Neutral Citation: [2015] IEHC 798

THE HIGH COURT

[2013 No. 198 EXT]

BETWEEN

ATTORNEY GENERAL

APPLICANT

AND

ERIC EOIN MARQUES

RESPONDENT

AND

[2014 No. 166 JR]

BETWEEN

ERIC EOIN MARQUES

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND

AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

NOTICE PARTY

JUDGMENT of Ms. Justice Donnelly delivered the 16th day of December 2015.

1. INTRODUCTION AND BACKGROUND

1.1 Eric Eoin Marques is sought by the United States of America ("the USA") for prosecution in respect of four alleged offences relating to the advertising and distribution of child pornography. The Attorney General seeks from the court an order for his extradition to the USA. Mr. Marques contests his extradition on a wide variety of grounds, Mr. Marques has also bought judicial review proceedings against the Director of Public Prosecutions ("the DPP") and has named the Minister for Justice and Equality ("the Minister") as a Notice Party. The same counsel represented all the State defendants at the hearing of both applicants and the State defendants will be identified as "the State" throughout this judgment except where otherwise specifically indicated. In view of this joint judgment disposing of both the application for extradition by the State and the application for judicial review by Mr. Marques, the latter shall be referred to by his name throughout.

1.2 The aim of Mr. Marques in the judicial review proceedings is to force the DPP to prosecute him in this jurisdiction for those alleged offences upon which his extradition is sought. He has offered to plead guilty to the offences and to have the extradition proceedings adjourned to ensure that he keeps this promise. If he is prosecuted in this jurisdiction, regardless of the outcome, he cannot be extradited to the USA in relation to the same offences. If he is extradited he faces the possibility of maximum sentences of greater length than he would face in this jurisdiction, served far from his home and family and perhaps in conditions of greater severity than would be experienced in custody in this jurisdiction.

1.3 The points of objection in the extradition proceedings were twenty-nine paragraphs in length. The court requested an issue paper so that the hearing could be focused on more particularised points of contention. Unfortunately, that only reduced the points of objection to twenty-seven paragraphs while introducing a further preliminary issue; however, the actual issues raised in the objections to extradition were limited in number and can be dealt with under the headings set out in the next paragraph. Counsel on behalf of Mr. Marques identified those areas where the decision of this Court in *Attorney General v Damache*, [2015] IEHC 339, represented binding authority against him. Counsel maintained those arguments but recognised that this Court would be bound to hold against Mr. Marques on those issues.

1.4 This judgment will address the following issues:

1. Introduction and Background
2. Required proofs for extradition
3. Correspondence of Offences and Minimum Gravity
4. Federal Guidelines and Disproportionate Disregard for Character of the Accused
5. Speciality

6. Sentencing Provisions: Sentencing for the Relevant Conduct of Co-Conspirators and for Uncharged and Acquitted Conduct on the basis of the Preponderance of the evidence

7. De Facto Life Sentence and Irreducible Life Sentence

8. Coercive Plea Bargaining

9. Prison Conditions and Mr. Marques' Asperger's condition

10. Right to respect for personal and family life, including questions of proportionality of the extradition

11. The Judicial Review

12. Conclusion

1.5 The relevant background and facts are set out in detail in the judgment of Edwards J, [2014] IEHC 443, in which he refused leave to apply for judicial review to Mr. Marques. It is unnecessary to set out all those details again. In synopsis, it is alleged against Mr. Marques that, on dates between 24th July, 2008, through on or about 29th July, 2013, in Ireland, and the United States, he committed the following four offences:

> Count 1: Conspiracy to advertise child pornography, in violation of 18 USC §§ 2251(d)(1) and (e), which carries a maximum of 30 years' imprisonment;
>
> Count 2: Conspiracy to distribute child pornography, in violation of 18 USC §§ 2252A (a)(2) and (b)(1), which carries a maximum of 20 years' imprisonment;
>
> Count 3: Advertising child pornography and aiding and abetting, in violation of 18 USC §§ 2251 (d)(1) and 2, which carries a maximum of 30 years' imprisonment; and
>
> Count 4: Distribution of child pornography and aiding and abetting, in violation of 18 USC §§ 2252A (a)(2) and 2, which carries a maximum of 20 years' imprisonment.

1.6 It is alleged against Mr. Marques that he was the administrator of an anonymous web hosting service (referred to as "AHS" in the documentation and in this judgment) which operated on a computer network allowing users to communicate and to host entire websites anonymously. This network protects users' privacy online by bouncing their communications around a distributed network of relay computers run by volunteers all around the world. These websites are alleged to all be located on a single server.

1.7 As of July, 2013, it is alleged that more than one hundred and thirty child pornography related websites ("the Target Websites") were operating on the AHS wherein users could upload and download content from anywhere in the world. Collectively these websites have thousands of members who have posted millions of images or videos of child pornography, some of which depict minors as young as infants engaged in graphic sexual acts with adults. Details are given in the extradition documentation of the contents of three of these websites which are alleged to be representative of same.

1.8 The documentation deals with the alleged identification of Mr. Marques as the administrator of the AHS. Some of this material results from the search of Mr. Marques' home by members of An Garda Síochána on the 29th July, 2013.

1.9 The documentation in the extradition request alleges that U.S. law enforcement agents determined that the Target Websites advertised and distributed child pornography by openly displaying images of child pornography that were available for download or instructing users about how to gain access to site sections where child pornography could be viewed and downloaded. Details of the advertisements and content available on some of the Target Websites are set out in the supplemental affidavit of Ms. LisaMarie Freitas, a Special Assistant United States Attorney, who is familiar with the charges and evidence in the case against Mr. Marques.

1.10 It is further of some relevance to the issues raised that the Gardaí also played a role in the investigation of Mr. Marques in relation to possession of child pornography and that Gardaí were in communication with the FBI. According to the evidence of Detective Inspector Declan Daly, the Gardaí conducted a search of Mr. Marques' apartment on the 29th July, 2013, having obtained a search warrant issued under s. 7 of the Child Trafficking and Pornography Act 1998. Mr. Marques was present and it is alleged that he ran towards the computer which was located in a corner of the room when they entered. The computer was seized and Mr. Marques was arrested for an alleged offence under s. 5 of the Act of 1998. He was subsequently detained under the provisions of s. 4 of the Criminal Justice Act, 1984 for the proper investigation of that offence and was later released pending a file being sent to the DPP. Three days later, on the 1st August, 2013, Mr. Marques was arrested on foot of a provisional warrant for his arrest issued by the High Court that same day, pursuant to a provisional request by the USA for his arrest pending a formal extradition request.

1.11 It is necessary to refer at this juncture to the aforementioned decision of this Court in *Attorney General v Damache*. Mr. Damache, who was also sought by the USA for extradition, was represented by the same solicitor and counsel as Mr. Marques in the present case. Of importance is that the evidence relied upon by Mr. Marques was provided by the same expert in US law, Mr. Joshua L. Dratel, Attorney at Law, who provided much of the evidence on behalf of Mr. Damache. Where the evidence as to the applicable US law is the same as that presented in *Attorney General v Damache* it will not be repeated herein.

1.12 Mr. Marques also raised as a preliminary issue, whether it was more appropriate to have the judicial review dealt with prior to the extradition proceedings. It was argued that he could not make a proportionality argument against the necessity for extradition without knowing the reasons why the DPP had decided not to prosecute him. The Court notes the following, which is contained in the Order of the Court of Appeal in allowing the appeal against the refusal to give leave on the judicial review:

> "that the parties consent to the hearing of this application for judicial review being heard together with the application of the third named respondent seeking the extradition of the applicant in High Court proceedings bearing record number [2013 No. 198 EXT] in such order as determined by the High Court."

Where a consent is made in certain terms before an appellate court, a subsequent change of mind is difficult to understand and of dubious relevance to the court to which the matter is remitted. In accordance with the Order, it was for this Court to determine the order in which the applications were heard and by implication the order in which judgment is to be given. The cases were heard together but with the submissions on the judicial review being heard first in time. It is the view of this Court that it is appropriate to

give this combined judgment with respect to both applications and to deal with the matters in the order as outlined above.

2. THE REQUIRED PROOFS FOR EXTRADITION

2.1 The USA is a State to which Part II of the Extradition Act of 1965 ("the Act of 1965") as amended applies. At para. [2.4.4] in *Attorney General v Damache* the court set out the manner in which Part II of the Act of 1965 was applied to the USA. I adopt that description save for the additional designation of the USA as a Convention country pursuant to the provision of s. 4 of the Extradition (European Union Conventions) Act 2001, which is discussed further below.

2.2 Section 29 (1) of the Act of 1965 as amended provides:

> "Where a person if before the High Court under section 26 or 27 and the Court is satisfied that –
>
> (a) the extradition 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."

2.3 Section 27 of the Act of 1965, as amended, permits a judge of the High Court, without a certificate of the Minister, to issue a provisional warrant, on the ground of urgency, where a request has been made on behalf of a country to which Part II of the Act of 1965 applies. The USA sent a request to Ireland for the provisional arrest of Mr. Marques for the purpose of his extradition on the 29th July, 2013, on grounds of urgency. A further letter, supplemental to that request, was sent on the 31st July, 2013.

2.4 Subsequent to the arrest of Mr. Marques on foot of the warrant of arrest issued by the High Court on the 1st August 2013, a request was made for his extradition on the 13th August, 2013, by Diplomatic Note from the Embassy of the USA. The Minister certified on the 14th August, 2013, under s. 26(1)(a) of the Act of 1965 as amended that the extradition request had been made. Failing such certification being made within the eighteen day time limit set out in s.27(7) of the Act of 1965 as amended, Mr. Marques would have been released from custody.

2.5 In the course of these proceedings, during which the Court queried the proof of documentation emanating from the USA authorities, in particular as regards sealing of documents (and also the swearing of affidavits coming from the USA on behalf of Mr. Marques), the Court was quite properly directed to the designation of the USA as a country deemed to have adopted the Convention on Simplified Extradition Procedures of the 10th March, 1995. Such designation is permitted by s. 4 of the Extradition (European Union Conventions) Act 2001 as amended by s. 52 of the European Arrest Warrant Act 2003. By S.I. 43/2010 – Extradition (European Union Convention) Act 2001 (Section 4) Order 2010 – the Minister for Foreign Affairs designated the USA as a country deemed to have adopted the Convention. It is the only country so designated.

2.6 The designation has an impact at various points in extradition proceedings under the Act of 1965 e.g. the proofs required for a provisional arrest. Of more relevance is that different criteria apply under s. 25 of the Act of 1965 (documents to support the request) and under s. 37 (evidence of documents) between Convention and non-Convention countries. The Supreme Court in *Attorney General v Pratkunas*, [2009] IESC 34, dealt with s. 37 in so far as it concerned non-Convention countries. However, the Supreme Court held that the phrase "supporting a request for extradition," which is also found in s. 37(2) referring to Convention countries, meant that s. 37(1) only applied to documents supporting the extradition under section 25. In *Pratkunas* it was stated that the appropriate manner in which to accept additional documentation was under s. 7B of the Act of 1965. That sub-section has since been repealed. Section 37(1) was however amended and now refers to "any evidence in writing received" from a non-Convention country. No such corresponding amendment was made to s.37(2) which deals with Convention countries.

2.7 Section 37 sub-sections (2) and (3) of the Act of 1965 provide:

> "(2) In proceedings to which the Part applies, a document purporting to be a copy of a document supporting a request for extradition from a Convention country shall, subject to subsection (3), be received in evidence without further proof.
>
> (3) In proceedings to which this Part applies, a document that purports to be certified by
>
> (a) the judicial authority in a Convention county that issued the original or
>
> (b) an officer of the Central authority of such a country duly authorised to so do,
>
> to be a true copy of a conviction and sentence of detention order immediately enforceable or, as the case may be, the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of that country, shall be received in evidence without further proof, and where the seal of the judicial authority or Central Authority concerned has been affixed to the document, judicial notice shall be taken of that seal."

2.8 Section 25(2) of the Act of 1965 states that:

> "For the purposes of a request for extradition from a Convention country, a document shall be deemed to be an authenticated copy if it has been certified as a true copy by the judicial authority that issue the original or by an officer of the Central Authority of the Convention country concerned duly authorised to so do."

No Central Authority appears to have been designated by the USA as this is not apparent from any of the documentation received by this Court nor mentioned in submissions by the State.

2.9 The European Union Conventions on Extradition, which were implemented by the Act of 2001 had, as part of their objectives, the simplification of extradition proceedings. It is perhaps an irony that procedures which were designed to simplify the extradition process may have created further confusion. The amendment to s. 37 (1) without a corresponding amendment to s 37(2) means that the court may be required to look beyond the Act of 1965 for admissibility provisions in relation to additional documentation in the

extradition proceedings for extradition requests from the USA. Furthermore, there is a difference in proof for the documents supporting the request.

2.10 In the submission of counsel for the State, it was suggested that the effect of the new scheme between USA and Ireland broadens the admissibility of documents and accordingly any documents that bear a certificate or a seal are admissible. Article VIII(7) of the integrated Washington Treaty states that documents that bear the certificate or seal of the Department of Justice, or Department responsible for foreign affairs, of the requesting State shall be admissible in extradition proceedings in the requested State without further certification, authentication or other legislation.

2.11 There is no definition of certificate or seal within the Act or the Instrument. Without such a definition or other indication as to meaning the plain and ordinary meaning must be given to the words.

2.12 The documentation supporting the request for extradition was received under the seal of the United States' Department of Justice. Under the provisions of the Integrated Treaty such a seal satisfies the requirements. It was submitted that S.I. 45/2010, applying Part II to the USA, has the effect that the S.I. becomes part of the rule of law itself and part of the Act unless conflicting with it (e.g. *Aamand v Smithwick* [1995] 1 ILRM 61). This is by reference to s. 8(5) of the Act of 1965 which provides that "every extradition agreement and every order applying this Part otherwise than in pursuance of an extradition agreement shall, subject to the provisions of this Part, have the force of law in accordance with its terms." Where there is a clear or plain inconsistency with the provisions of the Act of 1965, the Act must take precedence (Aamand). In the view of the Court, there is a clear or plain inconsistency if the Act provides admissibility criteria in respect of certain documents which conflict with the statutory instrument. That has particular significance with respect to the admissibility of the documents supporting the request as provision is made in the Act of 1965 as amended in relation to admissibility in evidence. On the other hand as there is now an absence regarding the proof of additional documentation, the means of proof is that provided by the Integrated Treaty.

2.13 In respect of the warrant of arrest, a copy of it is exhibited at Exhibit 1 to the affidavit of Ms. LisaMarie Freitas supporting the request for extradition of Mr. Marques. The copy of the arrest warrant was attested and certified that it was a full, true and correct copy of the original by a Clerk of the US District Court in the District of Maryland. In my view, where a Clerk of a Court certifies that a document is a full, true and correct copy of the original that is a certification by that judicial authority; therefore, I am satisfied that the copy of the warrant has been authenticated in accordance with the provisions of s. 25(2) and that it also purports to be certified in accordance with s. 37(3) of the Act of 1965.

2.14 The provision at s. 37(2) is somewhat unusual. It seeks to permit a document to be received in evidence without further proof if it is "a document purporting to be a copy of a document." By contrast s. 37(1) refers to "documents supporting a request for extradition." For example, the affidavit of Ms. LisaMarie Freitas is certified as the original affidavit by Ms. Lystra G. Blake, the Acting Deputy Director of the Office of International Affairs at the Criminal Division of the US Department of Justice. Receipt of the original is not provided for in s. 37(2) but a copy of it would be. That position appears absurd but it is difficult to interpret s. 37 in any other manner. As her affidavit contains a reproduction of the relevant enactments of US law there appear to be difficulties of proof in respect of those matters.

2.15 None of the subsequent documents that were sent by the US authorities were sent under the same seal of the US Department of Justice as the original documentation. It was submitted by counsel for the State, that a seal could be read as including letter heading and the letterheads of the letters from the Department of Justice were included. It was submitted that, in the alternative, such letterheads and the signature on the letters amount to a certificate. The Court is quite hesitant to accept that a letterhead or a signed letter on such letterhead amounts either to a seal or certificate. It would appear that this would do violence to the plain and ordinary meaning of the words "seal" and "certificate". Both words signify a greater degree of solemnity than that which is to be found on letterheads or on a mere signature to a letter. Moreover, even if there was a doubt over the plain meaning, the use of such words in a statute conveys a meaning of solemnity over and above the passing of letters between foreign and domestic government departments. Finally, in that regard it is noted that the US authorities gave a certification from Ms. Lystra G. Blake in respect of the affidavit of Ms. Freitas. That, in itself, is a recognition that a certification is something different from merely writing a letter.

2.16 It was further submitted that, if their submissions were incorrect regarding reliance upon the Integrated Treaty for the admission into evidence of the documents supporting the request and the additional documentation, the State could rely upon O. 40 r. 1 of the Rules of the Superior Courts to the effect that, upon any motion, petition or application, evidence may be given on affidavit. It was submitted that this rule was sufficiently wide to cover every matter. Order. 40 r. 7 however covers the issue of affidavits sworn in other jurisdictions. It permits affidavits to be taken before any Irish diplomatic or consular representative or an agent or, in the absence of same, before any notary public lawfully authorised to administer oaths or, in a place which is a part of the British Commonwealth of Nations or under British possession, before any judge, court, notary public or person authorised to administer oaths.

2.17 The State also submitted that the court was entitled, under the powers of s. 29 (2)(c) of the Act of 1965 as amended to make an order, if satisfied no injustice would be caused to the person by making an order, if there has been a technical failure to comply with a provision of the Act so long as the court is satisfied that the failure does not impinge on the merits of the request for extradition. The State submitted that in accordance with s. 8(5) of the Act of 1965 and the *Aamand* case above, the Treaty provisions come within the meaning of the Act in this section.

2.18 Section 29(2) of the Act of 1965 provides:

> "For the avoidance of doubt, the Court, if satisfied that no injustice would be caused to the person by making an order under subsection (1), may make that order even if…
>
> (c) there has been a technical failure to comply with a provision of this Act, so long as the Court is satisfied that the failure does not impinge on the merits of the request for extradition."

2.19 In those circumstances, the State submitted, if the court is satisfied that there has been a breach of the provisions regarding documentation it is a technical failure to comply. The provisions regarding admissibility do not impinge on the merits.

2.20 Counsel for the State expressly noted that they did not take issue with the affidavits of Mr. Marques even though they were not in compliance with the Rules of the Superior Courts. Counsel for Mr. Marques similarly noted that they too conceded that, subject to the court, they were not taking issue with the manner in which the State's documentation came before the court. It was indicated that neither side therefore took issue with the manner in which the paperwork or evidence was before the court and were content to proceed.

2.21 In the circumstances outlined above there are problems of proof of evidence relating to some of the documents supporting the request for extradition and in relation to the additional information. In this case Mr. Marques has not made an issue of these matters, subject to the court's ruling. The court is entitled to proceed to make an order for the extradition where there is a technical failure to comply with the provisions of the Act provided such failure does not impinge on the merits of the request for extradition. I am satisfied that the "Act" referred to within s. 29(2) includes the Integrated Treaty.

2.22 In relation to the documents supporting the request, with the exception of the warrant for arrest, there is a failure to comply with the legislative provisions, although, if the Act had been silent as to admissibility of documents, they would have been admissible under the Integrated Treaty as they are under seal. I am satisfied that this is a technical failure to comply with the Act. I am further satisfied that the documentation emanates from the requesting State and that its provenance has been duly attested by virtue of the seal attached to it. I have no hesitation in finding that the failure does not impinge on the merits of the request for extradition. I am also satisfied that no injustice would be caused to Mr. Marques in making an order under s. 29(1) in these circumstances.

2.23 In relation to the affidavits received by the USA and placed into evidence by the State in support of the application under s. 29(1), I am also satisfied that, even though the provisions of the Treaty can be read into the Act in the absence of conflicting provision in the Act, there has been a technical failure to have these documents provided under seal or certification. This is a technical failure to comply with the Act and there is no doubt as to the source and provenance of these documents. This technical defect as to providing a seal or certification does not impinge on the merits of the case. I am satisfied that no injustice would be caused by making an order under s. 29(1) despite this technical defect.

2.24 Even if the provisions of s. 29(2) do not apply, I also note that Mr. Marques did not object to their reception into evidence and this was because the position with regard to his own affidavits was also less that satisfactory. Order 40 r. 7 requires attestation before any Irish diplomatic or consular representative or agent or notary public in the absence of such representative or agent. That was not attempted in this case. It is an onerous requirement but no doubt seeks to ensure that legality, solemnity and propriety attach to the making of such an important document. In this case the documentation relied upon by Mr. Marques was attested by a lawyer, who, in the State of New York, appears not to be required to attest same before a Commissioner for Oaths, Notary Public or such figure. I am prepared to accept the documentation and to proceed to hear the case on the basis of all the evidence placed before this Court in light of the concessions that have been made in this case.

2.25 I am satisfied that the request was received through the diplomatic channels and it is a request for extradition that has been received in accordance with s. 23 of the Act of 1965.

2.26 Section 25 lists the documents which are required to support any request for extradition. I am satisfied that having accepted the documents into evidence for the reasons set out above that those documents include a statement of pertinent facts required under the Washington Treaty, in support of the request for extradition. There is also a detailed description of the person sought, naming Mr. Marques and giving his Irish and US passport numbers. He is also identified by reference to his date of birth which is 28th April, 1985. The authenticated warrant of arrest was produced and a copy of the relevant enactments is contained in the documentation. I am satisfied that all of the documents required to support an extradition request under s.25(1) have been produced.

2.27 Therefore, under the provisions of s. 29(1), I am satisfied that Mr. Marques is before the High Court under s. 27 of the Act and that his extradition has been duly requested, that Part II of the Act of 1965 applied to the USA and that the documents required to support a request for extradition under s. 25 have been produced. I will consider hereafter whether his extradition is or is not prohibited by Part II of the Act of 1965 by the relevant extradition provisions.

3. THE REQUIREMENT OF DOUBLE CRIMINALITY/CORRESPONDANCE OF OFFENCES AND MINIMUM GRAVITY

3.1 In an extradition case, the court is obliged to refuse surrender for prosecution unless the offence alleged corresponds with an offence in this jurisdiction. Furthermore, extradition must be refused unless the alleged offence is of sufficient gravity within this jurisdiction and the Requesting State. Mr. Marques did not make any argument on grounds of correspondence but the duty lies with the court to ensure that extradition is not prohibited under this ground.

