imagine how a restriction on a right of appeal that was predicated on the reason for the order rather than the nature of the order might work in practice. Here the appellant is, in fact, appealing the section 29 order, and thus the restriction on the right of appeal must apply. Secondly, the Attorney General submits that the appellant's interpretation does not stand up to scrutiny. The matters to be determined in accordance with section 29(1) are not confined to the formalities of extradition; they also involve a consideration of substantive issues that presuppose a detailed factual analysis. This is especially so as regards the various bars to surrender referenced by section 29(1)(c), which would encompass issues such as convictions*in absentia*(section 16),*non bis in idem*(section 17), pardon or amnesty (section 18A), specialty (section 20) and, most pertinently, the prohibition on torture (section 11(2A)). Thus the suggestion that differential rights of appeal will apply depending on the arguments raised is unsustainable.

Issue Two

40. The Attorney General submits that the decision of this Court in*Minister for Justice v. Rettinger*[2010] 3 IR 783 provides a complete answer to both aspects of the second question posed by the Court. He submits that it is relevant that the European Court of Human Rights ("ECtHR") applied an identical approach in*Ahmad v. United Kingdom*. The respondent accepts that a person's mental health falls within the protection of constitutional and ECHR rights in respect of bodily integrity and the prohibition on inhuman or degrading treatment. Thus in some circumstances the courts may well be

obliged to vindicate such rights by refusing to grant rendition or extradition. He submits that the circumstances in which such a duty arises are well understood and are set out in very clear terms in*Rettinger*. That duty is to ensure that such persons are not exposed to a real risk of inhuman or degrading treatment. That was the test applied by both the High Court and the Court of Appeal. It is wholly unclear whether a different test is now being agitated for: no criticism of the approach adopted by either of these courts has been advanced. The Attorney General observes that it is curious that the appellant's submissions make no reference whatsoever to*Rettinger,*and further submits that the appellant agreed both at first instance and on appeal that the*Rettinger*test was the correct test to apply in the circumstances of this case. Accordingly, it seems likely, but no more, that the criteria therein outlined are not in issue.

41. The respondent moreover questions the relevance of many of the authorities cited by the appellant. He acknowledges that the jurisprudence of the ECtHR regarding Article 3 establishes a number of propositions that can hardly be in doubt. However, this line of authority also establishes that each case must be considered in light of its own specific facts, a point also made in*Mulligan.*When that exercise is conducted, each of the cases referred to are utterly distinguishable from the situation of Mr. Davis and, accordingly, the determination of his extradition cannot be advanced by analogy with such cases.

42. The Attorney General accepts that the appellant is correct that the consideration of issues relating to conditions of detention is forward-looking; this is well understood in extradition proceedings and is the reason that the Court in*Rettinger*adopted the formulation of a*real risk*test, being the same as used by the ECtHR in*Saadi v. Italy*(2009) 49 EHRR 30 ("*Saadi v. Italy*"). No issue is taken on this.

43. Finally, it is submitted that no distinction ought be drawn between pre-trial conditions of detention and those imposed post-conviction. The protections of Article 3 of the Convention and those of the Constitution where relevant apply to the innocent and the guilty alike. Similarly, such protections apply to citizens and non-citizens in precisely the same way. To the extent that the appellant has suggested otherwise, such a view is based on a fundamental failure to understand the*Rettinger*principles and indeed the very nature of Article 3 and cognate constitutional rights themselves.

*Issue Three*

44. The Attorney General submits, as a preliminary matter, that this issue only arises if one of the circumstances which permits an issue of fact to be considered as a point of law actually arises (*i.e.*if the appellant can demonstrate such a circumstance on the first ground of appeal). Without prejudice to this point, the respondent has also made submissions on the substance of the third ground of appeal, as well as making some general observations which are later referred to in this judgment.

45. The respondent says that in attempting to assess the effect of imprisonment on the appellant, McDermott J. had regard to Mr. Davis's personal position, but in the process was entitled to comment on some unusual features attendant on his condition, for example, that he first sought a diagnosis of Asperger's Syndrome within 24 hours of his arrest on the extradition warrant and that relevant school and medical records, procured only by court order, disclosed nothing to support Mr. Davis's contention that he has suffered from Asperger's Syndrome from early childhood, with the evidence of Professor Kennedy being striking in this regard. Similarly, the appellant's arguments concerning the risk of suicide were difficult to reconcile with the actual evidence. There was no evidence that he is receiving any on-going medical treatment for depression involving suicidal ideation. There was no objective evidence of his reported attempt at suicide as a teenager. He disavowed suicidal thoughts in four attendances with his general practitioner between April, 2014 and September, 2015, although he did refer to same in

a consultation in October, 2015. All of these points were fact specific, and formed part of the spectrum.

46. Moreover, the trial judge's assessment of the mental health services provided by the Federal Bureau of Prisons afforded sufficient weight to the concerns raised by independent reports as to the quality and delivery of such services. The High Court made extensive inquiry into whether he would have the necessary services in the MCC or any other federal prison, and concluded, having considered the independent reports produced which cast doubt on what the U.S. had said, that he would have access to such services wherever he may be imprisoned. The suggestion that treatment would be limited to crisis intervention only was disputed, with evidence that many inmates with significant mental health diagnoses are successfully managed in the MCC, and that Mr. Davis's condition could be treated in that facility. Other evidence from the U.S. dealt with initial screening and later designations, as well as the availability of all appropriate medication. If medical staff determine, at any time during a prisoner's incarceration, that his medical or mental health care level requires adjustment, a request for a transfer to a more suitable facility can be submitted.

47. The Attorney General points out that a substantial part of the appellant's case was to the effect that he would be detained in the Special Housing Unit of the MCC, which would amount to a form of solitary confinement that would be particularly difficult for someone with his condition. The evidence in response said that there was no basis for this contention, because, on the information available, his circumstances did not meet the factors which would give rise to a placement in that facility: rather, it was more likely he would be housed in the general population. If such was accepted by the trial judge, as it was, this significant aspect of his complaint fell away.

48. Although the appellant will be more impacted by extradition than an individual not suffering from Asperger's Syndrome, the respondent submits that this alone is not a reason to refuse extradition (*Marques*). The learned trial judge attached appropriate weight to the particular vulnerabilities of those suffering from this condition, as is evident from paragraph 135 of his judgment. In the absence of any reliable evidence to suggest that the appellant's condition cannot be managed in the U.S., the trial judge was correct in declining to refuse surrender on this ground. The appellant bears the evidential burden of establishing such conditions. Finally, the Attorney General emphasises that the issue on appeal is not whether McDermott J. was correct, but rather whether the conclusion reached by him was open to him on the evidence.

**Discussion/Decision**

**Issue One**

49. Section 29(5) of the 1965 Act, as originally drafted, provided that "no appeal shall lie to the Circuit Court against an order of the Court under the section", with the present version (para. 7,*supra*) of that provision being inserted by section 20(1) of the Extradition (European Union Convention) Act 2001. The original provision of course reflected the pre-2001 position whereby the District Court had seisin not only of issuing the warrant of arrest, but also of dealing with the substantive extradition application itself. The absence of an appeal was very much offset, first, by the obligation of the District Court to inform the respondent of the right to apply for*habeas corpus*pursuant to Article 40.4.2Â° of the Constitution and, second, by the approach of both the High Court and the Supreme Court as to what issues could be raised on such application. In essence, it became the practice by custom and convention that points of law going to the legality of the proposed extradition, and not solely those relating to a person's immediate incarceration, could be canvassed in the course of an Article 40 inquiry. It was in this

manner that critical issues relating to extradition came to be raised before the High Court, including those concerning the rights accruing by reason of the State's obligations under the Constitution and the ECHR, as well as any issue arising from the 1965 Act itself. It was via this route that the vindication of constitutionally protected rights took place.

50. Whilst the procedure differed in certain respects in relation to extradition effected pursuant to Part III of the 1965 Act, there were in place similar measures to those set out in section 29(3) and (5) of the Act: no appeal to the Circuit Court was permitted and the presiding judge of the District Court had to inform the person concerned of his or her right to apply for*habeas corpus*. In addition, however, with regard to places specified in Part III, namely, Northern Ireland, England and Wales, Scotland, the Isle of Man and the Channel Islands, there was a further provision under which a person could seek his discharge from the process; it was section 50 of the 1965 Act, which reflected a number of prohibitions also contained in Part II. Such an outcome could result from a direction given by the Minister for Justice or by the High Court on any one of the several grounds outlined in the section. Whilst they are of no relevance to this case, I mention these measures simply to illustrate the avenue by which issues of high legal and constitutional significance in this area of law came to be dealt with by the courts.

