Neutral Citation [2012] IEHC 90

THE HIGH COURT

Record No. 2009 18 EXT

IN THE MATTER OF THE EXTRADITION ACTS 1965 to 2001

BETWEEN

THE ATTORNEY GENERAL

APPLICANT

-AND-

SEAN GARLAND

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 27th day of January, 2012.

1. Introduction

1.1 In these proceedings the United States of America (hereinafter the United States of America or the United States or the U.S.A. or the U.S.) seeks the extradition of the respondent with a view to placing him on trial for the offence of conspiracy to commit counterfeit acts outside the territory of the United States in violation of various U.S. laws.

2. Extradition between Ireland and the USA: Principal Legal Provisions

2.1 By virtue of the following measures the U.S.A. is a country to which Part II of the Extradition Act 1965, as amended (hereinafter the Act of 1965), applies.

2.2 On the 13th of July 1983, Ireland signed the Treaty on Extradition between the State and the U.S.A. at Washington D.C. [hereinafter the "Washington Treaty"]. The Washington Treaty was later amended by the Agreement on Extradition between the United States of America and the European Union, entered into on the 25th of June 2003 [hereinafter "the EU -US Treaty"].

2.3 S. 8 of the Act of 1965, as it applied at the material time, stated:

> "8.-(1) Where by any international agreement or convention to which the State is a party an arrangement (in this Act referred to as an extradition agreement) is made with another country for the surrender by each country to the other of persons wanted for prosecution or punishment or where the Government are satisfied that reciprocal facilities to that effect will be afforded by another country, the Government may by order apply this Part in relation to that country.

2.4 The Government by means of the Extradition Act, 1965 (Application of Part II) Order, 2000 [S.J. 474 of2000] made an order pursuant to s. 8(1) of the Act of 1965 applying Part II of that Act to the United States of America. Notice of the making of the said order was published in *An Iris Oifigúil* on the 6th of February, 2001, Part 9 of S.I. 474 of2000 was subsequently amended, in order to give effect to provisions of the EU - US Treaty, by the Extradition Act 1965 (Application of Part II) (Amendment) Order 2010 [S.I. 45 of 20I0). Notice of the making of this said order was published in *An Iris Oifigiúil* on the 19th of February, 2010.

2.5 Once Part II of the Act of 1965 applies there is a duty on the State to extradite by virtue of s. 9 of that Act, which is in the following terms:

> "9.- Where a country in relation to which this Part applies duly requests the surrender of a person who is being proceeded against in that country for an offence or who is wanted by that country for the carrying out of a sentence, that person shall , subject to and in accordance with the provisions of this Part, be surrendered to that country.'

2.6 A request for a person's extradition is made to the Minister (for Justice and Equality - as he is currently entitled) in the first instance and any such request must comply with the formalities prescribed in s. 23 of the Act of 1965 and be accompanied by the supporting documentation specified ins. 25 of that Act.

2.7 S. 23 of the Act of 1965 provides:

"23.- A request for the extradition of any person shall be made in writing and shall be communicated by-

(a) a diplomatic agent of the requesting country, accredited to the State, or

(b) any other means provided in the relevant extradition provisions."

2.8 S. 25 of the Act of 1965 provides:

"25.-A request for extradition shall be supported by the following documents-

(a) the original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or, as the case maybe, of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting country;

(b) a statement of each offence for which extradition is requested specify in g, as accurately as possible, t h e time and place of commission , its legal description and a reference to the relevant provisions of the l aw of the requesting country;

(c) a copy of the relevant enactments of the requesting country or, where this is not possible, a statement of the relevant law;

(d) as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality. and

(e) any other document required under the relevant extradition provisions."

2.9 Under s. 26(1)(a) of the Act of 1965 the Minister is required, upon receipt of a properly communicated request supported by the required documents, to certify having received the request. S. 26(1)(b) of the same Act (as amended by s. 7 of the Extradition (Amendment) Act 1994), and as further amended by s. 20 of the Extradition (European Union Conventions) Act, 2001) then provides:

"26.-(1)(b) On production to a judge of the High Court of a certificate of the Minister under paragraph (a) stating that a request referred to in that paragraph h as been made, the judge shall issue a warrant for the arrest of the person concerned un less a warrant for his arrest has been issued under section 27."

2.10 Where an arrest warrant has been duly issued pursuant to a request for extradition, the Act of 1965 provides, in s. 26(2) thereof, that it may be executed by any member of An Garda Síochana in any part of the State. Moreover, s. 26(5) requires that a person arrested under a warrant issued under s. 26(1)(b) shall be brought as soon as may be before a judge of the High Court.

2.11 This Court's function and duty in relation to a request for surrender received from a country to which Part II of the Act of 1965 applies is set out at s. 29(1) of that Act, as amended by s.20 of the Extradition (European Union Conventions) Act, 2001, which (to the extent relevant) is in the following terms:

"29- (1) Where a person is before t h e High Court under section 26 ....and the Court is satisfied that-

(a) the extradition of that person has been duly requested, and

(b) this Part applies in relation to the requesting country, and

(c) extradition of the person claimed is not prohibited by this Part or by the relevant extradition provisions, and

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

the Court shall make a n 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."

