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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

IN THE MATTER OF THE EXTRADITION ACT 2003

BETWEEN:

KEVIN BARRY HARKIN

Appellant

-v-

REPUBLIC OF IRELAND

Respondent

Before: McCloskey LJ and Rooney J

Representation

Appellant: Mr Sean Doherty, of counsel, instructed by Quigley, Grant and Kyle Solicitors

Respondent: Mr Stephen Ritchie, of counsel, instructed by the Crown Solicitor's Office

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McCloskey LJ (delivering the judgment of the court)

Outline

[1] This renewed application for leave to appeal is brought by Kevin Barry Harkin ("the appellant"). The application has its origins in a European Arrest Warrant ("the warrant") dated 4 September 2019 and signed by Mr Justice Binchy of the High Court of Ireland (the "requesting state"). The warrant describes the appellant as a male person of Irish nationality now aged 36 years and residing in

Derry. It is a so-called "accusation" warrant which seeks the extradition of the appellant to the requesting state to be tried for offences of extortion and demanding money allegedly committed in April 2016.

[2] The criminal process in the requesting state had reached the stage where the appellant had been returned for trial. The warrant was precipitated by the appellant absconding while on bail. A certificate from the NCA followed on 23 April 2020. The execution of the warrant followed the arrest of the appellant on 6 August 2020 in Northern Ireland in respect of suspected driving offences. This gave rise to a prosecution resulting in a sentence of imprisonment.

[3] The appellant seeks to challenge the order of Her Honour Judge McCaffrey ("the judge") dated 1 June 2021 pursuant to her decision that he be surrendered to the requesting state. In thus deciding and ordering the judge dismissed the appellant's case that his extradition would be incompatible with his rights under Articles 2, 3 and 8 ECHR in breach of section 21A of the Extradition Act 2003 (the "2003 Act") and section 6 of the Human Rights Act 1998.

Legal Framework

[4] The general legal framework was outlined in the recent decision of this court in *Dusevicius v Republic of Lithuania* [2021] NIQB 60 at [66] – [71]:

> "[66] The material provisions of the Extradition Act 2003 (the "2003 Act") are reproduced in Appendix 3 to the judgment in Mr M's case. In brief compass:
>
> i. A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since the alleged commission of the extradition offence or becoming unlawfully at large: **section 14**.
>
> ii. Where the request person is unlawfully at large or has not been convicted the court must decide whether the person's extradition would be compatible with the Convention rights under the Human Rights Act 1998: **section 21(1)** and **section 21A(1)(a)**.
>
> iii. In the case of an accused requested person the court must also decide whether the person's extradition would be disproportionate taking into account, so far as the court considers it appropriate, any or all of the matters specified in **section 21A(3)**.

iv. In the case of an accused requested person the court must order the person's discharge if it decides that the extradition would not be compatible with the Convention Rights and would be disproportionate: **section 21A(4)**.

v. Where the court considers that the physical or mental condition of the requested person is such that it would be unjust or oppressive to extradite him, it must either (a) order the person's discharge or (b) adjourn the extradition hearing until it appears to the court that this is no longer the case: **section 25**.

vi. **Section 29** regulates the powers of the High Court in cases where the appellant is the requesting state, challenging the order of the judicial authority discharging the requested person at the extradition hearing. By subsection (5) if this court allows the appeal it must quash the discharge order and remit the case to the lower court with directions.

[67] By Article 15(1) of the Framework Decision the executing judicial authority must decide whether the requested person is to be surrendered. The facility established by Article 15(2) was of particular significance in the proceedings before Belfast County Court. This paragraph provides:

> "If the executing judicial authority finds the information communicated by the issuing Member State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information … be furnished as a matter of urgency and may fix a time limit for the receipt thereof …"

Article 15(3) also had a role at certain stages of the extensive inter-state communications rehearsed above. This paragraph provides:

> "The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

[68] On appeal to this court, the appeal may be allowed only if two specified conditions are satisfied namely that

(a) the first instance court ought to have decided a question differently and (b) if it had decided such question in the way it should have done, it would have been required to order the appellant's discharge: **section 27(2)** and **(3).** Alternatively, the court may allow the appeal if the new issue/new evidence conditions in **section 27(4)** are satisfied.