51. As pointed out above, the parties are broadly aligned on the first issue (para. 21,*supra*). The Attorney General freely accepts that there are circumstances in which issues of fact can be regarded as issues of law in extradition cases. At the risk of repetition, section 29(5) provides that "[n]o appeal shall lie to the Supreme Court from an order of the High Court under this section, except on a point of law." The reference to the Supreme Court must now of course be read as referring to the Court of Appeal.

52. The scope of an appeal on a point of law was recently analysed by both Clarke J. and myself in our respective judgments in*Fitzgibbon v. Law Society of Ireland*[2015] 1 I.R. 516, [2014] IESC 48. The appellant has relied on a number of passages in that case, which the respondent is also content to adopt as a correct statement of the law. Given that this is a recent judgment, it is worth setting out what was said, which I propose to do by reference to the judgment of Clarke J.:

> "7. Appeal on a point of law
>
> [125] Many statutes make provision for an appeal on a point of law either from statutory bodies or decision makers to the courts or within the courts system. Examples in the former category include s. 123(3) of the Residential Tenancies Act 2004, which provides for an appeal on a point of law to the High Court by any of the parties in respect of a determination of a tribunal of the Private Residential Tenancies Board; and s. 42(1) of the Freedom of Information Act 1997, which provides for an appeal on a point of law to the High Court by a person affected by a decision of the Information Commissioner following a review under s. 34 of the Act of 1997. Appeals within the courts system to the High Court on a point of law are, for example, provided for in s. 26(3)(b) of the Data Protection Act 1988 in relation to a decision of the Circuit Court on a requirement or a prohibition in a notice or certain actions of the Data Protection Commissioner; and in s. 169(4) of the Personal Insolvency Act 2012, in relation to a decision of the Circuit Court on appeal from the Insolvency Service.
>
> [126] There is an established jurisprudence as to what the term "appeal on a point of law" means. Much of the jurisprudence on the

scope of such an appeal overlaps with the concept of case stated. In*Insp. of Taxes v. Hummingbird*[1982] I.L.R.M. 421, Kenny J., delivering the judgment of this court, explained, at p. 426, the approach a court should take when examining the determination of an expert body, in that case, the Appeal Commissioners:

> 'A case stated consists in part of findings on questions of primary fact, … These findings on primary facts should not be set aside by the courts unless there was no evidence whatever to support them. The commissioner then goes on in the case stated to give his conclusions or inferences from these primary facts. These are mixed questions of fact and law and the court should approach these in a different way. If they are based on the interpretation of documents, the court should reverse them if they are incorrect for it is in as good a position to determine the meaning of documents as is the commissioner. If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside. If however they are not based on a mistaken view of the law or a wrong interpretation of documents, they should not be set aside unless the inferences which he made from the primary facts were ones that no reasonable commissioner could draw.'

This passage was quoted and the principles therein were applied by Keane C.J. in*Henry Denny & Sons (Ireland) Ltd. v Minister for Social Welfare*[1998] 1 IR 34, which concerned an appeal on a point of law from a decision of the Chief Appeals Officer under the then applicable social welfare statutory provisions (s. 300(4) of the Social Welfare (Consolidation) Act 1981).

[127] The applicable principles were helpfully summarised by McKechnie J. in*Deely v. Information Commissioner*[2001] 3 IR 439 at p. 452, which concerned an appeal under s. 42 of the Freedom of Information Act 1997, as follows:

> 'There is no doubt but that when a court is considering only a point of law, whether by way of a restricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following:
>
> (a) it cannot set aside findings of primary fact unless there is no evidence to support such findings;
>
> (b) it ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw;
>
> (c) it can however, reverse such inferences, if the

> same were based on the interpretation of documents and should do so if incorrect; and finally;
>
> (d) if the conclusion reached by such bodies shows that they have taken an erroneous view of the law, then that also is a ground for setting aside the resulting decision …'
>
> This passage was later cited in the Supreme Court judgments of both Fennelly and Kearns JJ. in*Sheedy v. Information Commissioner*[2005] IESC 35, [2005] 2 IR 272.
> [128] In one sense it may be said that two types of points of law can legitimately be raised in an appeal which is limited to points of law alone. First, there may be an error of law in the determination of the first instance body. Second, it may be the case that the way in which the first instance body has reached its conclusions on the facts involves an error which itself amounts to an error in law. There may have been no evidence to support a finding or inferences may have been drawn on the facts which no reasonable decision-maker could have drawn. It follows that a higher degree of deference, so far as the facts are concerned, is paid by the appellate body to the decision of the first instance body in an appeal on a point of law only, as opposed to an appeal against error. In the latter case the court is entitled to form its own view on the proper inferences to be drawn (although not on primary facts)."

Mr. Davis has relied on this passage, subject to his submission that there is a distinction between a case stated which concerns a question of law and an appeal on a point of law, in that the former proceeds on the basis of facts recited by the referring court whereas different considerations are at play in the latter.

53. Before addressing the essence of question one, I am satisfied that, subject to context, a statutory right of appeal on a point of law will, if its wording does not otherwise prescribe, include the following:

> • Errors of law as generally understood, to include those mentioned in*Fitzgibbon;*
>
> • Errors such as would give rise to judicial review including illegality, irrationality, defective or no reasoning, procedural errors of some significance, etc.;
>
> • Errors in the exercise of discretion which are plainly wrong, notwithstanding the latitude inherent in such exercise; and
>
> • Errors of fact next referred to.

54. Drawing on what was said in both judgments in*Fitzgibbon v. The Law Society of Ireland*and on the authorities cited therein, including my own judgment in*Deely v. Information Commissioner*[2001] 3 IR 439, the following principles may be extracted when considering what issues of fact may be regarded as issues of law:

> (i) Findings of primary fact where there is no evidence to support them;

(ii) Findings of primary fact which no reasonable decision-making body could make;

(iii) Inferences or conclusions:

- Which are unsustainable by reason of any one or more of the matters listed above;

- Which could not follow or be deducible from the primary findings as made; or

- Which are based on an incorrect interpretation of documents.

As with the matters listed in para. 53, above, this enumeration is not intended to be exhaustive.

55. In light of the above principles or statements of law, it is difficult to see the relevance of some of the ancillary arguments made by the appellant in relation to this ground of appeal. Reference to the legislative history of section 29 of the 1965 Act, whilst of interest, does not advance his case. That background does not provide any basis to suggest that issues of fact should be viewed more expansively under that section than what otherwise is the situation. In fact, as the great preponderance of the case law will show, the issues determined, either on a habeas corpus application or those addressed under section 50 of the 1965 Act, dealt with matters which were correctly regarded as issues of law. Pure questions of fact, as such, played very little – if any – part in those determinations. Accordingly, the customary practice of the High Court (paras. 49-50 above) offers little support for what appears to be the inherent argument underlying this submission.

56. Furthermore, I do not accept the argument that the limitation on an appeal under section 29(5) is confined to appeals in respect of the matters contained in section 29(1)(a)-(d) of the Act, and that therefore any other appeal is unencumbered by the necessity of identifying a point of law. The Court must of course be satisfied of the matters listed at subsection (1)(a)-(d) but nothing in the terms of subsection (5) links the right of appeal back to the Court's determination on those issues. The appeal under section 29(5) is against the order committing the person to prison to await the order of the Minister for his extradition. The matters set out in subsection (1) are a pre-requisite to the making of the order which, if granted, essentially completes the judicial function at trial level. It is the order itself which is appealable under the section. Thus on a purely textual basis, it would appear that any appeal against the order of the court made under section 29 must be confined to an issue of law.

57. The point is also made that appeals "on a point of law" often arise in circumstances where the appellate review body should exhibit some extra degree of deference to the decision-maker, this because of its specialist or technical knowledge of the subject matter. It is said by Mr. Davis that no such considerations arise in extradition cases, where the appellate court is in as good a position to assess the evidence as the trial court, and is not at any deficit in terms of knowledge or expertise. Whilst that may be so, it is not clear how this can avail the appellant. The mere fact that a disparity in expertise regarding the subject matter may sometimes explain the rationale for an appeal being limited to "a point of law", does not justify this Court in disregarding the wording of the section simply because it is an appeal within the court system, as opposed to one from a statutory entity external to it. Thus there is no reason to suggest that an appeal on a point of law under section 29(5) of the 1965 Act has any meaning other than that as

described.

58. The principles regarding the circumstances in which an issue of fact may be regarded as an issue of law are set out at para. 54,*supra.*It is striking that despite the obvious need to identify what factual findings of the High Court, either in a primary or secondary sense, might be susceptible to challenge in this case, it has proved exceedingly difficult for the appellant to do so. Whilst this is a point which I will return to when discussing the third ground of appeal, it is self-evidently one of importance and needs to be noted. Simply put, Mr. Davis has not been able to identify precisely, or even in substance, what errors of law or fact he is alleging the High Court has made.

