Neutral Citation Number: [2022] EWHC 458 (Admin)

Case No: CO/160/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

3rd March 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

JOHN O'DONNELL	**Appellant**
- and –	
HIGH COURT OF THE REPUBLIC OF IRELAND	**Respondent**

- -
- -

Ania Grudzinska (instructed by Hollingsworth Edward) for the **Appellant**
Nicholas Hearn (instructed by CPS) for the **Respondent**

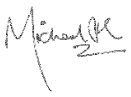
- -

Hearing date: 15/2/22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



.....

THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is an appeal in an extradition case. Permission to appeal was granted by Griffiths J on 28 July 2021 and the hearing was in-person. The Appellant is aged 58 and is wanted for extradition to Ireland. That is in conjunction with an accusation Extradition Arrest Warrant issued on 15 June 2020 and certified on 2 July 2020. It relates to 17 counts (each described as a sample count to cover a distinct two month period) of alleged sexual assault by the Appellant on his stepdaughter between May 2016 and January 2019, when she was aged 12 to 14. The maximum sentence, if the Appellant were convicted in Ireland, is 14 years imprisonment. The Appellant denies the allegations and says they are malicious. Extradition was ordered by DJ Jabbitt ("the Judge") on 12 January 2021, after an oral hearing on 12 November 2020 which resumed on 21 December 2020. In this appeal, two grounds are relied on to resist extradition: section 25 of the Extradition Act 2003; and Article 8 ECHR.

Fresh evidence and a fresh evaluation

2. At the first of the two hearing dates (12.11.20) the Judge heard evidence and submissions. He then decided to adjourn the case to resume on the second date (21.12.20). That was so that the Appellant would have the opportunity to instruct a psychiatrist to give expert evidence about his mental health condition and the impact of his extradition in terms of his mental health. In the event, the Appellant was unable to instruct a psychiatrist (I was told this was due to unaffordability of such a report) and the hearing resumed. In the context of the application for permission to appeal which was filed with this Court (18.1.21), an order was made (12.2.21) for an extension of the legal aid representation order so as to allow an expert psychiatrist to be instructed within the legal aid arrangements for this appeal. Dr Jeremy Berman, consultant forensic psychiatrist, duly provided the Court with an expert report dated 8 June 2021 ("Dr Berman's Report"), to the contents of which I will need to come. Mentioned within Dr Berman's Report is a press article from the Irish Times, dated 23 March 2021, entitled "Gardai in three-hour standoff with staff at gates of Central Mental Hospital" ("the Irish Times Article"). Also provided by him to the Appellant's solicitors (as Ms Grudzinska told me), and also placed before this Court, is a paper by G. Gulati and B.D. Kelly from the Irish Medical Journal, published (as Mr Hearn told me) on 14 March 2018, entitled "Diversion of Mentally Ill Offenders from the Criminal Justice System in Ireland: Comparison with England and Wales" ("the IMJ Paper"). In granting permission to appeal, Griffiths J gave the Appellant permission to adduce, as fresh evidence on this appeal: (i) Dr Berman's Report; (ii) the Irish Times Article; and (iii) the IMJ Paper. Griffiths J made clear, in giving permission, that the "weight" to be placed on those materials would be a matter for the Judge hearing this substantive appeal. It is common ground, in the light of that fresh evidence and in light of the permission to adduce it, that it is appropriate for this Court to conduct a 'fresh assessment' of both grounds of appeal, in which the mental health implications of extradition for the Appellant serve as a central feature. That is what I have done.

Dr Berman's Report: the Appellant's fitness to plead and stand trial

3. One discrete topic addressed in Dr Berman's Report is the Appellant ("Mr O'Donnell")'s fitness to plead and stand trial. Dr Berman's Report says this:

> ***Assessment of Fitness to Plead and Stand Trial***
>
> ***Mr O'Donnell confirmed he is charged with multiple child sex offences and the alleged victim is the daughter of his former partner. She was 12 when the alleged offences were first committed. He was aware that each offence could attract a maximum sentence of 14 years. He also confirmed that he was aware the police were investigating the alleged offences and he moved to the UK in April 2019 and was not arrested and charged until December 2019. Although Mr O'Donnell told me he was unfamiliar with the Irish court system, or the UK Crown Court trial process, he understood that by entering not guilty pleas then there would be a trial. He also understood that the prosecution would rely on the evidence of the complainant. He was able to retain and understand my explanation of the roles of the key courtroom personnel in a crown court trial.***

Dr Berman returned to this topic, in the "Opinion" section of the report:

> ***8. I have been asked the hypothetical question whether Mr O'Donnell would meet the Pritchard criteria were the criminal proceedings to be held in England and Wales. In my clinical opinion, based on the balance of probabilities, Mr O'Donnell is fit to enter a plea and stand trial according to R –v- Pritchard (1836) and subsequent case law. The most recent relevant case law with respect to his fitness to enter a plea is R v M (John) (EWCA Crim 3452 [2003]) in which the defendant on the balance of probability has to be capable of the following six things: (1) Understanding the charges; (2) Deciding whether to plead guilty or not; (3) Exercising his right to challenge a juror; (4) Instructing solicitors and counsel; (5) Following the course of proceedings; (6) Giving evidence in his own defence.***
>
> ***9. I was satisfied he was capable of all six things.***
>
> ***10. Were the case to be tried in England or Wales, Mr O'Donnell would be considered as a vulnerable defendant, as set out in Criminal Practice Directions – October 2015 (as amended April 2016, November 2016, April 2018, and May 2020) on the account of him suffering from a mental disorder, as defined by the Mental Health Act 1983 as amended. He would require regular and frequent breaks, given his reported history of impaired concentration and he is likely to be distressed by the nature of the prosecution's evidence against him and being cross examined.***