3.2 The applicable date for ascertaining correspondence in this case would appear to be the day upon which the alleged acts were committed in Ireland (see s. 10 of the Act of 1965 as amended and *Attorney General v Damache* at para. [3.2]). The allegations against Mr. Marques are said, by Ms. LisaMarie Freitas (para. 6 of her affidavit of the 8th August 2013), to have been committed between July 2008 and July 2013 in Ireland and the USA. Pursuant to the provisions of s. 10(3) of the Act of 1965 as amended, I am satisfied, on the affidavit of Ms. LisaMarie Freitas, that the offences set out in the charges were offences under the laws of the USA on the date upon which they were alleged to have been committed and on the day upon which the request for extradition was made.

3.3 Throughout the period of the alleged offences and, indeed, on the date on which the request for extradition was made, the Child Trafficking and Pornography Act 1998 ("the Act of 1998") was in force. The relevant issue is whether the alleged offences correspond with an offence under that Act.

3.4 Section 5 of the Act of 1998 provides:

> "(1) Subject to sections 6(2) and 6(3), and person who
>
> (a) knowingly produces, distributes, prints or publishes any child pornography,
>
> (b) knowingly imports, exports, sells or shows any child pornography,
>
> (c) knowingly publishes or distributes any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, prints, publishes, imports, exports, sells or shows any child pornography,
>
> (d) encourages or knowingly causes or facilitates any activity mentioned in paragraph (a), (b) or (c), or
>
> (e) knowingly possesses any child pornography for the purposes of distributing, publishing, exporting, selling or showing it,
>
> shall be guilty of an offence and shall be liable
>
> (i) on summary conviction to a fine not exceeding…or to imprisonment for a term not exceeding 12 months or both, or
>
> (ii) on conviction on indictment to a fine or to imprisonment for a term not exceeding 14 years or both.

> (2) In this section 'distributes', in relation to child pornography, includes parting with possession of it to, or exposing or offering it for acquisition by, another person, and the reference to 'distributing' in that context shall be construed accordingly.

3.5 The extradition documentation contained voluminous details of the operation and contents of the websites allegedly hosted by the AHS of Mr. Marques. That material has been carefully considered by the court. Sufficient detail of the allegations have been set out in the Introduction and Background section above, to demonstrate that the facts alleged against Mr. Marques on each count correspond with an offence under s. 5 of the Act of 1998 or a conspiracy to commit such an offence.

3.6 The alleged offences meet the minimum gravity requirements of s. 10 of the Act of 1965, in that each offence carries a maximum penalty of at least one year or by a more severe penalty in the USA and the corresponding offence under s. 5 of the Act of 1998 is also punishable by a maximum period of more than one year.

4. FEDERAL GUIDELINES AND DISPROPORTIONATE DISREGARD FOR CHARACTER OF THE ACCUSED
4.1 Mr. Marques relied upon the same evidence and the same legal arguments as were put forward in *Attorney General v Damache* (see part 6 of the judgment). For the reasons set out therein I reject his submissions under this heading

5. SENTENCING PROVISIONS: SENTENCING FOR THE RELEVANT CONDUCT OF CO-CONSPIRATORS AND FOR UNCHARGED AND ACQUITTED CONDUCT ON THE BASIS OF THE PREPONDERANCE OF THE EVIDENCE
5.1 Under this heading Mr. Marques contended that the sentencing regime in US Federal Courts, which permits a court to take into account relevant, uncharged and even acquitted conduct using "a preponderance of the evidence" burden of proof, amounts to a flagrant denial of justice. This argument and much of the evidence upon which it was based was before this Court in *Attorney General v Damache.* As it was referred to in some detail in that judgment it will not be repeated herein. The court incorporates, *mutatis mutandis*, the recital of evidence at paras [8.2.1] to [8.2.4] of that judgment in particular.

5.2 With specific regard to the facts of this case, Mr. Dratel referred to the conspiracy charged as involving a massive private "Network" devoted to the production and exchange of child pornography. Under US federal law, a defendant involved in only one aspect of a multi-object conspiracy would nevertheless be liable for other, distinct conspiratorial conduct in furtherance of a different conspiratorial objective as long as that conduct was reasonably foreseeable. The evidence for such a finding may come from trial testimony, although not just from Mr. Marques' trial, but also may include statements of co-conspirators or other hearsay.

5.3 Mr. Becker, a trial attorney for the United States Department of Justice, Criminal Division, Child Exploitation and Obscenity Section, swore an affidavit in reply to the earlier affidavits of Mr. Dratel. In his affidavit, Mr. Becker said it was correct that, in determining a defendant's sentence based upon the statutorily mandated considerations, a judicial officer may consider "all relevant conduct" which may include conduct by the defendant as well as any reasonably foreseeable action (and the consequences thereof) of co-conspirators or persons whom the defendant aided and abetted, and which may include conduct other than the offence conduct for which the defendant was convicted. The sentencing judge retains discretion as to how much weight to give such factors in balancing them with the other mandated considerations such as the defendant's history and characteristics. He also agreed that the standard of proof is that of a preponderance of the evidence.

5.4 Mr. Becker, relying on the sentencing judge's discretion to decide what weight, if any, to give any one sentencing factor, said that it would accordingly be incorrect to state that, by offering proof of one or another matter at a sentencing hearing, the defendant's sentence is necessarily "enhanced". Those factors, he said, simply represent matters that a sentencing judge may consider and weigh as appropriate in light of all of the required considerations in fashioning a sentence.

5.5 Mr. Becker stated that it would be mere speculation to say what sentence Mr. Marques would receive if he were convicted in the United States. Sentencing is within the exclusive jurisdiction of the court. He referred to a wide variety of factors that a judge must consider and stated that the sentencing judge must view each offender separately and independently in determining an appropriate sentence.

5.6 In these proceedings, Mr. Dratel signed a further affidavit on the 15th June, 2015, in which he sought to deal specifically with the situation in the present case. This may well have been in respect to the affidavit of Mr. Becker filed on behalf of the State, but also could have been prompted by the findings in the Damache judgment concerning the lack of substantial grounds to believe that there was a real risk of Mr. Damache being exposed to an enhanced sentence based upon any of these grounds. In that affidavit, Mr. Dratel sought to demonstrate that the sentencing court is obliged to consider the relevant, uncharged and acquitted conduct that is placed before it for consideration. In other words, he said that the court cannot refuse to consider the conduct simply because the defendant had been acquitted of it. Mr. Dratel gave examples of cases where relevant conduct and, in particular, acquitted conduct have influenced the defendant's sentencing calculation.

5.7 In relation to Mr. Marques' case, Mr. Dratel pointed out that the government's proofs could be, and in some instances, necessarily will be, markedly different on each count. He said that, as Mr. Marques is alleged to have played the non-traditional role of administrator of the websites through which other exchanged child pornography, this makes the proof required to obtain a conviction less straightforward. In essence, his evidence was that the offences of advertising require that Mr. Marques "knowingly makes, prints or publishes or causes to be made, printed, or published, any notice or advertisement seeking or offering" child pornography. In the distribution offences, the proof is "knowingly receives or distributes" child pornography.

5.8 Mr. Dratel stated:

> "Although the evidence used to prove each Count would overlap to a significant extent, should Mr. Marques be acquitted of any of the Counts in the Indictment or should the government agree to dismiss any of the Counts against him in exchange for a guilty plea, his sentence may still reflect responsibility for the criminal activity alleged, as long as the Court is satisfied that the conduct is established by a preponderance of the evidence."

5.9 Mr. Dratel then dealt at length with what he called "The Reality of Jury Compromise in US Trial and Verdicts." He put forward the view that juries are instructed, encouraged and even cajoled to reach unanimous verdicts and, as a result of such, bargaining among jurors occurs. This can lead to a compromise verdict in which certain jurors traded counts for votes by holdouts to reach an unanimous verdict. He stated that jury compromise, though not necessarily commonplace, can be prompted by various factors. His point is that jury compromise can lead to an acquittal, but that the acquitted counts can be considered at the sentence hearing in the context of a Guidelines enhancement or an independent sentencing factor.

5.10 Mr. Dratel also went into some detail in relation to uncharged conduct. He gave the example of the case of *United States v*

Ulbricht Docket No. 14 Cr. 68 (KBF), where the court imposed a life sentence for various drug, fraudulent document, computer hacking and money laundering offences arising from the administration of an underground black market website called "Silk Road". In that case, the court expressly relied upon uncharged conduct, among other things, to support the conclusion that a life sentence was "sufficient, but not greater than necessary" to accomplish the purposes of sentencing set forth in the relevant statutory provisions. The court concluded that the government had sufficiently "alleged" that the defendant solicited six murders, even though he was never charged with any crimes in relation to murders for hire, due in part to the fact that the alleged plots never came to fruition as the targets did not exist. This uncharged conduct formed the basis for a two level Guidelines enhancement because of the credible threat to use violence or direct the use of violence.

5.11 According to Mr. Dratel, in the *Ulbricht* case, this uncharged conduct gave a Guideline range of life but the court also stated that it contributed to the defendant's sentence beyond the Guidelines, as the court stated it was not imposing a "Guidelines sentence" thereby signally it was also relying on other factors which provide substantial discretion to the court. The government also used evidence not relied upon at the trial, namely that drugs sold on the Silk Road website were responsible for six overdose deaths. Mr. Dratel also referred to a case concerning a racketeering conviction where the government successfully argued that acquitted conduct, particularly murders, should be included in the calculation of the sentence.

5.12 Mr. Dratel also stated, despite being "well established that '[t]he Sentencing Commission plainly understands the concept of double counting, and expressly forbids it where it is not intended'", absent a specific prohibition on "double counting", using the same grounds for different sentencing enhancements and adjustments is entirely permissible, even where the defendant has been acquitted of the conduct. He referred to a particular provision which only permits departures when the uncharged or dismissed conduct "did not enter into the determination of the applicable guideline range" but said that this is illusory so long as the District Court has provided an adequate alternative explanation for imposition. He referred to a case where the appellate court left the sentence *in situ*; however, the reasoning given by the court was that the "error is harmless" because it had knowledge and would have reached the same result even if it had decided the Guidelines issue the other way.

5.13 In reply to that affidavit, Mr. Becker swore a further affidavit regarding whether Mr. Marques will be convicted of some, all or none of the alleged criminal conduct with which he is charged. He said that Mr. Dratel speculates wildly regarding what the government's proof would be as to particular charges, absent any actual support in the case record. He said that, nevertheless if Mr. Marques were to be convicted, there is no requirement that a sentencing court enhance or increase a defendant's sentence based upon acquitted or uncharged conduct. Rather, such conduct is one factor that a sentencing court may consider, along with a panoply of other factors, in exercising its discretion to determine a convicted defendant's sentence. The court is free to consider acquitted or uncharged conduct and determine whether it does or does not weight in favour of a greater or lesser punishment.

5.14 Mr. Becker rejected the contention that a sentencing court must consider acquitted conduct as a basis to enhance a defendant's sentence. He said that, in United States v Ibanga, 271 Fed App'x 298 (4th Cir. 2008), cited by Mr. Dratel, the appellate court found it to be a procedural error to categorically exclude acquitted conduct from the information that the court could consider during the sentencing process and remanded the case for re-sentencing under a standard that did not categorically exclude such conduct from consideration. Nothing about that case, or any US law, requires a sentencing court to enhance a defendant's sentence on the basis of acquitted conduct.

5.15 Mr. Becker stated that Mr. Dratel wildly speculates as to the purported phenomenon of "jury compromise". He outlined the process of jury instruction including the ability of a judge to request that jurors continue in an attempt to reach a unanimous verdict. The trial judge may declare a mistrial if the jury cannot reach a unanimous verdict on a charge or charges. That ceases the jury's deliberations. He said that jurors are not instructed to compromise regarding their verdict and that it is likely any such instruction would be legally improper which would give rise to an appeal of any conviction in such a case. He said that the extent to which it has been suggested that "jury compromise" is a recognised or sanctioned legal term or phenomenon is incorrect. He said that the characterisation of the jury's verdict as a "compromise" merely represent speculation as to the jury's deliberative process.

Submissions

5.16 On behalf of Mr. Marques, the Court is urged that, if he is convicted, a wide panoply of factors arise for the judge's consideration in sentencing. Not all of these can be said to be uncontroversial and arising from the facts alleged, although counsel conceded that factors, such as the potential number of conspirators, the under twelve age of some of the children and the violence inherent in the sexual act perpetrated upon them, are indeed likely to be uncontroversial. One particular issue was identified and this was whether Mr. Marques has benefited financially from the crimes. Although there was some evidence that suggested the administrator of the AHS covers the cost of hosting himself, other websites had a $5 donation policy.

5.17 Furthermore, in the bail applications, it was indicated that large amounts of money belonging to Mr. Marques were frozen by the FBI and further allegations that additional amounts had passed through his person. If he has benefited financially to more than $30,000 a Guideline enhancement is mandated. Mr. Marques also suggested that it is unclear if the financial benefits referred to by the FBI were derived from other criminal activities apart from that which is presently alleged against him.

5.18 Counsel also referred to other evidence of the alleged uploading of child pornography by Mr. Marques which is not evidence that has to be proved at trial but which would be introduced as evidence which is supportive of Mr. Marques' knowledge of the content of the sites and hence his involvement in the conspiracy. It is submitted that the sentencing judge could, without hearing any further evidence and on the basis of the balance of probability, conclude that Mr. Marques produced and uploaded child pornography.

5.19 Mr. Marques submitted that the sentencing judge could conclude that he is a paedophile of the most dangerous kind, who has facilitated child pornography on an unprecedented scale. If this was found as the reason for his activities, rather than a business one or a laissez-faire attitude to the internet, the sentencing judge might conclude that the applicable Guidelines range do not remotely reflect such heinous conduct and that he deserves a significant consecutive sentence to prevent his re-offending. Other matters were referred to e.g. his alleged obstruction of the Gardaí in seeking to turn off his computer. This could be found on the basis of a lower standard of proof. Counsel also relied upon the evidence of a posting on a website saying "I like to kill a girl or a boy?" [sic]. If Mr. Marques was aware of that, the content could be then relied upon to make a finding that children were intentionally harmed as a result of the conduct of co-conspirators.

5.20 Counsel on behalf of the State observed that Mr. Marques was engaging in huge speculation as regards these matters. In particular, as regards his motivations as well as his level of knowledge and his participation in respect of the websites, it was submitted that these will form part and parcel of the prosecution case. It was apparent from the extradition request that Mr. Marques knew that the websites hosted on the AHS were child pornography sites, that he had administrative authority and that he accessed those sites. It was submitted that, to suggest that this evidence will not form part of the case before the jury but will be presented as uncharged or acquitted conduct at a subsequent sentencing hearing, was not only speculative but was also absurd.

5.21 The State submitted that, even on his own submissions, Mr. Marques accepted that certain matters were likely to be uncontroversial. Counsel submitted that Mr. Marques had failed to acknowledge that most if not all, of the issues will form part of the evidence in the case. It is submitted that there is a fallacy in the argument to say that a particular part may not be accepted by a jury but that a judge might be free to accept it at the sentencing hearing. That position is the same as that which would apply in this jurisdiction. A jury may be satisfied of guilt as to a particular offence but not necessary satisfied on each piece of evidence offered as proof.

5.22 The State pointed to the acknowledgement by Mr. Marques that the case relates to an online network of child pornography websites involving many thousands of offenders, some of whom have been involved in the more serious forms of abuse and violence. Upon conviction, he could be held responsible to any and all such conduct and have a sentence "enhanced". Mr. Marques accepted that, in principle, the approach in this jurisdiction might not be radically different. His written submissions went on to state, at para. [22]:

> "An offence of conspiracy here could potentially result in a higher sentence if the actions of the co-conspirators were extremely serious and the accused had been found, beyond reasonable doubt, to have had knowledge of them."

5.23 Mr. Marques submitted that there are two fundamental egregious breaches of justice in the US Federal sentencing procedure. First that the sentencing judge determines the relevant conduct (including uncharged and acquitted conduct) on the basis of the burden (more properly the standard) of proof on the preponderance of the evidence and secondly that to take into account uncharged and acquitted conduct violates the presumption of innocence (particularly, though not limited to, the taking into account of acquitted conduct).

5.24 Mr. Marques relied upon a variety of cases from this jurisdiction, from across the common law jurisdictions, and from the European Court of Human Rights to show that the standard of proof beyond reasonable doubt is a vital ingredient of the presumption of innocence. Furthermore counsel relied upon the case of Minelli v Switzerland, App. No. 8660/79 (ECtHR, 25 March 1983) to illustrate that the presumption of innocence in Article 6(2) is violated when a judicial decision reflects a view that a person is guilty without having been previously proven guilty or having the opportunity of exercising his rights of defence.

5.25 In particular Mr. Marques relied upon the case of *People (DPP) v Gilligan* (No. 2), [2004] 3 IR 87, and in particular the principle enunciated by Lord Bingham of Cornhill in *R v Kidd*, [1998] 1 WLR 604, restated therein by the Court of Criminal Appeal as follows:

> "Curiously, there seems to be very little authority in relation to that issue in this country. However, the matter was considered by the Court of Appeal in England in the case of *Reg. v Kidd* [1998] 1 W.L.R. 604. In that case, the issue was posed as follows at p. 606:-
>
> 'The issue may be expressed as follows: if a defendant is indicted and convicted on a count charging him with criminal conduct of a specified kind on a single specified occasion or on a single occasion within a specified period, and such conduct is said by the prosecution to be representative of other criminal conduct of the same kind on other occasions not the subject of any other count in the indictment, may the court take account of such other conduct so as to increase the sentence it imposes if the defendant does not admit the commission of other offences and does not ask the court to take them into consideration when passing sentence?'

This was decisively answered by Lord Bingham of Cornhill at p. 607 in the following terms:-

> 'A defendant is not to be convicted of any offence with which he is charged unless and until his guilt is proved. Such guilt may be proved by his own admission or (on indictment) by the verdict of a jury. He may be sentenced only for an offence proved against him (by admission or verdict) or which he has admitted and asked the court to take into consideration when passing sentence: see Reg. v. Anderson (Keith) [1978] A.C. 964. If, as we think, these are basic principles underlying the administration of the criminal law, it is not easy to see how a defendant can lawfully be punished for offences for which he has not been indicted and which he has denied or declined to admit.
>
> It is said that the trial judge, in the light of the jury's verdict, can form his own judgment of the evidence he has heard on the extent of the offending conduct beyond the incidents specified in individual counts. But this, as it was put in Reg. v. Huchison [1972] 1 W.L.R. 398 at p. 400 is to 'deprive the appellant of his right to trial by jury in respect of the other alleged offences'. Unless such other offences are admitted, such deprivation cannot in our view be consistent with principle.'

That seems to this court to be a clear and unambiguous statement of principle with which the court entirely agrees. Indeed, counsel on behalf of the respondent does not really challenge it. He does seek to argue, however, that the sentencing court is entitled to have regard to the overall evidence of the activities of an accused in determining the gravity of the individual charges in respect of which he has been convicted. In the present case, he points to the fact that the offences took place over a period of some 28 months, that there was clear evidence that these offences were part of organised crime and that indeed the applicant was closely involved in the organisation and that he would appear to have been motivated purely by greed.

While this court accepts the reasoning in Reg. v Kidd [1998] 1 W.L.R. 604, quite clearly a sentencing court cannot act in blinkers. While the sentence must relate to the convictions on the individual counts, and clearly the applicant must not be sentenced in respect of offences with which he was neither charged nor convicted and which he has not asked to be taken into account, nevertheless the court in looking at each individual conviction is entitled to, and indeed possibly bound to, take into consideration the facts and circumstances surrounding that conviction. Indeed, if that were not so and these were treated as isolated incidents occurring at six month intervals, it might well be that the proper course for the court to adopt would be to impose consecutive sentences. The court does, therefore, accept the basic principle behind the argument of counsel for the respondent. However, the court does think it important to emphasise that in many cases there may be a very narrow dividing line between sentencing for offences for which there has been no conviction and taking into account surrounding circumstances, which may include evidence of other offences, in determining the proper sentence for offences of which there has been a conviction. It is important that courts should scrupulously respect this dividing line."

5.26 It was submitted, on behalf of Mr. Marques, that the US Federal sentencing Guidelines do not blur the appropriate dividing line between sentencing for offences for which there has been no conviction and taking into account surrounding circumstances, but demolish it

5.27 The State submitted that, even in this jurisdiction, a wide variety of factors have to be taken into account by the court in

sentencing. In the context of child pornography offences they point to the case of *People (DPP) v Loving* [2006] 3 IR 355. The Court of Criminal Appeal said, at para. [27]: "[t]he task of the courts is, following the guidance given by the Oireachtas, to measure the seriousness of individual cases and to fix appropriate penalties."

5.28 Counsel submitted there was no universally acknowledged or accepted rule that uncharged or acquitted conduct could not be taken into account as part of the sentencing process. Counsel pointed to the reality that the fact finding function of any court takes place in circumstances where the presumption of innocence has been removed in relation to the offence. Reliance was placed on O'Malley, *Sentencing Law and Practice, 2nd Ed.*, (Dublin, 2006) which notes differences in approach in terms of standard and burden of proof in relation to fact finding during the sentencing process, at para [31.12]. Counsel pointed to s. 4 of the Criminal Justice Act, 1994 in this jurisdiction.

Analysis and Determination
5.29 In *Attorney General v Damache* I concluded that it was necessary for the respondent to establish, on substantial grounds, that he was at real risk of having his sentence enhanced on the basis of any of the impugned categories of relevant, uncharged or acquitted conduct. I also accepted that while there may always be an element of speculation about what course a sentencing hearing may take, this did not mean that a court could not, or should not, address the risk of certain things happening. However, to establish real risk there must be evidence amounting to more than mere speculation.

Relevant conduct
5.30 The Federal sentencing provisions permit the court to take into account all relevant conduct when sentencing the person before it. While perhaps not so formally stated in this jurisdiction, a court is obliged to measure the seriousness of the offence and impose an appropriate sentence (see; *People (DPP) v Loving*). Furthermore, as stated in *People (DPP) v Gilligan*:

> "the court in looking at each individual conviction is entitled to, and indeed possibly bound to, taken into consideration the facts and circumstances surrounding that conviction,"

5.31 Even *People (DPP) v Gilligan* anticipates that the surrounding circumstances may involve evidence of other offences. The decision of the Court of Criminal Appeal is that the court should not sentence for those other offences but can, and perhaps should, take into account the circumstances which include evidence of those offences. The Irish Courts have not grappled with the issue of whether those "other offences" could include an offence for which the person has been acquitted. The State did not seek to argue that it would be permitted here, but preferred to rely upon there being no universal norm in that regard.

