Neutral Citation Number: [2006] IEHC 164

THE HIGH COURT

Record Number: 2005 No. 57 Ext.

BETWEEN

THE ATTORNEY GENERAL

APPLICANT

AND
FREDERICK DAVID RUSSELL

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 23rd day of May 2006

1. The extradition of the respondent is sought by the U.S. Department of Justice on foot of a Request received by the Minister for Justice, Equality and Law Reform so that the respondent can stand trial on three charges of vehicular homicide, three charges of vehicular assault, one charge of forgery and one charge of theft ("the extradition charges").

2. The respondent has also been charged in the U.S. with an offence of 'Bail Jumping', and a charge of "inter-state flight" ("the non-extradition charges") but his extradition is not sought in respect of those charges, and there are averments which I will come to, that the respondent will not be proceeded against in respect of them, if returned on the extradition charges.

3. As required by s. 26 of the Extradition Act, 1965, as amended ("the Act") the Minister, following receipt of the said Request has certified that such a Request had been made.

4. Thereafter, as provided for in s. 26(1)(b) of the Act, an application was made for a Warrant for the arrest of the respondent who was known to be living and working in this State under an assumed name. That Warrant duly issued, and on the 23rd October 2005 the respondent was arrested in Dublin by Sgt. Anthony Linehan of The Crime Branch, Garda Headquarters, Dublin.

Factual Background

5. The respondent was charged with the extradition offences and the non-extradition offences following a multiple vehicle collision in Washington State on the 4th June 2001, in which three persons died, and others were seriously injured. He was the driver of one of the vehicles involved, and it is an incident which has engendered much public outcry in the area concerned, and much animosity towards the respondent who is thought by those connected to the deceased and injured to have been responsible for the collision. There are allegations that he was driving at an excessive speed and on the incorrect side of the road when overtaking another vehicle. Blood samples taken from him after the incident are said to confirm the presence of alcohol in excess of the permitted limit as well as the ingestion of marijuana.

6. Having been charged with the offences referred to, he was granted what is referred to as 'pre-trial release' or bail. As a condition of that release he was required to appear in court for what is referred to as 'a readiness hearing' on the 26th October 2001 so that the court might be informed by both sides as to their readiness for trial. The respondent failed to appear at that readiness hearing, and a bench warrant was issued for his arrest.

7. What is alleged to have happened next gave rise to the charges of theft and forgery for which his extradition is being sought. It appears that at the time of this incident the respondent was living with his father, but that shortly before the readiness hearing set for the 26th October 2001 he left home. His father made a statement to the police to the effect that on the 26th October 2001 he noticed that a cheque was missing from his cheque book, and later discovered that this cheque had been forged by the respondent and cashed for the sum of $1300.00 on the 23rd October 2001.

8. No issue is raised by the respondent as to identification, or the manner in which this arrest was carried out here and I am satisfied that he was duly arrested, detained and brought before this Court on that date in accordance with the requirements of s. 26(5) of the Act and remanded thereafter in custody pending the hearing of the present application under s.29 of the Act. He has not applied for bail here pending the determination of this application.

9. It is provided in s. 26(6) of the Act that "*where a person has been arrested under a warrant issued under this section, then in any proceedings it shall be presumed, unless the contrary is proved, that a request for the extradition of the person has been duly made and has been duly received by the Minister.*" No attempt has been made to show the contrary.

10. Section 29 of the Act provides for the circumstances in which the High Court may make an order for the committal of the requested person to a prison "*there to await the order of the Minister for his extradition.*" That section provides:

> *"29. (1) Where a person is before the High Court under section 26 or 27 and the Court is satisfied that –*
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> *(a) the extradition of that person has been duly requested, and*
>
> *(b) this Part applies in relation to the requesting country, and*
>
> *(c) extradition of the person claimed is not prohibited by this part or by the relevant extradition provisions, and*
>
> *(d) the documents required to support a request for extradition under section 25 have been produced,*
>
> *the Court shall make an order committing that person to a prison (or, if he is not more than twenty-one years of age, to a remand institution) there to await the order of the Minister for his extradition." (my emphasis)*

11. Regard must be had not just to the Act, but to the terms of the Treaty on Extradition between Ireland and the United States of America done at Washington on the 13th July 1983 itself ("the Treaty") so far as is relevant to the issues raised. This arises because of the reference in s.29 (1) (c) above to "the relevant extradition provisions". By virtue of s.3 (1) of the Act those "extradition provisions" are defined as "*the provisions of an extradition agreement or of an order under section 8 applying Part II otherwise than in accordance with an extradition agreement.*"

12. Under s. 10 of the Act, extradition may be granted only if a certain minimum gravity of offence is met, and if there is correspondence between the offences charged and offences in this State, as defined by s. 10(3) of the Act.

13. Having noted that no issue is raised by the respondent as to either minimum gravity or correspondence, I can say that I am in any event satisfied that the acts alleged against the respondent and which are said to give rise to the charges for which his extradition is sought in the U.S. would, if the same acts had been committed in this State on the day the Request for his extradition was made, have given rise to offences respectively of manslaughter, dangerous driving causing death, and dangerous driving causing serious bodily harm each being an offence under s. 53 of the Road Traffic Act 1961, as well as an offence of theft under s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and an offence of forgery under s.25 and s.26 of the same Act. In respect of all such offences the minimum gravity requirement is also met.

Issues raised by the respondent:
1. Specialty
14. The respondent has raised issues arising from the rule of specialty as set forth in his Notice of Objection dated 19th January 2006 (as amended) as follows:

> *"1. If extradited the said [respondent] will or is likely to be prosecuted and/or punished for the offences of bail-jumping and interstate flight to avoid prosecution, in breach of the rule of specialty provided for by Part II of the Extradition Act, 1965 as amended by the Treaty on Extradition between the United States of America and Ireland."*

15. That rule is expressed in Article XI of the Treaty as follows:

> *"Article XI Rule of Specialty*
>
> *1. A person extradited under this Treaty shall not be proceeded against, sentenced, punished, detained or otherwise restricted in his or her personal freedom in the Requesting State for an offence other than that for which his extradition has been granted, or be extradited by that State to a third State, unless:*
>
> *(a) the person has left the Requesting State after extradition and has voluntarily returned to it;*
>
> *(b) the person, having had an opportunity to leave the Requesting State, has not done so within forty five days of final discharge in respect of the offence for which that person was extradited; or*
>
> *(c) the Requested State has consented.*
>
> *2. ……*
>
> *3. Unless the law of the Requesting State otherwise provide, the person extradited may be proceeded against, sentenced, punished, detained or otherwise restricted in his or her personal freedom for an offence for which that person could be convicted under the law of that State, upon trial for the offence for which extradition was granted.*
>
> *4. …… " (my emphasis)*

16. Section 20 of the Act requires that extradition shall not be ordered unless provision is made by the law of the requesting state or by the extradition agreement that the rule of specialty will be applied. In that regard, there is manifestly a provision within the Treaty itself that the rule of specialty will be applied, and it is therefore not necessary to examine whether the laws of the United States themselves provide that the rule of specialty will be applied, although I will address that matter in the light of submissions made on the respondent's behalf.

17. But Counsel on behalf of the respondent, Thomas O'Connell S.C., seeks to establish that there is a real risk or likelihood that the rule as set forth in Article XI will not be observed in this case, in spite of its inclusion in the Treaty, and in spite of the fact that it has been averred in affidavits sworn on behalf of the applicant that the respondent will not be proceeded against in respect of the offence of 'bail-jumping'. His submission is that certain case-law from the U.S. Court of Appeals demonstrates that it is likely that he will in fact be so proceeded against, and that if that were to occur, the U.S. Court of Appeal would not regard it as being a breach of the rule of specialty.

18. On the same basis he also suggests that the respondent could, if returned, face a charge of 'inter-state flight', even though his extradition is not sought in respect of same, and indeed could not be since, for obvious reasons, there could be no question of correspondence in respect of such an offence in this State.

19. He contends also under this point of objection that the conduct of the respondent in not answering his bail, even if this is not being prosecuted as a separate offence, can under the law of Washington State, be taken into account by the trial judge when it comes to calculating the appropriate sentences for the extradition offences, and that accordingly any enhancement of sentence on that account amounts to punishing the respondent for an offence other than that for which his extradition is sought, and that in this way also the rule of specialty will be breached.

20. The respondent has filed an affidavit sworn by his attorney in the United States, namely Mark S. Moorer on the 13th January 2006, who has stated, *inter alia*, that if the respondent was to be prosecuted and convicted in respect of the charge of bail-jumping he would expect that an additional consecutive sentence of between twenty two and twenty nine months imprisonment would be imposed by the Court. In relation to the existence of the Rule of Specialty in the Treaty referred to, Mr Moorer states as follows:

> *"…it is my honest and considered opinion as a trial lawyer of eighteen (18) years standing that in the circumstances and history of the prosecution of this case pending before Whitman County Superior Court that the rule and form of specialty protection as envisaged by Article XI of the aforesaid Treaty will not be accorded to the Applicant if returned to face trial before Whitman County Superior Court and convicted of the alleged offences for which he stands charged at this time."*

21. He goes on to state that this is the first occasion in the history of Whitman County (Washington State) that a prosecutor has sought extradition from a foreign country, and that "thus there is no *"State Appellate decision similar to USA v. Andonian, 29 F.3d 1432, USA v. Lazarevich, 147 F. 3d 1061 (9th Cir. 06/23/1998), or USA v. Le Baron, No. 97-20517 (5th Cir. 09/25/1998) with which to compare*" -- those decisions emanating from the 9th Circuit i.e. California, and the 5th Circuit i.e. Texas. But these cases are nevertheless referred to by Mr O'Connell as part of his submission that if the respondent is extradited on the charges of vehicular homicide, vehicular assault, theft and forgery ("the extradition offences"), he could, and in all probability would, still be charged,

prosecuted and sentenced/punished for bail-jumping and inter-state flight since that case-law suggests that the U.S. Courts would not regard it as constituting a breach of the specialty provision in the Treaty, given the connection of these offences back to the underlying offences for which his extradition is sought. I will come back to these cases in due course.

22. In the alternative, it is submitted that even if he were not so prosecuted for those non-extradition offences, any sentence/punishment he will receive in respect of the extradition offences can and in all probability would be enhanced on the basis of the aggravating circumstances of the unproven conduct of bail-jumping/inter-state flight, and that such an enhanced punishment would, on the basis of the *Lazarevich* case referred to, not be regarded by the U.S. Courts as being a breach of specialty.

23. Apart altogether from any enhanced sentence being applied under the Guidelines themselves, there is also the question whether under the current 2005 Guidelines, the trial judge could impose what is termed "an exceptional sentence" in circumstances where he would form the view that the sentence otherwise to be imposed under the Guidelines would be too lenient in all the circumstances of the case. I will come to the distinction between an enhanced sentence and an exceptional sentence in due course.

24. It is submitted therefore on behalf of the respondent that there is no guarantee, or even likelihood, that the protection which he submits is intended to be afforded to the respondent by that rule of specialty will be available to him despite the provisions of Article XI of the Treaty.