<u>The IMJ Paper and Irish Times Article: 'diversion' to a secure hospital</u>

4. A distinct strand within the fresh evidence concerns capacity within secure hospital units in Ireland, for a remand prisoner or sentenced prisoner whose mental health condition (including suicide risk) is such that they are assessed as needing to be 'diverted' from prison to such a secure hospital. What emerges from the IMJ Paper, the Irish Times Article, and that part of Dr Berman's Report which references the Irish Times Article, is this. As the IMJ Paper recognises, for both remand prisoners and convicted prisoners within an Irish custodial setting there are arrangements so that a prisoner with a mental health condition can be the subject of "assessment by visiting psychiatrist and prison in-reach team", with the "potential for diversion if the prisoner is very unwell". "Diversion", as Dr Berman explains, is something that would happen to a prisoner already on "a prison healthcare wing", whom the "prison in-reach team would consider diverting … to a secure hospital". An example, discussed by Dr Berman, is the situation of a prisoner who – notwithstanding "enhanced observations" on the prison healthcare wing "to minimise the risk of him attempting to take his own life" – presented a "suicide risk" which "could not be managed within a prison setting". As Dr Berman also explains: "As in the UK, Irish mental health law makes provisions for the diversion of remand prisoners to hospital for urgent treatment". The IMJ Paper describes the "Central Mental Hospital" ("CMH") as the sole secure hospital to which remand prisoners can, legally and directly, be diverted from an Irish prison. In relation

to diversion and sentenced prisoners, the IMJ Paper describes the "limited access to secure beds in Ireland" which "impacts on the availability of treatment", observing that "a lack of Intensive Care Regional Units (ICRU) in Ireland … impacts negatively on psychiatric diversion from … custody in Ireland". The "three-hour standoff" described in the Irish Times Article involved a remand prisoner suffering from paranoid schizophrenia, whom a court (in mid-June 2021) had ordered be taken to CMH for treatment. The Irish Times reported that the "lack of beds in the CMH has been a serious issue for many years", that there was a typical waiting list of "20-30 prisoners waiting on a bed there at any time", and that the CMH had said it was at "100 per cent bed occupancy" and that "Covid-19 had negatively impacted capacity". In relation to this topic, the relevant paragraphs within the "opinion" section in Dr Berman's Report are these:

> ***14. Were Mr O'Donnell to be remanded and extradited, then it is likely this would maintain or exacerbate his depression. He would also be deemed to be a vulnerable prisoner and given his reported intention to commit suicide, it is very likely that he will require to be transferred to a prison healthcare wing and placed on enhanced observations to minimise the risk of him attempting to take his own life. A prison in-reach team would consider diverting him to a secure hospital in Eire pre-trial, if the suicide risk could not be managed within a prison setting.***
>
> …
>
> ***18. As in the UK, Irish mental health law makes provisions for the diversion of remand prisoners to hospital for urgent treatment. This would be considered if his depression was not responding to treatment, he continues to remain a high risk of completed suicide and his mental competency to enter a plea and stand trial was in issue.***
>
> ***19. I offer no expert view on the adequacy of mental health treatment of inmates in Eire, but I do note with concern a recent report [footnote: the Irish Times Article] of considerable delay in the transfer and treatment of mentally ill inmates. If that were to be Mr O'Donnell's experience, I would be seriously concerned for his welfare and the delay it would take for him to recover from this depressive episode.***

Further putative fresh evidence: an ongoing medical investigation (JRHO)

5. There is also before the Court evidence of an ongoing medical investigation, conducted at the John Radcliffe Hospital in Oxford ("JRHO"), into the question of whether the Claimant may have early onset dementia. On this topic, by way of further putative 'fresh evidence', which she seeks permission to adduce, the Appellant's representatives have placed before the Court: (1) a letter dated 4 October 2021 from Consultant Neuropsychologist Dr Ian Baker; (2) an appointment letter dated 6 October 2021 from Neurosciences Outpatients at JRHO; and (c) a letter received (I was told) on 14 February 2022 from the Appellant's GP Dr Goyder. The picture from this further fresh evidence is, in essence, as follows. The Appellant was referred to, and had an appointment (15.9.21) at, the Cognitive Disorders Clinic at JRHO, following on from an earlier visit (21.5.21) to the Neurology Rapid Access Clinic at JRHO. There has been undertaken "MR brain imaging" which was "normal" and showed no "focal atrophy". Further, there was "no evidence of gross amnesia at present". However, a "neurological examination revealed a fine postural tremor in the upper limbs", there was "a family history of early onset dementia in both … parents", and "cognitive assessment" had been "difficult and confounded by the limited literacy and education". It has been decided to arrange a "lumbar puncture to look for tau and amyloid ratios", a procedure due to take place on 11 March 2022, which procedure is to be followed by "review …

again in clinic on receipt of this investigation". The GP, Dr Goyder, gives their "understanding … that it is still not clear what is causing Mr O'Donnell's memory disturbance and that the neurologists need the lumbar puncture to investigate further for evidence of what might be causing this"; and that this is "an important investigation" required by the neurologists "before they can be certain of the underlying diagnosis".