5.32 In this present case, a great deal of what Mr. Marques put forward as evidence of other relevant conduct was speculative. Indeed, much of what he referred to was evidence that appeared to form part of the prosecution case. As regards evidence that forms part of the prosecution case, there is little difference from the situation that would apply here. In this jurisdiction a jury may reject individual items of evidence but nonetheless convict on the offence with which the accused is charged. The extent to which they have rejected particular aspects of the evidence will not be clear from the verdict which is not a narrative one but simply a question of whether the accused is guilty or not guilty of the count on the indictment. In such circumstances a judge will be left to consider same in sentencing. As that occurs in this jurisdiction it cannot be said that there will be a flagrant denial of justice if Mr. Marques is surrendered and faces a similar situation in the USA.

5.33 There is, however, one matter that causes me some concern in that respect and it is the extent to which the relevant conduct will include the allegation that he earned in excess of $30,000 for the alleged facilitation and provision of illegal services electronically. This does not appear to be alleged against him in the conspiracy as set out in the request, although, of course it must be recognised that the evidence could be different. In light of the evidence at the bail hearing, regarding the freezing of his assets, there is a real risk that he will have that part of the sentencing guidelines which increases the offence base for financial gain applied to him, should he be convicted of the offence and evidence of financial gain is given at the sentence hearing.

5.34 In those circumstances, the issue is that the judge will decide, on the basis of the preponderance of the evidence (balance of probabilities), the appropriate sentence. There can be no dispute that the presumption of innocence requires a standard of proof beyond reasonable doubt before a person may be convicted of an offence; but, is it an egregious breach of fundamental rights to apply a standard of the balance of probabilities to relevant matters at sentencing? As is by now well established law, it is not sufficient to point to a constitutional standard of fair trial rights; on the contrary, a real risk of a flagrant denial of justice must be established.

5.35 The starting point at any sentence hearing is that the person has been found guilty on a standard of beyond reasonable doubt. The maximum sentence to which the person is liable must be established at law (whether at common law or by statute). The maximum sentences applicable to Mr. Marques should he be convicted has been established. No decision or finding of the sentencing judge can exceed the maximum sentence set down by Statute in the USA. The purpose of the sentencing hearing, both in this jurisdiction and, on the evidence from the US attorneys, in the USA, is to find an appropriate sentence. That involves a consideration of many factors too numerous to outline here. Amongst those factors will be the extent of the offending e.g. the extent of the conspiracy and the role of the offender in that conspiracy. Even in this jurisdiction we do not require that a jury must determine those matters. The resolution of those matters exists outside the confines of the jury trial mandated by Article 38. So too, in the US, jury trials do not take place for the determination of those aspects.

5.36 Therefore, in the sentencing phase, the court is not dealing with the trial of a person on any offence, but with a fact finding process designed to ensure that the appropriate sentence is imposed for the offence for which the person has been convicted. All of the cases put forward by Mr. Marques deal with the presumption of innocence in the context of the trial for the offence. Mr. Marques made reference to *T & V v United Kingdom*, App. No. 24724/94 (ECtHR, 16 December 1999) and to the finding by the ECtHR that Article 6(1) of the ECHR covers the whole of the proceedings in issue, including appeal proceedings and the determination of sentence. The finding of the ECtHR in that case does not go so far as to say that each matter at the sentencing (or indeed the pre-trial stage e.g. bail) must be determined on the basis of a standard of beyond reasonable doubt. Indeed, all the common law cases referred to by Mr. Marques appear to concern the burden of proof in the trial as to guilt or innocence of the offence charged. The Court accepts that a standard of beyond reasonable doubt is universal for the trial of offences. None of the cases demonstrate a universal requirement that all matters at sentencing be determined on the basis of a beyond reasonable doubt standard.

5.37 In this jurisdiction, it is highly likely that the court would approach contested matters of relevant fact, particularly where a finding will amount to an aggravating factor for the purpose of sentencing, on the basis of a beyond reasonable doubt burden of proof. Indeed, our constitutional requirements of fair procedures under Article 40 and the due process rights under Article 38.1 may mandate such an approach. As recently confirmed by the Supreme Court in *Minister for Justice and Equality v Buckley* [2015] IESC 87, it is only where there is a real risk of being exposed to an egregious breach in the system of justice in the requesting State that

extradition must be refused.

5.38 The US takes a different approach to sentencing than Ireland and the question is whether this amounts an egregious denial of rights in the sense required to prohibit extradition. In short the Court must determine whether being exposed to this type of sentencing hearing is a manifest denial of fair trial rights.

5.39 In the US system at issue in this case the sentence cannot extend beyond the statutory maximum. Many jurisdictions, including Ireland have presumptive minimum sentences. Many jurisdictions have mandatory sentences (Ireland has such for the offence at the highest scale i.e. murder and at the lower end of the scale regarding fines and penalties in certain cases). Mandatory sentences do not allow for individual assessments of the particular offence committed by the particular individual. As I stated in *Attorney General v Damache* it has not been demonstrated that mandatory sentences have been held to be either unconstitutional or a breach of the European Convention on Human Rights. I refer to this to indicate that a choice may be made within legal systems and legal traditions as to how to assess an appropriate sentence to fit the crime for which an accused has been convicted. Is the assessment by the legislature or is it by a judge? Is it by sentencing guidelines or by judicial precedent? Where factors are contested are they to be decided by a jury or a judge? On whom does the burden of proof lie? On the prosecution for "aggravating factors"? On the defence for "mitigating factors"? What is the standard of proof? Beyond reasonable doubt for the prosecution for all factors including aggravating or contested mitigation? On the balance of probabilities for the defence when putting forward mitigation? Or can the factors which are relevant to the offence for which one has been convicted beyond reasonable doubt be proven by the prosecution to a standard of the balance of probabilities?

5.40 To ask those questions is to illustrate the type of issues that arise in the approach to sentencing. I am not satisfied that the answer to the final question posed above is so clear cut that the court is obliged to say that to surrender a person to a jurisdiction which provides for such an approach to sentencing is a manifest denial of fair trial rights. Indeed, to provide what are in effect rules of evidence for a judicial assessment of the appropriate sentence for a crime, but which do not provide for that assessment to be made on a beyond reasonable doubt standard, may not necessarily be any more objectionable than mandatory minimum sentences where no provision is made for judicial assessment of individual circumstances as to the offence and the offender. The point here is that the sentence hearing will only take place if there is a conviction for an offence on a standard of beyond reasonable doubt, the sentence may not exceed the statutory maximum, the appropriateness of the sentence is to be determined after a judge, not jury, led enquiry into the relevant facts. The sentencing assessment is not a trial of guilt or innocence but a means of establishing the appropriate sentence. Therefore having considered the submissions made to me and the case law referred to therein, I am not satisfied that there is any universal standard by which relevant conduct considered at the sentence stage can only be taken into account when a judge adjudicates on a beyond reasonable doubt standard. No real risk of a manifest denial of fair trial rights has been demonstrated.

Uncharged conduct
5.41 In terms of uncharged conduct, the case of *People (DPP) v Gilligan* and indeed subsequent cases such as *People (DPP) v O'Donoghue*, [2007] 2 IR 336, establish that it is permissible in this jurisdiction to consider conduct that would otherwise amount to a criminal offence in sentencing a person. It is important that the dividing line between sentencing for other offences and taking into account surrounding circumstances, which may include evidence of other offences is scrupulously respected. I do not accept that the affidavit evidence shows, to the extent that it is dealing with uncharged conduct, that a dividing line for sentencing for other offences and taking into account surrounding circumstances has been demolished. Indeed Mr. Becker, in his affidavit, indicated that such conduct is one factor, along with a panoply of others that the court must consider in exercising its discretion to determine the sentence. In particular I am satisfied that the sentence that would be imposed on conviction would not be for that other conduct but would be for the offence for which there has been a conviction. The sentencing court is not determining guilt or innocence on that other uncharged conduct; in a similar way, the court in this jurisdiction, in determining the surrounding circumstances which involve evidence of other offences, is not determining guilt or innocence in relation to those offences.

5.42 For the reasons I have set out above, I am not satisfied that there is a universal requirement that, where uncharged conduct is taken into account in determining the appropriate sentence for an offence for which a person has been found guilty, that the conduct can only be taken into account when proven beyond a reasonable doubt.

Acquitted conduct
5.43 The issue with acquitted conduct perhaps raises different issues both in the arguments as to whether it constitutes a flagrant denial of justice but also as to whether there are substantial grounds for believing that Mr. Marques is at real risk of being exposed, in this case, to being sentenced for acquitted conduct. I am satisfied that under US sentencing law that acquitted conduct is a factor which a judge may consider amongst others, in exercising his or her discretion to determine the appropriate sentence. That fact does not of itself establish that there are substantial grounds for believing that Mr. Marques is at real risk of having his sentence increased on such a basis.

5.44 There are four offences alleged against Mr. Marques in this case. They break down to alleged offences of advertising (conspiracy and substantive) and distributing (conspiracy and substantive) child pornography .

5.45 The State initially submitted that Mr. Dratel's evidence was to the effect that he would receive the maximum sentence on all offences. That is incorrect as is demonstrated in the section below on *de facto* life sentence. On the advertising offences in particular the Guideline sentence would not reach the statutory maximum

5.46 Mr. Dratel's evidence was that there are different proofs between advertising and distributing as outlined above. As a statement of law that is correct. However, the reality in the case is that Mr. Marques' alleged position as the administrator of the AHS, upon which this illegal activity was taking place, will form the gravamen of the case against him. The distinction between advertising and distribution has little relevance to that reality. Neither do the relevant proofs for conspiracy. Even Mr. Dratel accepted that the offences are related because they arise out of the same alleged course of conduct. He also accepted that the evidence used to prove each count would overlap to a significant degree.

5.47 What Mr. Dratel then refers to, in seeking to establish the substantial grounds for believing that there is a real risk that he will be sentenced on the basis of acquitted conduct, is, "the reality of jury compromise". In my view, it is highly speculative, to say that a jury in Mr. Marques' case would ignore the jury instructions and engage in a process of compromise so that verdicts contrary to the evidence are reached. This speculation is the opposite to establishing substantial grounds that there is a real risk that he will be sentenced on the basis of acquitted conduct. Moreover, I consider it telling that Mr. Dratel had to resort to such wild speculation about jury compromise to try to establish that Mr. Marques was at risk of an acquittal on one offence but a conviction on the other

5.48 In light of all of the foregoing arising from the particular factual circumstances of the allegations against Mr. Marques, I am

satisfied that there are no substantial grounds for believing that there is a real risk of being acquitted on one offence and not the others. On that basis, this ground can be rejected.

5.49 Moreover, I am satisfied that the evidence of Mr. Becker establishes that there is no requirement for a court to enhance or increase a sentence on the basis of acquitted conduct. The court cannot categorically exclude such conduct from its consideration. However, the acquitted conduct will be one factor amongst many others that a court may consider in determining the appropriate sentence. In the particular circumstances of this case, the combination of factors demonstrate that nothing more than the mere possibility of having acquitted conduct taken into account in sentencing has been established. Therefore on this basis also Mr. Marques has not satisfied the test that there are substantial grounds for believing that he is at real risk of having his sentenced enhanced or increased on the basis of acquitted conduct.

5.50 In those circumstances it is not necessary to consider whether the fact that a judge could take into account conduct for which he was acquitted by a jury at the sentence hearing, amounts to a flagrant denial of justice. For the reasons set out I reject this point of objection on the basis that no real risk of acquitted conduct being taken into account has been established.

6. SPECIALITY

6.1 Mr. Marques submitted that the rule of speciality would be violated should he be extradited to the USA. His arguments and evidence were virtually identical to that which were put forward on behalf of the respondent in *Attorney General v Damache*at part 7. For the reasons set out by me in that judgment, I reject his argument under this heading.

7. DE FACTO LIFE SENTENCE AND IRREDUCIBLE LIFE SENTENCE

7.1 Mr. Marques makes the case that he faces a very lengthy sentence, amounting to a *de facto* life sentence, which does not provide properly for his rehabilitation and which would not allow for the prospect of early release. It is claimed that, where a sentence is not reducible so as to allow for review and the prospect of early release, rehabilitation and reintegration, the prisoner is liable to experience such feelings of hopelessness and frustration as to amount to inhuman and degrading treatment.

7.2 Mr. Marques relied upon the evidence of Mr. Dratel to establish that he is at real risk of a *de facto* or extremely lengthy sentence and that such a sentence will be irreducible. He further relied upon the judgments of the ECtHR in *Kafkaris v Cyprus*, App. No. 21906/04 (ECtHR 12 February 2008), and *Vinter and Ors v United Kingdom* App. Nos. 66060/09, 130/10 and 3896/10 (ECtHR, 9 July 2013) in submitting that such an irreducible life sentence is inhuman and degrading. Finally, he relied upon the decision in *Trebelsi v Belgium*, App. No. 140/10 (ECtHR, 4 September 2014) to say that extradition is prohibited in those circumstances.

7.3 Counsel for Mr. Marques proposed a four stage test in relation to determining whether a sentence would amount to inhuman and degrading treatment:

> (1) Whether the sentence to be imposed on the prisoner is a life sentence; or, alternatively, whether it is a very lengthy sentence in respect of which there is a real risk that it will extend beyond the prisoner's natural life span or will be of such length that upon the prisoner's eventual release, they would have no realistic prospect of rehabilitation and reintegration into society.
>
> (2) If (1) is satisfied, then whether the impugned sentence is reducible in the sense identified in Vinter, by reason of the availability of a review and the prospect of early release, rehabilitation and reintegration into society.
>
> (3) If (1) and (2) are satisfied, then whether, having regard to the length of the sentence and the known circumstances of the prisoner, there is the real prospect of the prisoner being sufficiently rehabilitated during the currency of the sentence such that their reintegration into society would potentially be possible.
>
> (4) If (1), (2) and (3) are satisfied, then whether, as a result of the prospect of the prisoner dying in prison or at least remaining in custody for such a length of time that their reintegration into society is no longer possible, the prisoner is liable to experience such a loss of dignity and to experience such feelings of hopelessness and frustration as to amount to inhuman and degrading treatment.

7.4 Regardless of whether Mr. Marques has correctly identified the tests to be applied, the first step is that a respondent must establish that he is at a real risk of having such a lengthy sentence imposed upon him. In this case, Mr. Marques relied upon the evidence of his own witness, Mr. Dratel, but also on the assertions of those representing the US authorities in bail hearing in this jurisdiction and in the papers grounding the extradition.

7.5 It must be recalled that Mr. Marques was the subject of a provisional arrest warrant. In the course of explaining the grounds of urgency, Ms. Mary D. Rodriguez, Acting Director of the Criminal Division of the Office of International Affairs, US Department of Justice stated: "[o]n the current US charges alone, maximum, consecutive sentences would result in Marques spending the rest of his life incarcerated." During the course of the first bail application (relating to his arrest on the provisional warrant), Special Agent B. Donahue of the Federal Bureau of Investigation in the USA stated that he could be facing "anywhere from twenty years to life in prison." He said that the US court could give a consecutive sentence which could essentially mean a life-term.

7.6 In the second bail application, Special Agent Donahue confirmed that he could be facing up to life imprisonment. Under cross-examination he agreed that he had said there was a likelihood of Mr. Marques spending the rest of his life in prison. He was asked whether that was a reference to the likelihood of the imposition of a sentence or sentences without parole that would cover the rest of anyone's natural life and he replied that it "very well could be, yes". Special Agent Donahue was asked if it was correct that he was "positing as the likely outcome in the event of him being surrendered, the matter being contested and presumably the application of the Federal Guidelines and all the rest of it would be multiple consecutive sentences, probably totting up in excess of one hundred years or something of that sort." Special Agent Donahue replied "[i]t could very well be that high." The maximum possible is, of course, one hundred years.

7.7 Mr. Dratel gave detailed evidence of "US Federal sentencing Law, Policy and Practice as it relates to Mr. Marques". Naturally, his evidence of the general legal principles that are applicable in Federal sentencing proceedings was the same as in the *Damache* proceedings and will not be stated again in detail. The Guidelines are not mandatory, but advisory and there are seven factors which a sentencing court has to consider in each case. Of particular note is that Mr. Dratel gave his opinion that Mr. Marques would, most likely, if convicted, receive a sentence within his applicable Federal Guidelines range (absent the presence of some compelling factor that has not yet been disclosed) and that such sentence would survive any challenge on appeal. He gave statistics to show that, for 2013, 51.2% of all defendants received sentences within the Guidelines range although in the District of Maryland this figure was 30.5% for 2014. A significant majority of the below Guideline sentences are accompanied by a Government motion regarding

substantial assistance.

7.8 There are also statutory minimums on each charge, namely fifteen years for the advertising and five years for the distributing charges. Unless there is a motion from the Government authorising the court to impose a lesser sentence to reflect "substantial assistance in the investigation or prosecution of another person who has committed an offence" the mandatory minimum must be imposed regardless of the applicable Guidelines range. Mr. Dratel stated:

> "[t]hus, absent a 3553(e) motion from the government, Mr. Marques faces a mandatory fifteen year prison sentence after conviction, regardless of his applicable Guidelines range."

In light of the "good conduct time" he would serve 87% of this, making it a minimum of thirteen years, regardless of any other factors.

7.9 Mr. Dratel addressed the various possible scenarios that might apply to Mr. Marques' case. He addressed what he described as "enhancements" for, *inter alia*, the roles which might be ascribed to Mr. Marques in the offence as well as the sentencing for relevant conduct (and he noted that everything relevant is ripe for judicial consideration). Mr. Dratel also considered the Guidelines horizontal axis, the criminal history category where points will be assessed on, *inter alia,* Mr. Marques' prior criminal record (in the USA only), prison sentences and related matters. Mr. Marques is apparently in the lowest category here as, in the absence of any indication to the contrary, it is assumed that he has no criminal history in the USA.

7.10 The Guidelines range for Mr. Marques, according to Mr. Dratel and not disputed by the US authorities, without taking into account any "enhancements for motivation and role in the offence" is ten years and one month (121 months) to twelve years and seven months (151 months). At the other end of the spectrum, if the court finds that he was motivated by pecuniary gain and/or that he played a supervisory or managerial role in the conspiracy and that the Government withhold its discretionary point under acceptance of responsibility, Mr. Marques' Guidelines range is nineteen years and seven months (235 months) to twenty-four years and five months (293 months), again according to Mr. Dratel and without contradiction.

7.11 His sentencing is not complete however as the maximum and minimum terms must be factored in. Since the lowest possible Guidelines range falls below the statutory minimum term of fifteen years required by Counts One and Three he would have to be given the mandatory minimum unless the government moved for a reduction based on the defendant's substantial assistance. On the other hand, if the higher Guidelines' range is imposed, the bottom of this range falls within the statutory maximums on all counts i.e. less than twenty years.

7.12 Mr. Dratel then dealt with the nub of this issue – whether the court is restricted to the thirty years maximum for each conviction on Count One and Count Three and the twenty year maximum for each conviction on Count Two and Count Four. He stated that the courts are not required to run the sentences concurrently; that judges have discretion. In his view, commonly the decision to run sentences consecutively reflects the seriousness or heinous nature of a crime, or a strong risk of recidivism by the defendant. Further he posited that, relevant to this issue was the widespread, and largely unsupported, belief that sex offenders have an extremely high recidivism rate which is relied upon in courts throughout the US. What Mr. Dratel stated therefore was as follows:

> "[I]f the Court finds that a sentence between 240 and 293 months is warranted in light of the factors set forth in 3553(a), it may impose a sentence on each count that is within the statutory maximum for that account, but run the sentences consecutively in order to reach the sentence within the Guidelines range that it finds appropriate. Consequently, even if Mr. Marques were only convicted on Counts Two and Four, each of which carries a statutory maximum of twenty years, the Court would be permitted to impose a total sentence of up to forty years, if it found that consecutive prison terms were necessary to appropriately sentence Mr. Marques."

7.13 A supplemental affidavit dated 13th April, 2015, of Mr. Dratel was then filed on behalf of Mr. Marques. Mr. Dratel averred that, where there exists:

> "an aggravating circumstances of a kind, or to a degree, not adequately taken into consideration elsewhere in the Guidelines, the court has discretion to grant an upward departure and impose a 'reasonable' sentence outside the specified Guidelines range."

It also appears that the sentencing court may grant both an upward departure and an upward variance to reach the appropriate sentence. An upward variance appears to be permitted where the resulting departure range is inadequate. Mr. Dratel stated that:

> "[g]iven the nature of the crime alleged here – a vast network devoted to providing an exclusive and secure forum for distributing and consuming huge amounts of home child pornography – there is the possibility of an upward departure or upward variance from the calculated Guidelines range."

7.14 Mr. Dratel pointed to a number of examples of cases where upward departures and/or upward variances have been affirmed. In particular he said that these cases "fall outside the heartland of child pornography cases". He included, as a reference, the case of *US v Sebolt*, No. 13-4093 (4th Cir. 2014), where there was an upward variance to a life sentence following a conviction for the advertisement of child pornography.

7.15 In reply, the State filed an affidavit of Mr. Keith A. Becker, a trial attorney for the United Stated Department of Justice, Criminal Division, Child Exploitation and Obscenity section. In this affidavit he stated that the sentencing court is:

> "required to impose a sentence sufficient but not greater than necessary to comply with the statue purposes of sentencing, that is, the need for the sentence imposed to reflect the seriousness of the offence, to promote respect for the law, and to provide just punishment for the offence; afford adequate deterrence to criminal conduct; protect the public from further crimes of the defendant; and provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner."

He also set out the factors that the sentencing court must consider.

7.16 Mr. Becker confirmed many of the basic averments made by Mr. Dratel. In essence he said that the statutorily authorised sentencing on the advertising and conspiracy to advertise charges is fifteen to thirty years and on the distribution and conspiracy to distribute it is five to twenty years. He said that the court maintains significant discretion in determining the sentence and, in the event that Mr. Marques were to be convicted of all charges, the court may issue a sentence as low as the statutory minimum

sentence, which is fifteen years. He said that the judge also has discretion to depart upward or downward from the sentencing guidelines and in certain situations, to sentence the defendant below a mandatory minimum sentence.

7.17 Mr. Becker stated that Mr. Dratel correctly identified a number of potential guideline factors that a sentencing court may decide to apply or not apply in the event that Mr. Marques were to be convicted. He pointed out that acceptance of responsibility is one mitigating factor and that, out of the three points available for reduction, two of those can be obtained even where a defendant proceeds to trial. He said that there is a trend within the US in the last several years where an increasing number of sentences are below prescribed guidelines range. In 2014, the statistics of the US Sentencing Commission show that more than half (51.7%) of sentences are below guidelines range. He said that 66.2% of child pornography cases were below guidelines range. He said that in 2014 only 2.2% of cases nationally were above a defendant's guideline range although in the US District of Maryland, to where Mr. Marques is sought, 4% of cases resulted in sentences above a defendant's guideline range. Mr. Becker later references the specific primary guideline section that would apply to Mr. Marques should he be convicted and says that only 2% of sentences were above the guideline range.