59. It will be recalled that the Court of Appeal viewed the submission made on this point as one asking that court to reach a "different conclusion on the same evidence to that of the High Court". Without more, such could not form a basis of an appeal on a point of law. Moreover, although the appellant has submitted that this Court enjoys "full appellate jurisdiction" on this issue, a submission which is in any event incorrect for several reasons, it is not entirely clear how he would expect the Court to proceed unless by way of a full re-hearing on all issues of both fact and law, which no appeal from the High Court ever is. Even outside of the context of any statutory right of appeal, it is always the case that this Court, and now the Court of Appeal, limits its appellate jurisdiction to points of law, as informed by the very well-known principles set down by McCarthy J. in*Hay v. O'Grady*[1992] 1 I.R. 210. These of course include the important principle that this Court is bound by findings of fact made by the trial judge which are supported by credible evidence, however voluminous and apparently weighty the testimony against them might be. The relevance of this point will become apparent when the third ground of appeal is discussed below. For now it will suffice to say that in truth what the appellant seems to desire is a*de novo*evaluation of his arguments against his surrender. It is simply not the function of this Court to provide him with a forum for such exercise (but see paras. 91-92).

60. Finally, I should say that the general principles applying to appeals on a point of law, and in particular those involving or relating to issues of fact, as above outlined, are a sufficient answer to the first question posed by the court in granting leave. Although its precise terms refer specifically to the circumstances in which issues of law might arise out of issues of fact under section 29 the 1965 Act, I do not think it prudent or wise to pronounce more prescriptively than what has been stated. The simple reason for this is that the circumstances and context of any given case, together with the grounds of objection raised by the proposed extraditee, will determine more specifically whether the judge's findings of fact give rise to issues of law. One could only fall short if attempting to enumerate a definitive list of such findings, for it is not possible to anticipate the almost endless list of matters that could arise, and objections that could be made, at an extradition hearing. Accordingly, it is by the application of the principles as set out at paragraphs 53 and 54,*supra,*that the evaluation is to be made of whether a "point of law" arises for appellate purposes.

**Issue Two**

61. The first aspect of the second question before the Court asks whether the State, under the Constitution, is obliged to protect vulnerable persons suffering from mental illness within the context of an extradition application. The unconditional answer to this, as a matter of principle, is unquestionably 'Yes'. Depending on the circumstances several provisions of the Constitution may be in play; these will mostly, though not exclusively, be found in the section dealing with fundamental rights, with Articles 40 and 41 particularly prominent in this respect, though Article 38.1 may also have an obvious

relevance.

62. Indeed it should also be said that the reference in the question to "vulnerable persons suffering from mental illness" might fairly be said to be superfluous. The duty to guard against violations of,*inter alia*, the right not to be subjected to inhuman or degrading treatment applies in all extradition cases where such is raised, regardless of whether or not the extraditee is a vulnerable person. Such a proposition is so fundamental as to hardly require authority, though there is an abundance of it if one is so minded. See, for example, the judgments of this Court in*Russell v. Fanning*[1988] I.R. 505,*Finucane v McMahon*[1990] 1 I.R. 165 and*Clarke v. McMahon*[1990] 1 I.R. 228. From a Convention perspective the existence of a comparable obligation is clearly evident from the judgments of the ECtHR. The presence of a mental illness, or for that matter any other form of a disabling condition, will of course be relevant to the court's consideration of the presenting issues. However, even in the absence of any such illness or condition the same duty, involving the same inquiry, will exist regardless.

63. There are of course several other sources at the international level where the same or similar obligations exist. It is expressly provided for in the Charter of Fundamental Rights of the European Union, Article 19(2) of which provides that "[n]o one may be … extradited to a State where there is a serious risk that he or she would be subjected to … torture or other inhuman or degrading treatment or punishment." Moreover, Article 7 of the International Covenant on Civil and Political Rights states,*inter alia*, that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The UN Human Rights Committee has interpreted this to mean that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition" (*CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), 10th March, 1992). These instruments are binding on or have been signed up to by a great number of countries, including Ireland.

64. In short, therefore, prisoners in Ireland, both prior to and post-trial, must have their life and health secured and must be treated with essential dignity as human beings: their right to bodily integrity is intrinsic to this and encompasses mental and psychological wellbeing. There are many other rights which survive lawful incarceration in complete or modified form, all of which must be respected, honoured and protected by and within the system. To that end the judiciary in this jurisdiction, when called upon in the extradition context, must exercise a supervisory function to ensure that the core constitutional values of such rights are not compromised.

**Article 3 ECHR**

65. As previously noted, the appellant has elected to make no mention of*Rettinger*in his written submissions to this Court, even if only to distinguish it: it is unclear why that is the case. Instead, he has laid heavy emphasis on ECtHR case law, including the decision in*Ahmad v. United Kingdom.*Even through this lens, however, he does not appear to mount any serious challenge to*Rettinger.*Normally one would regard that as an indication of acceptance, but in view of the overall submission it seems best to treat the issue as remaining open.

66. What is clear, however, is that the substance of Mr. Davis's arguments has been navigated through the prism of Article 3 ECHR, with his submissions in respect of the right to respect for private and family life being argued as part thereof. This provision, which is expressed in absolute terms, provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment." Accordingly, I propose to

approach his objections from that perspective, being satisfied that the same evaluation will also cover his fears concerning apprehended breaches of his constitutional rights.

*Minister for Justice v. Rettinger [2010] 3 IR 783 ("Rettinger")*

67. In response to the Minister's application to have Mr. Rettinger surrendered to serve the balance of a two year sentence for burglary, the respondent objected,*inter alia*, on Article 3 grounds, alleging that the conditions in Polish prisons were such that he would be subject to a real risk of torture or inhuman or degrading treatment if extradited. Peart J. in the High Court found that the respondent had failed to establish said real risk to the required standard. However, the learned judge did certify two points of law of exceptional public importance for an appeal to this Court. Of direct relevance for present purposes is the test as set out by Denham J. at paragraph 31 of her judgment, which is to be applied where an objection to extradition is raised on the basis of Article 3 ECHR; the following summary reflects virtually*verbatim*what the Grand Chamber of the European Court of Human Rights stated in*Saadi v. Italy*:

> "(i) A court should consider all the material before it, and if necessary material obtained of its own motion;
>
> (ii) A court should examine whether there is a real risk, in a rigorous examination;
>
> (iii) The burden rests upon a respondent, such as the respondent in this case, to adduce evidence capable of proving that there are substantial grounds for believing that if he (or she) were returned to the requesting country he, or she, would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention;
>
> (iv) It is open to a requesting state to dispel any doubts by evidence. This does not mean that the burden has shifted. Thus, if there is information from a respondent as to conditions in the prisons of a requesting state with no replying information, a court may have sufficient evidence to find that there are substantial grounds for believing that if the respondent were returned to the requesting state he would be exposed to a real risk of being subjected to treatment contrary to article 3 of the Convention. On the other hand, the requesting state may present evidence which would, or would not, dispel the view of the court;
>
> (v) The court should examine the foreseeable consequences of sending a person to the requesting state;
>
> (vi) The court may attach importance to reports of independent international human rights organisations, such as Amnesty International, and to governmental sources, such as the State Department of the United States of America;
>
> (vii) The mere possibility of ill-treatment is not sufficient to establish a respondent's case;
>
> (viii) The relevant time to consider the conditions in the requesting state is at the time of the hearing in the High Court. Although, of course, on an appeal to this court an application could be made,

> under the rules of court, seeking to admit additional evidence, if necessary."

The other judgment in that case was delivered by Fennelly J., who also allowed the appeal. The matter was thus remitted to the High Court for reconsideration in accordance with the decision of the Supreme Court.

*Attorney General v. O'Gara [2012] IEHC 179*

68. The*Rettinger*principles, as broadly understood, though delivered in the context of a European Arrest Warrant case, have been applied in many subsequent cases, not only within that framework (*Minister for Justice and Equality v. I.S.*[2015] I.E.H.C. 36;*Minister for Justice and Equality v. Bukoshi*[2017] IEHC 113), but also external to it (see*Attorney General v. Piotrowski*[2014] IEHC 540,*Attorney General v. Damache*[2015] IEHC 339 and*Attorney General v. Marques*[2015] IEHC 798). Another example of the latter situation is to be found in the case of*The Attorney General v. O'Gara*[2012] IEHC 179, where the U.S. sought the extradition of the respondent with a view to putting him on trial for bank robbery. This request was opposed on the grounds, inter alia, of strong evidence that prison rape and sexual assault are endemic in U.S. prisons and correctional facilities and that he faced a real risk of being subject to same if extradited. He claimed that such would breach his rights under the constitution and Article 3 ECHR. Subject to some disagreement regarding the presumption of respect by the U.S. for the fundamental rights of the respondent, the parties agreed, and Edwards J. accepted, that the*Rettinger*principles should apply.