3. The Request for Extradition in this Case

3.1 The evidence before the Court establishes that on the 1st of December 2008, a request in writing was made by the United States of America for the extradition of the respondent for the purpose of having him stand trial in the U.S.A for the offence of conspiracy to commit counterfeit acts outside the territory of the United States, in violation of various U.S. laws specified in the said request. The request was communicated to the Minister by the Embassy of the United States of America in Dublin. The Court is satisfied in the circumstances that it was duly communicated by a diplomatic agent of the requesting country, accredited to the State.

3.2 The Court has had produced to it a certificate of the Minister (for Justice, Equality and Law Reform - as he was then entitled), dated the 21st of January 2009, in which he certifies that a request has been duly made by and on behalf of the United States of America, and received by him, for the extradition of the respondent. The Court is satisfied that the said certificate was made under, and is sufficient for the purposes of, under s. 26(1)(a) of the Act of 1965.

3.3 The evidence before the Court further establishes that the applicant then applied to the High Court pursuant to s. 26(1)(b) of the Act of 1965, as amended, seeking a warrant for the arrest or the respondent; that the said application was successful and that such a warrant was issued by Mr. Justice Peart on the 28th of January 2009.

3.4 The evidence further establishes that in execution of that warrant the respondent was subsequently arrested by Sgt. Martin O'Neill, a member of An Garda Síochana, at Mountjoy Square, in the city of Dublin on the 30th of January 2009. He was then brought before the High Court and was duly remanded from time to time, initially in custody, and later on bail, pending a s. 29 hearing in these proceedings, and he has duly appeared before the High Court and has answered hi s bail on all occasions on which he was required to do so.

3.5 The matter was before the Court for the purposes of an s.29 hearing on the 18th, 19th, 20th, 21st, 22nd and 25th of July 2011, following which the Court reserved its judgment, which it now delivers.

4. Broad Outline of the Case against the Respondent

4.1 A précis of the case against the respondent is set out in an affidavit sworn in support of the request for extradition with which the Court is presently concerned by Brenda J. Johnson, Assistant United States Attorney for the District of Columbia on the 12th of November, 2008. The said affidavit and its accompanying exhibits are receivable in evidence without further proof pursuant to s. 37(1) of the Act of 1965, the Court being satisfied that they have been signed by an officer of the requesting country and are certified by being sealed with the Seal of the Department of Justice of the United States of America on the authority of Condoleezza Rice, Secretary of State. Yet further details are set out in the copy indictment which is exhibited in the said affidavit marked exhibit A.

4.2 Ms Johnson states the following at paragraphs 14 to 31 inclusive of her affidavit of the 12th of November 2008:

"SUMMARY OF EVIDENCE

14. The government's evidence in this case will establish that Garland acted in to an agreement and conspired with others to buy,

sell, exchange, transfer, receive, and deliver to others, counterfeited obligations of the United States (that is, counterfeit $100 Federal Reserve Notes), with the intent that such counterfeited obligations of the United States be passed, published, used and tendered as true and genuine, for the purpose of making money. Garland knew that the Federal Reserve Pates were counterfeit. Garland traveled circuitous routes and met with other conspirators to discuss the Supernote operation and engage in Supernote transactions. Co-defendant Christopher Corcoran ("Corcoran") traveled and met with conspirators to discuss the Supernote operation and engage in Supernote transactions. Garland and Corcoran used couriers to transport Supernotes and payments for Supernotes, in order to avoid detection themselves. Some members of the conspiracy who were apprehended in possession of or passing Supernotes have admitted that Garland was the source and leader of the illegal Supernote distribution organization and that Corcoran was his direct contact, communicator and negotiator. Their statements are substantiated by documentary evidence, physical and electronic surveillance, and other witness accounts. Some of the specific evidence which w ill be presented at the trial, is discussed below:

A. NATIONAL CRIME SQUAD UNDERCOVER INVESTIGATION

15. From approximately February 1999 through January 2000, the NCS conducted an undercover operation targeting the criminal activity of the Garland organization. NCS utilized an undercover NCS police officer ("UC") to infiltrate the organization. During the course of the investigation the UC met with, and spoke frequently to, several of the organization 's members, to include Garland 's co defendants, Alan Jones ("Jones"), Terence Silcock ("Silcock"), and Corcoran . Some of the highlights of these meetings, which comprise overt acts done in furtherance of the conspiracy, are detailed below:

16. On February 9, 1999, the UC made contact with Jones at the White Swan, a pub in Wythall, England. Jones initially approached the UC about purchasing and reselling cigarettes. Jones later advised that he and his partner were involved in the sale of high quality counterfeit currency, and more specifically counterfeit U.S. $100 notes. J ones advised that he had personally passed more than $125,000 worth of this note in England and that his partner 's source for the counterfeit notes was in Russia . Jones asked the UC if he was interested in purchasing this counterfeit U.S. currency. The UC indicated that he was in fact interested.

17. On February 12, 1999, Jones introduced the UC to Silcock at the Dog Public House, a pub in the Birmingham area of England. Jones advised that Silcock was his financial backer, and that he and Silcock would be working together in the counterfeit transaction. Jones and Silcock advised that their partner in this transaction was an Irishman. Jones vouched for the quality of the counterfeit $100 bills.