Adjournment

6. In light of the ongoing medical investigation at JRHO, Ms Grudzinska submitted, (a) by way of a pre-hearing application for determination on the papers and then (b) by way of an oral application at the hearing, that this case should be 'stood out' and fixed for a subsequent hearing date. In the alternative, she submitted that – having heard submissions – I should adjourn this case part-heard. The basis for these courses of action – or any of them – was as follows. This Court ought to await the outcome of the lumbar puncture procedure due to take place at JRHO on 11 March 2022. This substantive hearing had been fixed for a date just 3 weeks prior to that medical procedure. The Court ought to evaluate the legal merits of the grounds of appeal only on an informed basis. The lumbar puncture procedure could result in a diagnosis of early onset dementia. That – whether standing alone or in combination with the Appellant's mental health conditions – could be a basis for concluding that extradition would be oppressive (section 25) or disproportionate (Article 8); and/or that the Appellant is unfit to plead or unfit to stand trial; and/or that the Appellant has "complex medical conditions" which would need assurances from the Irish authorities regarding "of concrete measures". I approached the question of adjournment in stages. First, I determined that I was not satisfied, on the papers, that a basis had been demonstrated for the case being 'stood out'. Instead, the materials relating to the JRHO could be before the Court at the substantive hearing for consideration 'de bene esse' and I would hear oral submissions. Secondly, I determined at the start of the hearing that I was not prepared to 'stand out' the case without having heard the submissions on the substantive issues. I wanted to see how matters fitted together, including in the round, so I could decide whether an adjournment was justified. As it happened, that approach mirrored what the Judge had done. Thirdly, having heard the submissions and having been shown and reminded of the key materials in the case, I told the parties at the end of the hearing that I was not intending to adjourn the case "part-heard". The essential reason for that was that I would be able to 'factor in' that – put at its 'highest' so far as the Appellant resisting extradition is concerned – the ongoing JRHO investigation might, a few weeks from now, involve a diagnosis that the Appellant does have early-onset dementia. I considered it appropriate for the Court to conduct the analysis 'factoring in' that as a known prospect, evaluating its relevance and materiality for the purposes of section 25 and Article 8.

Dr Berman's Report: other aspects

7. I have referred already to those parts of Dr Berman's Report which address the Appellant's 'fitness to plead and stand trial' (see §3 above), and which address 'diversion' to a secure hospital (§4 above). It will be helpful if I address here key contents from the remaining parts of the report, setting out some further key passages. Dr Berman's Report has sections in which he does the following: describe the Appellant's background and history (employment, medical, drug and alcohol, relationship and psychiatric); review the Appellant's medical records and inmate medical records for the period of the Appellant's remand in custody to HMP

Wandsworth (20.7.20 to 31.7.20); gives an assessment of the Appellant's fitness to plead and stand trial; described a mental state examination; and gives his "opinion". As Mr Hearn noted, within the mental state examination, Dr Berman said this about the Appellant's memory: "He … described his memory 'getting bad'. Although there was no evidence of any problems with his autobiographical memory during the two-hour interview, he described absent-mindedness (forgetting on one occasion to report for bail) and an incident of poor concentration/ retrieving memories when working".

8. As part of the review of the inmate medical records, Dr Berman recorded that: "On 27 July 2020, although he was still under an ACCT" – that is, an Assessment Care in Custody and Teamwork, "opened in response to his disclosure he was experiencing suicidal thoughts" – "prior to attending court, Mr O'Donnell disclosed he had attempted to kill himself twice since he had been remanded, using a ligature". As part of the review of medical records, Dr Berman recorded that the Appellant's "GP referred him to the [local] AMHT" – which I take to mean Adult Mental Health Team – "on 4 February 2021", continuing: "The GP referral described Mr O'Donnell having tried to hang himself twice in 2020 and being discovered on each occasion. He was reporting ongoing suicidal ideation and stress with his extradition case." In the same review, Dr Berman recorded that the Appellant had "described trying to commit suicide twice while on remand at HMP Wandsworth" and having given "an account of, on both occasions, his cell mate finding him and calling prison officers to intervene". Also as part of the mental state examination Dr Berman recorded: "He also told me that he had ordered 'a lot of tablets' online and bought a Stanley knife and had researched online how to slit his wrists with fatal consequences". The same theme was identified in the review of medical records, where Dr Berman recorded: "He disclosed stockpiling tablets with the intention to overdose, buying a supply of Stanley knives, researching how to cut his vein so he would die quickly and stopping medication prescribed to reduce the risk of repeat myocardial infarctions". In another passage, also within the mental state examination, Dr Berman recorded: "I asked him whether there were any protective factors such as the effect his suicide might have on his adult children, or whether he was a man of faith. He argued that if he committed suicide before he went to trial, then his children would not have to face the shame of having a father who was convicted of child sex offences. He also told me he was not a man of strong faith".