69. The learned judge applied those principles, subject to slight modification of no material relevance, save that he also relied on the judgment of Fennelly J. in that case. He concluded that although the evidence in the case was sufficient to put the Court upon enquiry, it fell short of demonstrating that the particular respondent in the case would, if extradited, be exposed to such a risk as would prevent his surrender. It is important to note, however, that the objection addressed in the judgment was one based on a general criticism of the U.S. prison system, rather than any unique characteristic individual to the respondent.

*Attorney General v. Marques [2015] IEHC 798*

70. The judgment of Donnelly J. in*Attorney General v. Marques*[2015] IEHC 798 is more on point and is particularly relevant for present circumstances. There the U.S. sought the respondent's extradition to stand trial in respect of four alleged offences relating to the advertising and distribution of child pornography. The request was opposed on a number of bases, one of which related to the respondent's Asperger's Syndrome. His objections were in substance akin to those of Mr. Davis in the within case, with the added factor that Mr. Marques feared being subjected to violence on the basis of being a sex offender. Donnelly J. had no hesitation in accepting that the respondent did indeed suffer from Asperger's Syndrome. The real issue to be addressed was whether that condition would expose him to a real risk of inhuman and degrading treatment.

71. In relation to the test to be applied, the learned judge referred to her own judgment in*Attorney General v. Damache*, where she had considered the law relating to the prohibition on extradition on grounds relating to inhuman and degrading treatment, be it under the ECHR or the Constitution. She summarised the test as follows:

> "In short, if there are substantial grounds for believing that there is a real risk that Mr. Marques will be subjected to inhuman and degrading treatment in the Requesting State the court must refuse extradition. There is an evidential burden on Mr. Marques to adduce

> evidence capable of proving that these substantial grounds exist. It is open to a Requesting State to dispel any doubts by evidence – that is not a shifting burden. The real risk should be examined rigorously." (para. 9.21)

It will be observed that this test is in essence a combination of factors (ii), (iii) and (iv) set out by Denham J. in*Rettinger.*

72. The learned judge then went on to elaborate by highlighting that the assessment, though at an individual and personal level, must remain focused on the test and, unless it is necessary for that purpose, should not involve an exercise of trying to predict the future pathway of the disease or illness, as a physician might. The prison conditions and the medical, psychiatric, psychological or other services available, though of great significance, must likewise be assessed to that end. She pointed out that people with significant physical, mental or associated conditions are not immune from incarceration in this jurisdiction and neither, in her view, should they be immune from extradition. Again, whilst the approach to Article 8 rights is somewhat different to Article 3 rights, the learned judge noted in the context of the former that separation from family and friends is an inevitable part of extradition and, although the same may have been more likely to impact on Mr. Marques due to his condition, that did not mean that there was a real risk that his rights would not be respected; difficulty with separation is not the equivalent of a violation of one's rights. Although Mr. Marques had threatened self-harm if extradited and thereby separated from his family, Donnelly J. was not convinced, by reference to the expert evidence, that this threat was entirely real. In any event, on the evidence tendered, she was satisfied that adequate medical care would be provided according to his needs. As a result, his objections on both the Article 3 and Article 8 grounds were dismissed.

73. Whilst fully appreciating that the findings reached by Donnelly J. related solely to the evidence presented in that case and her assessment of it, nonetheless, given the obvious similarity between the objections raised in*Marques*and those in the instant case, it is worth recalling at least part of them:

> "9.44 It has not been established that within the US federal prison system there is a systemic problem that gives rise to cause for concern for the health of Mr. Marques as a person who has a specific vulnerability, namely Asperger's syndrome. The US authorities have established that they have a constitutional obligation to provide adequate health care to its inmate population (as averred to in the affidavit of Mr. Christopher Adams). I also accept the evidence of Dr. Ong that Mr. Marques' condition is manageable within the Bureau of Prisons and that the Bureau is currently providing treatment to persons with Asperger's syndrome and similar conditions. Overall it cannot be said that the adequacy of the medical care that will be available to Mr. Marques on extradition gives rise to concerns of risk to life, bodily integrity or inhuman and degrading treatment. Furthermore, there is nothing on the evidence that reveals it is inadvisable at present in view of the state of health of Mr. Marques to maintain his detention.
>
> 9.45. In all the circumstances, there are no substantial grounds for believing that Mr. Marques is at real risk of being subjected on surrender to inhuman and degrading treatment or to having his right to bodily integrity [seriously] violated on account of his Asperger's syndrome and the treatment or lack thereof that he would receive on extradition to … the USA.

…

> 9.50 I reject his point of objection that there is a real risk that due to the prison conditions in the USA generally applicable in US Federal prisons or with specific regard to his Asperger's syndrome, that he will be subjected to inhuman or degrading treatment or that his right to bodily integrity, protection of the person and to human dignity in contravention of his constitutional and ECHR rights."

74. This conclusion is not dispositive of the within appeal, of course. The appellant's Article 3 ECHR objection must be assessed in light of the particular evidence adduced in respect of his own personal circumstances and mental condition, as well as the evidence and arguments in relation to the prison conditions and available medical treatment in the U.S. and his likely deterioration if detained there. Having said that, it is not readily apparent, given its recency and similarity of subject matter, why the appellant has failed to engage with*Marques*at any level of discourse.

**ECtHR Approach**

75. As mentioned, it is altogether unclear whether Mr. Davis posits that in fact another test should be preferred over what has been above described. No Irish case has been referred to which might lead to that conclusion. In the Convention context the principal case cited by him in respect of the extradition of a person with a mental disorder is*Ahmad v. United Kingdom*. In order to put that decision into perspective, I should make some brief reference to some other judgments from the Strasbourg court.

76. In*Khudobin v. Russia*(App. No. 59696/00, judgment of the 26th October, 2006), the applicant had several serious medical conditions, suffered from a mental disorder and was HIV-positive. His condition deteriorated whilst in custody, where, despite several requests for a proper assessment being made by his lawyer, he had epileptic seizures and did not receive qualified or timely medical treatment, nor were his chronic diseases properly monitored by the authorities. In stressing the absolute nature of the prohibition contained in Article 3, the Court noted that that provision does not lay down a general obligation to release detainees on health grounds, but rather imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. If the authorities place a seriously ill person in detention, they should demonstrate special care in guaranteeing conditions of detention that correspond to that prisoner's special needs. At paras. 90-93 the Court outlined the legal position in respect of prisoners with a mental illness. In order to come within its terms ill-treatment must attain a minimum level of severity, to be judged on all of the circumstances: in exceptional cases the state of an applicant's health may require his release. In this regard the Court will consider (a) the medical condition of the prisoner; (b) the adequacy of the medical assistance and care provided in detention; and (c) the advisability of maintaining the detention measure in light of his state of health. The Court found on the facts that "the absence of qualified and timely medical assistance, added to the authorities' refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical sufferings, it amounted to degrading treatment within the meaning of Article 3" (para. 96).

77. The jurisprudence of the Court, whilst consistently applying the test above described, illustrates how case-specific and fact-dependent its application will be. As the following brief survey shows, the outcome of the assessment will greatly depend on,*inter alia*, the circumstances and health of the individual and the apprehended conditions of detention at issue. For example, the applicant in*Taddei v. France*(App. No. 36435/07, judgment of the 21st December, 2010) suffered from a number of conditions, including Munchausen

syndrome. Her doctors recommended that she be placed in a specialised centre with psychotherapy for this disorder, but she was instead sent to an ordinary prison where her condition deteriorated. On the facts, the Court held that the transfer of this prisoner to a prison with no infrastructure to treat her illness, and where she was far away from her family, amounted to a violated of Article 3 ECHR.

78. Other cases have similarly turned on their individual circumstances. The applicant in*Xiros v. Greece*had major physical disabilities; likewise, the applicant in*Topekhin v. Russia*was paraplegic. In*Kucheruk v. Ukraine*(App. No. 2570/04) a mentally ill applicant was handcuffed for seven days without any psychiatric justification, and the finding in*Dybeku v. Albania*(App. No. 41153/06) was influenced by the conditions for mentally ill prisoners in Albanian prisons. In*Renolde v. France*(2009) 48 EHRR 42 the disciplinary punishment imposed on a detainee was found to be incompatible with the standard of treatment required in respect of mentally ill prisoners. Finally, in*Topekhin*, the Court stated that Article 3 requires States to ensure that prisoners are not subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. There have been several other statements to this and like effect.

