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*Transcribed ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:*	19/069855/A01
	Delivered:	27/09/2021

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REPUBLIC OF POLAND

v

ROBERT MAREK KOCHANSKI

Mr Ronan Lavery QC with Mr Michael Forde BL (instructed by P A Duffy & Co Solicitors) for the Appellant
Mr Stephen Ritchie BL (instructed by the Crown Solicitor) for the Respondent

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Before: McCloskey LJ and Humphreys J

McCLOSKEY LJ

Introduction

[1] Having considered the submissions of Mr Lavery and all of the papers before the court, including the written submission of Mr Ritchie, the court does not require to hear from the respondent. We have come to the very clear conclusion that this appeal is without merit and it must be dismissed in consequence.

[2] The appellant is Robert Kochanski. The other party is the Circuit Court in Lublin, Poland. The appellant appeals against the order of the Recorder made further to his decision dated 4 December 2019, the effect whereof was that the court acceded to the request of what I will describe as the requesting state, that is the Republic of Poland, that the appellant be, in the statutory language, surrendered to Poland pursuant to a European Arrest Warrant: a so-called "conviction" warrant based on the conviction of the appellant in Poland in his absence.

[3] The Recorder's decision, compact and focussed, speaks for itself. It suffices to record that the judge rehearsed the rather protracted history of these proceedings and then summarised the medical evidence which was available to him. That

medical evidence at this remove remains unchanged. Similarly, the Recorder had available to him a written statement of the appellant. That continues to be the only statement on behalf of the appellant. We hesitate to call it evidence. First of all, it is not an affidavit. Secondly, the appellant did not testify before that court, from what we have read, and thirdly, the document is neither signed nor dated. It is appropriate to add that the detail in that document is as bare as could conceivably be.

[4] The Recorder further noted inter alia the objection to extradition on behalf of the appellant based on an asserted risk to his life emanating from the conduct of non-state agents. He dismissed that objection on the basis that it had no sustainable evidential foundation and in particular no independent evidence in support.

[5] The Recorder then addressed what was the central issue before him namely the objection based upon risk of suicide on the part of the appellant in the event of his surrender to Poland materialising. All of the evidence to which I have just adverted bore, to some extent or another, on that objection to extradition. The Recorder reasoned as follows in paragraph [12] of his judgment:

> "Although the risk of suicide cannot be dismissed in terms outright – [*this court's paraphrase*] it could not be regarded as substantial, giving effect to the guidance on this issue set forth in the judgment of Lord Justice Atkins in the case of *Turner* v *The United Kingdom*. There, the Lord Justice stated inter alia:
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> > '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. 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's succeeding in committing suicide, whatever steps are taken, is sufficiently great to result in a finding of oppression. 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.'"

[6] It is evident that the last of those passages in *Turner* formed the basis of the Recorder's conclusion that the relevant legal test was not satisfied. This court concurs without reservation. We have considered with care, in particular, all of the references to attempted suicide in the earlier medical reports and in the most recent report of Dr Best which Mr Lavery QC correctly highlighted. That report is dated 9 October 2019. While all of the other medical evidence is now of nine years vintage, we observe that the vintage of the appellant's statement is unknown. However, it was unnecessary to explore this issue in any detail.

[7] Dr Best's recent report was generated by an interview of the appellant on the 9 October 2019 in Maghaberry Prison. Dr Best records conveniently the basis of the European Arrest Warrant, namely the appellant having been convicted of murder in Poland in his absence. He notes the previous reports which he prepared, following interview of the appellant, on two dates in 2012. In expressing his opinion, Dr Best confirms the previous diagnosis of dysthymia i.e. prolonged depressive adjustment reaction lasting over two years. The report continues:

> "Mr Kochanski suffers from a persistent low mood. This is secondary to the social circumstances and the threat of imprisonment in Poland and the risk that that is to him. Mr Kochanski maintains he is not guilty of the crime he was convicted of in his absence in Poland. He is quite clear that should he be sent back he will be murdered and prefers to choose a time to end his own life rather than sit waiting for someone to kill him. I don't think medications are going to help this although he is on anti-depressants. They probably bring some settling of mood but they are not going to cure him. His depression is reactive to the predicament that he is in."