[69] Thus section 27 establishes two gateways for a successful appeal. The first of these arose in both appeals to this court. The second arose in the appeal of Mr M only.

[70] The Framework Decision has its origins in one of the main objectives enshrined in the TEU namely the creation of an area of freedom, security and justice. Within this general objective there is a series of constituent principles which have featured with regularity in the jurisprudence of the CJEU and the leading United Kingdom cases since the Framework Decision replaced the European Convention on Extradition (1957). The key principles which have been identified are those of a high level of mutual trust and confidence between EU Member States and mutual recognition. Recital (6) of the Preamble to the Framework Decision describes the latter principle as the "cornerstone" of judicial co-operation in criminal matters. Article 1(2) gives effect to this by providing that Member States are in principle obliged to execute an EAW: see, amongst other cases, *Melloni v Ministerio Fiscal (*Case C-399/11*)* and *Minister for Justice and Equality v Lanigan (*Case C-237/15*)* at [36].

[71] While the duty of a requested state to give effect to the execution and surrender provisions of the Framework Decision is very much the norm, it is not absolute. This is so because of, firstly, recital (10) in the Preamble which states that the implementation of the EAW mechanism is capable of being suspended, but only in the event of serious and persistent breach by one of the Member States of the principles enshrined in Article 2 EU and in accordance with the procedure prescribed in Article 7 EU. Furthermore, the jurisprudence of the CJEU has recognised that limitations to the principles of mutual recognition and mutual trust and confidence may be appropriate in "exceptional circumstances": See Opinion 2/13 (EU:C:2014:2454) at [191]. The Charter of

Fundamental Rights of the EU (the "Charter") is another limiting measure. Article 1(3) of the Framework Decision provides, in substance, that its procedures and arrangements operate in the context of the unmodified obligation of Member States to respect fundamental rights contained in inter alia the Charter."

[5] Having regard to the resistance to extradition mounted by the appellant at first instance and the grounds upon which he seeks to challenge the decision and order of the judge it is convenient to reproduce [72] – [76] of *Dusecvicius* at this juncture:

> "[72] The interaction between the governing principles and the aforementioned limitations was addressed by the CJEU in its landmark decision in Criminal Proceedings against *Aranyosi* and *Caldararu* (Joined Cases C-404/15 and C-659/15 PPU) ("*Aranyosi*"). The essential question raised in these combined preliminary references was the duty of the requested state in a case where there is evidence that detention conditions in the requesting state are incompatible with fundamental rights, in particular Article 4 of the Charter (the analogue of Article 3 ECHR).
>
> [73] The following are the main tenets of the decision of the Grand Chamber:
>
> i. There is, in substance, a presumption that all Member States comply with EU law and particularly the fundamental rights recognised by EU law, save in exceptional circumstances: see [78] and [82].
>
> ii. There is a "binding" obligation on Member States to comply with the "absolute" provisions of Article 4 of the Charter: [84] – [85].
>
> iii. "It follows that, where the judicial authority of the executing Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State … [it] is bound to assess the existence of that risk when it is called upon to decide on the surrender to the authorities of the issuing Member State of the individual sought by a European Arrest Warrant" [88].

iv. Where there is such evidence, the first task of the executing judicial authority is to consider "information that is objective, reliable, specific and properly updated" on the detention conditions prevailing in the requesting State: [89].

v. If, having performed this task, the executing judicial authority finds that there is a real risk in the foregoing terms, this cannot per se warrant a refusal to surrender the requested person: [91].

vi. Rather, where such a finding is made, a second task for the executing judicial authority crystallises, namely to make "a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State": [92] – [94].

vii. In performing this second task, the executing judicial authority "must" invoke Article 15(2) by requesting of the requesting State the provision of "all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State": [95] – [97].

viii. "If, in the light of the information provided pursuant to Article 15(2) … and any other information that may be available to the executing judicial authority, that authority finds that there exists, for the individual (concerned) …. a real risk of inhuman or degrading treatment … the execution of that warrant must be postponed but it cannot be abandoned": [98].

ix. At this stage, two possibilities arise. First, where the executing judicial authority, having considered all available information, discounts the existence of a real risk of a violation of Article 4 it must make a surrender decision: [103]. Second, "if the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide

whether the surrender procedure should be brought to an end": [104].