*Ahmad v. United Kingdom*

79. The appellant has relied heavily upon this case. The United States had requested the extradition from the United Kingdom of six individuals, including Mr. Ahmad, to stand trial on various terrorism-related charges. They opposed the request on the basis that if extradited and convicted they would be at real risk of ill-treatment, either as a result of conditions of detention at a "supermax" detention facility or by the length of their possible sentences. The applicants' extradition was ordered and, having exhausted their domestic remedies, they lodged applications with the court in Strasbourg.

80. At paragraph 178 of its lengthy judgment, the Court drew together a number of factors which are instrumental in its analysis of Article 3 violations:

> "178. Equally, in the context of ill-treatment of prisoners, the following factors, among others, have been decisive in the Court's conclusion that there has been a violation of Article 3:
>
> - the presence of premeditation (*Ireland v. the United Kingdom*, cited above, Â§ 167);
>
> - that the measure may have been calculated to break the applicant's resistance or will (*ibid, Â§ 167; IlaÂºcu and Others v. Moldova*and*Russia [GC*], no. 48787/99, Â§ 446, ECHR 2004 VII);
>
> - an intention to debase or humiliate an applicant, or, if there was no such intention, the fact that the measure was implemented in a manner which nonetheless caused feelings of fear, anguish or inferiority (*Jalloh v. Germany*[GC], no. 54810/00, Â§ 82, ECHR 2006 IX;*Peers v. Greece*, no. 28524/95, Â§ 75, ECHR 2001 III);
>
> - the absence of any specific justification for the measure imposed (*Van der Ven v. the Netherlands,*no. 50901/99, Â§Â§ 61-62, ECHR 2003 II;*IwaÃ±czuk v. Poland*, no. 25196/94, Â§ 58, 15 November 2001);

- the arbitrary punitive nature of the measure (see*Yankov*, cited above, Â§ 117);

- the length of time for which the measure was imposed (*Ireland v. the United Kingdom*, cited above, Â§ 92); and

- the fact that there has been a degree of distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (*Mathew v. the Netherlands*, no. 24919/03, Â§Â§ 197-205, ECHR 2005 IX).

The Court would observe that all of these elements depend closely upon the facts of the case and so will not be readily established prospectively in an extradition or expulsion context."

81. Although informative, it is difficult to see how the point made in that part of the judgment can directly feed into this appeal. The Court continued by stating that:

"179. Finally, the Court reiterates that, as was observed by Lord Brown, it has been very cautious in finding that removal from the territory of a Contracting State would be contrary to Article 3 of the Convention. It has only rarely reached such a conclusion since adopting the*Chahal j*udgment (see*Saadi,*cited above Â§ 142). The Court would further add that, save for cases involving the death penalty, it has even more rarely found that there would be a violation of Article 3 if an applicant were to be removed to a State which had a long history of respect of democracy, human rights and the rule of law."

82. The Court then addressed the issue of detention and mental health at para. 215:

"215. The Court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 of the Convention and that the lack of appropriate medical care may amount to treatment contrary to that provision (see*SÂ³awomir MusiaÂ³ v. Poland,*no. 28300/06, Â§ 87, 20 January 2009 with further references therein). In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. The feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder calls for increased vigilance in reviewing whether the Convention has (or will be) complied with. There are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant (ibid. and*Dybeku v. Albania*, no. 41153/06, Â§ 41, 18 December 2007)."

83. The third applicant in the case was diagnosed as having Asperger's Syndrome. The

first and fifth applicants also had mental health conditions. Nonetheless, the Court was not satisfied that their detention at the supermax facility in question would lead to a violation of Article 3 ECHR:

> "224. … [T]o the extent that the first, third and fifth applicants rely on the fact that they have been diagnosed with various mental health problems, the Court notes that those mental health conditions have not prevented their being detained in high-security prisons in the United Kingdom. On the basis of Dr Zohn's declaration, it would not appear that the psychiatric services which are available at ADX would be unable to treat such conditions. The Court accordingly finds that there would not be a violation of Article 3 in respect of these applicants in respect of their possible detention at ADX."

84. Although it decided that it was not in a position to rule on the merits of the application of the second applicant (who had been diagnosed with schizophrenia), it otherwise held that there would be no violation of Article 3 of the Convention on the facts of the case. The second applicant subsequently had his surrender prohibited on the basis that there was a real risk that his extradition would result in a significant deterioration in his mental and physical health, capable of reaching the Article 3 threshold (see*Aswat v United Kingdom*(App. No. 62176/14), judgment of the 16th April, 2013). In*Aswat,*the Court distinguished the position of the second applicant from that of the others "on account of the severity of his mental condition" (para. 57). The Court noted that, unlike the other applicants, he had had to be transferred from HMP Long Lartin to a high-security psychiatric hospital in the UK and that it was appropriate for him to remain there "for his own health and safety" (para. 55). Moreover, the Court accepted the evidence of Dr Claire Dillon, Consultant Forensic Psychiatrist, that the second applicant's schizophrenia was "characterised by auditory hallucinations, thought disorder, delusions of reference, grandeur and guarded and suspicious behaviour" (para. 51) and that interference with his medication while in prison may lead to a relapse. The critical point is that both*Ahmad*and*Aswat*, like every other case, were decided on the basis of their own particular facts and the evidence presented.

**Proper Test where extradition is objected to on the basis of Article 3 ECHR**

85. Ultimately, I am satisfied that whether one applies the tests in*Rettinger, O'Gara,*and*Marques*, on the one hand, or the principles ascertainable from the jurisprudence of the European Court of Human Rights, on the other, makes no difference of substance. The test set out by Denham J. in*Rettinger*was expressly said by her to be adopted in its entirety from the principles set out by the ECtHR in*Saadi v. Italy*(App. No. 37201/06) (2009) 49 EHRR 30. Her judgment was also heavily influenced by the judgment in*Orchowski v. Poland*(App. No. 17885/04, European Court of Human Rights, judgment of the 22nd October, 2009).*Rettinger*in turn informed the subsequent case law in this jurisdiction. The appellant has relied solely on*Ahmad v. United Kingdom*in his written submissions, but the principles laid down in that case and the ECtHR's analysis of the facts are in fact entirely consistent with the approach which the Irish courts have taken to the issue. Indeed*Ahmad v. United Kingdom*was considered and cited by Donnelly J. at paragraphs 9.23-9.24 of her judgment in*Marques.*

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

> • Some authorities say that "substantial grounds" must be established such as would give rise to a real risk; others say

"reasonable grounds". Given the difficulty of obtaining credible evidence which is current at the time of hearing, I would prefer the latter, though in substance there may be no difference between the two.

• A respondent does not have to show that if returned he would or probably would suffer a violation of his Article 3 rights: a real risk thereof is sufficient.

• Neither the objectives of the Framework Decision nor those underpinning the Washington Treaty can defeat an established risk of ill-treatment.

87. Regardless of whether the proper test is couched in terms of "reasonable grounds" or "substantial grounds", it may be thought that in some respects this is not a difficult bar for a proposed extraditee to overcome: the combination of "reasonable/substantial grounds", allied to the inherently forward-looking assessment of "real risk", may at first blush suggest a low threshold to be met in order to prevent one's extradition. This is not so. There is a default presumption that the other country will act in good faith and that it will respect a proposed extraditee's fundamental rights; although this presumption is weaker and more easily rebutted in respect of countries outside of the European Arrest Warrant system, it remains in play and it is for the proposed extraditee to rebut (see, foe example, the judgment of Edwards J. in*O'Gara*at para. 10.3). The basis for this presumption is the underlying principle of mutual trust, reciprocity and confidence which goes to the heart of the bilateral/multilateral extradition arrangements that have been entered into by the State on the international plane. Experience has shown that the presumption can indeed be rebutted, but such a conclusion will not be reached lightly. Thus while the courts will conduct a rigorous inquiry into any proposed objections to extradition, intervening where necessary to safeguard the subject respondent's fundamental rights, the onus is on that person to establish by evidence that there is a real risk of a violation of such rights if surrendered and extradited. In so stating I am not endeavouring to set forth any new principle, but merely summarising the practice that the courts in this jurisdiction have hitherto engaged in when called upon to assess the objections so raised.

88. Accordingly, it is the*Rettinger*principles, as subsequently explained and adapted in the*O'Gara*and*Marques*cases in relation to extradition to the U.S., which form the applicable test in an Article 3 situation: the question, as stated, is whether the evidence establishes that there is a real risk that, if surrendered and extradited, the proposed extraditee will be subjected to torture or inhuman or degrading treatment. This test applies where the objection raised is based on what is prohibited by that provision, including where a person who is suffering from a mental condition or disorder would be detained in a foreign country. As one can never be definite regarding future events, the aim of the exercise is to measure risk. This requires a fact-specific inquiry conducted in part against known facts and in part against future events. The matters for consideration will inevitably be particular to the person concerned and may range over an extensive area; likewise in relation to the prison conditions, and perhaps even in respect of the legal and judicial regimes of his intended destination. The exercise so conducted should and must be as thorough as the facts and circumstances demand.