18. On July 31, 1999, Silcock introduced Corcoran to the UC at the Hyatt Hotel in Birmingham's city center. Corcoran was identified by Silcock as his Irish partner in the counterfeit U.S. currency transactions. During the meeting, Silcock and Corcoran discussed a recent trip to Moscow, the purpose of which was to finalize a counterfeit U.S. dollar deal. Corcoran advised the UC that his boss "Sean" travelled to Moscow to complete the deal. Corcoran further advised the UC that "Sean" is a part of the "old IRA." Corcoran stated that they would be willing to sell the "little heads" to the UC, and then, if all went well, they would sell the "big heads" to the UC[1]. Corcoran was referring to the counterfeit U.S. $100 notes.

19. On September 7, 1999, Corcoran and the UC met at the Stakis Hotel in Birmingham and discussed the counterfeit U .S. currency transaction. Corcoran and the UC discussed the sale of $1 million in counterfoil U.S. dollars to the UC. Corcoran stated that the cost for the "big heads" would be 45% of the face value and that the price for the "small heads" would be a little less because they were older. Corcoran stated that he had up to $5 million in counterfeit dollars available but that it would require the UC to travel. Corcoran also stated that the UC would have to put up a bond like "Russian Dave," for the purchase of the counterfeit notes. Corcoran advised the UC that he was meeting with "Dave" the next day.

20. On September 7, 1999 and September 8, 1999 the UC overheard a series of telephone calls made by Corcoran to "Dave," in which he scheduled a meeting at the Stakis Hotel bar on September 8, 1999. NCS surveillance confirmed a meeting at the Stakis Hotel bar on September 8, 1999 between Corcoran, Silcock and David Levin ("Levin"), also known as "Russian Dave."

B. SEIZURE OF SUPERNOTE AND IDENTIFICATJON OF GARLAND

21. The investigation revealed that from 1993 to 1999 Hugh Todd ("Todd") purchased Supernotes from the Garland organization, which he would then redistribute into the world's economy at various money exchanges throughout Europe. In February 1999, Todd was arrested by the NCS. A search incident to his arrest resulted in the discovery of a suspected Supernote "big head," bearing serial number AB87548289D. This note was forwarded to USSS headquarters for analysis, which confirmed it to be a Supernote.

22. Todd subsequently agreed to cooperate with law enforcement authorities. On September 20, 2007, the USSS met with Todd in South Africa, at which time he admitted that h e conspired with Garland and Corcoran to purchase, distribute, and pass as true and genuine high quality counterfeit United States Federal Reserve Notes, also known as a Supernotes. Todd advised that from 1994 to 1999 he personally received in excess of two-hundred and fifty thousand dollars in Supernotes from Garland and Corcoran and passed the high quality counterfeit currency at various money exchanges in Europe. The highlights of the Todd interview are detailed below:

23. Todd stated that on April 17, 1 998 he traveled to Moscow, Russia, for the purpose of meeting with Garland to discuss the purchase of counterfeit U.S. currency. Todd stated he stayed at the Radisson Hotel in Moscow, and that Garland first made contact with him at hi s hotel. Todd advised that Garland knocked on his hotel room door. Todd stated that after opening the door, Garland immediately entered the hotel room and emptied a leather bag containing approximately $80,000 of counterfeit U.S. currency onto the bed. Todd stated that he paid Garland $30,000 in genuine currency for the counterfeit currency. Records from Scandinavian Airways ("'SAS'") confirm that Garland traveled to Moscow during the time of this meeting.

24. Todd also stated that on June 28, 1998, he again travel ed to Moscow for the purpose of purchasing counterfeit currency from Garland and stayed at the Savoy Hotel in Moscow. Todd stated that after about two days, Garland met Todd at the Savoy Hotel. Garland produced and sold Todd approximately $160,000 to $180,000 in counterfeit U.S. currency. Todd advised that he made a partial payment to Garland for the counterfeit currency and was instructed by Garland to pay the remaining balance to a co-conspirator. Todd advised that he later traveled to London, England where he paid the co-conspirator the balance owed to Garland for t his transaction. Records from SAS confirm that Garland traveled to Moscow during the time of this meeting.

25. Todd stated that on February 5, 1999, he traveled to Birmingham, England to meet with Corcoran and Silcock. Todd advised that he met Silcock at the Birmingham train station and then the two went to the Novotel Hotel where they met Corcoran. Todd advised that while at the Novotel Hotel Corcoran provided him with a sample "big head" Supernote, the same note that was recovered at the time of his arrest. Todd's account of t his meeting is corroborated by the NCS investigation, which at the time, was conducting lawfully authorized electronic surveillance with in Todd's hotel room. The recorded conversations, which occurred February 6, 1999, through February 9, 1999, confirm that Corcoran and Silcock met Todd in his hotel room and discussed the sale of counterfeit U.S.

currency. Specifically, Todd was overheard by NCS stating to Corcoran that Todd: (1) had traveled to Moscow to meet Garland; (2) stayed at the Savoy Hotel while in Moscow; (3) had received "one hundred and sixty thousand" from Garland; (4) made a partial payment to Garland in genuine dollars; and (5) engaged in discussions concerning future counterfeit U.S. currency deals involving "new" and "old" currency.

26. On or about September 20, 2007, during the meeting with the USSS, several photographs were displayed to Todd. After carefully reviewing the photographs, Todd immediately and positively identified a photograph of Sean Garland, as the person he knew as Garland, and the person with whom he had dealt with on counterfeit U.S. currency. The photograph which Todd identified is attached hereto as Exhibit E. Todd was shown, but was unable to identify a photograph of Corcoran.