25. Mr Moorer in his first affidavit makes reference to the notoriety of this case locally, and it informs his view that the respondent will be proceeded against in respect of all possible offences including bail jumping and interstate flight, despite the assurances contained in the applicant's affidavits to the contrary. He also states his belief that even in respect of the offences for which his extradition is sought, the trial court will impose what is referred to as an enhanced or exceptional sentence to take account of the aggravating circumstance of the respondent's flight from the jurisdiction, since that is a matter which could be regarded as indicating "an egregious lack of remorse" on the part of the respondent.

26. Following the filing of the Notice of Opposition by the respondent on the 16th January 2006, an affidavit in response to the specialty issue was sworn by Carol La Verne, Chief Deputy Prosecuting Attorney in Whitman County, Washington and she states therein that the respondent will be prosecuted only in respect of the offences for which he is extradited. Specifically she states in paragraph 11 of her affidavit that he will not be prosecuted for 'bail jumping' and neither will he be prosecuted for 'interstate flight to avoid prosecution'.

27. She states at paragraph 7 of her affidavit that the respondent, if convicted of the three vehicular homicide offences and the three vehicular assault offences, would face at most under the Sentencing Guidelines a standard sentencing range of 129-171 months in prison, and that the specific range of sentence would depend on whether the jury found him guilty of the vehicular homicides while under the influence of alcohol, while driving recklessly or while driving with a disregard for the safety of others.

28. The theft and forgery offences would, if he is convicted, give rise in her view to an additional sentence of between twenty two months and twenty nine months in prison.

29. She states in paragraph 8 of her affidavit that in 2005 the Washington State legislature passed new laws amending the existing law regarding the imposition of an exceptional sentence, i.e. one above the standard range. Under these new laws it appears that if the jury was to find that there were aggravating circumstances in the case, an 'exceptional sentence' could be imposed by the trial judge if he/she was of the view that the standard sentence under the Guidelines was too lenient in all the circumstances. She clarified in a later affidavit that prior to that change, the jury could find any circumstance to be an aggravating circumstance, but that after the 2005 amendments, what could amount to an aggravating circumstance was defined clearly and set forth, and can exist only where there are multiple victims, an *egregious lack of remorse*, or the offence involved attempted or actual monetary loss substantially greater than that which typically occurs in this type of case.

30. She goes on to state in this regard that since the respondent is charged with a separate count in respect of each victim *"it is unlikely that the court would impose an enhanced sentence based on a finding that there were multiple victims"*.(my emphasis)

31. She also states that such an exceptional sentence is highly unlikely on ground of an egregious lack of remorse, or on the ground that an untypical monetary loss has resulted.

32. In addition to that affidavit by Ms. La Verne, an affidavit has been sworn by Thomas J. Hopkins, Assistant U.S. Attorney at the U.S. Department of Justice assigned the relevant area in Washington State. He describes himself as one of the supervisors in the Criminal Division in that area. He states as follows in paragraph 2 of his affidavit:

> *"If Frederick David Russell is returned to the United States, the United States Attorney's office in the Eastern District of Washington will not prosecute him for interstate flight to avoid prosecution in violation of Title 18, United States Code 1073. The United States Attorney's Office authorised a criminal complaint that charged Frederick David Russell with interstate flight to avoid prosecution solely as a mechanism to empower federal law enforcement agencies to assist Whitman County authorities in the search to find fugitive Frederick David Russell……..The United States Attorney's Office does not intend to seek that approval; instead, the office intends to follow the policy of the U.S. Department of Justice to move the Court to dismiss the Criminal Complaint upon the return of Frederick David Russell to the United States."*

33. There is a further affidavit filed on behalf of the respondent, namely one by John B. Webster, who states that he is "a sentencing and mitigation consultant" in the United States, and Managing Director of National Prison and Sentencing Consultants Inc, a company which provides consulting services to attorneys and legal practitioners on issues related to sentencing. He states *inter alia* that he has been made aware of the content of the Extradition Treaty between Ireland and the United States of America and goes on to opine:

> *"it is my honest and considered professional opinion that under the circumstances The United States District Court for the District of Washington of the prosecution of this case pending before the said court that the rule and form of specialty protection as envisioned by Article XI of the aforesaid Treaty will not be accorded to Mr Russell if returned to face trial on the federal charges."*

34. This comment relates to the charge of interstate flight, which is a federal offence, and one for which his extradition is not sought and in respect of which Ms. La Verne and Mr Hopkins have stated that he will not be charged. In any event she states that since it is a federal offence, the Washington State Court has no jurisdiction over such a charge. Mr Webster, after a lengthy dissertation within his affidavit on the basis upon which a sentence would be imposed in respect of an interstate charge, concludes that an additional

sentence of between 33 and 41 months would be imposed on this charge, and that it would be consecutive to any other sentence imposed on other charges.

35. He concludes his affidavit as follows:

> *"To the extent that the Rule of Specialty is intended to prohibit punishment for crimes other than the crime which forms the basis of the Extradition Request, it is my considered opinion that the Rule of Specialty may be violated in the within case. The federal sentencing scheme permits courts to increase punishment for particular crimes based upon facts not proven beyond a reasonable doubt; permits courts to impose or increase a sentence based upon uncorroborated hearsay testimony and evidence; permits a court to increase a sentence premised upon prior uncharged and acquitted conduct and permits a court to rely in large part upon facts and allegations that can be unchallenged and unproven."*

36. There are therefore two distinct issues arising for determination under the Point of Objection (as amended) relating to the Rule of Specialty. Firstly, whether in spite of the existence of arrangements regarding specialty being contained in Article XI of the Treaty, and the assurances contained in the affidavits of Ms. La Verne and Mr Hopkins, the respondent is likely to be proceeded against, in the sense of being charged and prosecuted, in respect of bail-jumping and inter-state flight in breach of specialty.

37. The second issue is whether, though not actually charged and prosecuted in respect of bail-jumping and inter-state flight, that uncharged and unproven conduct may be nevertheless taken into account and relied upon for the purpose of passing an enhanced or exceptional sentence in respect of the extradition offences, and, if so, whether that would constitute a breach of the specialty provision.

38. I will deal with these issues separately.

(a) Whether the respondent might be prosecuted for bail-jumping and inter-state flight in breach of the rule of specialty.
39. It will be recalled that Ms. LaVerne and Mr Hopkins have each respectively sworn that the respondent will not, if extradited, face prosecution in respect of the bail-jumping charge and the charge of inter-state flight even though there are charges against him in respect of same. Mr O'Connell has argued that this Court should not be expected to accept an undertaking in this regard and that these charges should by now have been formally wthdrawn. He refers to the fact that courts in the past have been reluctant to accept undertakings for reasons such as that administrations may change in the requesting state, and undertakings given by one administration may not be observed by some in-coming administration. He has referred in this respect to *Bourke v. The Attorney General* [1972] I.R. 36 in which at p.65 of his judgment, O'Dalaigh C.J. referred to *R. v. Governor of Brixton prison – Ex Parte Armah* [1968] A.C. 192 in which the desirability of accepting undertakings or expressions of intention not to prosecute was questioned. However at this juncture I should state that this case is not really of assistance since at issue in *Armah* was a question of returning a person to the state of Ghana from the United Kingdom, and in respect of which two states there was no specialty treaty provision. In the present case the Treaty provision exists in Article XI, and what is stated in the affidavits with regard to the non-pursuit of the respondent in respect of the non-extradition charges is not in any way in substitution for the treaty provision, but merely by way of statement in accordance with the rule of specialty. It is not a question of this State or this Court having to or being asked to rely solely upon any undertaking or statement of intention in the absence of anything else.

40. Mr O'Connell also referred to the judgment of Denham J. in *Attorney General v. Burns,* unreported, Supreme Court, 6th December 2004. That was a case which came before the High Court by way of case stated from the District Court, and then to the Supreme Court by way of appeal from the judgment of the High Court (O'Caoimh J.). The District Court had ordered the extradition of the respondent on the basis that the argument made in respect of the rule of specialty had not "gone far enough", but the District Judge sought the opinion of the High Court by way of Case Stated as to whether he was correct in holding against the respondent on the rule of specialty arguments made, even though he had found as a fact that under U.S. law, *inter alia*, the respondent could be punished for offences other than those for which his extradition was ordered, namely by the trial judge taking into account uncharged conduct when imposing sentence. Mr O'Connell submits therefore that the same could happen in the case of Mr Russell. The learned Denham J. was of the view that such a finding of fact by the District Judge (one with which the Supreme Court could not interfere given that the matter was before the Supreme Court by way of Case Stated) required that the respondent be released.

41. On reading the judgment of Denham J. it is clear that the decision in Burns is confined to the facts as found in that particular case by the District Court. The matter came before the Superior Courts by way of a Case Stated, and as such both the High Court and the Supreme Court were constrained by the finding of fact deemed to have been made by the District Judge as to the law in the United States in relation to sentencing. The learned Supreme Court judge refers to the fact that the evidence of foreign law which was adduced in the District Court was that of a lawyer on behalf of the respondent only, and that there was no other evidence called by the applicant to contradict that evidence. It was on those deemed findings of fact as to U.S. law that the learned judge considered that the District Judge had erred in not releasing the respondent, but it is made clear that the case may not have any precedential value. I would readily and respectfully concur with that view.

42. Nonetheless Mr O'Connell refers to the three cases already mentioned (*Andonian, Lazarevich and LeBaron*) and these were cases also referred to by the expert witness called in the Burns case, and they are the cases referred to by Mr Moorer in his affidavit in the present case. He submits that it is clear from these judgments that the rule of specialty will not be applied to the respondent if returned. I am of the view that to rely on these decisions for the proposition that the rule of specialty will not be observed in this case is to misunderstand those cases. Mr Bermingham is, I believe, correct when he states that in fact these cases confirm the opposite, namely that the rule is carefully observed by the United States. But it is necessary to understand the facts of those cases and exactly why it was deemed to be not a breach of the specialty rule to proceed against the respondents in question in respect of charges which had not been themselves the subject of the extradition requests. However, it is certainly the case that the interpretation of the rule by the courts in question is based on a background of sentencing history in the United States going back many years, as well as a view on their part as to the purpose behind the development of the rule. That historical background is referred to in the cases themselves.

43. However, it is also the case that simply because the U.S. Courts have interpreted the rule of specialty in a certain way, and against a particular historical background, it does not follow that this Court may not take another view and conclude that the rule, as understood and interpreted here, will not be observed and applied in respect of the respondent if returned to the U.S. This is the view taken also by Laws L.J. in the case of *R. (Bermingham and others) v. Director of the Serious Fraud Office* [2006] All ER 268 to which I shall refer later.

***U.S. v. Andonian* 29 F.3d. 1432**
44. There were a number of defendants who had been extradited to the United States from Uruguay, one of whom was Raul Vivas. It is in respect of the latter that this case is relevant. On their return to the United States from Uruguay they were all convicted of

conspiracy to money launder as well as money laundering. Vivas appealed his conviction on the ground, *inter alia*, that his trial on an additional indictment (referred to as a "superceding indictment") violated the rule of specialty because the indictment which formed the basis of the extradition request contained fewer counts and alleged a conspiracy of narrower scope than the superceding indictment. In addition, the superceding indictment contained a greater number of alleged overt acts said to have been in furtherance of the conspiracy, and more detail as to Vivas's role in the conspiracy.

45. For all practical purposes the specialty provision in the Treaty between Uruguay and the United States is in the same terms as Article XI of the Treaty between Ireland and the United States.