[74] As the judgment in *Aranyosi* demonstrates, there is a fusion of Article 4 of the Charter and Article 3 ECHR and, in substance, an adoption by the Grand Chamber of the Article 3 tests and principles which have been developed in the jurisprudence of the ECtHR. This observation is apposite having regard to the decision of the latter court in *Othman v United Kingdom* [2012] 55 EHRR 1. One of the issues which arose in that case, which concerned the proposed deportation of the applicant to Jordan for the purpose of being tried for alleged terrorist offenses, was whether this would infringe his rights under Article 3 ECHR. This entailed consideration of the "*Soering*" test namely whether there was sufficient evidence of a cogent nature to establish substantial grounds for believing that the applicant would be at real risk of being subjected to treatment proscribed by Article 3 (*Soering v United Kingdom* [1989] 11 EHRR 439). Where such a risk is demonstrated, an implied obligation arises under Article 3 not to deport the person concerned. Furthermore, given the absolute prohibition enshrined in Article 3, the reasons advanced for the expulsion are immaterial. In *Othman* the Strasbourg Court observed, at [186], that in cases where the requested state seeks and receives assurances from the requesting State, the task of the court is "… to examine whether the assurances obtained in a particular case are sufficient to remove any real risk of ill treatment." The court elaborated at [187]:

> "In any examination of whether an applicant faces a real risk of ill treatment in the country to which he is to be removed the court will consider both the general human rights situation in that country and the particular characteristics of the applicant. In a case where assurances have been provided by the receiving State, those assurances constitute a further relevant factor which the court will consider. **However, assurances are not in themselves sufficient to ensure adequate protection against the risk of ill treatment.** There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the

applicant will be protected against the risk of ill treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time."

[75] Continuing, the court observed at [188], that cases in which the general human rights situation in the receiving State would preclude the attribution of any weight at all to assurances given would be rare. The judgment then provides the following guidance, at [189]:

> "More usually, the court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the court will have regard, inter alia, to the following factors:
>
> - (1) whether the terms of the assurances have been disclosed to the court 81 ;
> - (2) whether the assurances are specific or are general and vague 82 ;
> - (3) who has given the assurances and whether that person can bind the receiving state 83 ;
> - (4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them 84 ; ***59**
> - (5) whether the assurances concerns treatment which is legal or illegal in the receiving state 85 ;
> - (6) whether they have been given by a Contracting State 86 ;
> - (7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances 87 ;

- (8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers 88 ;

- (9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible 89 ;

- (10) whether the applicant has previously been ill-treated in the receiving state 90 ; and

- (11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State."

[76] We have already adverted to the symmetry between Article 3 ECHR and Article 4 of the Charter, clearly discernible in *Aranyosi.* In addition there is a clearly identifiable correlation between the detailed guidance in [189] of *Othman* and the albeit less prescriptive approach of the Grand Chamber in [89] – [98] of *Aranyosi.*

[6] The judgment in *Dusevicius* continues at [85] – [87]:

"[85] The themes and principles addressed so extensively by the Grand Chamber in *Aranyosi* resurfaced in its more recent decision in *Dorobantu* [Case C-128/18), in which judgment was given on 16 October 2019. Once again this decision was generated by the preliminary reference mechanism. It involved a case in which the requesting state was Romania and the requested state was Germany. The questions referred related to the minimum standards for custodial conditions prescribed by Article 4 of the Charter in the context of the EAW and surrender

procedures. The ruling of the Grand Chamber, at [85], was in four parts:

"Article 1(3) of Framework Decision 2002/584, read in conjunction with art.4 of the Charter, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment within the meaning of art.4 of the Charter, take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe art.4 of the Charter of Fundamental Rights."

(ii) "As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under art.3 of the ECHR, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell."

(iii) "The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of his detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions."

(iv) "A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial co-operation in criminal matters and to the principles of mutual trust and recognition."

[86] Noting its earlier decisions *(ML et al)* the court provided the following convenient summary of their effect at [50]:

> "… Subject to certain conditions, the executing judicial authority has an obligation to bring the surrender procedure … to an end **where surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter** …"
> [Emphasis added.]