**Issue Three**

89. A number of general points, none of which can possibly be controversial, can be made as an introduction to this issue. First, imprisonment is inherently distressing for any person and unlikely in the vast majority of cases to improve one's health or wellbeing, irrespective of their medical condition. Accordingly, the suggestion that any

deterioration in a person's health as a result of imprisonment will amount to a violation of their rights cannot be sustained. Secondly, it is a matter of high probability that a person with Asperger's Syndrome will find imprisonment, particularly in a foreign jurisdiction, more difficult than would someone without such condition: though relevant, this is not an end in itself. Thirdly, separation from one's family, which frequently follows, is an intrinsic consequence of extradition and at a*per se*level does not amount to a violation of one's rights.

90. It is not clear that any point of law, within the meaning attributed to that term at paras. 53 and 54,*supra,*truly arises on any aspect of this appeal. The Court of Appeal took the view that what the appellant had asked it to do was to reach a different conclusion to that of the High Court on the same facts, without demonstrating how the trial judge erred in his approach to or evaluation of the evidence giving rise to his ultimate findings. If that was the true situation, then quite clearly the manner of appellate review requested was not available. Something more fundamental than that is required. In short, an error of law, howsoever arising, must be established. As the Court of Appeal could not discern the existence of any such error, nor had the appellant even identified any such purported error, it concluded as it did.

91. The situation before this Court, however, may be different, given the terms on which leave was granted and the manner in which the case was ultimately argued. Before addressing why this is so, I should say that in trying to identify what the "point of law" might be, I cannot discern from the appellant's submissions any definitive assertion that the "findings" of the trial judge, as such, could not be supported by the evidence given, nor indeed that the available evidence, if accepted, was not "credible evidence", in a technical sense. Rather, it seems to me that the suggestion, at its highest, is that the learned judge failed, on the one hand, to give due and proper weight to the evidence which favoured the position of the appellant and, on the other hand, assigned a disproportionate importance to that offered by the requesting state. Thus at most the argument is that the manner in which the evidence was weighed and balanced in this case amounts to an error of law. It would be of far-reaching consequences for the appellate structure of the courts if such an assertion, without more, could be regarded as a point of law. It cannot be the case that merely taking issue with the weight assigned by the judge to one side's evidence relative to that of the other side can be said to demonstrate an error of law; if it were otherwise, all unsuccessful litigants would invariably have a "point of law" to argue.

92. It should also be said that, as a matter of logic and practice, an appeal from the Court of Appeal to this Court cannot be broader than the original appeal from the High Court to the Court of Appeal. This Court, in granting leave to address particular points, however formulated, cannot expand the issues that were before the Court of Appeal; more particularly, in the circumstances of this case, it could not grant leave in respect of an issue that was not, and could not have been, argued before or decided by the Court of Appeal, given the statutory limitation on appeals to that court in extradition cases. However, in light of the form of the certificate and the manner in which the appeal was argued before this Court, I will address the third issue for the sake of completeness. It will be recalled that the question before the Court asks whether the condition of Mr. Davis is so severe in fact that, as a matter of law, he may not be extradited to the United States of America. Accordingly, and exceptionally, based purely on the bases mentioned, I will not merely adopt the same approach as the Court of Appeal and dismiss this point*in limine*, but rather will engage in a re-evaluation of the evidence.

**Approach of the High Court to Evidence**

93. In the High Court, no oral evidence was called by either party and no affidavit

deponent was cross-examined on his or her evidence. It was not entirely clear why this is so, especially as regards the medical evidence, where most of the relevant witnesses were within this jurisdiction; naturally the evidence given by the requesting state posed more obvious difficulties. In any event, the trial proceeded on evidence by affidavit or statutory declaration only, either with the agreement of, or at least to the satisfaction of, the parties. In such circumstances, where some evidential conflict or even tension arises, what is the trial judge to do?

94. Clearly, such could not be resolved in the manner it would normally be, that is, if a plenary process was in place. Presumably the judge would first identify what the relevant and critical issues were, then what agreement or common position existed in relation to those. Next he would consider how that commonality could influence the areas of dispute. Finally, he would isolate what remained in contention and prioritise what needed resolution so as to dispose of the case. This is one possible approach, though there are several others. If at the end of the process there remains a conflict as between competing evidence, which it is not possible to resolve by direct evaluation, the judge should stand back and take a view on what is more likely than not, by reference to how the other material evidence stands at that time. In the majority of cases a definitive conclusion on the contentious point may not be critical: if it is, some alternative means of dealing with it will be required. But in a general sense, in a case such as this, particularly where anticipatory future events are in play which in any event may be incapable of being stated with any certainty, or even to the level of probability, a fair, realistic and balanced assessment of the evidence may suffice. In such a situation an appellate court, when asked to review those findings as against the evidence tendered, must have regard to the process adopted. If, despite affording a generous latitude to the views of the trial judge, the reviewing court considers that by reason of the approach, assessment or the methodology used, or for any other good cause, the conclusions reached are unsustainable and cannot be allowed to stand, then it must intervene.

95. In this case all the evidence presented was considered, as were the submissions made. Questions of hearsay and other technical evidential rules were not in play. On that basis, what the trial judge did, which was the only course open, was to make an overall assessment of what was before him. The areas in which there was agreement presented no difficulties. Matters on the fringe of those areas again did not prove troublesome.

96. The evidence can usefully be split into two groups: (i) evidence relating to Mr. Davis's Asperger's Syndrome, mental health and suicidal ideation, as well as evidence pertaining to the likelihood and severity of any deterioration in his condition resulting from incarceration in the U.S.; (ii) evidence concerning the pre-trial and post-trial detention conditions in federal facilities in the U.S., including evidence in respect of the manner in which a detainee with Asperger's Syndrome would be managed during such detention.

*i. Medical evidence concerning Mr. Davis*

97. The medical evidence in respect of the appellant was faithfully and comprehensively set out by the learned trial judge at paragraphs 82-113 of his judgment. Having read the underlying affidavits, declarations and reports in their entirety, it can be stated that it would be difficult to improve upon the account contained in the High Court judgment. Hopefully the reader will forgive the need to cross-reference that judgment.

98. Undoubtedly there was a difference of medical opinion in respect of the proper diagnosis of Mr. Davis. On the one hand, Professor Simon Baron-Cohen, Professor of Developmental Psychopathology at the University of Cambridge and Director of the Autism Research Centre in Cambridge, and Professor Michael Fitzgerald, Professor of Child and Adolescent Psychiatry at Trinity College, Dublin, were firmly of the view that a

diagnosis of Asperger's Syndrome was appropriate. Professor Baron-Cohen concluded in his initial report, having interviewed the appellant and the appellant's eldest sister, that "[t]here is no doubt in my mind that Asperger Syndrome is the correct diagnosis for Gary. He remains at suicidal risk." When asked by the High Court to address certain matters, including the severity of Mr. Davis's Asperger's Syndrome, in a supplemental affidavit, he noted that the appellant's scores on a number of tests for measuring the condition were "the most extreme scores I have seen". In another affidavit he noted that Mr. Davis is "extremely typical" of the cases of Asperger's Syndrome that he sees at his specialist clinic in Cambridge. Virtually the entirety of Professor Fitzgerald's report is set out at paragraph 87 of the High Court judgment; he concluded, also from interviewing the appellant and his eldest sister, that Mr. Davis meets the criteria for Asperger's Syndrome ICD 10.

99. On the other hand, Professor Harry Kennedy, Consultant Forensic Psychiatrist and Clinical Director at the Central Mental Hospital, Dundrum, Dublin, was far from satisfied that this was the case. His conclusion was that in spite of the absence of objective evidence, "a diagnosis of Autism Spectrum Disorder/Asperger's may be correct, though only if it is so mild as to be of no practical significance. This is because it is in the nature of the retrospective diagnosis of Asperger's Syndrome that it is almost impossible to rule out completely."

100. Though other evidence was admitted in the form of affidavits from school principals, the appellant's general practitioner, and an addiction counsellor, it is relevant principally insofar as it informed the conclusions reached by the aforementioned experts. In light of these divergent views, it is difficult to understand why no attempt at cross-examination of the relevant witnesses was undertaken, particularly those based in this country.