46. Circuit Judge Beezer referred to what he called "the doctrine of specialty":

> *"The doctrine is based on principles of internationality comity; to protect its own citizens in prosecutions abroad the United States guarantees that it will honor limitations placed on prosecutions in the United States…… Our concern is with ensuring that the obligations of the requesting nation are satisfied".*

47. In that regard, the judge then referred to another case, namely *U.S. v. Najohn* 785 F.2d 1420 in which it is stated *"Because of this, the protection exists only to the extent that the surrendering country wishes"*.

48. He went on to state that it was necessary to look to the Treaty itself in order to determine the protection which an extradited person is afforded under the rule of specialty. As I have said already the rule as appearing in the Treaty with Uruguay mirrors the provision in Article XI referred to. The judge referred to the portion of the rule in the Treaty with Uruguay at which it is provided that a person *"shall not be prosecuted… for an offence other than that for which extradition has been granted… unless… the requested party has manifested its consent to his detention, trial or punishment for an offence other than that for which extradition was granted…"*

49. That clause is mirrored in Article XI of the Treaty between Ireland and the United States where there is a similar prohibition *"unless … the Requested State has consented."* The question of consent has not arisen in the present case.

50. The Court also agreed with the government's submission that the appropriate test in relation to Vivas was whether Uruguay would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited. The judge expressed the view that by adding more counts of money laundering to the indictment there was no breach of the rule of specialty and that Uruguay would not regard it as a breach. This was because the superceding indictment did not alter either the nature of the scheme alleged nor the particular offences alleged, and the only significant difference between the two indictments was that the superceding indictment was more specific as to the nature of the money laundering scheme and contained added substantive counts of money laundering which were identical to those in the original indictment. In all the circumstances the Court considered that Uruguay would not consider these additional offences to be separate and independent of the original charges in respect of which he had been extradited. One can see that this is a view arrived at by the U.S. Circuit Courts of Appeal without any reference back to Uruguay as to whether they do or do not regard it as a breach of the rule. The Courts form their own view of the matter unilaterally.

***U.S. v. LeBaron* 156 F.3d. 621**

51. This is another case in which the defendant appealed his convictions on one count of conspiracy to obstruct religious beliefs, as well as two other counts, on the basis, *inter alia*, that there was an incorrect application of the specialty rule. The defendant had been extradited from Mexico to the United States and within the extradition treaty with Mexico there is a specialty provision in the same terms as already set forth above. The Resolution (the equivalent of an order for extradition) under which he was extradited from Mexico specifically referred to the charges in respect of which he was being extradited, and also set forth specifically the charges in respect of which extradition was not granted. However different wording was used in the Resolution from that contained in the indictment itself, and this led to some confusion later.

52. There were fourteen charges contained in the indictment on foot of which his extradition was sought, and on his return Le Baron was proceeded against in respect of all these charges. The judgment of the court records *that "the different descriptions of the counts in the indictment, and the charges in the Resolution, created confusion regarding the counts on which Aaron [LeBaron] could be prosecuted. At the request of the United States for detailed specification of the counts to which Mexico had consented, Mexico sent an explanatory diplomatic note that stated……".* That note apparently clarified the situation and the prosecution against *LeBaron* proceeded only in respect of certain of the fourteen charges on the original indictment.

53. Nevertheless after conviction, *LeBaron* contended in his appeal that the prosecution of him in respect of the charges for which he was convicted in fact breached the specialty rule, in spite of the clarification given, and specifically the count of conspiracy to obstruct religious beliefs, and two charges referred to as RICO counts.

54. In reaching a conclusion that the rule was not violated in the case, and referring to previous case-law, including Andonian, the Court stated:

> *"These cases suggest that the doctrine of specialty is concerned primarily with the prosecution for different substantive offences than those for which consent has been given, and not prosecution for additional or separate counts of the same offence. The appropriate test for a violation of specialty is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited."*

55. The Court went on:

> *"Similarly we must determine whether Mexico's consent to prosecute 'criminal conspiracy to commit homicide' authorized prosecution on Count 9 conspiracy to obstruct religious beliefs. In the explanatory letter, Mexico specifically authorized prosecution under ss. 247 which appears only in Count 9. Like Counts 13 and 14, never has Mexico expressly objected to prosecution for count 9. Aaron contends that licence to prosecute 'conspiracy to murder' does not license prosecution for conspiracy to obstruct religious beliefs. We previously found in United States v. Barlow ….. that 'the plain language of ss. 247 manifests Congress' specific intent to make criminal, inter alia, the conduct at issue here: the killing of Ed, Mark, and Duane for the sole reason that they chose to exercise their right to extricate themselves from their beliefs, practices, and the fellowship of the Church'. For these reasons we find that Mexico would not consider Aaron's conviction for conspiracy to obstruct religious beliefs to be an offence so separate from the one for which he was extradited as to be a breach of faith by the United States. See Fiocconi, 462 F.2d at 481."*

56. I have set forth detail of these cases at some length as I am of the view that it is necessary to look at the manner in which the

decisions were arrived at and the basis for the decisions. Mr O'Connell seeks support from these cases for a submission that even though the Treaty between this State and the United States contains Article XI (the rule of specialty as set forth) and even though the affidavits on behalf of the applicant by Ms. LaVerne and Mr Webster have confirmed that the respondent will not be proceeded against in respect of the bail-jumping and inter-state flight charges if returned to the United States, there is a real risk on account of this case-law that the Courts there would not find it to be a breach of the rule of specialty in the Treaty if in fact he was proceeded against in respect of those charges, contrary to both the statements made in the affidavits and the Treaty provision in Article XI, and that the respondent would have no protection available to him from the U.S. courts in that eventuality. He urges this Court to take a different view and to hold that it would be a breach of the rule as interpreted here as opposed to in the United States.

57. I am of the view firstly, as I have already stated, that the existence of Article XI in the extradition agreement between this State and the United States of America precludes a refusal of extradition under s. 20 of the Act. But if the Court was satisfied that in spite of Article XI it was clear that the United States would breach Article XI in spite of its averments to the contrary, by virtue of the manner in which the Courts there have interpreted the rule of specialty – that manner being one with which this Court did not agree – perhaps it would be necessary to find a way to protect the respondent from the prospect of being proceeded against in respect of the non-extradition offences by refusing to make the order sought.

58. But it does not arise in this case. Indeed the idea that it could arise in circumstances relevant to the present case seems unlikely and far-fetched in the real world.

59. The present case on its facts is markedly different from the cases of *Andonian* and *LeBaron*. In *Andonian* for example the superceding indictment contained charges additional to those for which his extradition was sought, and alleging a wider conspiracy in relation to money laundering, but were found to be so connected to the original charges as not to be a breach of the rule, and this was on the basis that the requested state would not see it as being a breach. The charges were not charges of a kind unrelated to the facts which gave rise to the earlier charges.

60. It is in this respect in my view that it is worth considering the purpose of the rule of specialty. As was pointed out in the decisions referred to, the rule is there to protect a State's citizens in respect of prosecutions abroad on the basis of mutuality between sovereign states. It enables the requested state to have an opportunity of examining for example whether the offence for which extradition is sought corresponds to an offence in the requested state. In that way the requested state can protect its citizen, or a non-citizen within its territory, from being exposed to prosecution or punishment in respect of conduct which it does not recognise as being an offence. The requirement that the requested offence must correspond with an offence in the requested state would be set at nought if upon extradition back to the requesting state the accused person could be exposed to all manner of other charges which had not been included in the request for whatever reason.

61. Let us suppose also that the requested state recognised what was known as the political exception, and having ordered extradition for the offences contained in an extradition request, the defendant was proceeded against in respect of another unmentioned offence to which the political exception may have applied. In such a situation the requested state has been deprived of an opportunity to examine the proposed offence and consider whether extradition ought to be refused on the basis that it constituted a political offence.

62. These examples are but two, yet sufficient to elucidate a purpose and function of the rule of specialty, and in turn to understand the reasoning of the U.S. courts in the cases to which Mr O'Connell has referred. The view was formed in those cases that the offences for which the respective defendants were charged on their return to the U.S., and which differed from those in respect of which the extradition was specifically sought, were not independent of and separate from the offences in the request. They arose out of the same factual background which gave rise to the offences referred to in the request for extradition. It could therefore be reasonably considered, according to the U.S. jurisprudence, that the requested state had the opportunity to consider the issues mentioned such as perhaps correspondence, and that no further consideration of such issues would be necessary in respect of the added offences.

63. It cannot in my view be said correctly on behalf of the respondent that because the U.S. courts have decided *Andonian* and *LeBaron* in the way they have, it follows that the U.S. courts are likely to breach the rule of specialty by prosecuting the respondent for bail jumping and/or inter-state flight, particularly in the present case since those non-extradition offences rely on completely different facts to the extradition offences and are independent and separate from the facts underlying the extradition offences, and indeed solemn statements have been made before this court that these non-extraditoon charges will not be proceeded with.

64. In the present case the requesting state has not sought extradition in respect of those offences and, quite to the contrary, have given an express assurance that they will not prosecute him on those charges. Nothing in the judgments of the U.S. Courts in *Andonian* or *LeBaron* can be taken as permitting those facts to be overlooked or resiled from. No such assurances had been given in *Andonian* and *LeBaron*. It is not a situation in the present case where matters are being viewed post-extradition, and where extradition having been ordered on a certain basis in respect of specified offences, the defendant found himself being pursued in respect of other offences never referred to in the extradition request. I am satisfied that the rule of specialty exists in the Treaty, and that there is nothing in the case law referred to which demonstrates that it willl not be observed in this case.

65. I am satisfied that the rule will be applied to the respondent in respect of the charges of bail-jumping and inter-state flight. It would constitute a flagrant breach of the specialty rule, not to mention a breach of good faith by the U.S. authorities, if the respondent was, if returned, prosecuted in respect of the non-extradition offences. I am completely satisfied that *Andonian* and *LeBaron* are not authority for the proposition that specialty is breached by the United States with impunity. I am satisfied that the contrary is the situation and that the rule of specialty as found in the Treaty will be scrupulously observed by the United States as one would expect of a sovereign state which has entered into reciprocal arrangements with this State for the extradition of persons to and from each state. The assurances contained in the affidavits referred to are simply further, perhaps unnecessary reassurance in this respect.

(b) whether, though not actually being charged and prosecuted in respect of bail-jumping and inter-state flight, that uncharged and unproven/unconvicted conduct may be nevertheless taken into account and relied upon for the purpose of passing an enhanced or exceptional sentence, and in breach of the Rule of Specialty.

66. The starting point for this point of objection is the terms of Article XI itself which I have already set forth, but which by way of reminder provides:

> *"1. A person extradited under this Treaty shall not be proceeded against, sentenced, punished, detained or otherwise restricted in his or her personal freedom in the Requesting State for an offence other than that for which his extradition has been granted, or be extradited by that State to a third State, unless…" (my emphasis)*

67. The next point of reference should be the Sentencing Guidelines themselves which have been exhibited before this Court.

Sentencing Guidelines
68. Being satisfied that the respondent will not be proceeded against in respect of the charges relating to inter-state flight and bail-jumping, it is not necessary to reach conclusions about what level of sentence may have been appropriate under the Sentencing Guidelines. I mention that because much of the evidence of Mr Webster in his second affidavit is directed at the question of what sentence would be imposed on the federal charge of interstate flight. That does not arise.