A second notable feature of this decision is the focus on <u>the actual prison</u> in which the requested person is expected to be detained: see [66]. The rationale of this is distilled from [62] – [65], namely the inter-related requirements that the assessment of the court of the requested state must be "specific and precise" and, further, must not be "limited to obvious inadequacies only." A further striking feature of the Grand Chamber's decision is its reiteration of *ML* (at [92]) that in cases where the personal space available to a detained person is

less than three square metres in multi-occupancy accommodation, this will operate as a "strong presumption" of a violation of Article 3 ECHR: see [72].

[87] Continuing, at [75], the court, drawing on the jurisprudence of the ECtHR, added that even where this minimum space requirement is satisfied, it may nonetheless be a relevant factor to be weighed in conjunction with other aspects of "inappropriate physical conditions of detention" – such as lack of outdoor exercise, natural light or air, poor ventilation, inadequate room temperature et al – in determining whether a violation of Article 3 is established: see [75] – [76]. A final notable feature of this decision is the court's identification at [79] of one specific option available to the requested state, namely it may –

> "… make the surrender to the issuing Member State of the person concerned by a European Arrest Warrant subject only to compliance with (Article 4 of the Charter)."

The court's expressed rationale for formulating this option was that of avoiding compromise of the efficacy of the Framework Decision by fortifying the principles of mutual trust and recognition upon which it is based."

The Appeal

[7] The grounds of appeal are framed thus:

> "1. The appropriate judge erred in finding that the appellant's case did not meet the required standard of demonstrating a real risk of harm contrary to Article 2 and 3, such as to oblige her to seek an assurance as to likely conditions of detention in Castlerea Prison further to the requirements of ***Aranyosi*** [2016] QB 91.
>
> 2. The appropriate judge further erred in failing to seek appropriate '*Aranyosi*' assurances regarding the mental health treatment and supervision the appellant would receive in the event of his extradition to the Republic of Ireland further to the medical report provided to the court by Dr Michael

> Curran, Consultant Psychiatrist, dated 5th March 2021."

The court will assume that "erred" is designed to denote erred in law. In counsel's skeleton argument, the linguistic formula is "erred in law and fact." No particularised error of fact is specified and there was no application to amend the Notice of Appeal.

[8] Some elaboration of the hearing at first instance is necessary. The appellant was represented by solicitor and counsel. The documentary evidence considered included a written statement of the appellant and the aforementioned report of Dr Curran. Furthermore, at the hearing, the appellant gave evidence and was cross examined. Submissions, both written and oral, were received.

[9] The other noteworthy components of the documentary evidence were these:

(i) The 2018 annual report of the Irish Inspector of Prisons which records inter alia that there is a high percentage of prisoners from the travelling community in Castlerea Prison.

(ii) The Inspector of Prisons Inspection Report relating to Castlerea Prison dated 11 March 2009 documenting a high percentage of members of the travelling community among this prison's population.

(iii) The appellant's criminal record, which discloses that he has been offending since the age of 17 accumulating a total of 120 convictions spanning a broad spectrum of criminality.

[10] At first instance the appellant made the case that following his initial arrest in respect of the subject offences he was remanded in custody to Castlerea Prison where, arising out of his alleged offending, he was attacked and beaten by other members of the travelling community. Although in his written statement he asserts "a number of violent attacks" he particularises only one. His statement also describes alleged "verbal taunting with physical threats." He asserts that the staff of Castlerea Prison "… are not receptive to complaints", further claiming that members of the travelling community run the prison. The issue to be determined by the judge at first instance is encapsulated in the following passage in the appellant's statement:

> "I am in no doubt that if I am returned to Castlerea that I will once more be subject to violent attacks on my person. My objection to the request is focused on this concern and I simply ask that an assurance be provided by the ROI indicating that I will not have to spend any prison time there. There are other prisons in the Republic which can accommodate my incarceration."

[11] The judge resolved this issue. In a nutshell, she was singularly unimpressed by these claims. She found nothing in the documentary evidence supporting the appellant's case. Her judgment continues:

> "He has not provided any supportive evidence to show that he was attacked as he asserts, he did not make any formal complaint either to the prison authorities or to the police in the Republic of Ireland, even though he confided in his solicitor. He has not provided any medical evidence either to support his assertions in relation to the injuries which he says he suffered."