101. Being ever-mindful of the eminent qualifications of these expert witnesses, the Court would nonetheless observe that Professor Baron-Cohen and Professor Kennedy would each appear to have made*prima facie*valid criticisms of the other's methodology and conclusions. Though the interviews with the appellant and his sister were clearly highly influential in the diagnosis made by Professor Baron-Cohen, the same also seemed to rely at least in some measure on self-reporting and on test scores which were liable to manipulation. It must also be acknowledged that on any reading of the relevant reports, there are a number of unexplained inconsistencies in the appellant's background history. The conclusion reached by Professors Baron-Cohen and Fitzgerald also seems at odds with the manner in which the appellant presented in interview with Professor Kennedy. On the other hand, one could not but agree with Professor Baron-Cohen that Professor Kennedy appears to have used a number of one-off instances of conduct or behaviour to drawing rather sweeping conclusions that do not necessarily logically follow from the premise. For example, the suggestions that developing a relationship with a girlfriend soon after the suicide of his brother-in-law means that he was not clinically depressed, or that his failure to name his cannabis dealer to the GardaÃ for fear of reprisals for being a "rat" shows that he has normal social awareness, seem to distort the overall picture. Professor Kennedy's view that there are no examples of encompassing preoccupation of abnormal intensity is directly at odds with his earlier acknowledgement that the appellant used to be so preoccupied with playing computer games as a child that he would soil himself rather than go to the bathroom. The Court will not express a view on whether Professor Kennedy was purposefully discrediting the appellant, as Professor Baron-Cohen suggests, but would agree that some of his more pointed comments regarding malingering seem unwarranted. Given the marked divergences in professional opinion, these matters, at the very least, could usefully have been explored on cross-examination.

102. Be that as it may, the evidence was as it was. Though there was expert evidence both ways, the weight of it suggested that Mr. Davis does indeed have Asperger's

Syndrome, and of quite a severe degree at that. The evidence was such that McDermott J. was undoubtedly entitled to conclude (para. 114) that a diagnosis of Asperger's Syndrome was appropriate. Indeed, I would add that I too have reached the same conclusion, albeit with similar misgivings.

103. Such conclusion has not been put in doubt on this appeal in any event. The essential reason for this is that notwithstanding this conclusion on Mr. Davis's condition, the trial judge nonetheless ordered his extradition. Accordingly, it would seem that even taking his case at his height, the learned judge was satisfied that Mr. Davis must be surrendered. Before reviewing this conclusion, it is necessary to set out the evidence given in respect of the conditions of detention, both pre-trial and post-trial, in the United States.

*ii. Evidence concerning detention conditions and the management of the appellant's condition*

104. The critical areas of contention related to the pre-trial detention centre where the appellant might first be incarcerated if extradited and, if convicted, his post-trial detention place. With regard to the former, the appellant argued strongly that it would be in the Special Housing Unit in the MCC. His evidence to this effect was given by Mr. Herbert J. Hoelter, Chief Executive Officer and co-founder of the National Center on Institutions and Alternatives in the U.S.

105. There was, however, evidence of a direct nature that that was unlikely: the appellant's evidence was strenuously disputed by Mr. Adam Johnson, Supervisory Attorney with the Federal Bureau of Prisons assigned to the MCC, who said that there was no basis for such a contention. Mr. Johnson gave evidence of his familiarity with the operations of the MCC, including its policies concerning the conditions of confinement and the psychological and medical services available to such inmates. He said that SHUs are units where inmates are securely separated from the general population; they may be placed in such units due to either administrative detention status or disciplinary segregation status. The latter would not arise unless the prisoner in question violated detention regulations. Administrative detention occurs in a number of situations, for example to ensure the safety, security and operation of the facility, to protect the public, as a holding area pending transfer, if the inmate is under investigation for violating a regulation or the criminal law, or if detention in that unit is requested by the prisoner or by staff. He stated that none of the factors cited on behalf of Mr. Davis, grounding his suspicion of being confined in this unit, in fact supplies a reason to house a detainee in the SHU. The nature of the offence alleged, the mental and psychological condition of Mr. Davis, including his Asperger's Syndrome, the fact that he is a foreigner and the fact that his case may be considered 'high profile' would not of themselves supply any basis to have him housed in the SHU. Some further and other connecting factor would be necessary. Such factor, in Mr. Johnson's view, does not exist. Accordingly, he stated that it is highly unlikely that the appellant would be housed other than in the general population.

106. Associate Warden Regina Eldridge of the MCC also disputed the assertion that the appellant would likely be held in the SHU, saying that on the available information he was more likely to be housed in the general population. Warden Eldridge said that none of the factors cited by Mr. Hoelter in support of his submission regarding the appellant's likely incarceration in the SHU in fact supplies a basis to house an inmate in that unit. Again, it is clear that there was evidence both ways. The judge was entitled to make a call on that. I agree with the conclusion that he reached.

107. Secondly, also in contest were the facilities (including services, treatment and medication) available at either stage of detention and whether those were suitable to

respond to Mr. Davis's condition, both as it is and as it develops; such was disputed by Mr. Hoelter, who suggested from experience obtained from inmates that the practice did not correspond to what the manuals said. This was contradicted, with a number of witnesses categorically stating that services suitable to the appellant's condition would be made available to him. There was evidence from Ms. Elissa Miller, Chief Psychologist at the MCC, that many inmates with significant mental health diagnoses are successfully managed in the MCC. Her evidence was that there was no reason to believe that Mr. Davis's condition could not be managed successfully in that facility. Mr. Ralph Miller, Senior Designator at the Federal Bureau of Prisons Designation and Sentence Computation Centre, provided a declaration as to the manner in which initial health care and mental health designations are carried out when inmates enter the custody of the BOP. If medical staff determine, at any time during a prisoner's incarceration, that his medical or mental health care level requires adjustment, a request for a transfer to a more suitable facility can be submitted. Moreover, Mr. Anthony Bussanich M.D., Clinical Director of the MCC in New York, spoke in his declaration of the high-quality, cost-effective drug therapy available to the BOP inmate population.

108. There was also evidence tendered on behalf of the respondent as to what assessment takes place post-conviction and how an appropriate centre for a convicted person to serve his sentence is identified. A person's physical, mental and psychological condition is a factor in the assessment. There was also evidence, on both sides, let it be said, as to the likely destination of Mr. Davis if he should be convicted either by verdict or by plea. Both parties accepted that it was likely to be in a medium security institution. The High Court made extensive inquiry into whether Mr. Davis would have the necessary mental health services in the MCC or any other federal prison, and concluded that he would have access to such services wherever he may be imprisoned. In respect of such evidence the trial judge specifically stated that "the court also regards this evidence as a solemn assurance to the court by the Government of the United States that all reasonable and necessary care and treatment will be given to the respondent during all period of imprisonment while in the U.S." (para. 143). On that basis, the judge was entitled to make the call which he did. Moreover, contrary to the appellant's submission, the High Court judge expressly considered the manner in which he might be impacted by pre-trial detention. Having done so, he was satisfied that reasonable and adequate provision has been made within the MCC to accommodate those who have Asperger's Syndrome and/or suffer from depression. Once more, it must be said that there was evidence both ways concerning the likely conditions of detainment and the management of the appellant's condition. However, having regard to the entirety of that evidence, I agree with the conclusions reached by the learned trial judge.

*Areas of Continuing Concern to Mr. Davis*

109. Mr. Davis says that the evidence tendered by the U.S. was insufficient to dispel the real and foreseeable risk that he would suffer inhuman and/or degrading treatment if extradited. He points to five alleged deficiencies in the evidence presented, with their effect said to be that there remains a real and foreseeable risk of a breach of his fundamental rights if extradited. For the reasons which follow, none of these concerns reaches the requisite threshold to establish such a risk.

110. First, the appellant points out that the U.S. has not in fact accepted that he has Asperger's Syndrome; the most that it has committed to do is to carry out a screening assessment in accordance with its own standard operating procedures. Even if this is so, it does not indicate a real risk that the appellant's Article 3 rights will be violated. The issue pointed to by the appellant cannot displace the finding that his condition will be monitored and that adequate facilities and treatment will be available to him to help manage his condition. Second, he says that the U.S. has not rebutted the evidence that extradition will lead to a severe deterioration in his condition and will increase the risk of

suicide. However, evidence bearing directly on this issue was considered and weighed by the trial judge, and properly so, in my view. As stated by Donnelly J. at para. 9.33 of*Attorney General v. Marques*:

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

111. Third, he says that there was no evidence as to how the U.S, would in fact in any material way modify or relax its standard prison rules or procedures to accommodate the needs of a person suffering with Asperger's Syndrome. However, even if the tendered evidence did not suggest any structural alterations to the prison regime in place, as such, what was stated was that the appellant's individual condition would be appropriately treated in accordance with the procedures presently in place. In addition, it was also said that if further specific care was needed, the same would be provided. The learned judge was entitled to find that this ground of objection did not give rise to concerns regarding the appellant's Article 3 rights.