9. Alongside other passages which I have already quoted (§§3-4 above), the "opinion" section of Dr Berman's Report contains the following:

> ***2. My opinions are based on Mr O'Donnell's uncorroborated account of his life history, as I have not seen his past medical records before he moved to the UK. Based on the account he provided me, he gave a history of significant physical abuse and emotional neglect as a child. He also gave me an account of trying to hang himself at the age of nine.***
>
> …
>
> ***4. He gave an account of taking a significant overdose approximately ten years ago after he discovered his younger sister had been diagnosed with cancer and that he intended to kill himself. He later presented to his GP with symptoms of depression approximately five to six years ago and disclosed seeing a counsellor rather than taking antidepressant medication. He also gave a history of frequent periods of feeling depressed during adulthood.***
>
> ***5. Mr O'Donnell's mental health has deteriorated since the start of the extradition process and he described a particularly traumatic time when he was briefly on remand at HMP***

Wandsworth, describing the prison officers not being caring and being attacked by his cellmate.

6. He has developed, based on the symptoms he reports, a severe depressive episode with anxiety symptoms with several biological symptoms of depression including low mood, significant sleep disturbance, anhedonia, low energy levels, poor concentration, forgetfulness, a lack of energy and symptoms of hopelessness and helplessness. He has also made (repeatedly) a conditional threat to kill himself were he to be extradited to Eire due to the stigma of the allegations made against him, even though he maintains his innocence, and he is also facing a very long custodial sentence if he is convicted.

7. Although Mr O'Donnell reported being severely depressed when I interviewed him, I also considered the possibility he might have been exaggerating some symptoms, although I was satisfied he was at least moderately depressed, as he was able to concentrate throughout a two-hour interview and I did not notice any evidence of psychomotor slowing or agitation which I would have anticipated if he was severely depressed. Also, it is unusual for someone with severe depression to describe their mood as being constantly zero out of ten with no diurnal variation at all. However, unlike other mental disorders, there is no psychometric test available to explore the possibility of exaggerating symptoms of depression and this is solely a clinical judgement.

…

11. Mr O'Donnell has consistently made conditional threats of killing himself, as he is insistent he will not be remanded again or extradited to Eire. Whether or not it would be oppressive to extradite him is a matter for the Court to determine, rather than a Consultant Forensic Psychiatrist, but I am able to comment that there are a number of historical and dynamic risk factors that would put him in a very high-risk group for attempting to or completing suicide.

12. These include being male, a family history of mental illness and suicide, a reported personal history of suicide attempts, a history of experiencing physical and sexual abuse, a history of depression, suicidal thoughts, and access to a means of suicide such as stockpiling medication and / or Stanley knives, various current clinical symptoms of moderate or possibly severe depression including insomnia, self- neglect, anhedonia, and hopelessness.

13. Furthermore, in Mr O'Donnell's case, he faces the stigma and shame of being accused of contact child sex offences even if he is acquitted of the charges he faces, and also the shame were he to be convicted and the likelihood of a very long custodial sentence.

…

15. I have been instructed to consider, if measures are put in place by the prison in Eire to prevent Mr O'Donnell from committing suicide, what effect would being on e.g. constant suicide watch have on Mr O'Donnell's mental well-being?

16. I have no expertise on the Irish Prison System, but I would envisage the Prison System would have measures in place for those assessed to be of high risk of self- harm or suicide.

17. Although the purpose of any intervention would be to minimise the risk of him taking his own life, I would anticipate Mr O'Donnell would become frustrated were he to be under constant suicide watch, although it would be difficult to predict with any certainty how he would respond under such circumstances.

…

20. I have been instructed to consider whether I am able to assess whether Mr O'Donnell's mental condition is such that it removes his capacity to resist the impulse to commit suicide?

> ***21. Mr O'Donnell has given an account of becoming depressed while on remand at HMP Wandsworth and his depression has since worsened to the extent he had to stop working shortly before I interviewed him. He was concerned with the stigma of the allegations and does not want to return to Eire to defend himself against the allegations; indeed, he would rather commit suicide than to go back to Eire and face trial.***
>
> ***22. In my opinion, if Mr O'Donnell believes, as a result of his depressed state and the impact it has on his thinking, it is the only option when weighing up options, at that point he would lose capacity / the ability to resist the impulse to take his own life. There appears to be a lack of objectivity in his decision-making processes with his depression severely impacting his ability to rationalise. Cognitive distortions, which are a feature of depression, are habitual tendencies or patterns of thinking that cause people to make appraisals that are systematically biased in particular ways. His reasoning for not wanting to return to Eire can in my opinion be understood in terms of biased thinking and as a result of his depressive illness. He has limited ways of coping with the situation he is in, and sees suicide as his only option were he to be extradited to Eire.***

The section 25 ground of appeal

10. A key question under section 25, as applicable to the present appeal, is whether the mental condition of the requested person is such that it would be oppressive to extradite him. The "well-trodden" path of the law relating to oppression and suicide risk, seen especially in Turner v USA [2012] EWHC 2426 (Admin) (including the well-known 'Turner propositions') and Wolkowicz v Poland [2013] EWHC 102 (Admin) (decided 5 months later), was identified and discussed in the recent cases of Assange v USA [2021] EWHC 3313 (Admin) at §§63-68 and (the previous year) in W v Spain [2020] EWHC 2278 (Admin) at §§27-33.