From this foundation the judge concluded:

> "In my view therefore there are no substantial grounds for believing that there is a real risk of death or ill-treatment of the requisite degree of severity in the requesting state. In light of that I do not consider it necessary to seek any additional information from the requesting state on the issue."

The judge added:

> "… there is absolutely no evidence which supports a submission that the requesting state could not provide sufficient protection, particularly given that the Defendant failed to report the treatment to which he says he was subjected."

The judge then considered, and rejected, the appellant's case based on Article 8 ECHR, a ground which is not pursued before this court.

[12] The report of Dr Curran was the product of a Zoom video conference with the appellant on 5 March 2021. The first noteworthy feature of this report is the account given by the appellant of his previous sojourn in Castlerea Prison. There are four especially noteworthy matters. First, he alleged that he was "regularly attacked" without providing <u>any</u> particulars of his alleged assailants, the nature of the attacks, the dates or any injuries sustained. Second, he gave <u>no</u> description of the <u>single</u> attack recounted in his written statement. Third, his description of "the threat of a pole being inserted into my anus" was elevated by him to the level of an <u>actual</u> attack (the only one) in his witness statement. Fourth, he did not point to any visible sign of injuries sustained.

[13] Dr Curran's diagnostic formulation was expressed in these terms:

> "Anxiety state – mild to moderate fluctuations with occasional panic attacks etc – secondary to a court hearing in the near future regarding his extradition to another jurisdiction."

Dr Curran was obliged to enter two caveats, which the court considers to be of undoubted significance. The first was the unsatisfactory mechanism of conducting a psychiatric assessment via video conferencing. The second was the unavailability to Dr Curran of the appellant's medical notes and records. Finally, Dr Curran made certain recommendations about the oversight and assistance which the appellant should receive in the event of the prison transfer materialising.

Our Conclusions

[14] Having regard to the nature of the exercise conducted by the judge at first instance and the case made at both judicial levels by the appellant there are certain additional elements of the governing legal framework which must be highlighted. First, in cases where an appeal is not based on an asserted pure error of law but, rather, raises issues of fact, the High Court will ordinarily accord due respect to the first instance judge's treatment of the relevant factual issues: see *Wiejak v Olsztyn Circuit Court of Poland* [2007] EWHC 2123 (Admin) at [10], per Sedley LJ, a passage frequently quoted subsequently, for example *Sbar v The Court of Bologna* [2010] EWHC 1184 (Admin) at [4]. This will apply with some force in cases where (as here) the judge has received oral evidence and has made findings based thereon.

[15] Second, in cases where resistance to extradition is based on Article 3 ECHR, the threshold for success is a high one. This arises from the leading decision of the Strasbourg Court in *Soering v United Kingdom* [1989] EHRR 439, considered in extenso by this court in *Dusevicius v Lithuania* [2021] NIQB 70 at [138]ff. As stated by Lord Bingham in *R (Ullah) v The Special Adjudicator* [2004] 2 AC 323 the successful invocation of Article 3 ECHR – "… demands presentation of a very strong case … it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment …" The test, Lord Bingham added, is a "stringent" one. As this passage makes clear this elevated test applies equally to Article 2 ECHR cases.

[16] Third, where (as here) the asserted future harm relates to the conduct of non-State agents the requested person must (a) satisfy the *Soering* test and (b) demonstrate that the requesting state will not provide a reasonable level of protection against the asserted harm. In short, per Lord Brown in *R (Bagdanavicius) v Home Secretary* [2005] 2 AC 668, in non-state actors cases the additional requirement is to show that "… the state has failed to provide reasonable protection": see paragraph [24].

[17] Our first conclusion is that the decision at first instance suffers from no error of law, material or otherwise. The judge correctly identified the governing legal

principles by reference to the relevant authorities and made a decision consonant with the relevant provisions of the 2003 Act. There was no misunderstanding of the law, no omission of any relevant legal principle and no misconstruction of statute.

