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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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QUEEN'S BENCH DIVISION

IN THE MATTER OF THE EXTRADITION ACT 2003

HEM

Requested person/Appellant;

-v-

THE STATE ATTORNEY'S OFFICE, DUSSELDORF, GERMANY

Requesting State/Respondent.

Before: Girvan LJ, Coghlin LJ and Horner J

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This is an appeal from the decision of His Honour Judge Fowler QC whereby he ordered the extradition of HEM ("the appellant") to Germany pursuant to section 21 of the Extradition Act 2003 on foot of a European Arrest Warrant. The appellant appeals on the grounds the judge erred in not finding that extradition would be unjust or oppressive given his mental illness and risk of suicide. In the course of the appeal the appellant sought leave to adduce updated medical evidence following an alleged suicide attempt by the appellant following the extradition decision.

History and Background

[2] The appellant is a 34 year old Algerian national. An allegation of rape was made against the appellant on 26 April 2011 which led to an arrest warrant being issued in Germany where he was then living and where the alleged offence was alleged to have occurred. The appellant left Germany apparently going to France and Belgium. He entered the United Kingdom illegally on 10 May 2011. A European

Arrest Warrant was issued against the appellant by the State Attorney's Office, Dusseldorf, Germany on 19 August 2011 for the offence of rape.

[3] In the course of his judgment in the court below the learned judge described the background to the case succinctly as follows:

“[3] In terms of the general background the defendant was born in Algeria, close to the Moroccan border. He is intellectually disadvantaged and semi-literate. He worked in Algeria mostly as an agricultural labourer and when he was in his late teens, he alleges that his parents and 11 year old sister were murdered by terrorists. Prior to this he had no mental health problems. However, since this event he has suffered mental illness. He left Algeria in or about 2006 and has travelled around Europe working as a casual labourer. He alleges that he was in prison in Germany where he was given medication which he said had a serious deleterious effect on his health and when he returned home to Algeria he had no identity papers and was returned to Germany. It is whilst in Germany he claims to have been drinking with a Moroccan woman who he says was attracted to him and they engaged in consensual sexual intercourse. He claims that because she was upset at him not wanting to marry her she is now alleging rape. Approximately, one month after these allegations he appears to have left Germany. He was in France and Belgium where he alleges he engaged in self harm by stabbing himself. He was, according to his account, feeling mentally ill and wanted treatment and was told the UK would be the best place to receive such treatment. On arrival in England in 2011, he was housed in accommodation for asylum seekers and sought medical treatment. He was diagnosed as schizophrenic and suffering hallucinations. While in England he again attempted to self-harm by threatening to swallow six tablets of his prescribed medication. After this episode he decided to come to Belfast to work at a friend's car wash but was arrested on arrival in Northern Ireland on 3rd November 2011.”

[4] Following a delay due to an asylum claim by the appellant, an extradition hearing took place at which the appellant gave evidence himself together with three medical experts. The learned judge rejected the appellant's arguments and, on 20

June 2014, he ordered the appellant's extradition. The appellant lodged a notice of appeal dated 26 June 2014.

Medical Evidence before the court below

[5] Medical reports were obtained on behalf of the requested person from Dr Harbinson, Dr O'Kane and Dr Bownes and submitted to the court by agreement at the hearing.

[6] Dr Harbinson examined the appellant on 19 January 2012 in HMP Maghaberry. She had sight of his medical notes and records from both his detention in London and Maghaberry. The notes from London recorded that he had a diagnosis of schizophrenia and suffered hallucinations and/or flash backs of his parents and 11 year old sister being murdered in Algeria. At this time he attempted an over-dose. His notes from Maghaberry recorded that he had difficulties sleeping, was hearing voices and was not coping well. On examination Dr Harbinson noted that he had scars on his arms and abdomen where he alleged he had cut and/or stabbed himself. He told Dr Harbinson that if he was sent back to Germany he would definitely kill himself. Dr Harbinson concluded that he was isolated and frightened, that his experience in Germany was not a happy one which caused him to say he would take his life if sent back and that these threats could not be ignored.

[7] Dr O'Kane examined the appellant on 8 November 2013 a year and ten months after Dr Harbinson. Dr O'Kane found him agitated, tearful and very distressed. He complained of poor sleep, auditory hallucinations and engaging in self harm by hitting himself and banging his head off the wall. Dr O'Kane concluded that he was mentally ill, suffering from post-traumatic stress disorder and intermittently psychotic when off his medication. She was of the view that he required on-going psychiatric treatment in a contained environment. In her view he is extremely vulnerable and at increased risk of self-harm and suicide. While his mental state has responded well to medication, if he were returned to Germany and he loses his current degree of stability he is likely to deteriorate and become increasingly psychotic with consequent increased risk of completing suicide.