Unfitness to plead

11. I will deal first with a discrete topic concerning fitness to plead and fitness to stand trial. It was common ground that the applicable principle is that identified in W at §47:

> ***It is well established that the question of fitness to plead is something which is to be left to the requesting court to decide, if it will do so adopting a fair procedure. Where the question of fitness to plead arises, it will be no bar to extradition under s.25 of EA 2003 unless it is clear that he or she will definitely be unfit to plead; and will not necessarily be a bar even in such a case.***

Ms Grudzinska accepts that the Irish courts would address the question of the Appellant's fitness to plead, "adopting a fair procedure". She submitted that the position regarding the ongoing medical examination at JRHO is capable of triggering the bar, in the application of the principle in W. She submitted that the Court should adjourn final determination, to await the outcome of the lumbar puncture at JRHO on 11 March 2022. That is because a diagnosis of early onset dementia could, in her submission, support a definitive conclusion of unfitness to plead or stand trial for the purposes of the W principle ("it is clear that he … will definitely be unfit to plead"). Dr Berman would need to revisit his previous assessment on this topic (§3 above), and such a diagnosis could be a basis for reaching the opposite, clear and definitive conclusion. I was and am unable to accept those submissions. Dr Berman conducted a two-hour interview on 10 March 2021 and provided a detailed assessment on 8 June 2021. He also considered how the Appellant currently presented as to memory (§7 above). The GP refers, in the context of the referral to the JRHO cognitive disorders clinic, to the Appellant having "noticed significant problems with his memory for 12-18 months before September

2021". I am very confident that – even if the JRHO now, or in the near future, identified a diagnosis of "early onset dementia" – there is no realistic prospect that, in the application of the W principle, this would or could support a new and different conclusion as to fitness to plead, still less "clear" and "definite" unfitness to plead, so as to serve to bar extradition.

Suicide risk: the Turner propositions

12. The Turner propositions (found in Turner at §28) were discussed in Assange and set out in W (at §56). They are as follows:

> ***(1) The court has to form an overall judgment on the facts of the particular case… (2) A high threshold has to be reached in order to satisfy the court that a requested person's physical or mental condition is such that it would be unjust or oppressive to extradite him … (3) The court must assess the mental condition of the person threatened with extradition and determine if it is linked to a risk of a suicide attempt if the extradition order were to be made. There has to be a "substantial risk that [the appellant] will commit suicide". The question is whether, on the evidence the risk of the appellant succeeding in committing suicide, whatever steps are taken is sufficiently great to result in a finding of oppression… (4) The mental condition of the person must be such that it removes his capacity to resist the impulse to commit suicide, otherwise it will not be his mental condition but his own voluntary act which puts him at risk of dying and if that is the case there is no oppression in ordering extradition … (5) On the evidence, is the risk that the person will succeed in committing suicide, whatever steps are taken, sufficiently great to result in a finding of oppression… (6) Are there appropriate arrangements in place in the prison system of the country to which extradition is sought so that those authorities can cope properly with the person's mental condition and the risk of suicide … (7) There is a public interest in giving effect to treaty obligations and this is an important factor to have in mind.***

As a shorthand, I will refer to these seven propositions as "Turner (1)", "Turner (2)", and so on.

13. For the purposes of the application of the Turner propositions in the present case, it was possible to narrow down the contentious aspects. Mr Hearn accepted – for the purposes of this hearing in the present case – that there were the necessary "links" (see the first part of Turner (3)), based on the contents of Dr Berman's Report: there was the "link" between the Appellant's mental condition and the risk of a suicide attempt; there was also the "link" between the risk of a suicide attempt and an extradition order being made. It is common ground that Turner (1), (2) and (7) are important general points, which must be borne in mind throughout the analysis. As can be seen, Turner (7) is an important part of the rationale for Turner (2): the "high threshold", emphasised in W at §§33 and 57. As Counsel recognised, Turner (5) repeats the second part of Turner (3). Mr Hearn accepted – for the purposes of this hearing in the present case – that the Appellant is not excluded from relying on the section 25 bar to extradition on the basis that any suicide would be "his own voluntary act" (Turner (4)). That acceptance was on this basis. Dr Berman's Report addresses this question ("opinion" section at §§20-22) and, although it does so contingently ("if Mr O'Donnell believes …"), that contingency is – on Dr Berman's evidence – the relevant and the only contingency in which the suicide risk which he discusses arises. In those circumstances, since Turner (4) is not relied on against the Appellant, I can put it to one side and it is unnecessary to grapple with questions about whether it is placed into doubt by the (as yet unresolved: I was told) argument in the pending case of Modi v India [2021] EWHC 2257 (Admin) at §15(d). Having cleared the decks in that way, two key contentious topics arising from

the Turner propositions emerge. They are alternate routes in which the Appellant could succeed in establishing that extradition is barred by section 25.