7.18 In his view, the statistics directly contradicted Mr. Dratel's opinion that Mr. Marques would "most likely" be subject to a guidelines sentence. Mr. Becker was of the view that:

> "It would accordingly be incorrect to state that, according to current sentencing practice both nationally and in child pornography cases, most US court sentence defendants within the sentencing guideline range or that US courts sentence child pornography defendants within the sentencing guideline range."

7.19 In his affidavit he also described how a judge is entitled to take into account, at the time of sentencing, where a defendant has provided substantial assistance to the government in the investigation and prosecution of others. The court may depart from the guidelines where there is a government motion stating the defendant has provided such substantial assistance. He said that such departures are common. He further said that it is impossible to predict if Mr. Marques will wish to substantially assist but he said that, in his experience, such assistance is common in cases alleging a broad criminal conspiracy.

7.20 Mr. Becker's affidavit set out in detail how a pre-sentence investigation must be carried out by a US Pre-trial and Probation officer who must then submit a report to the sentencing court. That report must be forwarded to the prosecution and defence prior to submission and a final report is then submitted to the court. His affidavit also dealt with issues of the conduct of the sentencing hearing and the question of relevant evidence.

7.21 Finally, Mr. Becker concluded that "[i]t would be mere speculation to say what sentence Mr. Marques would receive if he were convicted in the United States." He listed again the factors that must be calculated.

7.22 Mr. Marques' solicitor filed an affidavit in which she exhibited the most recent statistics from the Central Statistics Office on life expectancy. These show that, in the period 2005-2007, life expectancy at birth was 76.8 years while at age 65 years it is 83.2 years.

Evaluation of the Evidence of Real Risk of a De Facto Life Sentence

7.23 Mr. Marques' written submissions begin with the assertion that the US authorities have, in two separate bail applications and in the pleadings grounding the extradition request, asserted that he could be facing a sentence beyond his natural lifespan. Counsel for Mr. Marques also pointed out that Mr. Becker has not expressly denied the possibility that the prosecution will seek consecutive sentences. Instead, he pointed to the 4% of US District of Maryland child pornography sentences which result in the above guidelines sentences.

7.24 In Mr. Marques' written submissions, counsel stated that Mr. Dratel has confirmed "that a significant above-guideline sentence is a possibility on the singular facts of this case" (emphasis added). It was submitted that Mr. Dratel has sought to demonstrate that child pornography cases which fall "outside the heartland" of this particular type of offending can result in a sentence upwards of the Guidelines range. They referred to the fact that the conspiracy in the Marques prosecution is unprecedented in its scale and in its seriousness and that he is alleged to be at the centre of it. They submitted that it is presumably for this reason that the US authorities have asserted that he faces a sentence which could extend beyond his lifespan.

7.25 Counsel for Mr. Marques referred to a policy statement referred to in paragraph 3 of the supplemental affidavit of Mr. Dratel of the 13th April, 2015, which limits the circumstances in which a downward departure is permissible in "child crimes". In fact, Mr. Dratel did not specifically refer to this aspect of the policy statement as he referred to it in terms of upward departure or upward variance. In any event, a circumscribed possibility on downward departure is irrelevant in this case, where the Guidelines sentence would not bring Mr. Marques up to a life sentence or indeed a very lengthy sentence of the type that his counsel submits is prohibited.

7.26 Prior to considering if the imposition of a *de facto* life sentence (including a very lengthy sentence) would put Mr. Marques at real risk of being subjected to inhuman and degrading treatment, it is necessary to determine if there is a real risk of such a sentence being imposed. There must be substantial grounds for believing that there is such a real risk. Undoubtedly, as I stated in *Damache*, by virtue of the fact of the extradition proceedings themselves, it is axiomatic that there are substantial grounds for believing that he is at risk of being convicted and therefore subjected to a sentence.

7.27 The starting point in this case must be that, it is only in circumstances where a consecutive sentence is imposed, will there be a risk of a lengthy, perhaps *de facto* life sentence being imposed. The Guideline sentence for the offences of which Mr. Marques is accused are not de facto or lengthy sentences of the type impuged by Mr. Marques. Furthermore, the maximum sentence on any single count is thirty years. That maximum sentence is not such a lengthy sentence that, given remission and his age, would leave no prospect of rehabilitation. Therefore, the court is obliged to consider whether there are substantial grounds for believing that he is at real risk of having consecutive sentences being imposed upon him.

7.28 It is perhaps not surprising that Mr. Marques' submission began with and focussed upon the information provided by the US authorities. The information provided by Mr. Dratel, which was otherwise detailed and confidently assertive in respect of the likelihood of Mr. Marques receiving a within Guidelines sentence if convicted, was entirely more reticent about the imposition of consecutive sentences. I find it of particular importance that, in his original affidavit (at para 106 and 109), he referred to the discretion of the court with regard to consecutive sentencing and restricted himself to a statement that the court could, if it finds that the Guideline sentence of 235-293 months is warranted, that it "may impose" a sentence on each count within the statutory limit but do so consecutively in order to reach the sentence within the Guidelines range it finds appropriate. He gave the example of the possibility of convictions on Counts Two and Four only. These counts carry twenty year maximums but the Guideline range extends beyond that maximum. He said that the court would be permitted to impose a total sentence of up to forty years if it found that consecutive prison terms were necessary to appropriately sentence Mr. Marques. Even accepting the possibility of such a sentence being imposed,

that sentence, with remission, is not a *de facto* life sentence or even a sentence that would allow no realistic prospect of rehabilitation and reintegration into society.

7.29 Moreover, when Mr. Dratel came to address the issue of upward variances or upward departures, having specifically referred to the heinous nature of the alleged crimes, he referred to the possibility of upward variance or upward departure. Therefore, the height of Mr. Dratel's evidence was that, while it is likely that he will receive a Guidelines sentence, there is a discretion in the court to impose consecutive sentences which have a particular significance if convicted on the distribution charges (max sentences of twenty years) and that there is a possibility of an upward variance/departure from the Guidelines sentence.

7.30 I would also comment that, in the *Sebolt* case, to which he made specific reference, a life sentence was imposed on child pornography offences. That case must have dealt with a different offence as no life sentence is available on the counts for which Mr. Marques is sought. Any particular factors which may have caused that court to seek a sentence outside the specific Guidelines range are also not addressed by him. Furthermore, that case does not appear to have been concerned with the imposition of consecutive sentences but with the imposition of an above Guideline sentence on a specific count to enable the court to give a life sentence.

7.31 I also note that Mr. Dratel, when commenting on the discretion that the sentencing court has to impose consecutive sentences, spoke of the strong risk of recidivism. He said relevant to that is the fact that the widespread and largely unsupported belief that sex offenders have an extremely high recidivism rate is relied upon in courts throughout the US. Even if true, the statement has no relevance to this case when one considers the established statistics that only 2.2% nationally (and 4% in Maryland) of persons convicted of federal child pornography offences had sentences that departed upwards from the guidelines. Those statistics do not support his contention that US courts rely upon a high risk of recidivism in child pornography cases (whether such a risk is unsupported or otherwise), to impose sentences in excess of the Guideline sentences.

7.32 Finally, I note the disparity between Mr. Dratel and Mr. Becker as to whether it can be said that Mr. Marques is most likely to be subject to a guidelines sentence. Mr. Becker gave evidence of that fact that 66.2% nationally in 2014 received below Guideline range. Some, but not all, of those below departures appear to relate to government motions to depart from Guideline sentences (and even mandatory minimum sentences). Co-operation was not addressed by Mr. Marques and indeed it would be violating his presumption of innocence to approach the matter with that in mind. Suffice to say that while the Court accepts that there is a real risk of a Guideline sentence being imposed in this particular case, the real risk of a very lengthy consecutive sentence, amounting to a *de facto* life sentence including one where release would occur with no prospect of rehabilitation and reintegration, has not been established beyond the level of the merely possible.

7.33 In *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45, the Supreme Court specifically stated that the "mere possibility" of a breach of Article 3 is not sufficient. There must be substantial grounds for believe that the real risk has been established. On Mr. Dratel's evidence, either on its own or in combination with the evidence of Mr. Becker, the Court is satisfied that such a real risk of the type of sentence that Mr. Marques says he is at risk of receiving has not been established.

7.34 That is not the end of the Court's consideration because it is necessary for the Court to consider all of the evidence in the case. By focussing on the statements emanating from the US authorities during the early stages of these proceedings, Mr. Marques has recognised that the strength of his argument may lie there. To counter this, the State relied upon the evidence of Mr. Becker to say that it would be mere speculation to say what sentence Mr. Marques would receive if he were convicted in the US as sentencing is within the exclusive jurisdiction of the court and a great variety of factors that are specific to each individual must be considered.

7.35 What has been established before this Court is that the US sentencing judge retains discretion in sentencing subject to the maximum and minimum statutory sentence and must consider a wide range of factors prior to imposing sentence (including the non-mandatory US Federal Sentencing Guidelines). I do not accept the contention that, because there is discretion in sentencing, this court is unable to assess whether there are substantial grounds for believing that there is a real risk of a sentence of a particular length being imposed. Speculation and the establishing of real risk can be distinguished.

7.36 In relation to the statement in the documentation relating to the provisional warrant, signed by Ms. Mary D. Rodriguez, I find that it is simply a statement of the legal position. The legal position permits consecutive sentencing which would amount to a total of one hundred years i.e. Mr. Marques spending the rest of his life incarcerated. That does not establish a real risk of that sentence being imposed. I have set out in detail above the evidence of Special Agent Donahue. An examination of his evidence demonstrates that he too was setting out the possible maximum penalty available. His reference, in the first bail application, is to the possible sentences available. It was on cross-examination that he agreed with the proposition that he was likely to face a life sentence but when asked to clarify he said "could be yes". Again his reply to a lengthy but direct question about the likely outcome being a sentence in excess of one hundred years was "[i]t could be very well be that high."

7.37 In my view, that evidence, stemming from a law enforcement officer and not a lawyer, but more particularly couched as it in the terms set out, does not amount to substantial grounds for believing that there is a real risk that the sentence that may be imposed upon Mr. Marques if convicted would amount to a sentence equating to his natural life. On the contrary, I have the detailed evidence from Mr. Becker, following on from the evidence of Mr. Dratel, that sets out a much more nuanced legal and factual situation. The Court should treat the evidence of Special Agent Donahue in the same manner as a count treats the evidence of flight risk in a bail application based upon a statement of the seriousness of the offence and the maximum sentence it may attract. For example a court will assess whether an objection to bail based upon the maximum 10 year sentence has any reality when considering the case of a juvenile with no previous convictions who allegedly stole a chocolate bar. The court must establish the real risk of such a sentence being imposed as distinct from the theoretically possible. Special Agent Donahue was referring to the theoretically possible as distinct from establishing the real risk of the imposition of a sentence of one hundred years in this case.

7.38 Therefore, I conclude that Mr. Marques has not established on substantial grounds that there is a real risk that he is facing consecutive sentences that would amount to a de facto life sentence. On that basis it is unnecessary to consider the legal implications of the imposition of a de facto life sentence.

8. COERCIVE PLEA BARGAINING

8.1 Mr. Marques relied upon the evidence and the same legal argument that was before the court in *Damache*. Since this Court gave its decision in Damache, a decision of Edwards J was uploaded to the Courts Service website. That decision *Attorney General v Lee*, [2015] IEHC 340, was delivered on the 23rd March, 2015. In that case, Edwards J held that the court was not satisfied that the system of plea bargaining that exists in the United States constitutes so egregious a defect in their criminal justice system as to create a concern that the respondent to that application would be deprived of the right to contest his innocence at trial, or to receive a fair trial, such as might justify the court in refusing extradition. Mr. Marques sought to distinguish Lee on the basis that very little evidence had been before the High Court in that case; however, the evidence before the court in this case does not differ from

that before the court in *Damache*. For the reasons set out in *Damache* I reject Mr. Marques' argument under this heading.

9. PRISON CONDITIONS AND MR. MARQUES' ASPERGER'S SYNDROME

9.1 Mr. Marques claimed that his extradition is prohibited on the ground that his Asperger's syndrome puts him at real risk of being subjected to inhuman and degrading treatment in the Federal Prison system and to significant infringements of his bodily integrity there. He claimed, in his submissions, that this condition can deteriorate if not properly managed, to such an extent that bodily integrity can be impacted. He also made a claim that he is at real risk of being subjected to inter-prisoner violence due to the level of overcrowding in US prisoners, his status (on any conviction) of being a sex offender, his Asperger's syndrome and his isolation as a foreign national.

The Evidence

9.2 The history of the proceedings establishes that it was only very late in the day that the possibility of Mr. Marques having Asperger's syndrome was considered. This apparently came about because of concerns that his counsel and solicitor had about his presentation. Prof. Casey, Consultant Psychiatrist was specifically asked to consider whether he had any psychiatric condition and in particular whether he suffered with Autistic Spectrum Disorder (Asperger's syndrome) and, if he did, to consider the impact that extradition to the USA would have on his condition. She saw him in March, 2015, in The Midlands Prison. She had recourse to records from his assessment at the Child Psychiatry Department in the Mater Misericordiae Hospital, Dublin. She relied upon documentation provided by Mr. Dratel to address the second consideration.

9.3 At the conclusion of her face-to-face interview, Prof. Casey was of the view that there was some, but not definitive, features suggestive of Autistic Spectrum Disorder (Asperger's syndrome). She reviewed the records from the Mater Misericordiae Hospital where she noted that some features of Asperger's syndrome were exhibited yet that diagnosis was not mentioned. In light of her uncertainty about diagnosis, she asked for a clinical psychologist to carry out an assessment. The assessment by Mr. Odhran McCarthy, senior clinical psychologist at the Mater Misericordiae Hospital, concluded that he met the criteria for Autistic Spectrum Disorder (Asperger's syndrome). Mr. McCarthy said that, in contrast with classic autism that is routinely identified by the age of three years, many individuals with Asperger's syndrome are not identified until their teens or adulthood.

9.4 Dr. Breda Wright, Consultant Forensic Psychiatrist, examined Mr. Marques on behalf of the State. Counsel for the State sought to rely upon the statement by Dr. Wright that his:

> "diagnosis of Asperger's syndrome has newly arisen in the context of legal proceedings, which may give rise to the question of malingering to escape negative consequences, in this case extradition to the USA."

Dr. Wright did not identify areas, answers or behaviours which were suggestive of malingering. She expressed some reservations about her own expertise in adult autism (and queried whether Mr. McCarthy had that expertise in adult autism). She gave her opinion, based upon the information available to her and her meeting with Mr. Marques, that he met the criteria for a diagnosis of Asperger's syndrome.

9.5 At this point, two very experienced Consultant psychiatrists have examined Mr. Marques. They have had access to a thorough report carried out by a clinical psychologist based at the Adult Psychiatry Department of the Mater Misericordiae Hospital as well as access to his childhood psychiatry notes. I have no hesitation in accepting their opinion that Mr. Marques suffers from Asperger's syndrome. While the court case may have been the driver for seeking out the diagnosis, that fact does not undermine the diagnosis itself.

9.6 A diagnosis of Asperger's syndrome puts him at Level 1 severity of autism. He had deficits in social communication with noticeable impairments. He had difficulties initiating social communication with a decreased interest in social interactions. He had an intense preoccupation with computers resulting in significant interference with his social functions and exacerbating social communication difficulties. It is clear that he has functioned without help up to now. He is of average intellectual ability with no evidence of clinical delay in either cognitive or language functioning.

9.7 The issue to be addressed is whether the fact that he has Asperger's syndrome will expose him to a real risk of inhuman and degrading treatment. Prof. Casey based her opinion on (a) Mr. Marques' particular conditions together with (b) the conditions in US Federal Prisons as outlined by Mr. Dratel in his affidavit.

9.8 With respect to his condition, Prof. Casey had concerns about his language ability but I find, on the basis of Mr. McCarthy and Dr. Wright's reports, that he has no language difficulties. Prof. Casey also referred to how people with Asperger's syndrome experience sensory overload, in that noises are louder and lights are brighter to those so afflicted than to those in the general population. She said the effect of this is mention by Mr. McCarthy. That reference was at a very general level given in an attempt to explain what might have been behind problems at school. I note and accept Dr. Wright's specific questioning of Mr. Marques on this issue. He reported that he had no problems with the level of auditory or visual stimulation during his time in prison and did not identify that kind of hypersensitivity as an issue.

9.9 The main concerns of Prof. Casey were that those with Asperger's syndrome find change difficult and may decompensate behaviourally and emotionally. Simple changes to routine may provide such an outcome, thus the change of regime in the US could cause decompensation by Mr. Marques. Among adults, decompensation may take the form of suicidal behaviour, depression, obsessive compulsive disorder or, in some instances, psychosis. There would be difficulties with regard to visits from his parents. He does have emotional needs although, as a person with Asperger's syndrome, he may not articulate it. As he is not overtly psychiatrically ill with hallucination he runs the risk of being regarded as not having a psychiatric disorder or as presenting as a malingerer. He may need his own cell and special diet (Mr. Marques only wants to eat crisps and cheese sandwiches). A belief that he is a malingerer and a convicted (possibly) sex offender would place him at great risk of being the victim of sexual assault in the environments outlined by Mr. Dratel. In Dr. Casey's opinion, his mental health will be significantly compromised if he is extradited and imprisoned in the USA. Prof. Casey also said that his safety will also be diminished, not just because of the nature of the offences with which he is charged, but also because of his diagnosis and the nature of the penal system there.

9.10 According to Dr. Wright, Mr. Marques has not experienced any deterioration in his mental conditions since admission to prison. He has not been attending any visiting psychiatric services and is not prescribed any medication. He has not incurred any disciplinary sanctions. Dr. Wright noted that there are no autism-specific services available within the Irish Prison Service. She recommended cognitive behaviour therapy but said that the success of this is highly depended on the willingness of the person to engage. She also referred to the two specific difficulties which he has had in prison. He finds it difficult to tolerate anything other than cheese sandwiches; this is related to sensory issues of taste, smell and texture. The risks include nutritional deficiencies, weight loss or impaired psychosocial functions. He also had difficulties with respect to change of cell mates. Many people have this anxiety in prison

but persons with Asperger's syndrome can find change very difficult, particularly when the change is beyond their control and unpredictable.

9.11 With specific reference to his situation in the event of his extradition and imprisonment in the USA, Dr. Wright said Mr. Marques identified the loss of contact with his parents as the most significant stressor for him. She says his capacity to manage this separation may be compromised by his limited capacity to form other social contacts. This, she said, is a real and unfortunate consequence of imprisonment, particularly imprisonment in a distant jurisdiction, and is not specific to those with Asperger's syndrome.

9.12 Dr. Wright made reference to a statement from Mr. Marques that, if he were to be extradited, he would kill himself. She said that, in the absence of a history of suicidal behaviour, a history of depressive illness, or a current depressive illness, it is difficult to predict the likelihood of him acting on this statement. She believed the statement had the quality of an ultimatum. With respect to the contents of the affidavits filed on behalf of the State by officials at the US Federal Bureau of Prisons, Dr. Wright said that it is not within her competence to comment on the capacity of another prison service to appropriately safeguard and provide medical and psychiatric care for its inmates.

9.13 Mr. Dratel swore an affidavit on the 17th February, 2015, dealing with what he said were the inadequacies of the US Federal Prison systems facilities for the treatment of those with mental health problems and in particular Asperger's syndrome. This affidavit was sworn before the diagnosis of Mr. Marques with that condition. Mr. Dratel referred to the difficulty in analysing the quality of psychiatric care offered, which he stated is due to the lack of transparency in the system that would enable this evaluation. He said that the prison system lacks sufficient funding for medication or therapeutic treatment for inmates who would benefit from regular psychiatric care. Even where diagnosis is recognised, the ability of the Federal Prisons to meet the mental health needs of inmates is seriously limited. He referred to Human Rights Watch, *Mental Illness, Human Rights and US Prisons: Human Rights Watch Statement for the Record to the Senate Judiciary Committee Subcommittee on Human Rights and the Law* (22nd September, 2009) at paras. [1-3], [5-1].

9.14 With specific reference to Autistic Spectrum Disorder, Mr. Dratel said that there are very few facilities and the capacity for them is extremely limited. He stated that the admissibility requirements for those programmes are strict and directed at inmates who are able to demonstrate long term and serious impairments. He referred to difficulties of individual assessment for a prisoner who may be viewed as a malingerer. Other conditions such as depression or anxiety would be exacerbated and are difficult to treat without in depth intervention. Mr. Dratel said that substandard medical and psychiatric treatments (or neglect thereof) might constitute and abrogate Article 3 standards. He also said there is a potential for violence being committed against Mr. Marques. Mr. Dratel also relied upon his own experience of clients with mental illnesses where there have been inadequacies in treatment or diagnosis.

9.15 The State filed an affidavit sworn by Dr. Edgardo T. Ong who is the Regional Health Services Administrator for the Mid-Atlantic Region of the Bureau of Prisons. He set out the mission of the BOP to "safely, humanely and securely house sentenced inmates for the duration of their sentence." They have promulgated policies which are audited by the American Correctional Association, a third party accreditation organisation. Dr. Ong said that it is impossible to predict where Mr. Marques would be housed if convicted in the USA. He said that it would depend on a number of matters which include medical (which in the context is to be understood as physical) and mental health needs. He stated that, at the designations phase, where an inmate has known medical concerns, the Office of Medical Designations and Transportation reviews the file to determine an appropriate facility based on the inmate's medical condition. Inmates are assigned one of four Care Levels to ensure that they are matched with the institution best suited to meeting their individual medical needs. The BOP has a number of medically-oriented facilities capable of meeting the needs of seriously ill inmates including those with psychiatric issues. Dr. Ong stated that, should Mr. Marques have medical concerns that the BOP is not able to handle, the BOP would provide him with access to local medical providers and specialists, as necessary.

9.16 Dr. Ong also stated that he reviewed the information provided, as it pertains to Mr. Marques' Asperger's syndrome, and consulted with the BOP's Chief of Psychiatry. Based upon the limited information from his psychological and psychiatric evaluation, it appears that his medical condition is manageable within the BOP facilities. He said that the BOP is currently providing treatment to inmates diagnosed with this and similar disorders. Depending on the results of an evaluation by both physical and mental health medical professionals, the BOP may designate a place to Mr. Marques that addresses his physical, mental health and activities of daily living issues. He gave his opinion that the BOP will be able to provide appropriate care for Mr. Marques.