69. In addition it is not necessary for the purpose of my decision to make any finding of fact as to what the standard range of sentence would be in respect of the extradition charges themselves. There is some divergence of opinion in that regard but not a great deal.

70. The only matter upon which I should express a view is whether under the present Guidelines the trial judge is permitted to take account of other conduct, such as in the present case his flight to avoid prosecution, in order to impose what is referred to as an exceptional or an enhanced sentence on the extradition charges. In fact since I am deciding that any such enhancement or upward movement from the standard range of sentence under the Guidelines is not a breach of the rule of specialty anyway, it is not strictly necessary even to embark on that finding of fact. But for the sake of completeness I will deal with that.

71. I am satisfied that on the Counts relating to vehicular homicide and vehicular assault, the judge could enhance the standard range of sentence if the jury was satisfied that the offences were committed as a result of the consumption of alcohol. But that enhancement is not something which is related in any way to conduct which is outside or independent of the extradition offences themselves. There is nothing in the Guidelines which provides for an enhancement of sentence on the basis that the defendant jumped bail. I cannot find any reference to such a possibility in the Guidelines themselves, and Ms. La Verne has sworn to this effect in her affidavit dated 15th February 2006.

72. Mr Moorer has sworn in his affidavit dated 7th March 2006 that in 2005 the Washington legislature amended the Sentencing Reform Act in order to comply with two U.S. Supreme Court decisions referred to as Blakeley and Booker respectively. Compliance with those decisions required that any facts taken into account in sentencing as aggravating facts leading to an exceptional sentence had to be found as facts by the jury and had to be proved beyond a reasonable doubt. Prior notice of the circumstances on foot of which an exceptional sentence will be sought must be served on the defendant Prior thereto, the trial judge could take into account facts which were outside the findings of fact made by the jury in reaching its verdict on guilt. But in carrying out the necessary amendment to the legislation, the legislature also set forth in some detail what matters could be regarded as aggravating facts.

73. Under the new procedures (see RCW 9.94A.537), once the jury finds the aggravating facts proven, the sentencing judge must then decide whether or not those aggravating facts constitute a substantial and compelling reason to impose an exceptional sentence.

74. The factors which may be put to the jury for consideration of proof beyond a reasonable doubt for the purpose of having an exceptional sentence considered by the trial judge are set out in subsection (3) of RCW 9.94A.535. They are numerous, extending from (a) to (y) as listed therein, and with some paragraphs containing sub-categories. Only one of the paragraphs is relevant, in my opinion, to the question as to whether in the present case, if the jury found the necessary underlying facts proved to the required degree, the trial judge may consider that there was sufficient justification for an exceptional sentence over the standard range. That paragraph is (q), namely if *"the defendant demonstrated or displayed an egregious lack of remorse"*.

75. The respondent submitted also that paragraph (a) was relevant also, namely that *"the defendant's conduct during the commission of the current offence manifested deliberate cruelty to the victim".* But I would hold the view that this would not reasonably relate to the respondent's extradition offences. The reference to "during the commission of the current offence" suggests circumstances completely distinguishable from a vehicle accident, such as a violent assault for example.

76. But in relation to (q) it is perfectly reasonable to expect in my view that the prosecution would seek to establish facts, including the fact that the respondent jumped bail and fled to this country, and having done so try and persuade the judge that he should depart upwards from the standard sentence range and impose an exceptional sentence on the basis of an "egregious lack of remorse" on the part of the respondent. This would be so, especially given the notoriety, public outcry and hostility towards the respondent in the locality where the incident occurred.

77. It is unnecessary for me to express a view on whether the available range of standard sentencing would be sufficient to enable the judge to impose an appropriate sentence. That will in due course be a matter entirely for him or her to decide in the event that the respondent is found guilty of any of the extradition offences. But I cannot rule out the possibility that under the Guidelines the conduct of the respondent in not appearing at the readiness hearing and fleeing the state of Washington in breach of his bail could be found to be an aggravating fact under (q) referred to, and that the judge could thereafter impose an exceptional sentence *in respect of one or more of the extradition offences.* It is another matter altogether to determine whether, if that was to occur, it would constitute a breach of the rule of specialty as found in the Treaty.

78. Mr O'Connell's submission on the respondent's behalf is that by reason of the fact that under the Sentencing Guidelines the trial judge may impose an exceptional sentence over and above the base level sentence in respect of the extradition offences, so as to take account of the conduct of the respondent in fleeing the state and the country (i.e bail-jumping and inter-state flight) this would amount to an non-observance of the rule of specialty since the respondent would in effect be sentenced/punished for an offence other than that for which his extradition has been granted. I do not agree that this is so.

79. The case of U*.S. v. Lazarevich* 147 F. 3d 1061 is of importance and has been referred to by Mr O'Connell.

80. In that case, the defendant had been extradited from the Netherlands to face charges involving passport fraud. Having been convicted in the U.S. he appealed his sentence on the basis that it constituted a punishment for a non-extradited offence in violation of the rule of specialty as contained in the Treaty between the Netherlands and the U.S. The facts of the case are important. In 1989 he had abducted his children in California and brought them back to Serbia, after a Californian court had granted custody to his wife. Some six years later he released them to his wife. An order for his extradition was made so that he would face charges in the U.S. that he had "made false statements on the passport applications of his two children", but the court refused to extradite for charges of child abduction on the basis that he had already been tried and convicted on similar charges in Belgrade in 1992. Upon his return to the U.S. he was indicted for making false statements on passport applications, and was convicted in respect of an application in respect of one of his children. He was sentenced to 24 months imprisonment and 3 years of supervised release. It appears that the sentencing judge arrived at his sentence by departing upwards from what is referred to in the Sentencing Guidelines

as "the base offence level" of six, to a level of fourteen on the basis that there was an aggravating factor which justified this increase. The increase in offence level for the purpose of the Guidelines was arrived at because the Court found that the offence for which he was convicted, namely of making false statements on a passport application, was committed to facilitate another offence, namely child abduction. That other offence was of course the offence for which extradition had been refused by the Netherlands Court. Pursuant to the Guidelines the sentencing judge increased his criminal history category from I to II and this was based on his 1992 conviction for child abduction in Belgrade. This resulted in a sentencing range of between 18 and 24 months, and the maximum of that range was imposed.

81. *Lazarevich* argued that this sentence in fact punished him for an offence in respect of which extradition had been refused, in breach of the rule of specialty. The Treaty between the Netherlands and the U.S. contains a provision in respect of specialty which includes a provision that a person *"extradited under this Treaty shall not be detained, tried, or punished in the territory of the Requesting State for an offence other than that for which extradition has been granted"* (my emphasis). Essentially it is the same as that contained in Article XI of the Treaty between the U.S. and Ireland.

82. The U.S. Court of Appeal decided that this sentence did not violate the rule of specialty. In doing so, it referred to the case of *Andonian* and to the statement that "the doctrine of specialty embodies the principle of international comity" and that "to protect its own citizens in prosecutions abroad, the United States guarantees that it will honor limitations placed on prosecutions in the United States". The Court also stated again that the specialty rule exists only to the extent that the surrendering country wishes. The argument made by *Lazarevich* was rejected for the reason stated as follows in the Court's judgment:

> *"The Supreme Court has held that the use of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorised statutory limits does not constitute punishment……The agreement and the Treaty were made … within an historical and precedential context. That context includes the long-standing practice of United States courts of considering relevant, uncharged evidence at sentencing…"*

83. The court stated that other countries when agreeing treaty provisions with the United States would be well aware of the well established basis on which sentencing were calculated and imposed for extradition offences, and that they could not therefore regard same as being in breach of the agreed specialty provision.

84. The court concluded that the taking into account of other criminal conduct in the calculating the appropriate sentence under the sentencing Guidelines did not run contrary to the rule of specialty, stating that:

> *"the plain language of a treaty must be followed unless a plain language interpretation effects a result inconsistent with the intent or expectations of the signatory nations. If the plain meaning of punishment is interpreted to preclude consideration of other criminal behaviour in sentencing, that interpretation would seem to effect a result inconsistent with the intent at least of the United States, given its long history of considering such conduct…"*

85. Stating again that the rule of specialty exists only to the extent that that the surrendering country wishes, the Court stated that it could find no evidence in the record that the Netherlands wished the specialty rule to protect *Lazarevich* from an upward departure from the base level for the offence for which he was extradited and convicted.

86. Mr O'Connell relies on the *Lazarevich* case, and urges that in the present case the evidence is that, in all probability, if the respondent was convicted on the charges of vehicular homicide, vehicular assault, theft and forgery, or any of them, the baseline sentence under the Guidelines would be departed from, and an enhanced or exceptional sentence would be imposed to take account of the fact that the respondent had fled to avoid his prosecution. He refers to the evidence of Mr Moorer in this regard as well as that of Mr Webster.

87. It will be recalled that in the case of *Attorney General v. Burns [supra]* the District Judge had made a finding of fact to which the High Court and Supreme Court were confined, and which was to the effect that under U.S law a person could be punished for an offence other than that for which his extradition was ordered. On that finding of fact, which had to be accepted as the factual basis on which to rule on the question posed in the Case Stated , the Supreme Court was of the view that the rule of specialty would not be applied to Mr Burns, and that his extradition should therefore be refused. The Court also clearly had reservations about that finding of fact and the evidence adduced from which the finding was made in that case.

88. The question which arises for determination in the present case is whether a person is in fact being punished for *"an offence other than that for which his extradition has been granted"* if in respect of the offence for which his extradition was granted he receives a sentence which reflects all the circumstances of that offence including the fact that he did not answer to his bail. If that be the position, does it follow also that extradition would have to be refused, if a person whose extradition is sought for an offence, has previous convictions in the requesting state either for the same type of offence or different offences, since such a person in all probability would receive a heavier sentence or punishment than a person who is being sentenced or punished for a first offence? I do not believe so. Mr O'Connell argues that this is not the position since it is only in respect of unindicted conduct that is taken into account that there would be a breach of the rule. But in my view that is not what is stated in Article XI, which refers specifically to any other offence, and makes no reference to conduct as such.

89. I am satisfied that the words used in the Treaty mean simply what they say, which is, for the purposes of this particular issue, that a person must not be punished in respect of any offence other than the offence for which extradition was granted.

90. But I am satisfied that under the Sentencing Guidelines, a trial judge may enhance a base level sentence for the extradition offence, or indeed impose an exceptional sentence in circumstances where in all the circumstances he/she considers the sentence under the Guidelines to be too lenient, and that such upward movement in the level of sentence can take account of other conduct of the respondent, including conduct which may have its factual background in the non-extradition offences, whether offences for which extradition was actually refused or not, or even uncharged and unproven conduct. In the present case I am satisfied that such matters have the capacity to enhance the respondent's sentence should he be convicted. The extent by which any sentence may be enhanced does not really matter as far as my decision is concerned.

91. But I am also satisfied that the taking into account of such other conduct for the purpose of calculating or arriving at the appropriate sentence or punishment for the extradition offence, even if it could give rise to another offence if charged, does not amount to punishment for another offence, but is simply a process by which the appropriate sentence for the extradition offence is arrived at. It is not therefore a breach of the rule of specialty.