C. MOSCOW, RUSSIA - SURVEILLANCE OF GARLAND AND CORCORAN AND SEIZURE OF SUPERNOTES

27. In early June 1999, in furtherance of this investigation, and acting at the direction of the USSS Counterfeit Division, USSS Special Agent Charles White ('SA White") made an official request to the Ministry of the Interior of the Russian Federation ("MVD") wherein the USSS, al on g with the NCS, requested the M VD to conduct surveillance in Moscow. The USSS, a long with the NCS, developed information which indicated that Garland, his spouse Mary, and two other individuals, identified as Corcoran and Silcock were to travel to Moscow in late June.

28. The MVD agreed to the USSS proposal, and from June 25 through June 29, 1999, the MVD maintained round-the-clock surveillance on Garland, his wife, Corcoran and Silcock. The movements of all of these individuals were relayed, in real time, from the MVD surveillance teams, by radio, to the MVD command post, which was staffed by officers from the MVD, NCS and USSS. At one point during the course of the surveillance, Garland and hi s wife were picked u p at the Metropole Hotel by a sedan with diplomatic license plates registered to the Embassy of North Korea. The MVD followed the vehicle to the Embassy of North Korea. Garland and his wife were observed entering the embassy, where they remained for some two hours. This information was relayed real time to SA White.

29. On Tuesday, June 29, 1 999, SA White was allowed to actively participate in the MVD surveillance, and personally observed Garland in the passport control area of Moscow Sheremetyevo airport. Garland was waiting in line with his spouse, and shortly thereafter departed Moscow on a flight. Hotel records confirm that Garland, Corcoran, and Silcock were present in Moscow during this time period.

30. On July 9, 1999, Silcock met with the UC, and told the UC that they were all under surveillance during the June trip to Moscow, and that he had abandoned hi s intended meeting because he feared being arrested, and was therefore, unable to obtain any Supernotes. Silcock also told the UC that "Dave the Russian" [Levin] had provided him with the passport and visa the night before his trip to Moscow.

31. Almost one year later, on July 7. 2000 an NCS detective contacted SA White and briefed him on the recent arrests of fourteen individuals in the United Kingdom who were tied to the Supernote investigation. One of the individuals, Levin, was in custody in the United Kingdom, but willing to cooperate with the NCS effort to locate more Supernotes. As noted above, the NCS investigation had revealed that Levin, purchased Supernotes from the Garland organization. Specifically, Levin advised, through his attorney, that he was willing to arrange for the delivery of $70,000 worth of Supernotes in Moscow within a week. An NCS detective requested that the USSS arrange a delivery location with the MVD. SA White contacted the MVD, and they determined a meeting point (Pushkin Square) within Moscow for the delivery of the Supernotes. SA White passed the location and time to a NCS detective, who in turn relayed the information back to the NCS in the United Kingdom.

32. On July 11, 2000 an officer from the MVD, a detective from CS, USSS Special Agent in Charge (SAIC) Patrick Miller, and SA White met in Pushkin Square in Moscow. While waiting for the 12 noon delivery of Supernotes, a member of NCS in the United Kingdom called the NCS detective to inform him that Levin's attorney indicated that the circumstances of delivery had changed and that the Supernotes were now to be found at the Kazanskij Voksal (Kazan Railway Station), in temporary luggage compartment #24. SA White and the others departed Pushkin Square and drove to the Kazanskij Voksal. With a five digit numerical code provided by Levin's attorney, the MVD opened the luggage compartment and located a black nylon sport bag. The bag was taken to the railway station police substation at which time it was opened by the MVD. Within the bag was another blue plastic bag which contained two 'Always' brand feminine napkin packages. Within seven of the feminine napkins were seven bundles of $100 Federal Reserve Notes, totalling $66,900 of suspected counterfeit currency. SAIC Miller and SA White were allowed to randomly inspect several of the notes. SA White removed and inspected random notes from each of the seven packages. The USSS was able to confirm that the examined notes were in fact Supernotes. All of the seized notes were subsequently forwarded to USSS headquarters for further examination, which confirmed that 668 of the 669 notes were in fact Supernotes."

5. The Points of Objection

5.1 A Notice of Objection to the proposed extradition filed on behalf of the respondent contains some 17 points of objection. The Court was informed on the first day of the hearing that only points 1, 2(b), 2(c), 3, 6, 11, 12, 15 and 16 were being proceeded with. These were pleaded in the following terms:

"1. There has been excessive delay in the prosecution of the extradition application and the Respondent has been thereby prejudiced as a result to such an extent as to warrant refusal of the application and/or extradition is prohibited by section 18 of the Act of 1965.

2. The application for extradition does not comply with the Treaty of 1983, in particular Article VIII thereof and/or the Act of 1965:

(a) …

(b) the requirement of dual criminality in Article 11.1 thereof and section 10 of the Act of 1965 is not satisfied.

(c) the offence alleged is with in the jurisdiction of the requested State within Article 1 11.2 of the said Treaty and section 15 of the Act of 1965.

3. Article VIII of the Treaty is ultra vires or unconstitutional and void, in that it exonerates the US from having to make out a prima facie case when seeking extradition whereas it requires a showing of a prima facie case in respect of any application to the US from Ireland. Section 22 of the Act of 1965 en visages a reciprocal arrangement and docs not authorise an arrangement whereby the onus to show a prima facie case falls only on one of the requesting states but not the other.