9.17 The State also filed an affidavit from Mr. Christopher Adams, Deputy Regional Director for the Mid-Atlantic Region of the Bureau of Prisons. Mr. Adams also outlines that the determination of where an inmate will be house is based upon multiple factors including his physical and mental health needs. He too set out that, at the designation stage, inmates are assigned one of four Care Levels to ensure that they are matched with the institution best situation to meet their individual needs. Inmates are screened upon arrival with respect to mental health and are connected with mental health professionals who provide them with care consistent with their policies to ensure that inmates are safely, humanely and securely housed for the duration of their sentences.

9.18 Mr. Dratel replied by affidavit stating his view that Dr. Ong's affidavit does little to contradict his own averments. He said that it confirms his view of some of the worst aspects of BOP care. In particular he said that the BOP confirms that they will provide him with access to local medical providers and specialists as necessary. Mr. Dratel's view was that this means that should Mr. Marques have a medical concern which the BOP determines not to *"require care"* it is probable that he will not receive treatment for the condition. He noted the reference to the care plan being based upon the evaluation and that they "may" provide a care plan. He said that this is conditional and that there is not any promise that he will get any particular level or nature of care. He said that the method of challenging any decision with regard to provision of care is limited to an administrative remedy process, which can take months to exhaust during which time counsel and courts are not permitted to intervene.

9.19 In their submissions, counsel for Mr. Marques relied in evidence from the report of Human Rights Watch, *Cruel and Callous: Use of Force against Inmates with Mental Disabilities in US Jails and Prisons* (May 2015) which was produced to, and read by, this Court. That report, which was focussed on prisons and jails across the USA and not just Federal prisons, was primarily dealing with mental health conditions such as bipolar disorder, schizophrenia and depression that may cause intense distress, be accompanied by psychosis, or substantially interfere with or limit one or more major life activities. The report outlines that "[d]eficiencies in correctional mental health services are pervasive across the country." There is little detailed focus on the Federal prison system and the BOP in the report. Indeed, the examples highlighted by counsel for Mr. Marques deal with prison facilities decided at State level within the USA.

9.20 Mr. Dratel highlighted the issue of overcrowding in US prisons and the risk of violence and in particular sexual violence. Mr. Adams filed a replying affidavit and much of the contents mirror the affidavit filed by another US official and referred to by Edwards J in the case of *Attorney General v. Lee*. The contents will not be repeated save to say that Mr. Adams stated that in 2014 the Bureau

of Prisons experienced a decrease of 5,000 prisoners.

The Law
9.21 In *Attorney General v Damache* I considered, in detail, the law relating to the prohibition on extradition on the grounds relating to inhuman and degrading treatment whether that be under the ECHR or the Constitution. In short, if there are substantial grounds for believing that there is a real risk that Mr. Marques will be subjected to inhuman and degrading treatment in the Requesting State the court must refuse extradition. There is an evidential burden on Mr. Marques to adduce evidence capable of proving that these substantial grounds exist. It is open to a Requesting State to dispel any doubts by evidence – that is not a shifting burden. The real risk should be examined rigorously.

9.22 The State relied upon a number of cases to outline the elements that must be considered where illness, in particular mental illness, is at issue. There are similarities with the case of *R (McKinnon) v Secretary of State for Home Affairs* [2009] EWHC 2021 a UK extradition case, where the requested person also suffered from Asperger's syndrome and who claimed that his detention there, pending trial and during sentence, would breach Article 3. Lord Justice Stanley Burnton stated, at para. [67] thereof:

> "It is well recognised that Article 3 applies to conduct of the most serious and severe kind. It is particularly difficult for a person to establish a breach of his Article 3 rights where the conduct that is envisaged is, as in the present case, not the deliberate infliction of harm by agents of a foreign state but neglect or a lack of resources on the part of that state."

9.23 The *McKinnon* judgment referred to a number of House of Lords decisions given in the context of immigration cases where deportation would affect life expectancy enormously. A critical stage must have been reached before the deportation would be said to be inhuman and degrading. In *Babar Ahmad and Ors v United Kingdom* App. Nos. 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (ECtHR 10 April 2012) the medical conditions of some of the applicants was at issue. The ECtHR stated, at para. [215]:

> "The Court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 of the Convention and that the lack of appropriate medical care may amount to treatment contrary to that provisions…In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 had, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. The feeling of inferiority and powerlessness which is typical of persons who suffer from a mental disorder call for increased vigilance in reviewing whether the Convention has (or will be) complied with. There are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical conditions of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant…"

9.24 In *Babar Ahmad*, one of the applicants supplied evidence that he suffered from Asperger's syndrome, recurrent depressive disorder and obsessive compulsive disorder as well as anxiety symptoms. The court concluded that these mental health issues had not prevented his detention in a high security prison in the UK. The court was also influenced in its decision by evidence as to the availability of appropriate psychiatric services in the US prison.

9.25 A further applicant, who suffered from paranoid schizophrenia and whose case was originally conducted alongside the *Babar Ahmad* proceedings, had his surrender prohibited on the basis that the extradition to a country, where he had no ties and with a different, potentially more hostile prison environment, would result in a significant deterioration in his mental and physical health. (See; Aswat v United Kingdom App. No. 62176/14 (ECtHR 16 April 2013)).

9.26 In this jurisdiction, Edwards J, in *Minister for Justice, Equality and Law Reform v Machaczka* [2012] IEHC 434, identified the test to be applied when addressing the question of whether a person will commit suicide if surrendered, at para. [146]:

> "However, in terms of the legal issues which the court has to decide, the critical question which requires to be addressed is not whether the respondent will commit suicide if he is surrender (the Court profoundly hopes that he will not, but accepts that he is at very serious risk of doing so); but, rather, whether there is a real risk in the circumstances of the case that to surrender him would breach his rights i.e. his right to life, to bodily integrity and not to be subjected to inhuman or degrading treatment – in other words to be treated with human dignity."

9.27 Edwards J highlighted that the fact that human rights violations take place is not in and of itself evidence that a particular individual will be at risk of being subjected to those human rights violations in the country in question. Systemic violations, together with a specific vulnerability of a particular individual, may cause the court to conclude that there is a real risk of a violation of rights.

Analysis and Determination
9.28 Any analysis of whether a person is at real risk of being exposed to inhuman and degrading treatment must focus on the risk to that particular person given his or her own vulnerabilities and the particular conditions to which the person risks being exposed. In this case Mr. Marques is a man who undoubtedly has Asperger's syndrome even if it was only diagnosed in the course of these proceedings. His diagnosis of Asperger's syndrome, putting him at Level 1 of Autistic Spectrum Disorder, means that his severity level is adjudged as "requiring support."

9.29 There is no evidence of any deterioration since his admission to prison in this jurisdiction over twenty-one months prior to the report of Dr. Wright. He has not been attending the visiting psychiatry services within the prison and he is not prescribed any medication. He has had no disciplinary sanctions. In essence, he is not having any treatment. There are no autism specific services here, but Dr. Wright recommends some interventions such as cognitive behavioural therapy.

9.30 The evidence placed before this Court on behalf of Mr. Marques in relation to prison conditions and Asperger's syndrome is sparse and, at times, anecdotal. The Human Rights Watch Report from 2015 is primarily focussed on the treatment of those with mental health disabilities of far greater severity than that of Mr. Marques. Moreover, that report has very little focus on the role of the BOP which administers the US Federal Prisons system. Mr. Marques sought to focus on the systemic nature of the problems but systemic problems at a state level in the USA cannot automatically be translated into a systemic federal issue.

9.31 Counsel for Mr. Marques referred in particular to the limited capacity for speciality programmes addressing the needs of Asperger's syndrome inmates, set out at para [122] of the affidavit of Mr. Dratel. Mr. Marques' main contention is that the BOP will require him to experience the decompensatory effects referred to by Prof. Casey before they will consider it necessary to treat him. It is submitted that he is in a Catch-22 system. It is for this reason they say that Mr. Marques is at real risk of being subjected to inhuman and degrading treatment in the USA "and of suffering a serious adverse impact on his bodily integrity".

9.32 A major problem with Mr. Marques' argument is that it is posited in the realm of the theoretical rather than the actual. He is a man, who, on all the evidence, has not had his mental health deteriorate while he has been in custody here for twenty-one months (up to the date of the reports) without treatment of any kind. In particular, there has been no decompensation of the type feared by Prof. Casey, despite the fundamental change he experienced when subjected to a prison regime instead of being at liberty. There is also no evidence before me to suggest that he has sought to engage in any treatment or therapy since his diagnosis. If he does not engage with therapy while in custody in this jurisdiction, this negatives the contention that lack of these therapeutic supports in the US prisons amounts to substantial ground for believing that his surrender would create a real risk of being subjected to inhuman and degrading treatment. It has not been established that there are substantial grounds for believing that there is a real risk that imprisonment in the USA will lead to the decompensation of the type feared by Professor Casey.

9.33 At a more fundamental level however, the court is of the view that the test identified by Edwards J in *Machaczka* is generally applicable to any situation of medical need. In this case, the test is not whether the surrender will cause Mr. Marques' Asperger's syndrome to deteriorate (and of course the court hopes it will not) or indeed even whether there is a real risk that his condition will deteriorate. The test is whether there is a real risk in the circumstances of the case that surrender would breach his rights i.e. to life, to bodily integrity and not to be subjected to inhuman or degrading treatment. In the same way as a person in this jurisdiction who has a mental illness, such as a major depressive disorder, schizophrenia, autism or an anxiety disorder, that may be negatively impacted by imprisonment, is not immune from imprisonment, so also a person with these conditions is not immune from extradition. The court must consider the person's medical condition, the adequacy of the medical care that may be provided and the advisability of maintaining the detention measures.

9.34 As regards his medical condition, the evidence establishes that Mr. Marques is of a man who can tolerate imprisonment. What may be different for him in the USA is that he will be far from home and without the support of his mother and father who pay him weekly visits at present. His ability to manage this separation may be compromised as he had limited capacity to form other social contacts. Dr. Wright said that this is a real and unfortunate consequence of imprisonment, particularly at a distance from home, and not specific to those with Asperger's syndrome. In my view, it is a factor that is more likely to apply to Mr. Marques than to a person without Asperger's syndrome. That is far from saying that there is a real risk that his rights will not be respected. A difficulty with separation from others does not amount to a finding that one's right are, or will be, violated

9.35 As stated above, it is speculative to say that, because he will have greater difficulties with separation, this will lead to the decompensation effects outlined by Prof. Casey. Indeed, her opinions are not couched in terms of probability but in terms of possibility e.g. "may cause".

9.36 I also note that Mr. Marques said to Dr. Wright, in the course of discussing separation from his parents, that if he were to be extradited, he would kill himself. Dr. Wright was of the view that, in the absence of a history of suicidal behaviour, a history of depressive illness or a current depressive illness, it was difficult to predict the likelihood of Mr. Marques acting on this statement. In her view, in the absence of those factors and on the understanding that, if he is not extradited that he does not intend to kill himself, the statement had the quality of an ultimatum. On balance, I agree that this is an ultimatum. A direct intention to commit suicide did not form part of the factors indicated by Prof. Casey and I view this as an opportunistic statement on the part of Mr. Marques.

9.37 As regards the adequacy of the medical care that may be available to him in the USA, the particular circumstances of Mr. Marques and the particular conditions of detention in which he may be at risk of being held, have not been adequately or sufficiently addressed by the evidence presented on his behalf. Mr. Dratel's first affidavit is at a level of generality; perhaps that is not surprising given that it was sworn prior to any diagnosis of Mr. Marques' condition. In the view of the Court, any concerns that might have arisen are offset by the affidavit of Dr. Ong, the Regional Health Services Administrator for the Mid-Atlantic and the affidavit of Mr. Christopher Adams, Deputy Regional Director for the Mid-Atlantic Region.

9.38 The assertion by Mr. Dratel that the affidavit of Dr. Ong confirms some of the worst aspects of the mental healthcare available within BOP facilities is rejected. Mr. Dratel may be misunderstanding the reference to access to local medicinal providers "as necessary". That appears to be a reference to the situation where there is a medical concern that cannot be dealt with in-house by the BOP. If that occurs then access to local medical providers will be provided as necessary. I see no difficulty with the reference to "necessary". Access to medical treatment is always only made available as necessary. That is an assessment that is made in every individual case.

9.39 I also do not accept that Mr. Dratel's evidence at para. [118] of the Bureau of Prisons' policy with regard to "medically acceptable – not always necessary" conditions for which medical treatment is not mandatory (and may it seems be provided to a prisoner) amounts to inhuman and degrading treatment. The conditions are those for which "treatment may improve the inmate's quality of life." but are without significant risk of "serious deterioration leading to premature death, significant reduction in the possibility of repair later without present treatment or significant pain or discomfort which impairs the inmate's participation in activities of daily living or are not immediately life threatening." Thus he will be entitled to treatment where there is significant risk of him experiencing the decompensatory effects of the type indicated by Professor Casey. While Mr. Dratel posits that he would likely not receive other medically appropriate but not always necessary care that would be available to him in the community, I am satisfied that adequate medical will be provided according to his needs.

9.40 Furthermore, I do not accept that the reference in the affidavit of Dr. Ong that the BOP "may formulate a plan" depending on the nature of the medical and mental health evaluation carried out is "deeply troubling and emblematic of uncertainty and inconsistency of care". The formulation of a plan is, of course, dependent on the evaluation as it is only then that the necessity for a plan can be determined.

9.41 The US authorities have stated that they will evaluate Mr. Marques if he is extradited and, depending on the results, they may formulate a plan for him which will address his physical, mental health and activities of daily living issues. His medical needs will be addressed either within the BOP medical system or alternatively by local providers.

9.42 The complaints of Mr. Marques in relation to inadequacy of the redress system are unfounded. Dr. Ong has identified that, in addition to internal compliance and auditing systems to ensure compliance with programme statements issued by BOP, inmates have "several methods by which they may seek redress, including from the judicial system". Mr. Dratel complained that, in his experience, there is only one method; administrative review. Dr. Dratel complained that this can take months to exhaust, counsel and courts are not permitted to intervene and that in nearly all circumstances, there is no change in the inmates care while the case is progressing.

9.43 In the view of the court, most challenges to administrative decisions, be they through the courts or an internal system, will take a substantial period, often months, to complete. I also do not accept Mr. Dratel's assertion, based upon his experience that there is only one method of redress being that of administrative review, over the statement of Mr. Adams that an inmate may file a lawsuit in

a Federal Court to ensure that the Bureau of Prisons is complying with Federal law, and the statement of Dr. Ong regarding redress from the judicial system. In those circumstances, there is no lack of fairness established that would elevate the conditions of detention to the status of inhuman and degrading.

9.44 It has not been established that within the US federal prison system there is a systemic problem that gives rise to cause for concern for the health of Mr. Marques as a person who has a specific vulnerability, namely Asperger's syndrome. The US authorities have established that they have a constitutional obligation to provide adequate health care to its inmate population (as averred to in the affidavit of Mr. Christopher Adams). I also accept the evidence of Dr. Ong that Mr. Marques' condition is manageable within the Bureau of Prisons and that the Bureau is currently providing treatment to persons with Asperger's syndrome and similar conditions. Overall it cannot be said that the adequacy of the medical care that will be available to Mr. Marques on extradition gives rise to concerns of risk to life, bodily integrity or inhuman and degrading treatment. Furthermore, there is nothing on the evidence that reveals it is inadvisable at present in view of the state of health of Mr. Marques to maintain his detention.

9.45 In all the circumstances, there are no substantial grounds for believing that Mr. Marques is at real risk of being subjected on surrender to inhuman and degrading treatment or to having his right to bodily integrity serious violated on account of his Asperger's syndrome and the treatment or lack thereof that he would receive on extradition to in the USA.

9.46 Furthermore, as regards that part of the claim that there is a real risk of being subjected to inter-prisoner violence or ill-treatment by prison officials, especially with respect to Mr. Marques' vulnerability as a person with Aperger's syndrome, the evidence in this regard was extremely limited. I do not accept the submission of counsel for Mr. Marques that there was little engagement with the issue of overcrowding. I also conclude that the Human Rights Report had little to say with regard to Federal prison.

9.47 The Court relies upon the conclusions reached by Edwards J in *Attorney General v Lee* as follows:

> "6.11. The Court considers that there has been appropriate engagement by the authorities in the requesting state with the concerns expressed on behalf of the respondent, and it is reassured by the responses received. As to the overcrowding issue, in particular, overcrowding is a common feature of many prison systems including our own. It is regrettable where it occurs, but while always uncomfortable for those prisoners affected by it, and sub-optimal, it will not necessarily be inhumane or degrading. It depends on the circumstances of the case, including the degree to which there is overcrowding, the duration of it, the amount of out of cell activity permitted, other conditions in the prison or detention centre and so on. Mr. Herman acknowledges that three persons are sometimes accommodated in two person cells but states that this is done on a limited and temporary basis and is closely monitored to ensure it is discontinued as soon as possible. The Court is reassured by this, and its concerns are allayed.
>
> 6.12. The Court does not consider that the evidence adduced by the respondent, when viewed in light of the responses received from the requesting state, is of sufficient cogency to establish that there are reasonable grounds for believing that the respondent is at real risk of being subjected to prison conditions, or a regime of incarceration, amounting to torture or inhumane or degrading treatment or punishment"

9.48 In the present case counsel submitted that the particular vulnerability of Mr. Marques virtue of his Asperger's syndrome to inter-prisoner violence was not addressed by the US authorities. I am satisfied that there has been sufficient engagement by the US authorities on this issue and I refer to the affidavit of Mr. Adams, which is similar to the evidence provided in the case of *Attorney General v Lee*. Furthermore, with specific reference to this case, the evidence of Mr. Adams and Dr. Ong appears to go further than that provided in *Attorney General v Lee*. For example, they averred that prisoners are screened upon arrival with respect to mental health and are connected with mental health professionals who will provide them with care consistent with their policies to ensure that inmates are safely, humanely and securely housed for the duration of their sentences. Mr. Adams also specifically addressed the issue of sexual violence in prisons and, in particular, the Sex Offender Management Program which is provided at nine institutions including the Federal Correctional Complex, Petersburg, Virginia. This program is designed to assist in the effective management of sex offenders and to provide services that minimise that population's risk for sexual re-offending. While it does not appear to be in all institutions, it is further evidence of the engagement of the Bureau of Prisons with the issue of sexual violence and the necessity for safe and humane detention of prisoners.

9.49 For all of these reasons I do not accept that it has been established that there are substantial grounds for believing that there is a real risk of Mr. Marques being subjected to inhuman and degrading treatment on the grounds of ill-treatment by other prisoners or indeed prison officials.

9.50 I reject his point of objection that there is a real risk that due to the prison conditions in the USA generally applicable in US Federal prisons or with specific regard to his Asperger's syndrome, that he will be subjected to inhuman or degrading treatment or that his right to bodily integrity, protection of the person and to human dignity in contravention of his constitutional and ECHR rights.

10. RIGHT TO RESPECT FOR PERSONAL AND FAMILY LIFE

10.1 Under this heading Mr. Marques claimed that to extradite him to the USA, as a person with Asperger's syndrome and completely isolated from his family, would be a disproportionate interference with the right to respect for his family life and contrary to Article 8 of the ECHR and Article 41 of the Constitution. In so far as the complaint concerns the personal rights of Mr. Marques, I have considered this as a complaint that extradition would be a disproportionate interference with his rights under Article 40 of the Constitution as well as a complaint under Article 8 of the ECHR.

10.2 Mr. Marques made this argument as a stand alone ground but also urges that, in circumstances where these charges could be prosecuted in Ireland, it is disproportionate to extradite him. In relation to the second limb of his argument under this heading he said that it is linked with his argument under his judicial review.

Necessity for extradition

10.3 Article 8 provides that everyone has the right to respect for his private and family life, his home and his correspondent. Article 8(2) provides that:

> "there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

10.4 The main argument submitted on behalf of Mr. Marques is that, in light of the fact that what is alleged against him amounts to a

crime in this jurisdiction, the court could not be satisfied that it is necessary to extradite him. This is particularly so in the absence of reasons from the DPP. Counsel argues that there is no necessity to extradite Mr. Marques because he could be prosecuted here. In particular, counsel submitted that the test regarding disproportionate interference with family rights has always presupposed a strong interest in extradition so that a person does not acquire immunity from prosecution. That immunity does not arise, however, where a person can be prosecuted in their own jurisdiction.

10.5 Under this heading Mr. Marques also pointed to what he said would be the likely gross disparity in sentencing between this jurisdiction and the USA, the harsh Federal sentencing Guidelines, the plea bargaining system, prison overcrowding and the risk of serious inter-prisoner violence. With respect to the latter points I have addressed and rejected them as set out above, as stand alone grounds for prohibiting surrender. It was urged, however, that these were points of particular relevance in assessing whether there was a disproportionate interference with his personal rights where no necessity was or could be demonstrated of the need to extradite him where the alleged offences could be prosecuted in this jurisdiction.

10.6 Counsel for Mr. Marques pointed to a number of cases from the United Kingdom and in particular the judgment of Lord Philips in *Norris v Government of United States of America* [2010] UKSC 9. However, counsel submitted that the initial cases in England derived from situations where the link with the UK jurisdiction was virtually non-existent. Counsel therefore disagreed with the conclusions in *Norris* which were as follows:

> "[66] At this point I will deal with the other subsidiary issue of principle that has been raised – is it of relevance when considering proportionality that a prosecution for the extradition offence might be brought in the requested jurisdiction? As I have pointed out, the Strasbourg Court gave a positive answer to this question in *Soering* 11 EHRR 439. There has recently been a spate of cases in which the extradite has argued that he ought to be prosecuted in this jurisdiction, of which *Bermingham* [2007] QB 727 was but one. The most recent was *R (Bary) v Secretary of State for the Home Department* [2009] EWHC 2068 (Admin). References to the others can be found at para. 72 of the judgment in that case. In each one the argument was rejected.
>
> [67] Extradition proceedings should not become the occasion for a debate about the most convenient forum for criminal proceedings. Rarely, if ever, on an issue of proportionality, could the possibility of bringing criminal proceedings in this jurisdiction be capable of tipping the scales against extradition in accordance with this country's treaty obligations. Unless the judge reaches the conclusion that the scales are finely balanced he should not enter into an enquiry as to the possibility of prosecution in this country."

10.7 Thus, in *Norris* the finding was that, unless the judge reaches the conclusion that the scales are finely balanced, he or she "should not enter into an enquiry" as to the possibility of prosecution in the Requested State. In so far as the public interest must take into account Treaty obligations with regard to extradition, this approach to the issue of domestic proceedings would appear to be a good one. It would only be where there is a fine balance between the public interest in the extradition and the damage which will be done to the private or family life of a requested person that a judge could even begin to consider whether the possibility of bringing criminal proceedings in the Requested State would tip the scales against extradition.