92. This is in line with the decision in *Lazarevich*. That case is of course not binding on this Court which can reach its own view of the

matter. But I am satisfied in any event that the Sentencing Guidelines, even though permitting upward movement from a base level sentence, does not thereby effect a breach of specialty, since whatever penalty is being imposed is being imposed as the appropriate sentence in respect of the extradition offence, taking into account all matters relevant to the level of sentence. It is not punishment in respect of any other non-extradition offence. I believe that the same situation would pertain in our own courts were a person returned from the U.S. to this State to face prosecution for an extradition offence. The sentence to be imposed could just as easily take into account any previous criminal record or history of the person, so that the sentence is appropriate, and it could not in reality be contended that such would be a breach of specialty.

93. Before finalising this judgment, and because they had not been referred to in submissions before me by Counsel for either party to this application, I gave Counsel an opportunity to address me in relation to two English cases of very recent origin (February 21st 2006) which my researches have uncovered and which seem to be on point. I should state that these cases are so recent they could not reasonably have been referred to by Counsel.

94. In carrying out that research I was conscious of the fact that, as has been stated on more than one occasion in judgments of the Supreme Court, extradition is a *sui generis* procedure in which it is the Court itself which must inquire, and be satisfied that an order for extradition should be made. It must not therefore confine its consideration of the issues to the arguments and submissions made by the parties, no matter how expert (and they have been in this case) those submissions may be. Those cases are both of recent origin, February 2006, from the Queen's Bench Division (Divisional Court). Each case touches upon the very questions raised by the respondent in the present case, namely whether the manner in which the U.S. courts interpret and operate the rule of specialty as expressed in the relevant Treaty, both in relation to the matter of proceeding by way of 'superceding indictment' against a person, in respect of offences other than those for which extradition was ordered, and in relation to other conduct being taken into account in arriving at a sentence *for the extradition offence*, offends against the rule in as much as a sentence may be adjusted upwards under the Sentencing Guidelines in respect of such conduct. I find that the reasoning and conclusions of these cases accord with my own, and I am happy to adopt what is stated for the purpose of elaborating upon my own conclusions.

95. The first case is *R. (Bermingham and others) v. Director of the Serious Fraud Office* [2006] All ER 268. I shall refer to this case as "*Bermingham*".

96. The second case is *Welsh and Thrasher v Secretary of State for the Home Department and another* [2006] All ER 289. I shall refer to that case as *"Welsh and Thrasher".*

97. Judgment was delivered in each case on the same day, the 21st February 2006.

The *"Bermingham"* case

98. According to the headnote, each appellant was employed by a division of a London clearing bank, of which the American company, Enron, was a client. The precise details of the fraud alleged against these persons does not matter, but the fact is that following investigations by the United States Securities and Exchange Commission, in which it was assisted by the U.K. Financial Services Authority, the Texas prosecutor brought charges of wire fraud, and aiding and abetting wire fraud, against these persons. Having indicted these persons with those offences, the government of the United States sought their extradition from the U.K. It appears that on the basis that 95% of the alleged conduct had been carried out in the U.K. and only 5% in the U.S. the defendants made unsuccessful efforts to have prosecutions brought in the U.K as part of their attempt to resist the extradition requests from the U.S. government. The district judge hearing the extradition application concluded that the extradition proceedings were not an abuse of process, and that to order extradition was not incompatible with the defendants' human rights, and he sent the case to the Secretary of State for his decision as to whether the defendants should be extradited.

99. Having decided that there were sufficient specialty arrangements in place within the meaning of s. 95 of the Extradition Act 2003, the latter ordered extradition of the defendants, and concluded that their extradition would not infringe their rights under article 8 of the Convention. The defendants sought a judicial review of the decision by the Serious Fraud Office not to prosecute in the U.K., and also appealed the order of the district judge. The only issue raised in those proceedings which is relevant to the present case is the issue as to whether the Secretary of State should have concluded that in fact there were no sufficient specialty arrangements in place for the purposes of s. 95 of the 2003 Act having regard to the practice in the United States of having what are referred to as 'superceding indictments' following extradition being ordered. In relation to that issue the Court held:

> *"When deciding whether the Secretary of State had correctly concluded that there were in being specialty arrangements with the US within the meaning of s 95 of the 2003 Act, the court had to consider not only the US's relevant laws and procedures, but also any circumstances specific to the particular case which might bear on the issue. The court was not directly concerned with whether the relevant law or practice in the US complied with the Extradition Treaty, it had to go by the 2003 Act. Section 95 forbade process against an extradited person in the requesting state unless it was an offence in respect of which the person was extradited or an extradition offence disclosed by the same facts as that offence.*
>
> *There was no doubt that superseding indictments were deployed in the US for the trial of extradited defendants, but that was not to say that such defendants were put on trial in breach of the specialty rule. The US adopted a realistic assessment of the sending state's attitude, in recognition of the specialty doctrine as a principle of international comity, but its courts did not treat it as a technical hurdle devised for the benefit of properly convicted criminals, enabling them to take points which truly belonged to the sending state and which the courts properly inferred that the sending state did not take. In the instant case, s 95 was met."*

100. The relevant provisions of s. 95 of the 2003 Act are set out in the judgments as:

> *"(1) The Secretary of State must not order a person's extradition to a category 2 territory if there are no speciality arrangements with the category 2 territory.*
>
> *...*
>
> *(3) There are speciality arrangements with a category 2 territory if (and only if) under the law of that territory or arrangements made between it and the United Kingdom a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if -*
>
> > *(a) the offence is one falling within subsection (4), or*

(b) he is first given an opportunity to leave the territory.

(4) The offences are -

(a) the offence in respect of which the person is extradited;

(b) an extradition offence disclosed by the same facts as that offence...;

(c) an extradition offence in respect of which the Secretary of State consents to the person being dealt with;

(d) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

(5) Arrangements made with a category 2 territory which is a Commonwealth country or a British overseas territory may be made for a particular case or more generally.

(6) A certificate issued by or under the authority of the Secretary of State confirming the existence of arrangements with a category 2 territory which is a Commonwealth country or a British overseas territory and stating the terms of the arrangements is conclusive evidence of those matters." (my emphasis)

101. The phrase "may be dealt with" which I have emphasised by underlining above, gave rise to some confusion and discussion in relevant cases, but it has been decided that it includes not only where a person is prosecuted or proceeded against, but also where a person is being sentenced or punished. For all practical purposes the matters arising for consideration under s. 95 are those same issues which arise in the present case under article XI of the Treaty.

102. The specialty provision in the 1972 Treaty on Extradition between the United States and the United Kingdom is contained in article XII thereof as follows:

"A person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted, or on account of any other matters, nor be extradited by that Party to a third State -

(a) until after he has returned to the territory of the requested Party; or

(b) until the expiration of thirty days after he has been free to return to the territory of the requested Party."

103. Laws L.J. put the issue to be decided in the following way:

"It is important to be precise as to the question or questions we have to decide. We are not directly concerned with whether the relevant law and practice in the United States complies with Article XII of the 1972 UK - USA Extradition Treaty, which I have cited. We have to go by the 2003 Act. Article XII(1) forbids process against an extradited person in the requesting State "for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted". S.95 forbids such process for an offence unless (so far as relevant here) it is "(a) the offence in respect of which the person is extradited; [or] (b) an extradition offence disclosed by the same facts as that offence" (s.95(4)). It is not, I think, to be assumed that the two prohibitions are identical, though they are clearly close."

104. Counsel for the defendants sought to rely on the case-law of the United States Court of appeals, including the cases to which reference has been made in the present case, in order to show that in the U.S. a situation is permitted where the specialty provision in the Treaty is "more honoured in the breach" by allowing the bringing of a superceding indictment following extradition which deals with more than the offence for which extradition was ordered. Laws L.J. does not himself examine these cases, but refers to the analysis of those cases by Ouseley J. in Welsh and Trasher to which I shall come in due course. But Laws L.J. states in this respect:

"I have expressed my agreement with Ouseley J's reasoning on which I cannot improve and will not replicate here. He holds, in particular, that the decision in LeBaron "not merely does not support [counsel's] submission, it shows it to be completely wrong" (paragraph 39).

I should, at least for clarity's sake, state our essential conclusions on the "superseding indictment" point in this judgment. There is no doubt that "superseding indictments" are deployed in the United States for the trial of extradited defendants. But that is not to say that such defendants are put on trial in breach of the specialty rule. LeBaron contains a characteristic statement, made by Circuit Judge Garza after citing earlier authority (627):

'The doctrine of specialty is concerned primarily with prosecution for different substantive offenses than those for which consent has been given, and not prosecution for additional or separate counts of the same offense. The appropriate test for a violation of specialty 'is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited'.

The formulation there quoted is from Andonian at 1435. This test, as Ouseley J shows, is a recurrent theme through the cases. In applying it, moreover, the courts of the United States do not simply go on the basis that the absence of specific objection by the sending State is to be taken as consent to the defendant's trial on a re-formulated charge. I would respectfully repeat and emphasise this passage in Ouseley J's judgment in Welsh and Thrasher:

'84. The US Courts do not infer consent merely because there is silence. They do not turn a blind eye to what are obvious problems in the sending state's known attitude, whether from past extradition requests or from the particular case or Treaty involved. Rather... they adopt a realistic assessment of the sending state's attitude, in recognition of the specialty doctrine as a principle of international comity and out of respect for a foreign state's sovereignty. But the Courts do not treat it as a technical hurdle devised for the benefit of properly convicted

criminals, enabling them to take points which truly belong to the sending state and which the Courts properly infer that the sending state does not take.

85. There is nothing in the cases which would justify the conclusion that the US Government or Courts would not respect the express limits in the UK-US Treaty or in the 2003 Act or in any judgment of this Court...'

This summation of the position, and indeed the formulation of the test for a violation of the specialty rule set out in Andonian, LeBaron and other cases, reflect the very approach taken by the Supreme Court in Rauscher in 1886 to which I have already referred."

105. Counsel had submitted that it was likely that if extradited on the offences of mail fraud and aiding and abetting mail fraud, the defendants would be indicted with a different fraud, namely a fraud on Enron itself. That submission was made in the face of an undertaking from the U.S. Justice Department that it would not seek a superceding indictment charging the defendants with offences arising from conduct other than the conduct for which they are extradited. Mr O'Connell makes a similar submission in the present case. Laws L.J. expressed the following view in relation to this undertaking:

"This undertaking was also deployed in Welsh and Thrasher, and Ouseley J considered (paragraph 152) that on the facts of that case it did not affect the position. In the present case I consider that the undertaking confirms the position which the United States courts would anyway adopt. They will be satisfied, not least by the terms of this court's judgment, that the defendants' extradition is ordered on the precise basis that the accusation they will face at trial will be limited to, and travel no wider than, the case which is essentially formulated in paragraphs 10 and 23 of the Texas indictment and reflected in the charge drafted for the proceedings at Bow Street. And the American courts will be loyal to this expectation: not merely because in general they respect the specialty rule, but because by their own express jurisprudence (from Rauscher onwards) it is "essential to determine... whether the surrendering state would regard the prosecution as a breach" (Fiocconi, 480). This test is meticulously applied. It means, in short, that the American courts will give effect to the views of the Secretary of State and of this court (as to which there will be no room for doubt) of the requirements of s.95 of the 2003 Act."