Risk of suicide: "whatever steps are taken"

14. This is the first contentious topic, and the first route by which the Appellant could succeed. It arises out of Turner (3) and (5). Ms Grudzinska submits that, on the evidence, there is a risk of the Appellant succeeding in committing suicide "whatever steps are taken", which risk is "sufficiently great to result in a finding of oppression". She submitted that this could be derived from the key passages in Dr Berman's Report, and from reading them as a whole. I cannot accept that submission. I have deliberately gone to some lengths: to summarise key passages in Dr Berman's Report (§§7-8 above), and to set out (§§3-4, 9) the key contents of his "opinion" section. In my judgment, these do not support the submission which is made. Dr Berman describes the Appellant as reporting "a severe depressive episode", being "at least moderately depressed", having "clinical symptoms of moderate or possibly severe depression", having risk factors which "put him in a very high-risk group for attempting to or completing suicide", whose depression being "remanded and extradited" would be likely to "maintain or exacerbate". Nowhere, however, does Dr Berman say that there would be a high or very high risk of the Appellant succeeding in committing suicide "whatever steps are taken". Indeed, the thrust of much of what Dr Berman says is about what steps would be appropriate were there remand and extradition: "it is very likely that he will require to be transferred to a prison healthcare wing and placed on enhanced observations to minimise the risk of him attempting to take his own life"; and "if the suicide risk could not be managed within a prison setting", the "prison in-reach team" would need to "consider diverting him to a secure hospital in Eire". Dr Berman does not say that he thinks such steps would be ineffective, if assessed as needed, and if taken. Further, Dr Berman specifically considers the "effect" on the Appellant of "measures … put in place", such as "constant suicide watch". Dr Berman describes frustration, and difficulty in predicting with any certainty how the Appellant would respond. But, again, there is nothing in that which says or supports a conclusion that such measures would be likely – still less highly likely – to be ineffective in preventing the Appellant committing suicide. Finally, even in the context where "diverting him to a secure hospital" were assessed as necessary by the prison in-reach team, and even if there were a delay in securing such a transfer, Dr Berman's opinion is expressed as a concern about the Appellant's "welfare and the delay it would take for him to recover from this depressive episode". Reading Dr Berman's Report fairly and as a whole, it is very clear, in my judgment, that Dr Berman considers that appropriate steps could indeed be taken to provide effective protection against the suicide risk in this case. That being so, the real focus must be on whether adequate measures will be taken.

15. On this first route, Ms Grudzinska relied on Jansons v Latvia [2009] EWHC 1845 (Admin). But, in my judgment, Jansons is strongly illustrative precisely because of the contrast which it presents. In Jansons the incompatibility of extradition with section 25 arose out of the expert opinion, expressed in terms which were "uncontradicted" and "unqualified", that if extradited to Latvia and notwithstanding the appropriate arrangements (which the Court specifically accepted would be in place within the Latvian prison system), the requested person's "successful" suicide attempts would be a "certainty": see Jansons §§24, 26-27 and 29 (read with §§15 and 17).

Risk of suicide: "appropriate arrangements … in place"

16. I turn to the second contentious topic, and the second route. The question is whether appropriate arrangements – having regard, in particular, to those arrangements which Dr Berman describes – would be made available. This is Turner (6). It has been described as the "key issue", in "almost every case" concerning suicide risk, relating to the three relevant stages of extradition: see Wolkowicz at §10. The starting point, as Mr Hearn emphasises, it is important that any extradition handover in a case such as the present should involve a careful handover of relevant information about mental health condition and suicide risk, to the requesting state authorities. That is something, he submits, which the Court may consider it appropriate to reinforce or secure through a court order. I agree with him, that this would be appropriate for suitable inclusion within this Court's Order, if the Judge's order for extradition is being upheld.

17. I turn to the position at later stages, and specifically in an Irish custodial setting. It is appropriate to recognise the following – as Dr Berman's Report does – in relation to Irish prisons in which remand prisoners and sentenced prisoners are held: those prisons have prison healthcare wings; they have prison in-reach teams; those teams can place prisoners on enhanced observations; those teams will consider 'diversion' to a secure hospital where a prisoner's suicide risk cannot be managed within a prison setting; Irish mental health law makes provision for this kind of 'diversion' to hospital for urgent treatment. To these points can be added this, as recognised by the IMJ Paper: remand prisoners and sentenced prisoners are assessed by visiting psychiatrists, as well as by the prison in-reach teams, which assessment includes the question of 'diversion' if the prisoner is very unwell.

18. There is an operative presumption that the Irish authorities will discharge their responsibilities to make appropriate provision. Observations related to this kind of presumption has been expressed in the following ways. In Wolkowicz at §10(iii) it was said of custodial institutions in EU states that "it will ordinarily be presumed that the receiving state within the European Union will discharge its responsibilities to prevent the requested person committing suicide, in the absence of strong evidence to the contrary". In Magiera v Poland [2017] EWHC 2757 (Admin) at §34 it was said that the "starting point must be that in the case of an EU member state there is a rebuttable presumption that there will be medical facilities available of a type to be expected in a prison". In W at §59 it was said that "normally the requested court should assume that medical problems will be appropriately treated on the basis of the mutual trust principles and the presumption that member states will comply with their treaty obligations under the ECHR and the Charter".