Dr Best and then invites the court to weigh the factor of the alleged previous asserted suicide attempts.

[8] This court, in the course of argument, has drawn attention to the evidential deficiencies in the material that has been assembled. In particular and a matter of no little concern, neither of the consultant psychiatrists – nor the appellant's solicitors - involved made any attempt to secure what must have been available independent source material relating to the alleged previous suicide attempts. According to the appellant, he was treated in Craigavon Area Hospital at least twice. Furthermore, if the history given by him was correct there must have been prison records of a medical and other nature and possibly others: general practitioner's records and maybe social services records, having regard to his family circumstances which

involve children from whom he has been separated for some time. However, Dr Best has expressed an opinion that is based upon, in effect, slavishly accepting everything the appellant told him. While this is, as a minimum, questionable this court is prepared to proceed on the same basis. In other words, we, in common with Dr Best and Dr Loughrey, will take the appellant's case at its notional zenith.

[9] I return to the material passages in Dr Best's most recent report. While he states that the appellant's depression is reactive to the predicament he is in, he makes no attempt to forge a nexus between that assessment and any possible future act of attempted suicide. In other words, the analysis which the Recorder undertook giving effect to the principles in the case of *Turner* remains unchanged. We note that the Recorder's judgment post-dated by just a matter of weeks Dr Best's most recent report. The Recorder undertook an analysis with the benefit of that report with which this court concurs in full. Based on the appellant's own account, and ignoring its shortcomings and disparities, the analysis on any ordinary and reasonable construction of all the medical evidence must be that any attempted suicide would be a voluntary decision rather than an uncontrolled, impulsive act dictated by the mental condition of the appellant. That means that in law the ground upon which the appellant now centres his resistance to extradition, namely the risk of suicide, giving effect to the attendant legal principles has no substance.

[10] We take cognisance of the fact that formally before this court the appellant continues to rely upon the possibility of future harm occasioned by non-state agents giving rise to a breach of one particular facet of Article 3 ECHR. While the evidential foundation for that can only be described as wafer thin and lacking in merit for the reasons given by the single judge, even if this court were to accept that it had some basis, it is completely confounded by the history of the case namely no threat to the appellant of any kind during previous incarceration in Poland and, maybe more significant, no threat whatsoever to him when he was at liberty and would have been at the mercy of the non-state actors in question. And, finally, the argument is confounded beyond redemption by the evidence provided by the Polish authorities in response to this court's "*Aronyosi*" request for specified information. That evidence makes abundantly clear that, bearing in mind the governing legal principles, they will take reasonable measures to protect the appellant in the expectation that those will be as successful as they were previously, with the result that the objection based on possible risk of serious harm or worse, relying on Article 3 ECHR, falls away completely.

[11] There is also formally before the court, arising out of an amendment of the Notice of Appeal, a suggestion that the appellant should not be extradited on the ground that in breach of, again, Article 3 ECHR, considered in conjunction with what we will describe in shorthand as the *Ahmad* principles, he is at risk of subjection to proscribed treatment by reason of predicted protracted solitary confinement in a Polish prison. Once again this is confounded in its entirety, first of all, by those aspects of the history to which I have referred and, secondly and beyond any plausible argument, by the most recent evidence emanating from the

Polish authorities. In short, in common with the non-state actors' ground of objection, this ground of objection is replete with bare assertion and mere speculation.

[12] There being no other objection to extradition before the court which we must address, for the reasons given none of the grounds of objection has any merit and, accordingly, concurring with the single judge, our decision is that leave to appeal in this renewed application must be refused.

[13] There are two ancillary issues. First, whether to grant free legal aid to the appellant under section 184 of the Extradition Act. The court will allow one week for written submissions on this issue. The judgment of this court in the case *Republic of Ireland v Harkin* [2021] NIQB 80, which was available two days after the hearing (on 27/09/21) but held back because we asked for a written submission on costs, should be finalised in the interim. Second, out of an abundance of caution we shall take the course adopted in earlier decisions of this court by directing the requesting State's representatives to ensure that all extant medical reports are transmitted to the appropriate Polish agencies.