106. As I have already indicated in relation to whether the respondent in the present case will be proceeded against in relation to bail-jumping and/or inter-state flight, the statements contained in the affidavits of Ms. LaVerne and Mr Hopkins, being similar in nature to the "undertakings" referred to by Laws L.J., are confirmatory of the position that the specialty rule will be observed, in spite of what is submitted as to the manner in which the cases referred to have been decided in the 5th and 9th Circuits in the United States in cases such as *Andonian* and *LeBaron*. Such undertakings or statements are not a requirement as such.

107. As to the second point made regarding the policy of passing enhanced sentences in respect of the extradition offences in order to take account of unconvicted and unproved conduct, it is useful to refer to what is stated by Laws L.J. in that regard also. He states:

"The Federal Sentencing Guidelines were also the subject of argument in Welsh and Thrasher, and their impact on the specialty rule is discussed by Ouseley J at paragraphs 100 ff of his judgment in that case. Again, I agree with his reasoning and will not repeat it. In summary the points are these. (1) The specialty rule does not in the United States "restrict the scope of proof of other crimes that may be considered in the sentencing process. The distinction is thus drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the rule of specialty" (Garcia 208 F.3d 1258 (11th Circuit 2000). More shortly, "[R]elated criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct." (Witte v US 515 U.S.389 (1995): Witte was not an extradition case.) (2) The US may regard offences in respect of which extradition has been refused as capable of aggravating sentence, and that is not treated as a breach of specialty. (3) Under the Sentencing Reform Act of 1994 the Guidelines had been promulgated as mandatory instructions to the federal criminal courts. The Supreme Court has held that to be unconstitutional: Booker 125 S.Ct. 738 (2005). The Guidelines are accordingly now discretionary. But this circumstance, I think, has no determinative impact on the question whether the defendants would if extradited face a violation of the specialty rule. If the US trial court possesses a discretion to pass sentence on a basis which means that the extradited defendant will be "dealt with" (s.95(3) of the 2003 Act) for an offence or offences other than "(a) the offence in respect of which [he] is extradited; or (b) an extradition offence disclosed by the same facts" (s.95(4)), then the conditions of s.95 are unfulfilled just as surely as if the US trial court was bound to sentence on such a basis; unless, perhaps, it were plain that the discretion would not be so exercised. (4) The sense to be given to the phrase "dealt with" in s.95(3) is accordingly of some importance. (my emphasis)

108. Regarding the meaning to be attached to the phrase "dealt with", Laws L.J. states as follows:

"Here I would respectfully commend the reasoning of Ouseley J in Welsh and Thrasher at paragraphs 135 - 139. I hope I do him no injustice if I venture to highlight these points. (1) "Dealing with" an extradited person plainly includes sentencing him. (2) The Secretary of State must make up his own mind whether on any given scenario of law and fact in the requesting State, the defendant would on return there be "dealt with" conformably with s.95. He may not simply adopt the requesting State's view of the reach of the specialty rule. (3) However, as Ouseley J says (paragraph 136) "the language of [s.95] has to be applied to many treaties and foreign justice systems which will differ from each other as well as from those of the UK"; there is, accordingly, no implied condition of the section's fulfilment that the sentencing practice in the requesting State should be mirror image to the practice here. (4) The authorities suggest that the sentencing practices reflected in the Guidelines have been in place for very many years. Had these practices been perceived in the United Kingdom as repugnant to our conception of the specialty rule, the matter would surely have been clarified in successive treaties or extradition statutes, or surfaced in litigation contesting an extradition order. Thus s.95 "is not intended to bring about profound changes in extradition arrangements in a way which would add a novel and significant hindrance to extradition". (Ouseley J, paragraph 137). (5) Although the United States courts appear to take broader considerations into account when sentencing than do the courts here, that will not of itself produce the result that an extradited defendant would be "dealt with" other than in accordance with s.95."

109. Laws L.J concludes by stating:

"Given the approach to be taken to the Sentencing Guidelines in light of the correct construction of s.95, as I have

summarised it and Ouseley J has explained it, there is in my judgment nothing in this part of the case to expose a violation of the specialty rule as it falls to be applied under the statute by the Secretary of State and on appeal by this court."

110. I have also concluded that the fact that in sentencing a person *for the extradition offence(s)* the court may enhance the base level sentence by taking into account all the circumstances of the case, as should happen in any case, including conduct which is uncharged and unconvicted, does not mean that the person is being sentenced or punished for some other non–extradition offence. It means that an appropriate sentence, taking into account all relevant facts and circumstances, is being imposed for the extradition offence in the same way as a previous conviction could reasonably be taken into account without offending against the double jeopardy principle. I believe that what is stated by Laws L.J. is consistent with this, albeit that what he states is in the context of a different Treaty and statutory provision. However any distinctions between the two regimes seem not to affect the issue to be determined.

111. Clearly Laws L.J. is in complete agreement with what Ouseley J. has stated in Welsh and Thrasher, and it is right that I should refer to that judgment also.

Welsh and Thrasher v Secretary of State for the Home Department and another **[2006] All ER 289**
112. The appellants in this case were persons whose extradition was sought by the United States from the U.K. so that they could face prosecution on a variety of conspiracy and substantive charges arising out of what is described in the head-note as a *"complex advanced fee fraud committed largely on U.S. residents"*. It would appear that the appellants were alleged to have induced people to pay substantial sums into various investment schemes with the promise of high returns and security. By the use of various deceptions it appears that the funds were not invested for the benefit of the investors but were transferred out of the jurisdiction into the hands of unknown conspirators. Early investments into the scheme received the promised high rates of return, so as to perpetuate the illusion of reality in the promised scheme, and induce others to invest in order to keep the scheme going. In due course the scheme collapsed and the appellants left their property in Virginia not long before it was searched by investigators into the scheme. They fled to the U.K. In due course a Grand Jury returned a 63 count indictment against the appellants. These included one count of conspiracy to commit mail and wire fraud, eighteen counts of wire fraud, seven counts of using a fictitious name, twenty three counts of mail fraud, as well as fourteen conspiracy and substantive counts relating to money laundering the proceeds of the other offences.

113. The appellants were arrested on foot of provisional warrants in the U.K. and contested the application for their extradition to the United States, on grounds *inter alia* that the U.S. would breach the rule of specialty by seeking and obtaining a superceding indictment by using the facts underlying the extradition offences in order to charge and prove other offences in the U.S, and by increasing the sentences which the appellants would otherwise receive by reference to facts underlying certain money laundering charges in respect of which extradition was sought but refused on grounds that correspondence had not been made out. This possible upward enhancement of sentence was submitted to constitute as much a breach of the rule of specialty as was a trial for such an offence.

114. Ouseley J. stated at the commencement of his judgment that *"the key question is whether the arrangements cover the requirements of the subsections: that is to say, that the person extradited should be "dealt with"* only for the offence which falls within subsection (4) [s.95 Extradition Act 2003]"

115. I have already set forth the terms of article XII of the Treaty between the U.S. and the U.K. and also s. 95 of the 2003 Act, and have referred already to the fact that "dealt with" has been found to include being punished or sentenced.

116. In his judgment Ouseley J. stated that he could not find the submission made by the appellants that the U.S. habitually violated the spirit and purpose of the rule of specialty as "remotely justified", and elaborates on that statement by reference to the absence of any cases being referred to where extradition had been refused to the U.S. by requested states, the fact that the 1972 Treaty and a later 2003 Treaty (not by that date ratified) had been negotiated in the light of knowledge as to how specialty was interpreted and applied in the U.S. courts. He also stated that the jurisprudence of the U.S. Supreme Court makes clear the adherence to the rule of specialty, and to the binding nature of such decisions on lower courts. He goes on at para. 36 of the judgment:

"…no decision has been cited to us in which any US Court expresses itself in a way which suggests or could support an allegation of disregard for the specialty rule as they interpret it. They instead express themselves as bound by and as adhering to it faithfully. That applies to all the cases which have been cited to us in support of the proposition that the US will in various ways breach the specialty rule in respect of these Appellants. The very highest at which this submission could properly be put is that the interpretation or application of the specialty rule differs in the US from that which the UK Courts would adopt. That may be relevant to the application of s95 to this case but it does not justify the breadth of some of the academic or learned commentary and submissions addressed to us or the Secretary of State.

37 The US Courts treat the origin and purpose of the specialty rule as deriving from the state parties' interests in extradition, and regard adherence to it as a matter of international comity and respecting foreign relations embodied in the treaty arrangements. The purpose is to protect the sending state against abuse of its discretionary act of extradition; Paroutian below. The US accordingly applies the rule even where there is no treaty obligation requiring it to do so. That means that the position of the sending state is regarded as of the highest importance.

38 It is rather less a rule which must be applied for the protection of an individual and it is clear that there is a divergence of practice or view among the various Federal Circuits as to whether a defendant has standing to raise issues of specialty or whether only the sending state can do so. Often the issue is considered without resolution of that point. But either way I can see nothing in that which would mean that the specialty doctrine is not applied or, more importantly, that the arrangements required by s. 95 are not in place."

117. Ouseley J. dismisses the notion that the case of *LeBaron (supra)* can be authority for a proposition that the U.S. would in breach of specialty prosecute on foot of a superceding warrant in respect of a charge for which extradition had been specifically refused and that U.S. courts would uphold such a conviction. He states in that regard at para. 39: *"not merely does [it] not support his submission, it shows it to be completely wrong. It requires attention to the precise facts."*

118. I do not propose to refer to the portion of the judgment of Ouseley J. in which he deals with the superceding indictment point, except to say that it supports the view I have formed on that question and on the cases of *Andonian* and *LeBaron*.

119. In dealing with the other question as to whether by enhancing a sentence by reference to other conduct the rule is breached, Ouseley J. refers to the case of *Lazarevich* and concludes in that regard:

"104 I do not regard this case as evidencing the very broad proposition put forward by Mr Summers that the US punished those extradited to it in defiance of the specialty rule, on the basis that the sending countries were all on notice that it would do so. It shows that the US regards offences in respect of which extradition has been refused as capable of aggravating sentence but does not regard that as a breach of specialty. It interprets Treaties in the light of its well-known practice and assumes that the other party would have objected to that practice in the Treaty or in the extradition order if that practice were regarded by the other party as objectionable. The fact that extradition was refused did not signify that the Netherlands regarded or would regard the reasons why Lazarevich made the false passport applications as irrelevant to the sentence for those offences, or a breach of the Treaty. Thus it did not ignore the Treaty, and press ahead in breach of it.

105 Nor can I see on the facts here that the specialty rule was breached. That rule does not prevent the sentencing Court having regard to the factors which are relevant to sentence for the extradited offence. One obvious factor is the purpose for which the offence was committed. Here it was the precursor to child abduction. That is relevant to the gravity of the offence of making false passport applications. The specialty rule is not a straitjacket for imposing an unreal approach to the degree of criminality in the extradition offence. I would be very surprised if the UK Courts were to adopt a different approach and I have seen nothing to suggest that they would. Of course, the precise levels of sentencing and the significance of aggravating and mitigating factors will vary from country to country. But that variance does not betoken a breach of specialty."