10.8 Perhaps more importantly however is that the law in the UK provides for the court to take into account the issue of forum and the interest of justice in considering whether to extradite a person who could be prosecuted in the UK. Counsel on behalf of Mr. Marques accepted that in the UK the DPP's certificate in that regard is important and will be conclusive if not successfully challenged. Counsel submitted that it is easier to challenge the certificate of no prosecution in the UK.

10.9 In an application for extradition under the Act of 1965, a judge is concerned with whether the statutory conditions to permit an extradition have been met. The court is obliged to extradite unless prohibited by the Act (or where there is a real risk of a breach of a constitutional or ECHR right). Simply because the conduct underlying the offence for which extradition is sought amounts to an offence in this jurisdiction does not give to the court any greater jurisdiction to prohibit extradition than that provided under the Act of 1965. In particular the court does not gain a jurisdiction to question the decision to prosecute or not to prosecute merely because extradition of that person is now sought.

10.10 At the point at which the court is asked to make an order for the extradition of a requested person, the DPP will have made her decision as regards prosecution. The DPP is the person responsible by statute (deriving from the Constitution) for the prosecution of serious offences in the State. The High Court has the power to review that decision and this is discussed further below. Where the DPP has lawfully determined a prosecution should not be brought against the person, the court, at an extradition hearing is bound by that determination. The question of the "necessity" to extradite has, subject to other considerations of proportionality, been established by the decision of the DPP not to prosecute and the request by the USA to seek his extradition. Merely because the offences could have been prosecuted in this jurisdiction is not a basis for holding his extradition is not necessary A requested person's full statutory, ECHR and constitutional rights will be protected within the extradition proceedings.

10.11 The reviewability of the DPP's decision in this case is a separate issue. In this case Mr. Marques has brought a judicial review of the DPP's decision and this has been considered in the section immediately below. As will be seen therein that decision of the DPP has not been successfully challenged. The Court will proceed to determine whether there is a disproportionate interference with his personal and family rights in light of the lawful decision of the DPP not to prosecute him.

Considerations of Proportionality

10.12 The principles applicable to a determination on whether a proposed extradition would constitute a disproportionate interference with rights under Article 8 of the ECHR (and *mutatis mutandis* Article 40 or 41 of the Constitution) are by now well-established in the High Court. In *Minister for Justice and Equality v T.E.,* [2013] IEHC 323 and restated in *Minister for Justice and Equality v P.G.,* [2013] IEHC 54, the High Court (Edwards J), having analysed the relevant Irish cases, ECtHR and UK cases propounded twenty two principles for application where Article 8 is engaged.

10.13 As I observed in the case of *Minister for Justice and Equality v D.S.*:

> "[115] In his decision in T.E., Edwards J adopted and applied many of the observations of McKechnie J in Ostrowski in formulating his twenty-two applicable principles of law. In assessing whether the consequences are disproportionate, the court considers whether the extradition is necessary in a democratic society. The public interest in the extradition is the extradition of the individual requested person. That public interest is case specific and requires a careful analysis. The gravity of the crime is relevant. Delay may be taken into account in assessing the weight to be attached to the pressing social need for such extradition.

> [116] As McKechnie J stated, the standard set by Article 8 is not one of exceptionality but one of proportionality. Exceptionality is not a legal test. Unusual facts or circumstances do not require to have to be sought after, as experiences such as children living with a single parent, reliance on a sole breadwinner, or a disabled parent totally dependant on a family carer are all examples which are not unusual or uncommon experiences of life. And yet, as McKechnie J said, a severance or disruption of any one such relationship could have devastating consequences for those affected.
>
> [117] Importantly, McKechnie J noted that the ECtHR have in many cases used the language of exceptionality in relation to Article 8 claims. McKechnie J said that it was clear that, however described or approached, a successful reliance on Article 8 will not be easy. He was not able to identify a single case from the ECtHR in which it was said that extradition would be an interference with Article 8 rights which were enjoyed in the requested state. He noted that that in itself was a powerful reflection of the positioning of the public interest in this process. And he said that the importance of that observation was evident from Gheorghe. In his view, the disposal of that argument in such a manner clearly reflects in explicit detail the difficulty which a respondent meets on any Article 8 defence.
>
> [118] In *Ostrowski*, the majority decision had stated that only in an exceptional case would Article 8 rights outweigh the requirement to surrender. In my view, that statement is entirely consistent with the observations made by McKechnie J. Reliance on Article 8 will only prohibit surrender in an exceptional case. Insofar as the judgment of McKechnie J and subsequent decision of Edwards J referred to the absence of a requirement to establish exceptional circumstances, neither decision moves away from the view that it will only be in the exceptional case that a respondent will be able to invoke Article 8 successfully to prevent surrender. To say that Article 8 arguments will only succeed in an exceptional case is not to make it a requirement that exceptional circumstances be established." [Ostrowski is the case of *Minister for Justice and Equality v Ostrowski* [2013] IESC 24]

10.14 In this case there is no doubt that the alleged crimes are particularly grave. There is no delay or lapse of time which might have the effect of diluting the public interest. It is clear that there is a general desirability of international cooperation in enforcing criminal law. In light of all the factors in the present case but, in particular, the gravity of the crime, there is a public interest of the highest degree in the extradition of Mr. Marques.

10.15 As against this, Mr. Marques said that his personal and family rights will be disproportionately interfered with in circumstances of his Asperger's syndrome diagnosis as outlined above. In particular, he submitted that to incarcerate him far from his family would be disproportionate. In reality he did not seek to make too much of his argument on this family rights issue as a stand alone ground. That was for good reason. While Mr. Marques does not have to demonstrate exceptional circumstances in order to show that his extradition would be a disproportionate interference with his right to respect for his private and family life, what is required is an assessment of the severity of the consequences of the proposed extradition measure on Mr. Marques and his family. As a stand alone issue his separation from his family is not anything other than the normal consequence of extradition.

10.16 There is no doubt that Mr. Marques will find extradition difficult; any person taken from their country of residence to serve time in a penal institution in another country, particularly a far away country, will find it difficult. That, however, is an unfortunate result of the necessity of extradition which has, as its purpose, that the enforcement of criminal law be not frustrated by international borders. In this case Mr. Marques' Asperger's diagnosis creates further difficulty for him in serving his sentence abroad. He has issues with regard to social interaction as outlined above and perhaps a greater need for interaction with those with whom he is most familiar; however, those difficulties do not create consequences for him that would make it disproportionate to extradite him for the particular offences for which he is sought. I have considered the potential affect on him should he be extradited in addressing the issue under Article 3 as set out above. I do not consider that the consequences, although more difficult for him than for a person without Asperger's syndrome, are exceptionally injurious, prejudicial or harmful so as to make it disproportionate to extradite him when set against the high public interest in his extradition.

10.17 Furthermore, I do not consider that any of the matters raised by him concerning the plea bargaining or federal sentencing Guidelines or prison overcrowding or risk of inter-prisoner violence are such as to amount to matters showing a disproportionate interference with his rights. There is an extremely high public interest in the extradition of Mr. Marques in the circumstances of this case. These are not matters which have relevance to his Article 8 and constitutional rights to respect for his family and personal life. They have been dealt with in this judgment and rejected as stand alone grounds preventing his extradition. It would only be in the most exceptional circumstances, if at all, that such conditions while not reaching the status of individual grounds for prohibiting extradition could amount to a disproportionate interference with family or personal life. No such circumstances have been demonstrated here. In particular no exceptionally harmful, injurious or prejudicial consequences to his personal or family life have been demonstrated under any of these headings.

Conclusion
10.18 For the reasons set out above, the point of objection of Mr. Marques, that his ECHR and constitutional rights to respect for private and family life have been infringed, is rejected.

11. THE JUDICIAL REVIEW
11.1 The application for judicial review raises two main issues;

> (a) whether the decision of the DPP not to charge Mr. Marques with offences under the Child Trafficking and Pornography Act, 1998 is reviewable; and/or,
>
> (b) whether the DPP is required to give Mr. Marques her reasons for not charging him.

11.2 Shortly after Mr. Marques' arrest on foot of the provisional arrest warrant from the USA, his then solicitor wrote a lengthy letter to the Director of Public Prosecutions dated the 8th of November, 2013, (see; *Marques (No. 1)* at para. [26]). The purpose of the letter was to request the DPP to give consideration to prosecuting Mr. Marques in this jurisdiction for the offences which are the subject matter of the extradition request. His solicitor stated that Mr. Marques was prepared to plead guilty to all matters in the District Court on signed pleas and be sent forward for sentence on that basis to the Dublin Circuit Criminal Court. It was stated that the extradition matter could be adjourned to a date after the date fixed for sentence.

11.3 The letter set out the basis upon which the Irish courts had jurisdiction over the offences covered by the extradition request. It stated that the reason for the request of Mr. Marques to be prosecuted here was to permit him to serve whatever sentence was imposed on him in this jurisdiction where he had family. The letter stated that Mr. Marques would be subject to the maximum sentence under Irish law which, pursuant to s. 5 of the Child Trafficking and Pornography Act 1998, would appear "to be fourteen

years imprisonment". Details of his personal circumstances were given, with particular reference to his being a citizen of Ireland and to the fact that his main centre of family life is located here.

11.4 Reference was also made to the evidence of Special Agent Donohue given at the bail hearing regarding the length of sentence he was facing. It was claimed that a sentence exceeding his life span without parole would be contrary to the prohibition on inhuman and degrading treatment set out in Article 3 of the European Convention on Human Rights.

11.5 Mr. Marques also relied upon the description of the alleged offending behaviour as set out in the extradition request. The letter stated that:

> "if one works on the assumption that the evidence to which reference is made in the diplomatic note is correct then it seems incontrovertible but that Mr. Marques is guilty of an offence contrary to Section 5 of the Child Trafficking and Pornography Act, 1998."
>
> In submissions Mr. Marques relied upon the description of him, as given in evidence on oath to the High Court of Ireland by Special Agent Donohue of the USA as "the largest facilitator of child pornography websites on the planet."

11.6 By reply, dated the 16th December, 2013, the DPP stated that:

> "The Director has decided not to prosecute your client in relation to the conduct the subject of the extradition application by the United States Authorities.
>
> In arriving at that decision the Director has taken into account the Director's Guidelines for prosecutors, available on our website, www.dppireland.ie.
>
> It is not the practice of the Director to give reasons for a decision not to prosecute."

11.7 The Court of Appeal, on consent, granted leave to apply for judicial review in respect of the following substantive reliefs:

"(i) An Order of *Certiorari* quashing the decision of the First Named Respondent, communicated on the 17th December, 2013, declining to prosecute the Applicant in respect of the offences for which his extradition is sought by the United States.

(ii) A Declaration that the decision of the First Named Respondent not to prosecute the Applicant amounted, in all the circumstances, to an abdication of her responsibility as Prosecutor.

(iii) A Declaration that the decision of the First Named Respondent was made without sufficient regard to relevant considerations, was disproportionate, unreasonable and amounted to a failure to vindicate the constitutional and Convention rights of the Applicant.

(iv) An Order of Certiorari quashing the decision of the First Named Respondent, refusing to provide the Applicant with reasons for her decision not to prosecute him in respect of the alleged offences for which his extradition is now sought by the United States.

(v) An Order of mandamus and/or an injunction by way of judicial review, requiring the First Named Respondent to give reasons for her decision not to prosecute the Applicant in respect of the alleged offences for which his extradition is now sought by the United States.

(vi) A Declaration pursuant to Section 3 of the European Convention on Human Rights Act 2003 that the First Named Respondent, in failing to prosecute the Applicant, has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5 & 8 of the European Convention on Human Rights.

(vii) A Declaration that the failure of the First Named Respondent to give reasons for the decision not to prosecute the Applicant amounted to a breach of his right to fair procedures as protected by Article 40.3 of the Constitution and has unduly hindered the Applicant's right of access to the Courts, as protected by Article 38.1 of the Constitution.

(viii) A Declaration pursuant to Section 3 of the European Convention on Human Rights Act 2003 that the First Named Respondent, in failing to provide reasons for her decision not to prosecute the Applicant, has failed to perform her functions in a manner consistent with the obligations of the State under Articles 3, 5, 6, 8 and 13 of the European Convention on Human Rights…"

11.8 The grounds upon which leave was granted are voluminous. They can be distilled as follows:

(i) The decision not to prosecute was unreasonable and could not have related to evidential matters as Mr. Marques was willing to plead guilty.

(ii) It was unclear whether forum conveniens and the impact of extradition on Mr. Marques were considered properly or at all by the DPP. The reference to the Guidelines was unclear as they do not apply to what occurs if an extradition issue arises.

(iii) No public interest considerations of sufficient gravity could arise.

(iv) A large number of relevant public interest factors should be taken into account such as the primary duty to ensure that serious offences committed in Ireland are prosecuted here. Other public interest considerations are that there will be significant cost incurred if he is not prosecuted here e.g. the Gardaí will have to travel. There will be a necessary delay in extraditing him as his contested proceedings will take time.

(v) The jurisdiction most adversely affected by the global impact of the alleged offences is Ireland. Ireland is the *forum conveniens* under the harm principle.

(vi) There is a duty on the Gardaí and the DPP to investigate and prosecute proactively high profile and serious internet crime for deterrent purposes so that Ireland is not seen as a safe haven for such offenders.

(vii) The impugned decision cannot be isolated from the extradition process. In this, it is argued that, if there was no extradition request, then it is undoubtedly the case that Mr. Marques would be prosecuted. The only conceivable ground for refusing to prosecute Mr. Marques is a forum consideration i.e. that the Requesting State is the more appropriate forum.

(viii) There is a necessity for the DPP to consider the impact of extradition on Mr. Marques. It is argued that the court considers necessity in respect of the interference with family and personal rights. If he is prosecuted there will be no extradition. The DPP is required to address that balance.

(ix) The decision should be quashed because it is disproportionate to extradite him to a jurisdiction where his rights are less than the rights in this jurisdiction.

(x) Reasons are required because the reasoning of the DPP is not readily apparent and there are substantial grounds to conclude that, by failing to prosecute Mr. Marques, she had abdicated her central responsibility. There are substantial grounds for concluding the DPP has acted disproportionately. The absence of reasons hinders access to the courts and will unduly hinder Mr. Marques' ability to make submissions to the Minister.

Preliminary Points

11.9 Unlike the factual situation in *Damache*, the decision to refuse to prosecute Mr. Marques had been taken after the amendment of s. 15 of the Act of 1965. Furthermore the ratio for the decision in *Damache* does not apply to this case because offences under the Criminal Justice (Terrorism Offences) Act 2005 are not at issue here. Nevertheless, counsel for Mr. Marques relied upon that finding in *Damache* regarding jurisdiction. Counsel pointed to Council Framework Decision (2004/68/JHA) of 22 December 2003 on combating the sexual exploitation of children and child pornography. The Framework Decision establishes criteria for determining jurisdiction. Unlike the Council Framework Decision (2002/475/JHA) of 13 June 2002 on combating terrorism, this Framework Decision does not appear to have been implemented in this jurisdiction. Certainly counsel did not point to any implementing Act. In those circumstances, this application for judicial review does not fall to be decided on the same basis as that of Damache.

11.10 Counsel for Mr. Marques made many of the same arguments that had been made in *Damache*. Some, though not all, of counsel's arguments in Damache are synopsised in that judgment. To the extent that they are set out therein it is unnecessary to repeat them in this judgment.

Submissions on Behalf of Mr. Marques

11.11 Counsel sought both to rely upon and to distinguish State (McCormack) v Curran [1987] 1 ILRM 225. Reliance was placed upon the dicta of Walsh J as follows:

> "The enforcement of the law of this State and the prosecution and punishment of the perpetrators of criminal acts within this jurisdiction must be given precedence over the actual or constructive surrender of such persons to another jurisdiction for the same or any other crime and it is the duty of the appropriate prosecuting authority to act accordingly."

11.12 Counsel submitted that the factual context of *State (McCormack)* was different as the DPP in that case had written to Mr. McCormack, the appellant, regarding the decision not to prosecute him, stating that the decision was taken in light of the depositions and book of evidence (from Northern Ireland) provided by the appellant's solicitor. It was submitted that this was an express engagement with the forum issue by the DPP and the concerns of that applicant and that, therefore, the court did not have to ask itself whether the DPP had asked himself the right question.

11.13 It was acknowledged that traditionally the DPP has enjoyed a special position in Irish law in relation to the reviewability of decisions and the obligations to give reasons. Although *State (McCormack) v Curran and H v DPP* [1994] 2 IR 589 indicated that a prosecutorial decision could only be challenged in circumstances involving *mala fides* or the existence of an improper motive or an improper policy, subsequent decisions of the Supreme Court clarify that the grounds are not quite so limited. Counsel referred to *Eviston v DPP* [2002] 3 IR 457 and Carlin v DPP [2010] 3 IR 547 in that regard.

11.14 Counsel for Mr. Marques relied primarily on *Murphy v Ireland & Ors* [2014] IESC 19. In that case, it was submitted that s. 46(2) of the Offences against the State Act 1939, which permitted the DPP to certify that the ordinary courts are, in the DPP's opinion, inadequate to secure the effective administration of justice and preservation of public peace and order in relation offences which were not scheduled offences, was repugnant to the provisions of the Constitution. The Supreme Court held that the challenge must fail as the section permitted the court to read into it the requirement of the DPP to give reasons. In the submission of counsel for Mr. Marques, the decision in Murphy constituted the extension of the administrative law jurisprudence of the Supreme Court in Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 59, Rawson v Minister for Defence [2012] IESC 26 and Minister for Justice and Equality v Kelly aka Nolan [2013] IESC 54 to the specific context of a challenge to a prosecutorial decision.

11.15 In *Murphy*, O'Donnell J observed that, in *Carlin v DPP* [2010] 3 IR 547, the Supreme Court had reiterated that the DPP's decision was subject to the obligation of fair procedures. O'Donnell J held, with reference to a statement by Finlay CJ in *State (McCormack)* as regards the limited scope of review by the courts:

> "In the light of subsequent decisions of this court quashing decisions of the Director, it is necessary to qualify that statement so as to provide that a decision of the Director is reviewable if it can be demonstrated that it was reached mala fides or influenced by improper motive or improper policy or other exceptional circumstances." (Emphasis in original)

11.16 Counsel further submitted that the prior statements of the Superior Courts, as to the grounds for review of a prosecutorial decision in light of Murphy, were either incomplete or incorrect. Counsel submitted that the Murphy case is authority for the proposition that a decision of the DPP is reviewable, not just in the situation of male fides or improper motive or improper policy, but also in circumstances where there exist exceptional circumstances. Counsel also emphasised that the important statements of Fennelly J in *Mallak*, at paras. [66] and [67] thereof, were reproduced approvingly by O'Donnell J in *Murphy* at para. 39.

11.17 Counsel submitted that the instant case is similarly such an exceptional case. A list of exceptional features were set out in written submissions. These are virtually identical to the list set out at para. [52] of the judgment of Edwards J in *Marques (No. 1).*

11.18 Counsel also relied upon the judgment of this Court in *Attorney General v Damache* in so far as it was held with regard to the DPP Guidelines for Prosecutors. They relied in particular on paras. [12.5.5.] [12.5.6] and [12.5.7]:

> "Extradition is mentioned in the DPP's Guidelines. It was never really suggested that this reference was anything other than to the situation where the DPP wishes to request the extradition of a suspect from another country to face trial in this country. Under this heading, matters such as delay, the likely disposition following conviction and the nature and gravity of the offence alleged against the fugitive are said to be relevant considerations. I am satisfied that the DPP's Guidelines do not refer to the situation where the extradition of a person is sought for an offence which may also be prosecuted here.

> The DPP's Guidelines permit a review of the decision not to prosecute (Chapter 12 of the DPP's Guidelines). However, s. 12 is headed '[t]he Right of Victims and Victims' Relatives.' It seems clear that the DPP's Guidelines were not drafted with reference to the position that now obtains where, since the amendment of the Act of 1965 in 2012, a requested person may be negatively affected by a decision not to prosecute. That is not surprising as the DPP's Guidelines were only revised in November 2010. At that stage, Mr. Damache and others in a similar position could not have been extradited.
>
> An obvious issue arises from the foregoing: on what basis did the DPP review the decision not to prosecute? The DPP's Guidelines which it is said were in play for the initial decision not to prosecute had no apparent relevance to the reconsideration of that decision. Nothing in the DPP's Guidelines specifically addresses it as the review is under the section of the Rights of Victims and Victims' Relatives. If, for example, the DPP had originally decided in accordance with the DPP's Guidelines that there was insufficient evidence due to the potential unavailability of witnesses who might be in custody in the US and therefore not compellable in this jurisdiction, is their apparent availability and willingness to testify as averred to by Ms. Williams on behalf of the US attorneys office, coupled with the concessions as regards video evidence, sufficient now to overcome that problem? Is that now a matter which in turn could lead to an increased public interest in the prosecution of what is undoubtedly an allegation of a serious crime perpetrated in this jurisdiction?"

11.19 On behalf of Mr. Marques the point was made that there is a gap between the protection the court may give in an extradition hearing where the role of the court is relatively limited and the need for the DPP to have regard to the impact of the extradition on a respondent. Counsel illustrated this with reference to the disparity of sentencing which is not a ground for refusal of extradition but could have a huge impact on Mr. Marques.

11.20 Overall, based upon the unusual facts in this case, Mr. Marques submitted that the duty of the DPP, as set out in *State (McCormack),* is to prosecute in this jurisdiction in precedence to a prosecution in another country. Mr. Marques submitted that, looking to the strength of the evidence criteria, the DPP must have been satisfied that there was a prima facie case against him. Counsel highlighted the detailed evidence in the extradition warrant and his open and unconditional offer to plead guilty to mirror offences in Ireland. Counsel also submitted that there can be no question but that it would be in the public interest to prosecute him on the basis that Ireland should not be seen as a safe haven for such offenders. It was submitted that there was a possibility that he will successfully oppose surrender, but that, even if extradited, he will not be bound by his plea of guilty over there. That such a scenario was possible was not in the public interest.