[8] Dr Bownes examined the requested person on December 2013 and had oversight of his care at Maghaberry Prison. He had access to his full medical records at the prison. On examination Dr Bownes could find no evidence of any disturbance of his mood, thinking, perception or behaviour or any clinically significant intellectual disability, organic mental impairment or formal mental illness. However, he did conclude that the appellant exhibited significant levels of psychologically distressing symptomology including anxiety, auditory hallucinations and thoughts that life was not worth living. This required medication with mood stabilising, anti-depressant and anti-psychotic drugs. Dr Bownes was of the opinion that he suffered from an adjustment disorder being distressed and emotionally disturbed. This arose from his fear of return to Germany and the stress that that would induce. He considered that he may still make a conscious decision to attempt to end his own life

as a reaction to these stressors. However, Dr Bownes acknowledged that it was difficult to assess the level of risk of a genuine prospective suicide attempt if he were extradited. Nevertheless, he does acknowledge that the risk of genuine suicide in this case must be taken seriously.

Extradition Act 2003

[9] Section 21 of the 2003 Act provides:

“(1) If the judge is required to proceed under this section (by virtue of section 11 or 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.

(4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.

(5) If the person is remanded in custody, the appropriate judge may later grant bail.”

[10] Section 25 provides:

“(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.

(2) The condition is that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be unjust or oppressive to extradite him.

(3) The judge must-

(a) order the person's discharge, or

- (b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied.”

The relevant authorities

[11] In an extradition case involving the issue of the extradition of a party to the United States of America Turner v Government of the United States of America [2012] EWHC 2426 (Admin) Aitkin LJ summarised the relevant principles applicable in cases involving the risk of suicide by a party threatened with an extradition order:

“(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 ...”

[12] In Wolkowicz v Poland [2013] 1 WLR 2402 the Divisional Court reviewed the authorities in relation to section 25. It accepted as correct the principles stated in Turner. After citing Aitken LJ’s propositions at paragraph [10] of its judgment it stated:

“The key issue, as is apparent from propositions (3), (5) and (6), will in almost every case be the measures that are in place to prevent any attempt at suicide by a requested person with a mental illness being successful. As (counsel) correctly submitted on behalf of the respondent judicial authorities, it is helpful to examine the measures in relation to three stages:

(1) First, the position whilst the requested person is being held in custody in the United Kingdom is clear. As Jackson LJ observed in Mazurkiewicz v Poland [2011] EWHC 659 (Admin) at [45], a person does not escape a sentence of imprisonment in the UK simply by pointing to the high risk of suicide. The court relies on the executive branch of the state to implement measures to care for the prisoner under the arrangements explained in R v Qazi (Saraj) [2011] Cr App R (S) 32.

(2) Second, when the requested person is being transferred to the requesting state, arrangements are made by the Serious Organised Crime Agency (‘SOCA’) with the authorities of the requesting state to ensure that during the transfer proper arrangements are in place to prevent suicide in appropriate cases. As Collins J helpfully mentioned in Griffin's case [2012] 1 WLR 270, para 52 steps should ordinarily be taken in such cases to ensure that no attempt is made at suicide and proper preventative measures are in place. Medical records should be sent with the requested person and delivered to those who will have custody during transfer and in subsequent detention.

(3) Third, when the requested person is received by the requesting state in the custodial institution in

which he is to be held, 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: see Krolik v Regional Court in Czestochowa, Poland (Practice Note) [2013] 1 WLR 490, paras 3–7 and the authorities referred to and Rot's case [2010] EWHC 1820 (Admin) at [10]–[11]. In the absence of evidence to the necessary standard that calls into question the ability of the receiving state to discharge its responsibilities or a specific matter that gives cause for concern, it should not be necessary to require any assurances from requesting states within the European Union. It will therefore ordinarily be sufficient to rely on the presumption. It is therefore only in a very rare case that a requested person will be likely to establish that measures to prevent a substantial risk of suicide will not be effective.”

The lower court's decision

[13] The learned judge adopted the approach approved by the English Divisional Court in Wolkowicz. He emphasised that the present case falls to be considered on its own unique facts and noted the high threshold required for an extradition to be deemed unjust or oppressive solely on the appellant's mental condition. Having considered the medical evidence the learned judge concluded that, whilst the appellant was at risk of suicide, given the relative stability of his condition due to his present medication the risk of suicide was not 'substantial'. Relying on Dr Bownes evidence he further found that the appellant was not suffering from a mental condition which would compel him to commit suicide or remove his capacity to resist such an impulse. He further observed that there was no evidence to suggest that appropriate arrangements will not be put in place in Germany nor would there be any impediment to the authorities in this jurisdiction communicating to the German authorities the current medication and treatment strategy applied to the appellant.

[14] Following the decision of the court below the appellant attempted suicide or purported to do so. We shall assume for the purposes of this appeal that this was a genuine attempt which was frustrated by timely intervention. Mr O'Donoghue QC contended that this attempt indicated the appellant's current state of mind and indicated a high risk of suicide. He sought to adduce fresh medical evidence in support of the appellant's case which post-dated the decision in the court below. By agreement the court heard *de bene esse* further medical evidence from Dr Loughrey, a consultant psychiatrist who provided medical evidence and advice to the requesting state in relation to the case.