4. …

5. …

6. The offences alleged are political offences or offences connected with political offences within Article IV (b) of the Treaty and/or section 11 of the Act of 1965, in particular by reason that they arise from the partition of Korea and its consequences, including the enduring military, diplomatic and economic conflict between the People's Republic of Korea and the United States of America.

7. …

8. …

9. …

10. …

11. Without prejudice to the generality of the foregoing, the surrender of the Respondent would constitute a violation of his fundamental rights and freedoms and would be in breach of the rule of law, in particular by reason of the following and/or by reason of a real risk of the following occurring, or any of them:

(a) The Respondent's surrender would contravene Artic les 38, Article 40.1 and Article 40.3 of the Constitution in that he will be remanded in custody without a real or any option for bail;

(b) He will not secure a fair trial;

(c) He will be ill treated and /or will be exposed to a prison regime that will fail to protect his health and will cause him to be seriously injured in his health and likely to die;

(d) He will be designated and therefore treated as an enemy alien.

12. His surrender would be contrary to and incompatible with the State's obligations under Articles 1,5,6,8 and 13, of the European Convention on Human Rights and Fundamental Freedoms and Article3 of the Statute of the Council of Europe and thereby contrary to the European Convention on Human Rights Act 2003.

13. …

14. …

15. The Extradition Act 1965 (Part II) (No. 22) Order I 987 (SI No 33 of 1987) and/or Extradition Act 1965 (Application of Part II) Order 2000 (SI No 474 of 2000) is ultra vires and invalid.

16. lf which is denied the Extradition Acts 1965 to 2001 permit the extradition of the Respondent, the said Acts arc un constitutional and void and contrary to the Respondent's constitutional rights.,

17. …

6. The Issues
6.1 For convenience, counsel for the respondent dealt with the various objections raised on behalf of their client on a grouped modular basis. Accordingly submissions were made, and responded to, under five broad headings. The Court is happy to adopt a similar approach in this judgment.

6.2 The five broad headings under which relevant issues were argued, and will be dealt with, are as follows:

1. Whether extradition is prohibited under s. 15 of the Act of 1965;
2. Whether extradition is prohibited for lack of correspondence;
3. Whether the principal statutory instrument relied upon (S.I. 474/2000) is ultra vires the Act of 1965 in as much as it does not require an applicant to establish a *prima facie* case;
4. Whether extradition is prohibited by s.11 of the Act of 1965;
5. Whether extradition would be contrary to the respondent's constitutional and/or fundamental rights (as guaranteed in the European Convention on Human Rights and Fundamental Freedoms.

7. Whether Extradition is Prohibited under s. 15 of the Act of 1965.
7.1 The respondent contends that this Court ought not to extradite him as the offence for which extradition is requested is regarded under the J aw of the State as having been committed in Ireland. In that regard he relies upon s. 15 of the Act of 1965 and contends that the offence in question is a non extraditable offence.

7.2 S.15 of the Act of 1 965 provides:

"15-Extradition shall not be granted where the offence for which it is requested is regarded under the law of the State as having been committed in the State."

7.3 What then is the offence for which extradition is requested in this case? The word "offence" is not defined within the Act of 1965 as amended, and must in the circumstances be regarded as bearing the ordinary and usual meaning of that word with due regard to the particular context in which it is used. In its usual and ordinary meaning, the word offence connotes an action or conduct that "offends" against some norm. Moreover, where the word is used in the context of an extradition statute, it is reasonable to infer that it is referable a breach of some criminal Jaw, whether that be at common law, or contrary to a criminal law statute, or some provision of a State's criminal or penal code. Invariably an offence as described within a request for extradition will be cast as an action or conduct that contravenes some provision of the criminal law of the requesting state. However, in any application of s. 15 of the Act of 1965, the High Court will not be concerned with the particular provision of law of the requesting state that is said to have been contravened by the action or the conduct complained of, but rather with the actual action or conduct itself. If the action or conduct

itself is regarded under the law of the State as having been committed in the State, then extradition is prohibited by s.15.

7.4 The offence for which the respondent's ex tradition is requested is particularised in the authenticated copy of the indictment filed with the United States District Court by a Federal Grand Jury sitting in the District of Columbia, USA on the 19th of May 2005, which is exhibited as Exhibit A to the affidavit sworn in support of the request for extradition with which the Court is presently concerned by Brenda J Johnson, Assistant United States Attorney for the District of Columbia on the 12th of November, 2008 and to which affidavit the Court has previously referred.

7.5 Though the indictment in all its particulars runs to some 24 pages, the background to the conspiracy and the specific action or conduct of the respondent for which he has been indicted is summarised in paragraphs 9 to 20 thereof which are in the following terms:

"9. The United States Government alone is authorised by law to manufacture and issue United States Federal Reserve Notes (FRNs or "bills"), which are the official paper currency of the United States of America and are "obligations of the United States" within the meaning of 18 U.S. C.§§ 470 and 473.

10. Beginning in or about 1989, and continuing throughout the period of this indictment, a type of high-quality counterfeit $100 FRNs began to be detected in circulation around the world. Their high quality made it particularly difficult for them to be detected as counterfeit by untrained persons. The United States Secret Service initially designated these counterfeit notes as "C-14342" and they became known as "Supernote" or "Superdollar".