11.21 In the submission of counsel, exceptionality had been shown and the scope for review had been reached. This was demonstrably so in a case where otherwise there would be no outside scrutiny or at least ability to understand the DPP's decision, as a decision not to prosecute meant that no court would see the reasons why e.g. by virtue of receiving a book of evidence. At para. [41] in *Murphy* O'Donnell J stated:

> "The obligation to give reasons is, as has been observed, dependent upon and a reflection of, the reviewability of the decision and the scope of that review. The decision made here is at the end of the spectrum where review is most limited and attenuated. This is because of the subject matter of the decision, the sensitivity of the matters routinely considered, and the fact that the end result of a decision to prosecute will be a trial in open court pursuant to the dictates of Article 38.1…"

11.22 With references to cases such as *Eviston v DPP, Carlin v DPP and GE v DPP* [2008] IESC 61, counsel submitted that the main reason advanced for the DPP's immunity from having to explain her reason to prosecute was the fact that the suspect would in reality be provided with the DPP's reasons as part of the criminal justice process. In other words, the reasons would be in the book of evidence or other documents provided to an accused person. Furthermore, fair procedures would ensure a fair prosecution. There would be no book of evidence here and no trial; therefore, there was an absence of fair procedures in the making of this particular decision in light of the exceptional facts outlined.

11.23 Counsel for Mr. Marques submitted that, if the State's view is correct, a forum issue is not maintainable either in the extradition proceedings before a judge or with the Minister, there will never be scrutiny of the correctness or fairness of the decision not to prosecute these offences in Ireland. There will be no scrutiny, judicial or otherwise, of whether relevant or irrelevant considerations have been taken into account and of whether the decision taken was proportionate or reasonable.

11.24 It was submitted that, at a minimum, the extradition process contemplated the arrest, pre-trial detention in the Requested State, extradition and pre-trial detention in the Requesting State of a citizen in a country with legal and penal regimes different from this one. It was submitted that, as an aspect of the State's duty to protect its citizens, reasonable and practicable alternatives to this process should be considered where this is in the interests of justice. It was submitted that, in assessing whether it was proportionate to decline to prosecute Mr. Marques, the DPP should have regard to the potential consequences of her decision including those inevitable consequences of an extradition that would not meet the threshold for refusal by the court or Minister. It was suggested that these are the sometimes dangerous and unpleasant prison conditions in the Requesting State, the negligible chance of the extraditee getting bail pre-trial and the unusual aspects of the trial process such as plea bargaining. In particular, the gross disparity in likely sentences between this jurisdiction and the United States is something that should be taken into account.

11.25 While Mr. Marques accepted that if a significant breach of his constitutional and Convention rights in the US was apprehended by the court it would refuse extradition; however, it was observed that, on occasions, the courts have to rely upon the presumption of good faith that a Requesting State will uphold the rights of an extradited person. It was submitted that such trust in the *bona fides* of the Requesting State is at the root of the principle of comity in extradition proceedings and it also reflects the concern that to refuse extradition might be a disproportionate result having regard to the public interest that crime be prosecuted and punished.

11.26 Counsel also submitted that the court had a function with regard to forum issues. It was submitted that a court should be in a position to assess the necessity and proportionality of an extradition. It was accepted that there was no express reference in the legislation or in the treaties that govern the extradition process to forum as a necessary consideration for the court hearing the extradition proceedings. It was submitted that this was not determinative of the matter and that the obligation to consider the issue of forum arises as an aspect of the court's duty to uphold Mr. Marques' constitutional rights to bodily integrity, liberty and due process. Counsel relied upon the Baker Review Committee report which led to the statutory scheme now in place in the United Kingdom. This was reviewed extensively by Edwards J in his first judgment in *Damache v DPP* [2014] IEHC 114. (See; paras. [145] to [162]).

11.27 Counsel relied upon the reasoning of the Baker Committee Report as to the justifications for a partial forum bar. A full forum bar was not recommended on the basis that the prosecutor was in the best position to determine which forum was appropriate. The committee, in recognising that that could lead to injustice, recommended that clear and transparent guidelines be introduced by UK

prosecutors so that a proposed extraditee could ensure that the decision not to prosecute domestically was based on rational and testable criteria.

11.28 Counsel for Mr. Marques rejected that the case of *R (Birmingham & Others) v Director of Serious Fraud Office* [2006] EWHC 200 (Admin) was good authority for the proposition that the court had no role in the consideration of forum issues. It was pointed out in that case that the court had before it a good deal of information about the reasoning of the Serious Fraud Office and was aware of the reasons why an investigation and prosecution had been deemed inappropriate. It was submitted that the judgment reflects the fact that the forum argument was purely academic. They said that that analysis was repeated in later cases, for example in R (on the application of Bary & Khalid Al Fawwaz) v Secretary of State for the Home Department [2009] EWHC 2068 (Admin), in which the lack of any connection between the UK and the fact that there had been no investigation by the authorities in the country in the intervening eleven years since the offences were committed was such that the natural forum for a trial was the United States of America for the claimants and the offences had little connection with the UK other than their physical presence.

11.29 Counsel submitted that, in those UK cases which had predated the UK legislation, forum issues were still addressed and weighed by the court. In none of the UK cases, however, was there a strong forum argument and it is submitted that that is in stark contract with the facts in this particular case.

Duty to Give Reasons
11.30 As the obligation to give reasons is dependent upon and a reflection of the reviewability of the decision and the scope of that review, the arguments relating to review and reasons intermingle. Much of what is said above were also grounds for the giving of reasons.

11.31 Counsel criticised the failure of the DPP to engage with the issue of what she must take into account in the proceedings. In *Damache*, counsel for the State had submitted there was no requirement on the DPP to take into account the forum issue. Despite this, it was submitted that the DPP had in the present case failed to make clear what she is obliged to take into account. Counsel on behalf of Mr. Marques submitted that the DPP was obliged to engage with the facts of this case as they are exceptional and unusual.

11.32 Counsel for Mr. Marques placed particular emphasis on the following passage from the Supreme Court decision in *Murphy v Ireland*, at para. [44]:

> "When the Director of Public Prosecutions is making the sole decision on whether a case which would otherwise be tried before a jury should be tried before the Special Criminal Court, and where the Director's decision is not subject to appeal or review, then fair procedures requires that the accused be provided with the Director's reasons for considering that the ordinary courts are not sufficient to secure the administration of justice in the particular case. By contrast, since a decision to direct trial in the District Court on an offence triable either way is always subject to review and decision by the District Judge who can refuse jurisdiction, such a decision does not require any reasons or hearing. Like the decision in Mallak, the conclusion here has no implications for the constitutional validity of the section. Since s. 46(2) does not prescribe the procedure to be followed or preclude the giving of reasons, there is no constitutional invalidity in the section as it currently stands. There is, moreover, in the view of the Court, no entitlement to obtain the gist of the information upon which the Director's conclusion is arrived at, and no requirement to have an oral hearing, cross-examination of witnesses or to provide for submissions."

11.33 It was acknowledged by counsel for Mr. Marques that Murphy is capable of being distinguished on the basis that the decision by the DPP in that case, to issue the certificate under s. 46 of the Offences Against the State Act 1939, had denied that appellant his right to trial by jury. Counsel, however, said that to distinguish it would ignore the wider statements of principle made by the Supreme Court in *Murphy*. Those principles have a more general application and give the decision significance beyond its immediate facts. Counsel submitted that the consequences for his client are greater than for the appellant, Mr. Murphy, and that the decision deserves a similar degree of accountability and scrutiny.

11.34 Counsel submitted that the duty to give reasons or, at a minimum, to justify the giving of no reasons, will be greater were there is a significant limitation on the jurisdiction of the courts to review the decision. Counsel submitted that the decision held that it was desirable that such an obligation should be required where the duty to give reasons can be complied with without damage to the other public interests involved. Counsel submitted that it was difficult to see how any State interest or public interest would be damaged where the DPP called upon to explain why Mr. Marques was not being prosecuted in this jurisdiction.

11.35 Counsel submitted that the court's concerns when considering an extradition request were limited; therefore, it was submitted that the DPP must have regard to the forum issues that cannot be considered by the court or by the Minister. It is submitted that this could have potentially devastating consequence for Mr. Marques. Mr. Marques sought to see the reasoning of the DPP to ensure that she has had regard to, what he asserts is a highly relevant consideration, the impact of his extradition to the USA. He wished to deploy the fact that he can be prosecuted in this jurisdiction in the context of the extradition proceedings and also, if arising, before the Minister. He sought to assess whether the DPP has taken into account relevant criteria and whether she has asked herself the right question.

Submissions on Behalf of the State
11.36 Counsel for the State submitted that the primary complaint of Mr. Marques was that it was "unclear" to him that forum conveniens and the impact of extradition on him were considered by the DPP when she made her decision not to prosecute. It was submitted that this was not sufficient to obtain certiorari and that what Mr. Marques really sought were reasons. It was submitted that the DPP's reply indicated that she had considered carefully all the matters and that the Guidelines were taken into account. The Guidelines include public interest considerations.

11.37 Counsel highlighted that Mr. Marques could point to no right not to be affected. The decision of the DPP not to prosecute must be viewed entirely separately and distinct from the extradition proceeding. Mr. Marques has no right to be prosecuted and the refusal to prosecute did not prejudice any constitutional or fundamental right.

11.38 Section 15 of the Act of 1965 as amended now means that, where there is a concurrency of possible jurisdiction between this State and a Requesting State, an extradition request may be entertained if the DPP has decided either not to institute or to terminate proceedings in this jurisdiction against the person concerned. The amended s. 15 does not give the DPP a choice between potential *fora*. The DPP's decision is confined to whether she should or should not prosecute the persons concerned in Ireland in respect of the offending conduct. Section 15 does not give the DPP any function pursuant to the provisions of the Extradition Act. The possibility of extradition may be an indirect consequence of her decision not to prosecute.

Issue Arising During the Course of the State's Oral Submissions
11.39 An issue arose during the submissions of counsel for the State as to the DPP's role in forum considerations. At the outset, it must be recognised that the word "forum" can mean different things. Forum can be understood as a jurisdictional requirement to consider the possibility of prosecution in another jurisdiction. This type of jurisdictional requirement to consider forum formed the basis for the decision of this Court in Damache concerning, as it did, the implementing legislation relating to the Framework Decision on Combating Terrorism.

11.40 Counsel for the State submitted that, rather than a jurisdictional issue, forum considerations arise in the context of the public interest concerns such as the personal circumstances on an individual but could also go to inform the decision of the DPP in relation to the availability or the ready availability of evidence. Counsel for Mr. Marques raised an issue that the DPP seemed to be suggesting that, although she could consider forum, she had no duty to do so

11.41 Counsel for the DPP raised the issue again on the following day. Counsel clarified that the DPP's duties were to be found under the Prosecution of Offences Act 1974 i.e. whether to prosecute or not. Reliance was placed upon the dicta of Edwards J in *Marques (No. 1)* which reiterated the foregoing and stated, at para. [23]:

> "It remains the case that the relevant criteria to which she must have regard are (i) the availability and sufficiency of relevant evidence, and (ii) the public interest in prosecuting the case in this jurisdiction. Clearly, however, what are sometimes referred to as 'forum issues' might now have a bearing upon the public interest consideration in a particular case."

11.42 During further discussion between the Court and counsel for the State, the Court queried whether the DPP had no role in taking into account the fact that it may be more convenient to prosecute somebody in another country i.e. does the public interest allow her to consider whether it might be more convenient to prosecute elsewhere. In reply, counsel for the State said that the DPP could go no further; the position regarding the DPP's duties is set out in case law. The DPP had a duty to prosecute if there was sufficient and reliable evidence and if it was in the public interest to do so. In considering what was in the public interest, a wide range of factors that must be taken into account. The factors are illustrated in the Guidelines but not exclusively or presumptively so. He pointed, by way of example, to the decision of Edwards J in Damache (No. 1) and to the very wide variety of matters that might be said to be in the public interest.

11.43 Finally, counsel submitted that, in the context of the case made by Mr. Marques, the above decision was academic. His application was based upon the four points set out in the letter of his then solicitor. Point one refers to personal circumstances within the Guidelines, point two was a matter of the jurisdiction to prosecute. Point three, counsel submitted, was of no consequence because s. 15 was not a bar to extradition. Point four, with respect to the plea of guilty, did not stand up to scrutiny.

11.44 Counsel argued that the plea of guilty was, together with his proposed extradition, the primary basis for Mr. Marques' contention that this was an "exceptional circumstance". Counsel submitted that the mere fact that there was a plea of guilty being offered did not impose a duty on the DPP to prosecute. People can walk into a Garda station and admit to murder either here or abroad. If abroad the courts could have jurisdiction under the Offences Against the Person Act 1861 but the DPP would not be bound to prosecute. Apart from the matters referred to by Edwards J in the judgment on the leave issue, counsel also submitted that there could be issues with the possible acceptance of a guilty plea e.g. if the court acted and sentenced on an improper basis or for an offence that did not exists or for conduct which was not an offence under Irish law for a technical or other legal reason, the DPP might be faced with an unanswerable appeal.

11.45 Counsel for the State submitted there was no obligation on the DPP to furnish reasons. The decisions of the Supreme Court in State (McCormack), *H v DPP, Carlin v DPP and Dunphy v DPP* [2005] IESC 75 were relied upon. It was submitted that Carlin post-dated *Meadows v Minister for Justice, Equality and Law Reform and Ors* [2010] IESC 3. High Court decisions such as *N.S. v Anderson* [2008] 3 IR 417, *Siritanu v DPP* [2006] IEHC 26 and *DPP (Quigley) v Monaghan* [2007] IEHC 92 were also relied upon. Further reliance was placed upon the decision of Peart J in *HH v DPP* [2012] IEHC 41 in which he rejected that the decision in *Meadows* had altered the position with regard to provision of reasons by the DPP.

11.46 In respect of the Supreme Court decision in *Murphy*, it was said that *Murphy* in fact underlines the earlier decisions. The decision by the DPP that was an issue in *Murphy* was not a prosecutorial decision per se but a decision that was a determination of rights. It was submitted that the decision of O'Donnell J was not disturbing the well established line of authority that went heretofore. The logic in Murphy expressly does not apply to prosecutorial decisions.

Supplemental Submissions
11.47 The Court asked both parties to consider the decision of the High Court in *Fleming v Ireland* [2013] IEHC 2 in so far as it dealt with the issue of prosecutorial guidelines. In that case, the plaintiff had sought an order directing the DPP to publish prosecution guidelines in relation to a third party who had assisted another in committing suicide. Kearns P. had contrasted the UK position with our own. In the UK, s. 10 of the Prosecution of Offences Act 1985 requires the DPP to issue guidelines. The guidelines issued in this jurisdiction have no statutory basis and Kearns P. was of the view that the insertion in s. 10 of the power to issue guidelines in the UK might be indicative of an absence of such power in the present jurisdiction.

11.48 Counsel for Mr. Marques highlighted that it was only offence-specific guidelines that were prohibited under the judgment. Counsel also contrasted the difference in how the DPP assisted the court in *Fleming* in understanding the relevant policy considerations which underpinned the law on assisted suicide and also the contrast with how the DPP responded to the letter of Ms. Fleming. On behalf of Mr. Marques it was submitted, in assessing the Guidelines issues, that it was worth recalling Mr. Marques' main argument; that the decision making process itself is opaque and uncertain and that there is confusion and doubt surrounding the facts which even the DPP herself feels regard should be had for. In the absence of Guidelines to indicate some of the criteria it was submitted that it is necessary to have reasons.

Reviewability of the Decision not to Prosecute and the Duty to Give Reasons: Analysis and Determination

The decision not to prosecute
11.49 It is important to recall that, on the facts of this case, any question of reviewability of the decision not to prosecute only arises for consideration if the offences were allegedly offences in this jurisdiction. The facts set out in the extradition request amount to an allegation of a substantive offence contrary to a number of the sub-sections of s. 5 of the Child Trafficking and Pornography Act 1998 regarding distribution and advertising of child pornography or conspiracy to commit such offences. On the basis that the extradition request states that the offences were allegedly committed in Ireland, as well as the inference that Mr. Marques was allegedly controlling these matters from his residence in Dublin, this hurdle has been overcome. Indeed, the Gardaí, acting presumably

on the basis of information from the FBI, had a reasonable suspicion that he had committed child pornography offences thereby justifying the search of his residence and legitimising his subsequent arrest. Thus the court must address the arguments of Mr. Marques on the basis that the decision not to prosecute him has resulted in him now being a person subject to extradition to the USA.

11.50 It must be acknowledged that a decision of the DPP is reviewable. That has been confirmed time and again by the Superior Courts; however, due to the special position of the DPP, the nature of that review is limited. As set out at para. [11.16] above, O'Donnell J. held that a decision of the DPP is reviewable "if it can be demonstrated that it was reached mala fides or influenced by improper motive or improper policy, or other exceptional circumstances." O'Donnell J. acknowledged that, as so qualified. The State (McCormack) has remained the law.

11.51 As the DPP's Guidelines for prosecutors state:

> "The prosecution system in Ireland is not described or set out fully in any one document. It is grounded in the Constitution of Ireland, 1937 and in statute law, notably the Prosecution of Offences Act, 1974, which established the office of Director of Public Prosecutions. The prosecution system in Ireland has developed from common law tradition and many important practices and rules in Ireland have their basis in common law, that is, judge-made law".

11.52 The Act of 1974 conferred on the DPP the function of prosecuting summarily and on indictment. It is not an exclusive function to prosecute summarily; on indictment it is an exclusive function save for a very few category of offences for which the Attorney General retains a function.

11.53 The Supreme Court established in *State (McCormack)* that the enforcement of the law of this State and the prosecution and punishment of the perpetrators of criminal acts within the jurisdiction must be given precedence over the surrender of persons to another jurisdiction for the same crime and it is the duty of the appropriate prosecuting authority to act accordingly. That statement is of course subject to any commitments imposed upon by law (e.g. Criminal Justice (Terrorism Offences) Act 2005 implementing the Combating Terrorism Framework Decision).

11.54 Finlay CJ also stated in *State (McCormack)* that he rejected the submission that the DPP only had discretion to prosecute or not to prosecute based exclusively on the probative value of the evidence laid before him. He said that there were many other factors that may be appropriate and proper for the DPP to take into consideration. This passage has been cited with approval by the Supreme Court in the case of Carlin v DPP. In the view of this Court this is the legal basis underpinning the basis for the public interest, absent strength of the evidence considerations that the DPP takes into account as published in her Guidelines for Prosecutors.

11.55 Therefore, the statement of principle by Walsh J concerning the duty to prosecute, has to take into account that a duty to prosecute does not arise solely on strength of the evidence considerations; considerations of public interest also arise. Therefore, it is possible that the type of legislative provisions enacted in the UK, after the Baker Commission, could be enacted here to give the DPP jurisdiction to consider *forum conveniens* in the manner set out therein. At present, no such express legislation exists; however it does not mean that forum considerations could not arise within the DPP's decision making process. The extent to which they do so will be discussed further.

11.56 In the view of this Court, the decision in *Murphy* compels the Court to address the reviewability of the DPP's decision in light of the decision in *State (McCormack)* as qualified in *Murphy*. A starting point is to ask the question posed by the Supreme Court in State *(McCormack)*; is there anything in the evidence from which to reasonably infer that the DPP's decision not to prosecute was perverse, mala fide or the result of improper policy or motive? A follow on question is whether the court, in the absence of any evidence of such improper policy or motivation, can infer such impropriety? If necessary, the final question is whether there are exceptional circumstances which render the decision not to prosecute reviewable?

11.57 Mr. Marques has not sought to confine his grounds of judicial review or his submissions to such discrete categories as *mala fides*, improper policy or improper motive. Indeed, a careful scrutiny of the grounds upon which the relief for judicial review was sought, set out in brief above, shows an absence of these words. This is not a criticism of Mr. Marques, rather it seems to be recognition by him of the difficulties he faces in light of the legal authorities on the issue. The result of those difficulties is an attempt to place him in a unique or exceptional situation as well as to highlight the difficulties he faces without having sight of the DPP's reasons. Indeed, in the course of the hearing, counsel's submissions crystallised somewhat and focussed upon the purported opacity and uncertain decision making process of the DPP, together with the confusion and doubt as to the DPP's role with regard to public interest and forum considerations.

11.58 There is no real suggestion, nor can their be, of *mala fides* on the part of the DPP. Lack of transparency is relied upon as evidence of improper policy or motive. An argument of lack of transparency must be viewed against a backdrop where the obligation to give reasons is "dependent upon and a reflection of, the reviewability of the decision and the scope of that review." (See; *Murphy* at para. [41]).

11.59 In the case of *Eviston v Director of Public Prosecutions* [2002] 3 IR 260 Keane CJ stated that the court would not interfere with the decision not to prosecute where "the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the person concerned." That language is taken from the judgment of Finlay CJ in *State (McCormack).* This test involves an engagement with the material placed before the court in order to assess whether the facts do not exclude the reasonable possibility of a proper and valid decision not to prosecute.

11.60 The law permits both evidential and other public interest reasons to be considered in the decision not to prosecute. When called on to exercise its powers of review, it is not for the court to substitute its own views for that of the DPP or to seek to establish the basis on which the decision could have been reached. Instead the court must assess whether the broad facts of the case exclude the reasonable possibility of a proper and valid decision not to prosecute.

11.61 It is undoubtedly the case that a confession of guilt is not the only matter that the DPP must consider, even under the strength of the evidence consideration. A confession could be false for many reasons e.g. delusion, self-serving reasons or a deliberate attempt to take the focus from another person. If a confession of guilt is not the only matter for consideration still less is an offer to plead guilty. Such an offer to plead guilty needs to be treated with caution for the same reasons, but also for reasons related to sufficiency of investigation regarding full culpability and difficulties that might be faced where there was an attempt to resile from the plea.

11.62 Lack of clarity with regard to the public interest considerations is a particular complaint of Mr. Marques. It is important to recall that the Supreme Court held in cases such as *GE, Eviston and Carlin*, that being subject to the Constitution means being subject to the constitutional requirements of fair procedures. However, as per the statement of Denham CJ in *Carlin*, at para. [9]: "the fair procedures appropriate at the investigative stage of a prosecution are not equivalent to those at trial in a court of law."

11.63 Is there a lack of clarity in the DPP's understanding or application of public policy? In particular, does this lead to an unfairness to Mr. Marques so as to render the decision reviewable?

11.64 Mr. Marques relied upon what was said by this Court in *Damache*. I do not consider that the paragraphs referred to; namely, [12.5.5]; [12.5.6]; and, [15.6.7], lend support to his argument. Those references were to the factual situations set out in the Guidelines. The first mentioned paragraph refers to the situation where extradition is mentioned in the Guidelines – a clear reference to the DPP requesting extradition of a suspect from another country to this jurisdiction. The second paragraph related to the review of a decision not to prosecute and did not include a reference to a person who, like Mr. Marques, is seeking to be prosecuted here rather than to be extradited. The final paragraph makes clear that these matters were raised in an open-ended fashion and could not be taken as any conclusion of the issue. It must also be acknowledged that the position with regard to concurrent jurisdiction also arises with respect to European Arrest Warrants and no express provision is made in the Guidelines with respect to the provisions of the European Arrest Warrant Act 2003. In other words, there have been and will be very many cases where the DPP has to consider whether or not to prosecute in circumstances where the alleged offence may be prosecuted in at least one other jurisdiction.