[15] Dr Loughrey interviewed the appellant on 15 October 2014 at Maghaberry. In his written report he detailed the appellant's recent psychiatric symptoms and the treatment which he received. The appellant stated that he began to have the thoughts of self-harm when he heard that he would be deported to Germany. He heard voices telling him to kill himself and he cut his wrist to hang himself but other people intervened to prevent him completing his suicide attempt. He said that he heard voices telling him to pour petrol over himself and set himself alight. He claimed that he was in custody and that while he was in custody in Germany where he was seeking asylum as an illegal entrant he was given medication which he claimed caused him to put on weight and change his appearance round his eyes. Dr Loughrey considered that the medication was probably Chlorpromazine or some atypical antipsychotic drug. Having been sent back from Germany to Algeria he returned to Germany and described stressful living conditions in Frankfurt. He stated he heard voices telling him to kill himself at that time. When he came to Northern Ireland and ended up in custody in Maghaberry he was on Quetiapine 100 mgs twice a day. He persistently asserted that he would rather take his own life than return to Germany. Dr Loughrey's diagnosis was that he suffered from a psychotic syndrome which he attributed to either PTSD or schizophrenia. He considered that the appellant's experiences in Germany did not make him ill since he had already suffered from a psychotic syndrome. According to Dr Loughrey it is clear that the appellant has been self-harming and his condition carried a significant risk of further self-harm and suicide. The appellant's antipathy to Germany flowed from a paranoid way of thinking. However, Dr Loughrey considered that there was a significant level of overlay and embellishment in the symptoms. Nevertheless, in his view the appellant was a vulnerable individual who is liable to react catastrophically and dangerously with a substantial risk of serious self-harm and suicide.

[16] Dr Loughrey's diagnosis differs from Dr Bownes which he rejected. He considers that the appellant's condition is relatively enduring whereas Dr Bownes' diagnosis would relate to a condition which should resolve after two years. His rejection of Dr Bownes' diagnosis led him to conclude that the appellant was suffering from a more severe form of mental illness which enhanced the risk of attempted suicide. In Dr Loughrey's view there is a medium risk of an attempt at suicide, a risk which would be likely to increase if he was extradited. Dr Loughrey concluded that, unless properly treated, managed and supervised, there is a real risk of potentially successful attempt at suicide. Proper treatment and supervision would reduce the level of risk. When asked to deal with the question whether the appellant's mental condition removed the capacity to resist the impulse to commit suicide Dr Loughrey accepted that if the appellant decided to commit suicide there would be some element of conscious choice but there would be a component of irrationality in the appellant's decision-making.

[17] Even assuming that the evidence of Dr Loughrey should be admitted notwithstanding the high threshold to be passed before fresh evidence is admitted

on appeal in such cases (see Hungary v Fenyvesi [2009] EWHC 231) his evidence does not lead us to conclude that the learned judge in the lower court was wrong to order extradition. Dr Loughrey's fears in relation to the risk of suicide are all qualified by his acceptance that if properly treated, managed and supervised the risk of a successful suicide attempt could be managed. Furthermore, he could not go so far as to say that the appellant's mental condition removed his capacity to resist the impulse to commit suicide.

[18] Germany is a member of the Council of Europe and it is bound by the provisions of the European Convention on Human Rights. It has in place a prison system which is bound to take reasonable steps to ensure that the prisoner's Convention rights are protected. No evidence has been adduced to rebut the presumption that Germany will discharge its responsibilities to safeguard the rights of prisoners and those in state custody. Just as this court is entitled to rely on the Executive branch within this jurisdiction to implement measures to cater for a prisoner at risk of suicide so, in the absence of compelling evidence to the contrary, this court is bound to rely on the executive branch of the German state to implement measures to care for a vulnerable prisoner such as the appellant. Accordingly we must dismiss the appeal.

[19] While the applicant is within this jurisdiction this court is bound to protect his Convention rights by taking steps to ensure that the risk of suicide is removed or reduced so far as possible. Accordingly, pending his removal and during his transit from the United Kingdom to Germany pursuant to the extradition order which we consider must be made, the authorities here are bound to take all reasonable steps to prevent the appellant committing suicide. In furtherance of this state's Article 2 and Article 3 obligations the UK authorities must take all reasonable steps to bring to the attention of the German authorities all the material information they have in relation to the appellant's condition, diagnosis, medication and treatment so as to ensure that the German authorities will be fully aware of the risk of suicide and the means adopted up to now within this jurisdiction to prevent or minimise the risk of attempted suicide. To this end the relevant medical reports and records pertaining to the appellant should be brought together and translated for transmission to Germany in advance of his return to that jurisdiction so that the German authorities are as fully informed of the situation as possible by the time the appellant enters Germany and becomes subject to German supervision under the extradition order. The order for his extradition will be so drawn as to take effect only when this court has been satisfied that these steps have been taken and that the German authorities have acknowledged that they are in receipt of all the information which this court has directed should be sent to them.