[18] Our second conclusion is that we can identify no material error constituting an error of law or error of fact or a combination of both in the judge's assessment of the evidence adduced and her ensuing findings and conclusions. In every respect the exercise conducted was beyond reproach. As a matter of legal principle this conclusion of necessity gives effect to the threshold for intervention on the part of an appellate court set out in [14] above. However, it is appropriate to add that if this were an outright appeal on the merits in relation to these purely factual matters this court would not hesitate to concur in full with the judge. Indeed, as our analysis of the evidence above demonstrates – see in particular [12] – there are further and additional grounds firmly buttressing what the judge decided. Ultimately, the central thrust of this appeal resolves to a mere disagreement with the judge's assessment of the evidence adduced and her ensuing findings and conclusions, all of which we consider to be beyond reproach.

[19] The <u>second</u> ground of appeal fails on the same principled basis as the first. In a sentence, there is no discernible error of law or fact or any combination of both in the judge's assessment of Dr Curran's written evidence and her decision that his report should be made available to the Castlerea Prison authorities. Neither Dr Curran's report nor any other piece of evidence provided any basis whatsoever for the invocation of the *Aranyosi* procedure. Furthermore, this aspect of her decision chimes fully with the approach adopted in *HEM v The State Attorney's Office, Dusseldorf Germany* [2014] NIQB 144 at [18] – [19].

Disposal

[20] For the reasons given there is no basis for concluding that the decision of Her Honour Judge McCaffrey is open to challenge in any material respect and, concurring with the single judge, McFarland J, this court refuses leave to appeal.

Costs

[21] On behalf of the applicant counsel applied for legal aid at the conclusion of the hearing. The power of both the first instance court and the High Court to grant free legal aid is contained in Section 184 of the Extradition Act 2003:

> "**Grant of free legal aid: Northern Ireland**
>
> (1) The appropriate judge may grant free legal aid to a person in connection with proceedings under Part 1 or Part 2 before the judge or the High Court.

(2) A judge of the High Court may grant free legal aid to a person in connection with proceedings under Part 1 or Part 2 before the High Court or the **[F3**Supreme Court**]**.

(3) If the appropriate judge refuses to grant free legal aid under subsection (1) in connection with proceedings before the High Court the person may appeal to the High Court against the judge's decision.

(4) A judge of the High Court may grant free legal aid to a person in connection with proceedings on an appeal under subsection (3).

(5) Free legal aid may be granted to a person under subsection (1), (2) or (4) only if it appears to the judge that—

(a) the person's means are insufficient to enable him to obtain legal aid, and

(b) it is desirable in the interests of justice that the person should be granted free legal aid.

…

(9) "'If on a question of granting free legal aid under this section or of allowing an appeal under subsection (3) there is a doubt as to whether –

(a) the person's means are insufficient to enable him to obtain legal aid, or
(b) it is desirable in the interests of justice that the person should be granted free legal aid,

the doubt must be resolved in favour of granting him free legal aid."

[22] This court is unaware of any directly relevant jurisprudence. The analogous statutory provision in England and Wales was repealed by the Legal Aid, Sentences and Punishment of Offenders Act 2012 and is now governed by Part 1 of the Access to Justice Act 1999. Also material is Article 29 of the Access to Justice (NI) Order 2003:

"Criteria for grant of right to representation

29.—(1) Any question as to whether a right to representation should be granted or extended, or whether

a limitation on representation should be imposed, varied or removed, shall be determined according to the interests of justice.

(2) In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account—

(a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation,

(b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,

(c) whether the individual may be unable to understand the proceedings or to state his own case,

(d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and

(e) whether it is in the interests of another person that the individual be represented."

[23] Mr Doherty, responding to the court's invitation to provide a written submission, advanced the following:

(a) The appellant was granted free legal aid at first instance by the appropriate judge who must have considered he was of 'insufficient means' and that the grant was in the 'interests of justice.'

(b) His financial situation has not improved since the original grant having been incarcerated at HMP Maghaberry in the interim.

(c) Whether the grant of free legal aid could be said to be in the 'interests of justice' is a matter at the discretion of this court.

(d) To grant free legal aid would be in the interests of justice particularly when the statutory provision indicates that any doubt should be exercised in the favour of the appellant.

(e) While the appellant's Article 3 ECHR case was rejected given the nature of the allegations it was entirely proper (and in the interests of justice) that these concerns were ventilated and examined both at first instance and on appeal.