11.65 The DPP's Guidelines are not rules of law, but they do lend a degree of transparency to what might otherwise be considered as the opaque functioning of that office. They provide a consistency of approach "so that a fair, reasoned and consistent policy underlies the prosecution process." (See; *Fleming* above). The Guidelines acknowledge that there is no simple formula which can be applied to give a simple answer to the questions the prosecutor has to face. They are general principles which should underlie the approach to prosecution, even though the individual facts of each case will require the prosecutor to use judgment and discretion in their application. It is also stated that the application of the principles does not and cannot bind the DPP to follow any particular course and does not fetter discretion. The public interest principles listed are not exhaustive.

11.66 It should be recalled that, in *State (McCormack),* the Criminal Law Jurisdiction Act 1976 was at issue. That Act permitted certain offences on the island of Ireland to be prosecuted in either of the two jurisdictions. Indeed, the appellant in that case had allegedly been in this jurisdiction during his active part in the alleged offence. There will have been many occasions where the DPP has been left with a determination to make regarding the prosecution of offences in this jurisdiction despite Northern Ireland having a concurrent jurisdiction. There is nothing unusual about that situation. Indeed, as the Supreme Court in *State (McCormack)* implicitly held, the fact of choice of jurisdiction is not a ground in itself to apply a different standard of review.

11.67 I have considered carefully if there has been a lack of clarity in the DPP's submissions either between *Damache* and this case, or internally within this case. In Damache there was a very clear statement that the DPP was not bound to consider, and did not consider, forum. It is my view that this submission was addressed to forum from a jurisdictional perspective. As a general statement of the law, in light of the principle set out in *State (McCormack),* that is unanswerable. The DPP's role is to prosecute the alleged perpetrators of criminal acts within this jurisdiction, having considered the strength of the evidence and public interest considerations. That statement by the DPP in the *Damache* proceedings was however, in light of the specific legislative provisions, incorrect on the facts of that particular case.

11.68 In this case, the submission from the DPP was more nuanced. The position of the DPP was that she was bound by the Act of 1974 and her duties as set out in case law. She was clear that her duty was to prosecute if there was sufficient and reliable evidence to prosecute and if it was in the public interest so to do. There are a wide range of factors which are covered by the public interest and could lead the DPP to consider that it would not be in the public interest not to prosecute in Ireland.

11.69 Counsel for the DPP was careful in his submission to the court, perhaps reluctant to stray into an area of giving of reasons; however, he did rely on a passage from Edwards J in *Marques (No. 1)* to highlight the type of considerations that might arise for the consideration of the DPP:

> "The second premise relied upon by the applicant is his assertion that a prosecution in this State was manifestly in the public interest. The Court has no hesitation in also rejecting this premise, as representing overstatement and hyperbole. While it is undoubtedly the case that there are a considerable number of factors, validly identified by or on behalf of the applicant, that arguably would favour the bringing of a prosecution in this State, it could not be credibly or tenably suggested that the argument must necessarily be regarded as being all one way, and that there could be no *bona fide* considerations sufficient to tip the scales the other way. It is not appropriate for the Court to speculate as to what factors in fact influenced the decision of the first named respondent. However, even at an abstract level the Court can readily conceive of a number of factors that might militate against domestic prosecution in a case such as the present. Such factors might include best use of scarce resources, difficulties in securing the availability of crucial evidence and witnesses located abroad, the need to secure the necessary co-operation of investigators and law enforcement agencies located abroad, difficulty perhaps in sourcing competent experts and specialists within in this jurisdiction, the expense involved in mounting a highly technical prosecution of a transnational crime, and the fact that another State with which Ireland has an extradition treaty has both a substantial interest in, and is desirous of, prosecuting the suspect. While the Court has no idea as to whether any of these suggested possible anti-domestic prosecution factors in fact had any influence on the first named respondent's view of the public interest consideration, they serve to illustrate the Court's point that the applicant's contention that the public interest in his domestic prosecution was "manifest" should be treated as hyperbole and overstatement. The most that can be said is that a number of factors favouring domestic prosecution undoubtedly existed."

11.70 It appears that Edwards J was not suggesting that the final factor was individually decisive as to have sole regard to this may undermine the duty of the DPP to prosecute within this jurisdiction. Edwards J had held in *Damache* (No. 2) [2014] IEHC 139 that the DPP's "range of decision, and the extent of her discretion, is either to prosecute or not to prosecute in this jurisdiction." However, the fact that an individual is sought for extradition by another State, in combination with any of the other factors outlined, are indicative of reasons why the DPP may decide in the public interest not to prosecute in this jurisdiction here.

11.71 In so far as Mr. Marques claims that there is a lack of transparency about the decision taken in his case, his cause of complaint is no more valid than that of any other person in respect of whom the DPP makes a decision. There is no statutory basis for the issuing of the Guidelines. They are based upon the clear statement of law in *State (McCormack).* As Kearns P. in Fleming stated, at para. [132], the Guidelines:

> "are general in nature, or, to put it another way, are non-offence specific and have no statutory force. The stated intention of the guidelines is to give general guidance to prosecutors so that a fair, reasoned and consistent policy underlies the prosecution process."

11.72 Kearns P. went on to hold that it could amount to a breach of the separation of powers principle, found in Article 15.2 of the Constitution, for the DPP to engage in an exercise of publishing guidelines specific to assisted suicide at para. [166]:

> "[o]nce guidelines may be characterised as having the effect of outruling a prosecution, they must be seen as altering the existing law and must therefore fall foul of Article 15.2 of the Constitution."

11.73 What Mr. Marques seeks, by way of transparency, is a detailed check list of the factors that the DPP considers when considering whether to prosecute a person for an offence over which another country exercises concomitant jurisdiction. This is not precisely what was ruled a breach of the separation of powers in *Fleming*, as that case concerned guidelines for the prosecution of a specific offence; however, it is quite similar. Given the duty on the DPP to prosecute in this jurisdiction, the true focus of her decision is the strength of the evidence and the public interest in this jurisdiction. Therefore her focus is not on whether it is convenient to prosecute in another jurisdiction but whether a prosecution should take place here.

11.74 What Mr. Marques seeks to do is to require the DPP to draft guidelines, which, as was stated in *Fleming*, she is not required to do. In the alternative, by seeking to review the decision of the DPP through an alleged lack of transparency, Mr. Marques is, in a circular fashion, asking the court to draft guidelines based upon the perceived issues that he submits should be contained therein. The reality is that to do so would amount to the court being involved in legislating and interfering with the separation of powers. The fact that, in the UK, a Committee such as the Baker Committee drew up recommendations for prosecutorial guidelines, does not amount to an argument that such guidelines were either required by law in that jurisdiction or are mandated in this jurisdiction.

11.75 The DPP's Guidelines require that she take into account whether the consequences of a prosecution or a conviction would be disproportionately harsh or oppressive in the particular circumstances of a putative offender. As outlined above, the Guidelines do not expressly advert to the situation where the possibility of extradition for the same alleged offences exists. However, that is not to say that the Guidelines have no relevance to the issues raised by Mr. Marques in terms of considering the impact upon him of not prosecuting him in this jurisdiction.

11.76 In his decision in *Marques (No. 1),* Edwards J was of the view that the fact that a suspect may face possible extradition if not prosecuted, together with other individual and peculiar circumstances of that suspect, are indeed potentially relevant matters of which some account ought to be taken by the DPP in determining whether to prosecute the suspect would be in the public interest. Although I am not bound by that reasoning I am persuaded by it. I would however comment that the phrase "may face possible extradition" need only exercise the mind of the DPP where there are indications that that is a real possibility rather than a theoretical one. That is because it is the real circumstances of a putative offender that should be the concern of the DPP and not fanciful ones. Thus, where the DPP's attention is brought to the interest in the extradition of the suspect from a State with concurrent jurisdiction, this is a factor that should be taken into account if the stage is reached where the DPP is considering if it is in the public interest to prosecute or not to prosecute.

11.77 Mr. Marques' main claim is lack of clarity. The DPP in her letter expressly stated that she was relying on the guidelines. She has relied expressly, in written and oral submissions, on the Guidelines including the reference to the consequence of whether a prosecution or a conviction would be disproportionately harsh or oppressive on a suspect. Her submissions also include the dicta from Edwards J in *Marques (No. 1),* para. [62], to the effect that

> "it is clear from a consideration of the said chapter 4, as a whole, that the first named respondent considers it appropriate, and is prepared, to take account of the individual and peculiar circumstances of an offender where that is potentially relevant to an assessment of the public interest."

11.78 Reliance on that passage is a clear indication that the DPP has taken into account in the consideration of the public interest, the impact of extradition on Mr. Marques, subject of course to her having reached a view that there is sufficient evidence to justify a prosecution. For the DPP to have relied upon that passage and yet not to have taken the impact on Mr. Marques into account or not to consider that the public interest issues required such considerations would be an act of *mala fides*. To find that the DPP acted mala fides would require cogent evidence. No evidence of *mala fides* has been placed before the Court, still less evidence of a cogent nature.

11.79 This Court, in the absence of evidence to the contrary, must and does accept the statement of the DPP that she has applied the Guidelines. Furthermore, in the absence of evidence to the contrary, it must be and is accepted that the DPP has carried out her statutory duty to prosecute alleged perpetrators for offences carried out in this jurisdiction bearing in mind her right to consider not only strength of the evidence but also public interest considerations.

11.80 Prior to considering whether there is an unfairness attaching to the DPP's decision not to prosecute and whether this is an exceptional case, I propose to deal with the duty to give reasons. The fairness and exceptionality issues arise under both the heading of reviewability and of the duty to give reasons.

Duty to Give Reasons

11.81 According to counsel for Mr. Marques, the decisions in *Meadows, Mallak and Murphy* form the triumvirate of developing authority in regard to the duty to give reasons. As was pointed out by Murray CJ in Meadows, a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. However, Clarke J in Rawson, delivered post Meadows and pre Mallak, identified that:

> "[h]ow that general principle may impact on the facts of an individual case can be dependant on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge." (Emphasis added).

11.82 The Supreme Court also gave its decision in Carlin v DPP, two months after the decision in *Meadows*. There can be no suggestion that simply because Meadows is not mentioned in the judgment in *Carlin* that the Supreme Court can have been unaware – two of the judges in *Meadows* were on the court in Carlin and indeed each gave judgments. *Carlin* is a very firm restatement of the law regarding the restrictive basis for a review of the DPP's prosecutorial decisions. It did not mention the DPP's duty to give reasons directly but Denham J, as she then was, referred to the "clear policy of non-intervention by the courts in the exercise of the

discretion of the prosecutor, except in particular circumstances."

11.83 After the Carlin decision came the decision in *Mallak*. There is no doubt that the impact of the main finding in *Mallak*, as set out with such precision and lucidity by Fennelly J at paragraph 66 of his judgment, is, per Donal O'Donnell, "Nial Fennelly: *Mallak* and the Rule of Reasons' in Kieran Bradley, Noel Travers and Anthony Whelan (eds.), *Of Courts and Constitutions: Liber Amicorum in Honour of Nial Fennelly* (Dublin, 2014):

> "to advance a principle of broad application and in doing so, significantly advances the boundaries of the territory now occupied by the duty to give reasons."

11.84 When the Supreme Court, speaking through Fennelly J, said in the present evolution of our law, that it was not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage, did they really mean to ignore or override the many careful decisions regarding the position of the DPP that they had ruled upon on three occasions within the previous five years (*Eviston, GE, Carlin*) and twice prior to that in the previous three decades (*State (McCormack) and H*)? It would be astounding if they had meant to do so without addressing the precise reason why the specific restrictions on reviewing DPP decisions should now give way to the general evolution of the law. In particular the decision in H had specifically addressed the issue of reasons and linked it to the availability of judicial review of the DPP's decision not to prosecute.

11.85 If *Mallak* was the only statement of the law the position would be that, a general statement of principle by the Supreme Court would not permit the High Court to ignore the specific and repeated statement of the law by the Supreme Court as regards the DPP's duty to give reasons; however, the law took another turn with the case of Murphy. In Murphy the Supreme Court held that where the DPP is making a decision that is subject to only limited review by a court and has the result that a trial, which would otherwise take place before a jury, would be heard without a jury, then the DPP is under a duty to give reasons for that decisions which extend to why she considered that the ordinary courts were not suitable for a trial of the accused. That decision was made in a context where the Supreme Court held that trial by jury is a constitutional requirement in those cases to which it applies and a decision to remove a case from trial by jury must comply with the dictates of the Constitution.

11.86 The Supreme Court in *Murphy* addressed the decision in *Mallak*. In relation to the rule of general applicability, identified at para. [66] of that judgment, O'Donnell J said that the decision in *Mallak* "was rather more nuanced than a simple citation that these paragraphs would suggest." He noted that the DPP was not subject to the Freedom of Information Act 1997 in respect of prosecutorial decisions and it was said that the considerations which underpin the limitation and the scope of the statutory right to reasons may also be effective at common law. O'Donnell J also noted that the decision in *Mallak* refers without disapproval to the decisions in Eviston and also to *The State (Lynch) v Cooney* [1982] IR 337 where there was limited right of review. O'Donnell J then said however:

> "Perhaps most notably, the decision in Mallak contemplated the possibility at paragraph 77 that a decision maker could comply with the requirement of the law not by disclosing reasons but rather by 'providing justification' for refusing to do so."

11.87 The decision in *Murphy* confirms that the reviewability of decisions of the DPP is not on a par with most other administrative decision makers. While reviewable, the availability of such review is restricted. This is because of the subject matter of the decision and the sensitivity of the matters routinely considered and the fact that the end result of a decision to prosecute will be a trial in due course of law. The fact that a decision not to prosecute may not result in such a trial does not lead to the decision not to prosecute becoming more amenable to judicial review (See; *H v DPP*). The requirement to give reasons is bound up with the reviewability and that requirement to give reasons is limited. I do not consider that the reference by O'Donnell at para [41] of his judgment to "the fact that the end result of a decision to prosecute will be a trial in open court" either implicitly or explicitly was meant to exclude the decision in H regarding a decision not to prosecute. It was simply a statement referring to the situation where a decision to prosecute was at issue.

11.88 The Supreme Court in *Murphy*, by referencing the constitutional right to trial by jury, identified a constitutional necessity to give reasons in that case. The decision identified the limited nature of the reason that would have to be given in that case (even contemplating that no reason may be given if it would impair national security). In my view, it is in this limited context that *Murphy* has extended the law. It explains that the general principle in *Mallak* did not have the effect of nullifying the special position of the DPP in terms of the reviewability of her decisions and the requirement to give reasons.

11.89 In this case Mr. Marques concedes, as he must, that he has no right to be prosecuted. The undoubted right that he has to be protected from interference with his constitutional rights can and will be protected by the courts to the extent that is required under the law and the Constitution. On the law, as elaborated by the Supreme Court, his desire to have a court review those aspects of his "rights," or more correctly extra perceived hardship due to his extradition to the USA, does not move this decision of the DPP into a category which requires the giving of reasons.

11.90 I have considered whether the reference by O'Donnell J in *Murphy* to para. [77] of *Mallak* is in fact an extension of the principle of giving reasons i.e. that there must at least be a statement as to why no reasons are being given. I do not believe that the Supreme Court meant that to apply individually in every case where the DPP takes a stance. In *Mallak* the court was engaged with the particular approach of the Minister, which apparently contrasted with the approach in other cases. In general the DPP does not give reasons for prosecutorial decisions. The legal basis for that approach has been approved and outlined in many of the decisions referred to above. In my view, it is acceptable for the DPP to rely in general on those reasons and she is not required to give a specific answer in each case as to why she is not giving reasons.

11.91 I have also considered the fact that Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the Victims Directive) has, since November 2015, given victims of crime certain rights to reasons regarding a decision not to prosecute their complaints. This is of no relevance as (a) Mr. Marques is not a victim and (b) the right to reasons was introduced by a process of law. An argument was also made by Mr. Marques that the decision in *H* was in part based upon a resources issue (see judgment of O'Flaherty J at p.602) and that this was no longer relevant in light of the Directive. I am of the view, in light of the repeated statements of the Supreme Court regarding limited availability of review of the DPP's decision and the link with duty to give reasons which have not been based upon a resources issue, that the presumably now greater resourced DPP's office for the purpose of giving reasons, does not affect the underlying basis for the DPP's right not to give a reason for a decision not to prosecute. It is only where the factors identified there have been established, which include exceptional circumstances that review will be ordered. The giving of reasons is linked to the limitation of review.

The Minister's Decision under S. 15(2)
11.92 Under s. 15(2) the Minister may refuse extradition for an offence which is also an offence under the law of the State, if the DPP or the Attorney General has decided either not to institute or to terminate proceedings against the person. The fact that the Minister may make this decision and must have some basis for making it was advanced strongly as a reason why the DPP should give reasons.

11.93 I am of the view that this is not a matter which can or should be decided at this point. Even if the Minister requires the DPP's reasons at the point of making a decision under s. 15(2), that is not a sufficient basis to state that a potential extraditee requires them prior to a court decision committing him or her to prison pending the order of the Minister for his or her extradition. It is premature to anticipate the decision of the Minister in this case. In so holding, I leave open the question of whether the Minister is obliged to consider the reasons behind the decision not to prosecute and whether the DPP is entitled or obliged to give those reasons to the Minister. These may be matters for another day when the facts will be crystallised and the court can apply the applicable law to those established facts.

Fair Procedures
11.94 Mr. Marques has no entitlement to be prosecuted. His complaints about lack of transparency have been considered and rejected. Many of his complaints are interlinked and have to a large, if not entire, extent been dealt with above. In so far as Mr. Marques complains that the DPP must have regard to the forum issues because these cannot subsequently be addressed by the court or by the Minister, a few further points can be made. The issue with regard to the Minister does not truly arise for consideration now for the reasons set out above. I have detailed how the DPP is to have regard to his personal circumstances. The High Court must have, and, as set out above, has had full regard to the protection of his constitutional and Convention rights and indeed his statutory rights under the Act of 1965.

11.95 Furthermore, there is no unfairness of the type identified in Eviston, or at all. There is no constitutional right at issue as there was in *Murphy*. There is no right to be prosecuted and there is no right to insist on prosecution in this jurisdiction. Thus no right has been determined by the DPP in her decision not to prosecute.

11.96 There is no unfairness in the fact that Mr. Marques says he is unable to advance specific arguments regarding the necessity to extradite him in the absence of reasons. The necessity for extradition arises for consideration where an extradition request is made in circumstances where he is not being prosecuted in this jurisdiction. The decision not to prosecute is a decision by the DPP in the exercise of her statutory function. Nothing in the Prosecution of Offences Act 1974 or the Act of 1965 or any other Act gives a power of, or requires, review by the court on a different basis than every other decision not to prosecute. The High Court on the other hand must protect his rights fully in the extradition sense.

11.97 In all of the circumstances there is no unfairness to Mr. Marques in either the decision not to prosecute him or the decision not to give any further reasons other than that the Guidelines have been adhered to by the DPP.

Exceptional Circumstances
11.98 By and large the circumstances facing Mr. Marques are common to a large number of requested persons who face extradition or surrender for offences either committed in this territory or which are offences over which Ireland exercises extra-territorial jurisdiction. There is nothing in the developing case law, including the decision in *Murphy*, which indicates that the decision not to prosecute in this jurisdiction or to give reasons in these types of cases amounts to an exceptional circumstance.

11.99 The fact that the Guidelines do not expressly cater for this situation does not translate this into an exceptional circumstance. The DPP is required to follow the law and prosecute in this jurisdiction where there is *prima facie* evidence and where it is in the public interest to so prosecute. The Guidelines have no statutory basis and are of general nature to assist prosecutors so that a fair, reasoned and consistent policy underlies the prosecution process. Not every eventuality can be covered in the Guidelines. In the final event, each case must be individually assessed. The Guidelines record that the personal circumstances of a suspect are considered under the heading of public interest. That was the real concern of Mr. Marques in this case; that his personal circumstances were not considered. On the basis of the facts and circumstances of this specific case, it is abundantly clear that they were considered by the DPP.

11.100 With regard to the particular circumstances of Mr. Marques' case, he submitted that, over and above the usual situation, he has offered to plead guilty. That, he submitted, was exceptional. It is an unusual factor but in the view of the court it does not amount, either on its own or in combination with all the other factors, to an exceptional circumstance. In Eviston, the constitutional right to fairness was, on the particular facts of that case, violated. In *Murphy*, the constitutional right to trial by jury was at stake. No constitutional or Convention right is at issue here. The offer of the plea of guilty is, but one of a number of factual considerations, that the DPP must consider in reaching her decision to prosecute or not to prosecute. It is a factual matter going towards the strength of the evidence. In general, a strength of the evidence factor is unlikely to amount to an exceptional circumstance for reviewing the DPP's decision or requiring reasons. This is because of the test set out in State (McCormack) that provided the facts do not exclude the reasonable possibility of a proper and valid decision not to prosecute; the decision is not reviewable. To hold otherwise would be to trample upon the carefully demarcated limits set to the reviewability of the DPP's decision.

11.101 Moreover, even if there had been a full confession the consideration of the public interest where the DPP is best placed to decide on same, would still operate as a significant factor reducing the exceptionality of this circumstance. In other words, there will always be cases where it may appear from the outside that strong evidence exists for a prosecution but where no such prosecution is directed. The restrictions on the reviewability of the DPP protect her from routine review in such circumstances.

Conclusion
11.102 For the reasons set out and in all the circumstances, the decision of the DPP not to prosecute Mr. Marques is not reviewable. Mr. Marques is not entitled to the reasons for the decision not to prosecute.

12. CONCLUSION
12.1 Having considered the documentation placed before it and having heard and considered Mr. Marques' objections to his extradition, this Court has determined in accordance with s. 29(1) that:

(a) the extradition of Mr. Marques has been duly requested;

(b) Part II of the Act of 1965 applies in relation to the requesting country;

(c) the extradition of Mr. Marques is not prohibited by Part II of the Act of 1965 or by the relevant extradition provisions; and,

(d) the documents required to support a request for extradition under s. 25 have been produced.

Furthermore, the Court has determined that extradition to the USA for the purpose of trial on these alleged offences would not amount to a violation of his constitutional or Convention rights.

12.2 For the reasons set out above, this Court has also refused the relief sought by Mr. Marques in respect of the decision of the DPP not to prosecute him in respect of these alleged offences in this jurisdiction and the failure to give reasons for that decision.

12.3 In the circumstances, the Court shall make an order committing Mr. Marques to a prison, there to await the order of the Minister for his extradition.