11. When counterfeit currency such as the Supernote is sold to persons who know it is counterfeit, the sale price is a fraction of the currency's face value. Eventually, counterfeit currency is exchanged for its full face value in goods or other currency, in transactions with persons and entities who do not know or suspect it is counterfeit.

12. Quantities of the Supernote were manufactured in, and under the offices of the government of, the Democratic People's Republic of Korea ("North Korea"). Individuals, including North Korean nationals acting as ostensible government officials, engaged in a worldwide transportation, delivery, and sale of quantities of Supernotes.

13. Defendant Sean Garland was president of the Irish Workers Party ("WP"). In the course of his official duties for the WP, defendant Sea n Garland would travel frequently to numerous countries, including the former Union of Soviet Socialist Republics and its successor states such as Russia, and would meet with officials of those and other countries, including North Korea.

14. The Official Irish Republican Army ("OIRA"), also referred to as the "Old IRA", is proscribed organisation in Ireland and Northern Ireland that had been established in 1969 following a split in the Irish Republican Army. Defendant Sean Garland was the chief of staff of the OIRA. The WP was the political party associated with the OIRA.

15. During the earl y 1990s, Supernotes began appearing in Ireland. Thereafter, banks and money exchanges in Ireland declined to exchange $ 100 bills.

16. During 1993 and 1994, defendant Hugh Todd was detected exchanging and attempting to exchange Supernotes for British currency at numerous banks in the United Kingdom; at the time of arrest for that activity, on July 27, 1994, he possessed Supernotes.

17. In 1996, United States began to issue our redesigned $100 bill; a distinctive feature of the change was that the portrait of Benjamin Franklin appearing in the centre of the bill was significantly enlarged. Thereafter, the older bills were commonly referred to as "small heads" and the new bills were commonly referred to as "big heads". Four security features of the "big heads" were the use of a particular optically variable ink ("OVI "), the use of an enhanced embedded security thread, a security watermark, and changed microprinting.

18. In the late 1990s, and continuing throughout the period of this indictment, Supernotes in the "big head" design began to be detected in circulation around the world; they were initially designated by the United States Secret Service as "C- 21555".

19. In or about October 1997, defendant Sean Garland and "J.M." travelled to Warsaw, Poland, where defendant Sean Garland met with North Korean national s to arrange for the purchase of a quantity of Supernotes.

THE CONSPIRACY

20. Beginning at least in or before December 1997 and continuing through at least on a bout July 7, 2000, in the Republic of Ireland, the United Kingdom, Russia, Belarus, Poland, Denmark, the Czech Republic, Germany and elsewhere outside the jurisdiction of any particular state or district of the United States but within the extraterritorial jurisdiction of the United States and therefore, pursuant to 18 U .S.C. §3238, within the venue of the United States District Court for the District of Columbia, the defendant's Sean Garland, Christopher John Corcoran, David Levin , Terence Silcock, Hugh Todd, Alan Jones, and Mark Adderley unlawfully and knowingly combined, conspired, confederated an agreed together and with others known and unknown to the Grand Jury, to commit offences against the United States, that is to commit, outside the United States, counterfeiting acts - to wit: dealing, possessing, buying, selling, exchanging, transferring, receiving and delivering counterfeited obligations of the United States (that is, $100 Federal Reserve Notes), with the intent that such counterfeited obligations of the United States be passed, published, and used as true and genuine—in violation of 18 U.S.C. §§ 470 and 473."

Submissions on behalf of the Respondent

7.6 The respondent contends that the essence of the offence as particularised in the indictment is conspiracy to commit unlawful acts, and specifically counterfeit acts, and that such an offence would under the law of the State be regarded as having been committed in the State and, accordingly, that the Irish courts would have jurisdiction to try the respondent for the alleged offence. The respondent maintains that the Irish courts certainly have such jurisdiction in the circumstances of the particular case where it is alleged that acts done in furtherance of the conspiracy were committed in Ireland. However, the respondent goes further and contends that the Irish courts would have jurisdiction in any event having regard to the nature of the conspiracy offence.

7.7 Moreover, the respondent further contends that in this case, beneath the umbrella of the generic inchoate offence of conspiracy to commit counterfeiting acts already referred to, there are many more specific conspiracy offences, as well as substantive acts allegedly done in furtherance of the conspiracy and to which the respondent was allegedly a party, which in their own right constitute

offences against Irish criminal law and for which the respondent could be prosecuted in Ireland. The respondent has submitted that such acts could include (i) conspiracy to utter or to possess forged "bank notes" (as defined in s. 1 8 of the Forgery Act, 1913). contrary to common law; (ii) actual uttering/possession of forged bank notes, contrary to s. 6 or s. 8 of the Forgery Act, 1 91 3; (iii) conspiracy to possess/distribute counterfeit "bank notes" (as defined in s. 52 of the Central Bank Act, 1942), contrary to common law (iv) actual possession/distribution of counterfeit bank notes, contrary to s. 55 of the Central Bank Act, 1942 and (v) complicity in the distribution of the proceeds of crime, contrary to s. 31 of the Criminal Justice Act, 1994