120. The learned judge refers to other cases also such *as U.S. v. Garcia* 208 F.3d 1258 (11th Circuit 2000), and *U.S. v. Garrido-Santana* 360 F.3d 565 (6th Circuit 2004) in which similar issues arose. In relation to the latter he states:

"120 This case supports the proposition that the US Courts would take into account in the sentencing of the two Appellants, if convicted, any proven allegation that they had laundered money which was the proceeds of their crimes even though that is a separate offence in US law and such laundering was not an extraditable offence. They would not do so in defiance of specialty but because they did not see specialty as precluding it. They would not see that as punishment for money laundering but as part of the punishment for the extradition offences."

121. He goes on to state of course that it is not simply a matter for the English Court to accept the U.S. view of these matters, and that the English court must reach its own view. He states:

"135 The effect of s. 95 is to impose a prohibition on extradition where the conditions it contains are not met. In my judgment, it does require the English Courts to reach their own view as to whether or not the practice in the USA amounts to "dealing with" someone, which includes punishing him, in a way prohibited by s. 95. It does not permit the UK simply to say that a practice is not regarded as falling foul of the specialty doctrine by the USA and therefore does not fall foul of the prohibition in the Act. It is not permissible simply to adopt the USA's view of what offences are being punished."

122. By way of general conclusion to the issue raised he states at para. 138-139:

138 For my part, I do not consider therefore that the absence of an arrangement which would prevent the extradited person being punished for the extradition offence in the way in which he could be under the now discretionary USA Sentencing Guidelines shows that the requisite arrangement for s95 is not in place. Such a person is not being "dealt with" within the scope of that phrase in the Act for an offence for which he has not been or could not have been extradited. He is being "dealt with" for that very offence by reference to conduct which is relevant to the gravity of the way in which he committed the offence or to the offending behaviour revealed by it.

139 I would accept that the US Courts appear to range more widely than would the UK but that does not take the approach outside the concept of "deal with" in an extradition Act. But this is a matter of degree. UK sentencing practice permits sentences to be aggravated on account of factors which could have been charged as separate offences, e.g. the extent of planning behind the commission of the substantive offence which could have been charged as a conspiracy, the procuring of an alibi found to be false on the jury's verdict which indicates the attitude of the offender though it could lead to a separate charge, the disposal of a weapon which could be charged as an offence related to the obstruction of justice or could be the basis of a possession offence, or disposal of a body which could be seen as obstruction of justice or a separate offence aggravating a homicide sentence. The reason for this practice may be to simplify the indictment; the details may emerge in the trial. The jury do not find the facts. I would be surprised to hear it suggested that practice described as punishing someone for a crime which has not been proved. It is punishing him for conduct relevant to the crime which has been proved."

123. As to whether it is permissible under the rule to take into account the person's flight the jurisdiction in order to escape prosecution, being a matter pertinent to the present case, he states:

"146 ……But I do not see that there is anything objectionable to specialty in treating the failure to appear as an aggravating feature when punishing the defendant for the crime at the trial of which he failed to appear. The concept of "dealing with" in s95, in its extradition context cannot have been intended to impose the English approach to sentencing, as opposed to requiring the English Courts to reach their own view of the scope of "dealing with" a purposive and flexible construction.

147 Accordingly, while I accept that the Appellants' sentences could be increased if the US Courts conclude that they have obstructed justice by leaving the US when they did, I do not consider that that would show that there was a breach of specialty , or more importantly, that the arrangements required by s95 were not in place.

148 What none of the cases do however is support the broader proposition for which Mr Summers cited them, which was that the fact that extradition had been contested would itself be seen as an obstruction of justice or warrant an upward enhancement of sentence on some other basis. I see no basis for it."

124. Given the fact that there is no real distinction between the Treaty arrangements as to specialty in place between the U.S. and the U.K., (even given the provisions of s. 95 of the 2003 Act to which reference has been made), and those in place with this State, I have quoted extensively from these two cases as the issues arising in the present case are addressed at some length and in a way with which I respectfully agree. I have been referred to no case by the respondent (other than the Burns case) which would suggest that a different view should be arrived at in relation to either point made in relation to the specialty rule, and I can see no basis for

doing so since I am satisfied that only the extradition offences are being punished by a sentence to be imposed, which is calculated by reference to the Sentencing Guidelines, and not a different or other offence for which extradition was not granted.

2. Threat to life

125. The second issue raised in the respondent's Notice of Objection is as follows:

> *"2. If extradited there is a real risk that [the respondent's] right to life will be imperilled."*

126. The respondent has sworn that the case against him has given rise to threats to his life and safety, and that these threats have been both verbal and physical. He states that as a result of these threats he feared for his life. As an example he states that in June 2001 he was attacked while attending a softball game, when a friend of one of the victims of the crash hit him across the head with a baseball bat. He states also that he has been verbally attacked and threatened on numerous occasions while attending at university. In addition he has averred that he has received several letters which have included a direct threat on his life, including two such letters in which a bullet was enclosed. He states that he has also received phone-calls in similar vein. He gives detail of another instance when his life was threatened in the toilet of the Courthouse in Whitman County by being told that if he did not receive a life sentence he would be killed. He states that these threats were reported to the police but that nothing was done to protect him. He refers to these matters to support his contention that, if returned to the United States, he will be subjected to violence and that the threats made to his life will be implemented.

127. Mr Moorer has also referred to these threats in his affidavit. For example at paragraph 5 he states:

> *"As this case progressed collateral problems arose. Attached as Exhibit G is a transcribed version of a death threat left at Mr Russell's home followed by an interview conducted by my private investigator. It was clear that either members of the victims' families or members of the community at large were going to impose their own sense of vigilante justice if the court did not take care of Mr Russell. When I met with Ms. Shannon, the Deputy Prosecuting Attorney, and disclosed this information I was appalled at the lack of concern being exhibited by her office for my client. After the threats escalated and a death note was left at Mr Russell's home, I had to caution not only Mr Russell but his family that it did not appear to me that the State would take any steps to investigate or even follow up those events. Therefore we would only be able to count on one another for assistance."*

128. In relation to the averment that nothing was done by the police following complaints being made about the threats, Ms. La Verne has deposed that neither the respondent nor any other person could provide any information regarding the person or persons who had left the threatening message on the answering machine, or who had threatened the respondent in the toilet at the courthouse, or who had left the threatening note referred to by the respondent. She states that although the police listened to the message and examined the note, neither provided any leads and consequently the police were unable to investigate matters further. She goes on to state that there was never any report to the police about the incident alleged to have occurred at the softball match in which he alleges that he was hit with a baseball bat.

129. The respondent's father has also sworn an affidavit in which he gives instances of threats being made to his son's life, and says that there is much animosity towards the respondent on the university campus. He expresses the view that if imprisoned, the respondent will be exposed to violence for an extended period of time and that there will be no reasonable means by which anyone can guarantee his son's safety in such a situation in prison, and in that regard refers to the likelihood that if imprisoned the respondent will most likely be imprisoned in Walla Walla State penitentiary. Mr Moorer referred to this particular prison in his affidavit already referred to and he stated with regard to same at paragraph 17:

> *"This prison was considered one of the nation's worst in the middle 1990s. It is one in which harm can occur to another if a party so desires. Given the earlier threats towards Mr Russell I would have legitimate concerns regarding his safety."*

130. Ms. La Verne avers that if the respondent is extradited he will be held in the Whitman County Jail until his trial is over, and if convicted, until he is sentenced. She states that this facility is connected to the courthouse by an enclosed skywalk, that it is a small jail with a maximum capacity of about fifty inmates, although the average population is only thirty eight. She goes on to state that there is a central control room which is enclosed in glass with a view of all of the living areas, and furthermore that each inmate has his own cell and is not permitted to enter another's cell. There are also facilities to segregate prisoners if any safety issues arise. She concludes paragraph 6 of her affidavit sworn on the 15th February 2006 by stating that since she has been with the Whitman County Prosecutor's Office there has been no serious assault at the Whitman County Jail.

131. A further affidavit is sworn in this regard by Eldon Vail, who is the Deputy Secretary for the Prison Division in the State of Washington. He has served in that position for six years and prior to that he served as Superintendent in three other prison facilities in Washington. He states:

> *"2. After conviction all male inmates sentenced to serve a term of imprisonment in a correctional facility in the State of Washington are sent to the Washington Corrections Centre in Shelton, Washington. While at the facility prison officials review their criminal record, their education and a myriad of other factors to determine the most appropriate facility for each inmate.*
>
> *3. Given the offences with which Mr Russell is charged and his potential sentence, it is likely that he would, if convicted, be assigned to one of the following prisons: (a) Clallam Bay Corrections Center in Clallam Bay, Washington, (b) the Monroe Correctional Complex in Monroe, Washington, or (c) the Washington State Penitentiary in Walla Walla, Washington.*
>
> *4. When inmates express safety concerns, we take measures to ensure that they are separated from other inmates who pose a threat by assigning them to different quadrants or compounds within a particular facility or to separate facilities. When that proves ineffective or impractical, we place the inmates who express safety concerns in protective custody - which significantly limits their access to other inmates, or transfer the inmates to prison facilities in other states or to federal facilities. Indeed, at any given moment, we have approximately three dozen inmates assigned to prison facilities in other states or to federal facilities.*
>
> *5. The Prisons Division takes its responsibility to maintain safe and secure facilities very seriously and makes every effort to take appropriate action when inmates express safety concerns. This approach is common to all of the correctional institutions operated in the State of Washington and is particularly relevant to all of the correctional institutions where Mr Russell would be likely to serve a sentence.*

6. Although the Washington State penitentiary in Walla Walla, Washington had a reputation for being one of the most dangerous prisons in the 1970s, it did not have that reputation in the 1990s, and certainly does not have that reputation today. In fact, violence in Washington State Penitentiary, as well as all other prison facilities in the state is very low.

7. Given Mr Russell's background and the offences with which he is charged, I would not expect him to encounter any significant safety issues in our prison facilities. However, if convicted, any safety concerns he expresses will be addressed and appropriate steps will be taken in accordance with the procedures stated above."

132. I ought to refer also to an affidavit sworn by Harold W. Clarke, who is Secretary of the Department of Corrections in the State of Washington. He states that this department operates in accordance with the standards laid down by the American Correctional Association ("the ACA") That body audits standards in institutions and accredits them having examined the conditions which affect the health and quality of life of all of its inmates. He goes on to state as follows:

"5. The Washington State Department of Corrections only places an inmate that requires protective custody in administrative segregation for a short period of time, i.e. until it is able to take appropriate action to eliminate or minimise the threat, or perceived threat, to the inmate. It does this by, inter alia, assigning the inmate to a different quadrant or compound within the facility or to another Washington Department of Corrections operated facility. It may also transfer offenders to other state jurisdictions pursuant to an interstate agreement. If that proves to be ineffective or impractical, it would transfer the inmate to an institution operated by the Federal Bureau of Prisons."