19. As Ms Grudzinska accepts, on the question of whether the Appellant would not receive "appropriate medical treatment because of systemic failings in the [Irish] provision of mental health treatment for prisoners", the applicable legal test is whether there is "clear and cogent evidence that there is a real risk of a violation of Convention rights in the requesting state, to which there are substantial grounds for believing the [Appellant] will be exposed", which evidence is "objective, reliable, specific and properly updated" (see W at §61). Ms Grudzinska relies on the evidence relating to 'diversion' (§4 above): the IMJ Paper; the Irish Times Article; and Dr Berman's opinion. She submits, based on that evidence, that the threshold is met in relation to the 'systemic' problems relating to 'diversion' and capacity, and that extradition of the Appellant could only be compatible with section 25 if there were a specific assurance (or reassurance) that a bed will be available for the Appellant in the CMH should he be assessed to need one.

20. In my judgment, appropriate arrangements are – on the evidence – in place in the prison system of Ireland, so that the Irish authorities can cope properly with the Appellant's mental health condition and the risk of suicide (Turner (6)). The IMJ Paper is a March 2018 report which discusses limited access to secure beds which impacts on the availability of treatment; the news story in the Irish Times Article states a general concern and describes a specific case in which in June 2021 a bed at the CMH for a remand prisoner involved a standoff, but was in the event secured that day; Dr Berman expresses a concern about the Appellant's welfare on the contingency that the Appellant were assessed as needing 'diversion' (which Dr Berman evidently recognises as a real possibility), with a statement of concern as to consequences which is expressed in terms of "the delay it would take for Mr O'Donnell to recover". This evidence relating to 'diversion' (at §4 above) falls very far short of constituting "clear and cogent evidence", which is "objective, reliable, specific and properly updated", that "there is a real risk of a violation of Convention rights in the requesting state, to which there are substantial grounds for believing the [Appellant] will be exposed", which evidence is "objective, reliable, specific and properly updated". There is no evidence which serves to rebut or qualify the presumption, expressed in each of the various ways (§18 above).

Complexity of a health/mental health condition: concrete steps

21. That leaves a distinct, final route, advanced by Ms Grudzinska under section 25. Ms Grudzinska relies on the Appellant's mental health condition described in Dr Berman's Report. She relies on the physical health condition involving the early onset dementia the prospect of whose diagnosis is identified as arising from the ongoing medical investigation at JRHO (whose outcome, she submits, the Court should await). She also relies on the possible combination of, or interrelationship between, these. Viewed against that backcloth, she submits that this is a case where "the complexity of the medical condition" (W at §59) calls for "detail" as to "concrete steps" which would be taken in relation to management or treatment (see Magiera at §35). She submits that extradition could only be compatible with section 25 in the present case if there were a specific assurance as to the "concrete steps" that will be available in custody to deal with the Appellant's "complex" mental health and health conditions. I cannot accept that submission. Again, there is no evidence which serves to rebut or qualify the operative presumption, expressed in each of the various ways (§18 above). Having regard to the evidence of the Appellant's mental health condition, and the physical health condition including the early onset dementia the prospect of whose diagnosis is identified as arising from the ongoing investigation at JRHO, and having regard to the combination of these, this is not a case where "the complexity of the medical condition" (W at §59) calls or would call for specific "detail" as to "concrete steps" which would be taken in relation to management or treatment (Magiera at §35). The Magiera case, on which reliance is placed, was an exceptional one on very specific facts: see W at §§59-60.

Section 25: conclusion

22. In my judgment, on an assessment of each of the topics and routes of argument, and on an overall judgment of the facts of this particular case, and having in mind the public interest in giving effect to treaty obligations, the evidence in this case falls short – and by a substantial measure – of the high threshold of section 25 oppression (or injustice) by reason of mental health (and/or health) condition.

Article 8

23. I turn to the Article 8 ECHR ground of appeal. On this part of the case, Ms Grudzinska relies on three aspects of the case, in combination. The first is the evidence relating to mental health and the risk of suicide, as material to Article 8 ECHR, even if the threshold of section 25 oppression (or injustice) is not met. The second is the evidence of the new neurological concerns in the putative further fresh evidence regarding the ongoing medical investigation at JRHO (the outcome of which she says the Court should await); again, independently of the section 25 threshold. The third is the possibility – given the extraterritorial criminal jurisdiction arising pursuant to section 72 of the Sexual Offences Act 2003 – that the Appellant could be tried in the United Kingdom rather than in Ireland. The first and second aspects are discussed above in the context of section 25. They are, as I have explained, informed by the fresh evidence and the putative further fresh evidence not available to the Judge.