7.8 The principal authority on which the respondent relies is *Ellis v 0'Dea (No.2)* [1991] 1 I.R. 251, a decision of the Supreme Court. In that case the United Kingdom (hereinafter the U.K.) was seeking to extradite the appellant from Ireland to face various charges including, *inter alia*, a charge of conspiring in Ireland to cause explosions in the U.K. The appellant had attempted before the High Court to resist his extradition on various grounds but without success. He then appealed to the Supreme Court. The principal judgment was delivered by Finlay C.J. (with whom Griffin, Hederman, McCarthy and O'Flaherty JJ. agreed). In the course of his judgment, Finlay C.J. considered (in the context of a correspondence issue) whether a person entering into a conspiracy outside Ireland in furtherance of which an overt act is done in Ireland is amenable to trial in the courts of Ireland. In doing so, he enunciated the following proposition at 258 upon which the respondent in the present case relies heavily:

> "....it is a fundamental principle of the Irish common law, applicable to the criminal jurisdiction of the Irish courts, that a person entering into a conspiracy outside Ireland in furtherance of which an overt act is done in Ireland is amenable to trial in the courts of Ireland. I am equally satisfied that a person who, though located outside Ireland, does an act which either in itself or by reason of the conduct of an accomplice has the effect of completing a criminal offence in Ireland, is amenable to the Irish courts. The broad reason underlying these two principles is, or course, that the criminal law must take cognisance of any crime committed with in the State and must make persons, if charged before it, amenable for that crime, irrespective of where they were located at the time of its commission. It would be the very negation of an adequate criminal jurisdiction and an absurdity if a person joining in a criminal act being either a conspiracy or a joint venture could escape responsibility by reason of the fact that he has committed no overt act within the jurisdiction."

7.9 The Courts attention was also drawn to the English House of Lords decision in a case of *R. v. Doot* [1973] A.C. 807. The respondents in *Doot*, American citizens, formed a plan abroad to import cannabis into the United States by way of England. In pursuance of the plan, two vans with cannabis concealed in them were shipped from Morocco to Southampton. The cannabis in one of the vans was discovered at Southampton; the other van was traced to Liverpool, from where the vans were to have been shipped to America. and the cannabis in it was found. The respondents were charged with, *inter alia*, conspiracy to import dangerous drugs. At the trial, they contended that the court had no jurisdiction to try them on that count since the conspiracy had been entered into abroad. Lawson J. overruled that submission, but the Court of Appeal quashed the respondents' convictions, holding that the offence of conspiracy was completed when the agreement was made. The D.P.P. appealed to the House of Lords who, allowing the appeal, held that although a conspiracy was complete as a crime when the agreement was made it continued in existence so long as there were two or more par1ies to it intending to carry out its design; that the English courts had jurisdiction to try the offence if the evidence showed that the conspiracy, whenever or wherever formed, was still in existence when the accused were in England; and that in the present case the acts of the respondents in England sufficed to establish the continuing existence of the conspiracy and their convictions had been right and should be restored.

7.10 The respondent in the present case places particular reliance on certain passages contained in the judgments of Lord Wilberforce and Lord Pearson, respectively, in *Doot*.

7.11 Lord Wilberforce said (at p. 817, para E, *et seq*):

"In the search for a principle, the requirement of territoriality does not, in itself, provide an answer. To many simple situations, where all relevant elements occur in this country, or, conversely, occur abroad, it ma y do so. But there are many "crimes" (I use the word without prejudice at this stage) the elements of which cannot be so simply located. They may origin ate in one country, be continued in another, produce effects in a third. Some constituent fact, the posting or receipt of a letter, the firing of a shot, the falsification of a document, may take place in one country, the other necessary elements in another. There is no mechanical answer, either through the Latin maxim ... "

This is a reference to the maxim: *extra territorium jus dicenti impune non paretur* (which roughly translates as "the judgment of one who exceeds his territorial jurisdiction can be disobeyed with impunity").

"...or by quotation of Lord Halsbury L.C's words in *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455 ..."

Lord Halsbury had opined in that case that "all crime is local".

"...or otherwise, which can solve these. The present is such a case.

In my opinion, the key to a decision for or against the offence charged ca n be found in an answer to the question why the common law treats certain actions as crimes. And one answer must certainly be because the actions in question are a threat to the Queen's peace, or, as we would now perhaps say, to society. Judged by this test, there is every reason for, and none that I can see against, the prosecution. Conspiracies are intended to be carried into effect, and one reason why, in addition to individual prosecution of each participant, conspiracy charges are brought is because criminal action organised, and executed, in concert is more dangerous than an individual breach of the law. Why, then, refrain from prosecution where the relevant concert was, initially, formed outside the United Kingdom?

Often in conspiracy cases the implementing action is itself the only evidence of the conspiracy - this is the doctrine of overt acts. Could it be said, with any plausibility, that if the conclusion or a possible conclusion to be drawn from overt acts in England was that there was a conspiracy, entered into abroad. a charge of conspiracy would not lie? Surely not: yet, if it could, what difference should it make if the conspiracy is directly proved or is admitted to have been made abroad? The truth is that, in the normal case of a conspiracy carried out, or partly carried out, in this country, the location of the formation of the agreement is irrelevant: the attack upon the laws of this country is identical wherever the conspirators happen ed to meet; the "conspiracy" is a complex, formed indeed, but not separably completed, at the first meeting of the plotters.

A legal principle which would enable concerting law breakers to escape a conspiracy charge by crossing the Channel before making their agreement or to bring forward arguments, which we know can be subtle enough, as to the location of agreements, or, conversely, which would en courage the prosecution into allegation or fiction of a renewed agreement in this country, all this with n o

compensating merit, is not one which I could endorse.