112. Fourth, he submits that there was no evidence as to where geographically in the U.S. he would be imprisoned if convicted. Accordingly, the full impact on his family relationships cannot be assessed, nor can any real evaluation of the probable conditions of detention be made. The appellant is correct that it is not known where he will be imprisoned if convicted. Again, however, that fact alone cannot weigh the balance of the assessment away from extradition. Even it being accepted that all prisoners will find imprisonment in a foreign country, away from their family, inherently difficult, and that this will likely be exacerbated by the appellant's condition, this too does not of itself amount to a violation of the Convention. The evidence simply fails to establish the same.

113. Fifth, Mr. Davis submits that there was no evidence of any special accommodation of the additional needs of a foreign national suffering from Asperger's Syndrome. This is so. However, evidence of this nature is not a pre-requisite to an extradition order. His argument does no more than speak to the cumulative effect of his condition and his incarceration in a foreign country; the combined effect of these two factors was manifestly taken into account by the High Court throughout its analysis.

114. 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. Having done so, I am satisfied that the findings reached by the trial judge were not only open to him on the evidence, but were in fact correct. I too have concluded, from a full review of the evidence, that Mr. Davis has not established that there is a real risk that his fundamental rights will be breached if he is extradited to the U.S. to stand trial.

**The*Lauri Love*case**

115. Subsequent to the hearing of this appeal, the solicitor for Mr. Davis wrote to the Court in order to bring its attention to the decision of the UK High Court in*Lauri Love v. The Government of the United States of America*[2018] EWHC 172 (Admin), delivered on the 5th February, 2018. The U.S. sought Mr. Love's extradition to stand trial in relation to a series of cyber-attacks on the computer networks of private companies and U.S. Government agencies in order to steal and then publicly disseminate confidential information found on the networks. Federal indictments were returned by Grand Juries levelling charges of,*inter alia*, conspiracy to access a computer without authority and to obtain information from a U.S. department or agency, computer hacking, aggravated identity theft, and conspiracy to damage a protected computer and to commit access device fraud.

116. Mr. Love, a British/Finnish national, suffers from Asperger's Syndrome. District Judge Tempia, sitting at Westminster Magistrates' Court on the 16th September, 2016, having rejected Mr. Love's objections to surrender, decided to send his case to the Secretary of State for the Home Department for her decision whether to order his extradition to the United States of America. Mr. Love brought an appeal to the High Court. The principal issues before the court were i) whether the judge was wrong to hold that the "forum bar" in section 83A of the Extradition Act 2003 did not prevent Mr. Love's extradition; ii) whether his extradition would be unjust or oppressive by reason of his physical or mental condition, and iii) whether various rights guaranteed by the ECHR, notably those under Articles 3 and 8, would be breached in the light of his health and the conditions he would face in the United States.

117. The High Court, in a joint judgment of the Lord Chief Justice, Lord Burnett of Maldon, and Mr. Justice Ouseley, held for Mr. Love in relation to the first and second issues above outlined; the court therefore found it unnecessary to consider Articles 3 and 8 ECHR. In light of its conclusion on extradition, the court was of the view, recognising the gravity of the allegations made and the harm done to the victims, that a prosecution in the UK should follow.

118. The "forum bar" issue is of no direct relevance to the within appeal. Of more interest is the High Court's finding that it would be oppressive to extradite Mr. Love to the U.S. based on "the particular combination of circumstances" in the case. It must be acknowledged frankly that there are some obvious similarities between the two cases. This is clear even from a surface level examination, in that Mr. Love's Asperger's Syndrome formed a large part of his objection to surrender, and certainly was influential in the Court's analysis. There are also more specific parallels that stand out. The primary evidence in support of Mr. Love's assertion that he has Asperger's Syndrome, which does not seem to have been seriously contested, was given by Professor Baron-Cohen, who of course also gave similar evidence on Mr. Davis's behalf. Likewise, evidence was led as to the possibility of Mr. Love being detained in an SHU at the MCC or another BOP facility,

the Metropolitan Detention Center in Brooklyn, New York.

119. However, an important distinction between the two cases is the relative strength of the evidence presented by Mr. Love in support of the risk of suicide should he be extradited. It will be recalled that in the present case, McDermott J. was struck by the absence of any ongoing active treatment or counselling offered to, or availed of by, Mr. Davis in respect of his depression or anxiety which is said to involve suicidal ideation (para. 113). The learned judge further noted his concern regarding the "complete absence of any evidence that Mr. Davis is in receipt of any on-going medical provision or treatment for depression involving suicidal ideation" (para. 115). There was no objective evidence of his attempt at suicide as a teenager. There was no evidence that he had attended the recommended specialists for therapy for his Asperger's Syndrome and he had disavowed suicidal thoughts through a series of attendances with his general practitioner. Although he had expressed such thoughts in a session in October, 2015, no further steps were advised at that time. There was no evidence that Mr. Davis is under the active treatment of a psychiatrist or psychologist.

120. That is in stark contrast to the evidence of suicidal ideation in Mr. Love's case. Evidence was given by Professor Baron-Cohen (see paras. 78-81), a Professor Kopelman (see paras. 32 and 83), Mr. Love's own father (see paras. 61-65), who is a prison chaplain by trade, and by Mr. Love himself (see para. 83). All such evidence suggested a very real and pressing risk of suicide. For example, Professor Baron-Cohen described him as "is a very vulnerable young man with a very high risk of suicide" (para. 78); Professor Kopelman was of the opinion that "there would be a high risk of a suicide attempt were Mr. Love to face extradition" (para. 83); his father referred to the fact that Mr. Love has had suicidal thoughts for years (para. 61); and Mr. Love regarded it as highly likely that he would commit suicide, with it being "vital to prevent… by any means necessary" his being taken into custody and placed on a plane for America (para. 89). This evidence all seems to have been accepted by the High Court. There was, moreover, convincing evidence of a history of severe depression (para. 121). Emphasis also seems to have been placed on Mr. Love's severe eczema and its two-way interaction with his mental state, in that the more stressed he becomes, the worse his eczema grows, and the more his skin condition deteriorates, the more stressed he gets (see,*e.g.*paras. 70-71 and 86). In addition, reference was made to Mr. Love's asthma. The Court clearly was of the view that the measures required to prevent Mr. Love from committing suicide would themselves be likely to have an adverse effect on his mental and physical wellbeing (para. 115).

121. Finally, it is evident that on the evidence presented in that case, the UK High Court was not satisfied that Mr. Love's condition could adequately be treated in the proposed places of detention in the U.S. (para. 116). There was no "satisfactory and sufficiently specific evidence" that his combination of severe problems, that is, his Asperger's Syndrome, his depression, and his eczema, could be treated in any of the U.S. prisons to which he might be sent. It was based on this combination of factors that the Court held that it would be oppressive to extradite Mr. Love.

122. Ultimately, despite some apparent similarities between the cases, I do not believe that Mr. Love's case can greatly avail the appellant. That case, like this one, was decided on the basis of its own particular facts and the strength of the evidence that was presented to the Court. The High Court, and now, exceptionally, this Court, have evaluated the evidence in Mr. Davis's case according to a well-established test which properly safeguards the constitutional and ECHR rights of the proposed extraditee. On the basis of said evaluation, both courts have concluded that the extradition of Mr. Davis would not violate his fundamental rights. Of course there may come a case at a later date in which a court validly concludes, on the evidence presented, that a proposed extraditee suffering from Asperger's Syndrome or other mental or psychological disorder

cannot be extradited to a certain country for fear of a breach of that person's fundamental rights stemming from an inability to properly treat their condition in the requesting state, or some other factor connected with the disorder. Any such objections will of course be evaluated in accordance with the test discussed in this judgment. My conclusion on the evidence in this case is that Mr. Davis has not established that there is a real risk that his fundamental rights will be infringed if he is extradited to the U.S.

**Conclusion**

123. In answer to the questions posed, it may be said, first, that issues of fact can sometimes be regarded as issues of law for the purposes of an appeal under section 29(5) of the 1965 Act, as amended. Such will occur in the circumstances set out earlier in this judgment, which has in effect reiterated well-known principles regarding the manner in which issues of fact may give rise to issues of law generally.

124. Second, the State is obliged under the Constitution to protect vulnerable persons suffering from mental illness within the context of an extradition application; indeed such duty extends to all persons, not just those suffering from mental illness. It is for the proposed extraditee to establish by evidence that there are substantial grounds for believing that if he were extradited to the requesting country he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR or equivalent fundamental rights under the Constitution.

125. Finally, having reviewed the evidence in its entirety, I am satisfied that McDermott J. was entirely justified in reaching the conclusion that Mr. Davis has not demonstrated such a risk, a conclusion which is objectively justified on the facts of this case. Accordingly, I would dismiss his appeal.