ADDENDUM [01/10/21]: FREE LEGAL AID

[14] The written response of the appellants' counsel to [13] above contained the following submissions in particular (verbatim):

1. The case was listed for the hearing of a renewed application for leave to appeal before a Divisional Court [McCloskey LJ, Keegan J and Simpson J] on 21 February 2020. On that date, the Divisional Court granted the appellant leave to file an amended Notice of Appeal dated 19 February 2020. The further ground of appeal was not a matter dealt with at the original hearing and is repeated below:

   "The appellant seeks leave to introduce a new issue, not raised at the original extradition hearing, which had it been raised would have resulted in the judge deciding a question before him differently and thereby ordering the appellant's discharge. The aforementioned issue is that to extradite the appellant to serve a 6 year prison sentence in an isolated "safe cell" is incompatible with his Convention rights within the meaning of the Human Rights Act 1998, in particular Article 3 of the Convention."

2. In essence, the new [and at that time, the primary] ground of appeal was advanced on the basis that *Ahmad* type considerations impacted upon the appellant.

3. Following an application by the appellant's counsel to adjourn the proceedings, the Divisional Court acceded to that application and further helpfully suggested that the appellant's counsel consider all articles, journals

and reports on Polish prisons and the use of 'solitary confinement'. The appellant's counsel informed the Divisional Court that this would be done and further that an appropriate expert was being sourced.

4. Quite a significant amount of private research was undertaken [with consideration of reports from the *European Prison Observatory* including *Prison in Europe: overview and trends; Prison Conditions in Poland; From National Practices to European Guidelines: Interesting Initiative in Prison Management; 2019 report on European Prisons and Penitentiary Systems* as well as the US State Department publication *Poland: 2018 Human Rights Report* as well as The European Union Agency for Fundamental Rights document on *Poland – Solitary Confinement* as well as a report by *Prison Insider on Poland [November 2018]* as well as a *CEPS Paper in Liberty and Security in Europe [May 2019]*].

5. An expert was further instructed with a detailed letter of instruction drafted by counsel, however the report when obtained was not ultimately relied upon.

6. The case was further subject to administrative review, with the parties drafting detailed updates for the court on 4 January 2021 and 19 May 2021. The case was further listed for an in-person review on 9 June 2021. Following the final review, the Divisional Court helpfully had a letter forwarded to the Polish authorities on 29 July 2021, detailing issues the parties [and ultimately the court] believed should be addressed. A response was received on 6 August 2021.

7. The response, it had to be conceded, effectively ended any argument the appellant had in relation to what was due to the central and primary ground of appeal [namely the *Ahmad* issue].

8. The court, applying the above [*Aranyosi]* principles, and having been in possession of evidence of a real risk of an Article 3 ECHR infringement, rightly made a request for further information from the Polish authorities.

[15] The recent decision of this court in *ROI v Harkin* [2021] NIQB 80 addresses, at [21] – [31], the governing statutory framework and related matters. We give effect to that approach in the following way.

[16] At the conclusion of the hearing the case in favour of the court exercising its discretion to grant free legal lead seemed unpromising. However, the court has found the further written submissions on behalf of the appellant persuasive. They disclose that much care and industry were invested by the appellant's legal representatives in the preparation and prosecution of this appeal. Appropriate steps were taken and there is no indication of anything questionable in this regard. Furthermore, we must take into account that this court agreed with their contention at an earlier stage that "*Aronyosi"* enquiries be directed to the requesting state.

[17] While the court did not deem it necessary to call on counsel for the requesting state at the hearing, this is not determinative. It is to trite that every decision under section 184 of the 2003 Act will be unavoidably case sensitive. In the particular circumstances of this case the court is satisfied, given the combination of facts and factors listed above, that it is desirable in the interests of justice that the appellant be granted free legal aid. The second of the statutory conditions, namely that of insufficient means, is not contentious and, on the basis of the evidence available to the court, is made out.