24. As the cases recognise and illustrate, there is an obvious overlap between section 25 (unfairness or oppression by reason of health and mental health) and Article 8 (disproportionate interference with private life). Where the court is dealing with what is predominantly a health (including mental health) case, the answers given when the case is analysed under the section 25 prism and under the Article 8 prism may be the same. In Magiera, for example, the requested person succeeded by reference to both (see §§32, 40 and 43). In the present case, I have already rejected the argument based on section 25 and the threshold of oppression (or unfairness). I will not repeat the points which I have made in the context of section 25, but they are relevant, and I have them in mind. In looking through the Article 8 prism, the three features are emphasised by Ms Grudzinska need to be considered alongside all other features of the case which are relevant to the Article 8 balancing exercise. That includes the absence of any finding by the Judge of "fugitivity" to the criminal standard. As to that, the position is that the Appellant was arrested and questioned on 5 March 2019 in conjunction with the alleged sexual assaults and came to the UK the following month (on 19.4.19), but did so in circumstances where he was not prohibited from leaving Ireland nor required to notify any change of address. Having said that, although he was not found by the Judge to be a fugitive, the Judge included in the balance-sheet – as a factor in favour of extradition – that the Appellant had "left Ireland knowing that the investigation process was ongoing". That was plainly correct and appropriate. In an Article 8 evaluation, fugitivity is not an on-off switch or a litmus test. All the circumstances are relevant. There is no basis for this Court taking a different approach.

25. In my judgment, the three features relied on by Ms Grudzinska – in combination and alongside the other features capable of weighing in the balance against extradition – do not and cannot serve to render the Appellant's extradition disproportionate in Article 8 terms. Ms Grudzinska is right to maintain her reliance for Article 8 purposes on the mental health and suicide risk concerns, and the health issues and uncertainties, whether or not it is the case (as I have concluded) that these do not cross the section 25 threshold of constituting oppression (or injustice). So far as concerns the new neurological concerns- as was the case in relation to section 25 – it is not, in my judgment, necessary or appropriate to adjourn or defer determination of this case to await the March appointment and consideration of its implications. Although the matter is under investigation, its nature has been identified, and I am able to posit the Appellant having early onset dementia which would be diagnosed in the near future. It is highly relevant

to Article 8 – just as it was to section 25 – that there is nothing, so far as that aspect of the case is concerned, to rebut the presumption as to the availability of medical facilities to be expected in a prison environment (see Magiera at §34). As I have explained, it is important and appropriate that any handover would be an on an informed basis and with the provision of relevant information and medical reports. There are in this case strong public interest reasons which weigh heavily in support of extradition. The alleged criminal conduct is, plainly, very serious. The Respondent can point to a strong public interest that the decision to prosecute in Ireland should be followed through. Principles of mutual respect, and the UK's international treaty obligations, are weighty features in the balancing exercise.

26. Although the possibility of a trial in the United Kingdom has been recognised as a feature on which reliance can be placed in the Article 8 ECHR balancing exercise, the applicable approach (accepted by Ms Grudzinska) is that it is a factor of "minimal weight" which would only be "sufficient to make a difference if all the other factors result in the scales been finely balanced": see W §41. That is not the position in the present case. The following further points are also relevant. The context, as the Judge rightly pointed out pointed out, is that is not a criminal investigation which the authorities of England and Wales have a pre-existing interest, the appropriate venue is clearly Ireland whose authorities have investigated the matter taking a decision to prosecute the Appellant and have all the witnesses on standby for that criminal trial. It would undermine the strong public interest considerations in favour of extradition if prosecution in Ireland were precluded or stood to be diverted, which would moreover inevitably inject material delay.

Consequential matters

27. For these reasons, I will order that: (1) the appeal is dismissed. There are two consequential matters. First, I have accepted Mr Hearn's invitation to consider building into this Court's Order appropriate provision to reinforce the fully informed and protective arrangements at the handover stage of surrender. I had hoped and expected, with Counsel's assistance, following circulation of this judgment in confidential draft (25.2.22), that it would be possible to design an appropriate Order. The Respondent submits that the appropriate Order is that: "The report of Dr Berman (dated 8 June 2021) and this Order are to be provided to the Judicial Authority and the National Crime Agency by 4pm on 4 March 2022". Ms Grudzinska has asked for a very short period, after hand-down of the judgment, to "take instructions immediately" and inform the Court. In those circumstances I will Order: (2) The report of Dr Berman (dated 8 June 2021) and this Order are to be provided to the Judicial Authority and the National Crime Agency in the period between 4pm on 9 March 2022 and 4pm on 11 March 2022. (3) Liberty to the Appellant to apply by 4pm on 4 March 2022, in writing by email to the clerk to Fordham J, on notice to the Respondent, to vary or discharge paragraph (3)". If such an application is made I will be able to deal with it promptly.

28. Secondly, following an interchange with Mr Hearn at the hearing – and in light of section 36 of the 2003 Act and §74 of W – I invited the Respondent to consider agreeing to postpone extradition, if the appeal is dismissed, so as to allow the lumbar puncture procedure scheduled for 11 March 2022 to be carried out, and so that the results of that procedure can then be made available to the Irish authorities. Mr Hearn subsequently informed the Court (on 21.2.22) that the Respondent would agree a later date for surrender pursuant to section 36(3)(b), and was content for a delay of 2 weeks following

the Appellant's appointment on 11 March 2022, with the time for removal commencing on 25 March 2022. The Order, with Counsel's assistance, will record this position as follows: "(4) Upon the Court and the Respondent Judicial Authority agreeing a later date for removal, the time for surrender pursuant to section 36(3)(b) of the Extradition Act 2003 will commence on 25 March 2022".