133. Mr O'Connell accepts that against this factual background the onus is upon the respondent to demonstrate that there is a real risk to life if the respondent was to be extradited, and that it would be only in such circumstances that the Court would be obliged to refuse to make the order sought in order to protect his constitutionally protected right to life. Mr O'Connell referred to *Finucane v. McMahon* [1990] 1 IR 165, where the applicant was released on the ground, *inter alia*, that if he were returned to Northern Ireland to serve out the remainder of an eighteen year sentence at the Maze prison from where he had escaped in a mass break-out, he would be subjected to assault, ill treatment and torture. In that case the Court was satisfied that there was sufficient evidence as to show a probable risk of this happening, given that in the case of other prisoners who had taken part in the break-out and who had been returned, such treatment had occurred. The duty of the Court in examining whether there was such a real risk has been referred to by Finlay CJ in his judgment in *Russell v. Fanning* [1988] IR. 505 at p. 531 as follows:

""I would accept that if a court upon the hearing of an application to set aside an order for delivery under the Extradition Act, 1965, were satisfied as a matter of probability that the plaintiff would, if delivered into another jurisdiction, be subjected to assault, torture or ill-treatment, that it would, in order to protect the fundamental constitutional rights of the plaintiff, be obliged to release him from detention and to refuse to deliver him out of the jurisdiction of these courts."

134. In his judgment in *Finucane v. McMahon [supra]* the learned Finlay CJ. Stated that:

"the duty of the court 'as far as practicable to defend' the constitutional rights of the applicant may not necessarily be best served by any rigid formula of standard of proof. I am satisfied that what is necessary is to balance a number of factors, including the nature of the constitutional right involved, the consequence of an invasion of it, the capacity of the Court to afford further protection of the right and the extent of the risk of invasion. Upon the balancing of these and other factors in each case, the Court must conclude whether its intervention to protect a constitutional right is required and, if so, in what form."

135. On the same topic, McCarthy J. expressed it as follows at p. 226:

"If in a series of instances it were shown that people in the same situation had been ill-treated over a period, then it is probable that another person put in the same situation and subject to the same control would be ill-treated. I accept, however, that in many instances, despite there being a very real danger, it is impossible to prove the probability of such ill-treatment. In my view, the courts charged with the protection of the Constitution and of the citizens whose fundamental rights are thereby guaranteed defence and vindication would fail in their duty if, being satisfied that there is a real danger that a citizen delivered out of the jurisdiction will be ill-treated, did not refuse to permit such delivery. In the light of that, the courts must look at the circumstances."

136. Mr O'Connell accepts that the respondent must show that in some way the risk to his life is apprehended as a result of some State action or inaction, rather than that there is simply a risk from persons outside the prison. In that regard, he submits that there is evidence from the affidavits filed that when the respondent made complaints about the threats which were made against his life and the other matters referred to there was less protection afforded to him because of the local notoriety of the case and the hostility of the public towards him. He submits that this is indicative of official attitudes towards him, although he accepts that there is no evidence of any such attitude on the part of prison officials since the respondent has not spent time in a prison there.

137. George Birmingham S.C. on the applicant's behalf submits that there is no reality to the suggested risk to the respondent's life. He submits that if he is returned, there are two possibilities - the first being that he will either be acquitted, or, if convicted, that no sentence of imprisonment would be imposed. In each of these situations the respondent would be at liberty and able accordingly to avoid any hostile behaviour towards him The second possibility is that he is convicted and sentenced to a term of imprisonment, in which case he would be contained within a prison, and Mr Birmingham refers to the evidence to which I have already referred as to the likely prison regime to which he would be subject. Mr Birmingham submits that this evidence is sufficient to satisfy the Court that the respondent's safety would be safeguarded by the agents of the Washington State prison system while in the prison. He submits that such a scenario is far away from the unique facts which were behind the *Finucane v. McMahon* case. He suggests that this Court can be completely satisfied with the evidence submitted in the present case as to the regime in place and to which the respondent would be subjected if returned, and held pending his trial, and thereafter, if convicted and sentenced.

138. Mr Birmingham submits that the fact that some persons in the local community may have made unpleasant and threatening remarks, and even threats to the life of the respondent as has been alleged is not sufficient to establish the reality of a threat to his life if he is returned to face trial on the offences for which his extradition is sought, and that in any situation anywhere in the world in which a crime is committed and which provokes public outrage, there will be people within that community who will express themselves in a hostile manner towards whom they perceive as the perpetrator.

139. Having considered all the evidence put forward by the respondent and his father, and having considered what has been stated by Mr Moorer in this regard, as well as Ms. La Verne, Mr Hopkins, and Mr Vail, I am driven to the conclusion firstly that there is no

sufficient evidence that there is a real risk, much less a likelihood, that should the respondent be returned to face trial his life will be at risk at the hands of agents of the U.S. prison service or authorities generally, or even at the hands of others. In so saying, I bear in mind that in *Finucane v. McMahon*, as already referred to, Finlay CJ stated that he preferred not to think in terms of "any rigid standard of proof" but that the Court should balance a number of factors.

140. In that regard the nature of the constitutional right involved is one of the highest degree (i.e. the right to life and to bodily integrity), and it would be appropriate for the Court to be most diligent in the care taken to consider the risk to that right. The consequence to an invasion of that right does not have to be spelt out as to its seriousness. In addition this Court would and could never have any capacity to afford further protection of the right and the risk of invasion once the respondent has been extradited. This factor emphasises the need for the Court to exercise the greatest care. It is upon the balancing of these "and other factors in each case" that Finlay CJ. stated that the Court must arrive at a conclusion as to whether its intervention is required so as to protect the rights involved.

141. If the respondent is perceived or perceives himself to be at risk from persons in the prison on account of any notoriety attaching to this particular case I am satisfied that there are the normal safeguards in place within the prison regime as described, both in respect of the pre-trial detention and in respect of any facility where he may be incarcerated in the event of him being convicted and sentenced, to ensure that his safety is protected. It seems more probable, however, to me that any danger to the welfare of the respondent exists outside the prison environment, rather than within it, since I accept, based on the evidence adduced in the form of averments and the newspaper articles exhibited, that the respondent is regarded with hostility by some in the community in which this awful tragedy occurred.

142. But it would not be unusual for a person suspected or believed to have been responsible for the death or serious injury of a person or persons in a local community to be regarded in such a way. It is reasonable to expect that such a situation would not be unknown to those working in the prison system and that there are procedures in place to deal with such situations in which a person may feel at risk. The Court has been provided with significant detail as to the arrangements which would be in place in the prison regime to which the respondent would be subject if and when detained. I am satisfied that there are such arrangements sufficient to satisfy me that were the respondent to be returned to the United States to face trial his safety and welfare and especially his life will be adequately safeguarded so as to obviate the necessity of this Court refusing to order his extradition in order to protect his constitutional right to life and bodily integrity. There is no suggestion being made that the respondent would be at risk from prison staff, unlike in the case of *Finucane v. McMahon*.

3. Exposure to inhuman and degrading treatment

143. A third issue is raised by way of an additional Notice of Objection filed on the 10th March 2006, as follows:

> *"If extradited [the respondent] will or is likely to be exposed to inhumane and degrading punishment in breach of his constitutional rights and rights guaranteed under the European Convention of Human Rights."*

144. This issue arises out of the very manner in which the US authorities say they are in a position to protect the respondent while in prison from any adverse attention that might come his way or threatened in that regard. I have already quoted paragraph 5 of the affidavit of Harold Clarke as the regime which would be put in place if necessary to protect the respondent. This affidavit was in answer to a second affidavit sworn by Mr Webster and in which Mr Webster seeks to provide evidence as to the nature of the prison regime in the event that the respondent was to be segregated in the interests of his own safety. I have some doubts, as raised by Mr Birmingham also, as to whether Mr Webster can be regarded as being in a position to state matters concerning the segregation regime within the prison system. He swore his first affidavit in his capacity as a consultant to attorneys in the matter of sentencing guidelines, and while he would have general knowledge as to the nature of the prison system, I am not certain that it is sufficient to express expert views on the conditions in which the respondent might be held were special arrangements to be deemed necessary for the safety of the respondent. However I heard his affidavit evidence *de bene esse*. Even accepting it in that way as evidence I am unconvinced that the regime as envisaged and described comes within the category of treatment which would amount to inhuman and degrading treatment. Mr Webster states that the respondent will be targeted by inmates in the prison because of the notoriety of the case in that area, that he may be exposed to male rape and refers to the fact that such an occurrence is common in the prisons of the United States. He also refers to the lack of opportunity for exercise within a segregated regime, and the deprivation of reading material, radio, human contact and that there would be confinement for up to twenty three hours per day.

145. It is important to consider in this context the motives of the authorities in placing the respondent in such a segregated regime for his own safety, and to bear in mind what Mr Clarke has stated as to the duration of such conditions. In that regard Mr Birmingham has pointed to a passage from the judgment of Finlay P. (as he then was) in *The State (C) v. Frawley* [1976] I.R. 365 in which a rigorous detention regime was put in place in circumstances where the person detained in prison had engaged in acts of serious self harm and placed himself in very great danger. This is a case relied upon also by Mr O'Connell. But the passage to which I wish to refer and to which Mr Birmingham referred also is as follows at p. 374:

> *"I am quite satisfied that the purpose and intention of the restrictions and privations surrounding the prosecutor's detention are neither punitive nor malicious. The strongest confirmation of this would appear to be that the restrictions have been somewhat relaxed since the improvement in his condition noted by Dr McCaffrey in the last six or seven months. There was no evidence before me of any privation or hardship which does not appear related to one or other of the main purposes of keeping the prosecutor from escaping and preventing him from injuring himself. In seeking to achieve these two purposes, the respondent is discharging two duties which appear to me to be constitutional in origin.*
>
> *I must construe the entire concept of torture, inhuman and degrading treatment and punishment as being not only evil in its consequences but evil in its purpose as well. It is most commonly inspired by revenge, retaliation, the creation of fear or improper interrogation. It is to me inconceivable to associate it with the necessary discharge of a duty to prevent self-injury."*

146. There is in the present case the clear distinction that there has been no suggestion that the respondent would be at risk of self-harm. It is harm from others which is at issue. But the segregation and other measures which may be required to be put in place to protect him from apprehended danger to life and limb would be put in place for his own benefit and not for any of the motives identified by the learned Finlay P. (as he then was). In the case of the respondent in the present case it is an anticipated regime which is referred to and in circumstances where in my view the likelihood of such a restricted regime being necessary in the first place is small, given that as I have already stated above the danger to the safety of the respondent emanates, if at all, from persons outside the prison system rather than those within it. In my view there is a heavy onus on the respondent to establish his case in this regard and the case made does not discharge it.

147. In that regard, both in relation to this issue and the previous issue of a threat to the right to life, I note also the following passage in the judgment of Laws LJ in *R (Bermingham and others) v. Director of Serious Fraud Office [supra]* where he is addressing issues as to human rights as they arose in that case. He states:

> *"While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, 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: Soering, paragraph 91; Cruz Varas, paragraph 69; Vilvaragh, paragraph 103. In Dehwari, paragraph 61… the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a 'near certainty'…"*

148. This Court is required to have regard to the Strasbourg jurisprudence and it is right therefore that I refer to this passage.

149. In the light of the above conclusions I will, make the order sought in these proceedings, being satisfied, as I am required to be under s. 29 of the Act, that the extradition of the respondent has been duly requested, that this Part applies in relation to the requesting country, namely the United States of America, that the extradition of the respondent is not prohibited by Part II of the Act or by the relevant extradition provisions, and that the documents required to support a request for extradition under section 25 have been produced.