[24] In response to the court, Mr Doherty candidly indicated that the renewed application for leave to appeal had been made on the insistence of the appellant in the teeth of legal advice to the contrary.

[25] Fundamentally, both the first instance court and, on appeal, the High Court are invested with a discretion. The exercise of this discretion is governed by the obligatory express statutory criteria and well established public law principles.

[26] The court's determination of this issue is as follows. First, we are disposed to accept in this particular case, without requiring supporting documentary evidence, that the first of the two statutory criteria namely that the appellant's means "are insufficient to enable him to obtain legal aid" is satisfied. We would add that satisfactory proof of compliance with this criteria will almost invariably be required in applications of this kind.

[27] The second criterion requires the court to determine whether it is desirable in the interests of justice that the appellant should be granted free legal aid. The familiar phrase "the interests of justice" is undefined and of potentially broad scope. Furthermore it is inescapably case sensitive. It requires the court to identify the material considerations in the individual case and, having done so, to determine whether the interests of justice would not be served by refusing the application for free legal aid. The effect of section 184 of the 2003 Act is that the court is appointed guardian of public funds. This requires the court to act conscientiously, scrupulously and in a coherent and consistent manner, in ascertaining the interests of justice in the individual case.

[28] We consider that one principle which shines brightly is that the grant of free legal aid is not designed for undeserving litigants. The interests of justice will generally not be undermined by the refusal of public funding in such cases. A litigant will be considered "undeserving" if the case in question is frail and unmeritorious, possessing no realistic prospect of success, subject always to the court's evaluation of the interests of justice. Frail and unmeritorious cases are unlikely to satisfy this test. We consider that in applications of this kind the court should also take into account whether it has considered it necessary to call on counsel representing the requesting state. In this respect the analogy with criminal appeals is appropriate: see *R v Maughan* [2020] NICA 19 at [15]. Where criminal appeals are concerned, it is the established practice of the Northern Ireland Court of Appeal to refuse to grant legal aid in cases where the single judge has refused leave to appeal and the court has not found it necessary to hear from counsel representing the prosecution.

[29] To this we would add that the court's evaluation and application of the second of the two statutory criteria will almost invariably be better informed at the conclusion of proceedings. In this way the court will be able to take into account a considerably broader range of material factors and, fundamentally, to make a fuller assessment of the merits of the case in question. The same approach is applied in criminal appeals: *R v Maughan* at [21].

[30] We consider that in applications of this kind the court should also take into account whether it has considered it necessary to call on counsel representing the requesting state. In this respect the analogy with criminal appeals is again appropriate. Where criminal appeals are concerned, it is the long established practice of the Northern Ireland Court of Appeal to refuse to grant legal aid in cases where the court has not found it necessary to hear from counsel representing the prosecution.

[31] As a reading of this judgment indicates this court, in pronouncing its decision ex tempore and without requiring to call on counsel for the requesting State, considered that the appellant's case was speculative and flimsy. The court considers that the interests of justice are ordinarily in no way threatened or compromised by a considered judicial decision to refuse free legal aid to litigants who insist upon pursuing cases exhibiting these characteristics. Furthermore, no identifiable facet of the public interest would be served by the judicial grant of free legal aid in such cases. Quite the contrary: we consider that the good husbandry dimension of the judicial discretion in this type of case points firmly to a refusal of public funding. Viewed through another prism, it would be irresponsible for the court to grant free legal aid in such a manifestly unmeritorious case absent some compelling factor to the contrary. While the court acknowledges that the appellant's lawyers continued to represent him following his rejection of their firm advice that the renewed application for leave to appeal should not be pursued, this factor does not begin to counter-balance those highlighted.

[32] Giving effect to the foregoing, the court concludes without hesitation that the application for free legal aid under section 184 of the 2003 Act must be refused. In the interests of providing guidance and for the benefit of practitioners we would add that the factor of the appellant's lawyers advising against the pursuit of an appeal and the client's insistence upon nonetheless doing so represents but one of the several considerations which have informed our decision in this case. If this factor had not been present, the decision of the court would have been the same. Thus the absence of this factor in other cases will not serve as a legitimate basis for distinguishing the decision of the court in the present case. Practitioners and judges alike will also consider the decision of this court in Republic of *Poland v Kochanski* [2021] NIQB [McC11625, 01/04/21].