In addition to these considerations, there is substantial authority, both English and American, that jurisdiction exists to try in our courts conspiracies entered into abroad but implemented here. My noble and learned friend, Lord Pearson, has quoted the English and some of the United States cases - there are others there which could be cited. I adopt and do not repeat his analysis. It establishes, in my opinion, that under existing principles of common l aw, supported by authority, the offence charged was triable in England.

I would add that the further question whether a conspiracy formed abroad to do an illegal act in England, but not actually implemented here, could be tried in the courts of this country is not before us and I express no opinion on it."

7.12 In his judgment Lord Pearson added (at p. 827, para C, *et seq*):

"A conspiracy involves an agreement expressed or implied. A conspiratorial agreement is not a contract, not legally binding, because it is unlawful. But as an agreement it has its three stages, namely (1) making or formation (2) performance or implementation (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed, and the conspirators can be prosecuted even though no performance has taken place: *Reg. v. Aspinall*. 2 Q.B.D. 48, *per* Brett J .A., at pp. 58-59. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it i s governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.

On principle, apart from authority, I think (and it would seem the Court of Appeal also thought) that a conspiracy to commit in En gland an offence against English law ought to be triable in England if it has been wholly or partly performed in England. In such a case the conspiracy has been carried on in England wit h the consent and authority of all the conspirators. It is not necessary that they should all be present in England. One of them, acting on his own behalf and as agent for the others, has been performing their agreement, with their consent and authority, in England. In such a case the conspiracy has been committed by all of them in England. Be it granted that "All crime is local" and "The jurisdiction over the crime belongs to the country where the crime is committed ...":*per* Lord Halsbury L.C. in *Macleod v. Attorney-General for New South Wales* [1891] A.C. 455,458. The crime of conspiracy in the present case was committed in England, personally or through an agent or agents, by all the conspirators.

The balance of authority is in favour of the view that the English courts have jurisdiction in a case such as this."

7.13 Lord Pearson then reviewed the authorities at some length including *Reg. v. Best*, 1 Salk. 174; *Rex v. Brisac*, 4 East 164 citing *Rex v. Bowes* (unreported, 30th May, 1787); *Rex v. Stone* (1796) 6 Term.Rep. 527 (where *Rex v. Bowes* was relied upon in argument by the Attorney General, as well as R. v. Hardy and Tooke referred to in *East's Pleas of the Crown* [1 East P.C. 60, 99]); the case of *Reg. v. Meany* in the Irish Court for Crown Cases Reserved (1867) 10 Cox C.C. 506; and the majority opinion of the Supreme Court of the United States in *Hyde and Schneider v. United States* (1912) 225 U.S. 347.

7.14 In further support of the respondents contention that the State has criminal jurisdiction over a trans-national conspiracy that has significant links with the State, the Court was also referred by the respondent to the English case of *R. v. Smith (Wallace Duncan) (No. 4)* [2004] 1 Q.B. 418, where it was held that a court has jurisdiction to try an offence of obtaining services by deception where the obtaining took place outside the jurisdiction but a substantial part of the deception took place within the jurisdiction, provided that there was no reason of international comity why the court should not do so. The Court further held, at p. 1438, that "it would undermine the inherent nature of the common law if courts were prevented as a matter of principle from developing the law to meet the needs of contemporary society in the present situation."

7.15 To the same end the Court was also referred to *R. (Purdy) v. D.P.P.* [2010] 1 A.C. 345, a judicial review to secure guidelines on the circumstances in which travelling from England to Zurich to commit suicide was an offence in English law. In that case, the House of Lords proceeded on the assumption that complicity in England is an offence, irrespective of where the actual suicide occurs, notwithstanding that the Suicide Act 1961 does not purport in terms to apply extraterritorially. The headnote concludes at p. 346: "Quaere: Whether acts in England and Wales which assist a person to travel to a foreign country, where assisted suicide is lawful, for the purpose of there committing suicide, fall within the scope of [this] Act."

7.16 Finally, the respondent further referred the Court to *Attorney General v. X* [1992] 1 I.R. 1. However, the Court does not regard this case, which it has nonetheless carefully considered, as being relevant or in point as it concerned a civil injunction granted in very unique circumstances that are very far removed from the circumstances of the present case. The X case concerned an injunction granted to restrain a proposed course of action (travel abroad) that would have facilitated a further proposed course of action abroad (the abortion of a pregnancy) that would have been lawful in the foreign state but unlawful and, indeed, a crime in this State. In the Court's view, it is unnecessary in the circumstances to specifically review it.

Submissions on behalf of the Applicant

7.17 In reply to the respondent's submission, the applicant commences by accepting that at the relevant time it was an offence under Irish law to possess or to utter forged US Dollars, and that it was also an offence to engage in a conspiracy to commit such an offence, where this State had by law jurisdiction over such conspiracy. Moreover, the applicant accepts Ireland had jurisdiction over such a conspiracy committed wholly within the State. It is further accepted that Ireland also had jurisdiction, per *Ellis v. O'Dea* [1991] 1 I.R. 251, over a conspiracy committed outside Ireland with the object of committing an offence within this State if any of the conspirators committed an overt act of the conspiracy within Ireland.

7.18 However, the applicant contends that the State did not have jurisdiction over the conspiracy in issue at the time the actions complained of were effected. The respondent is alleged to have conspired within this State and elsewhere to commit counterfeiting acts in respect of US Dollars outside the State. Although some of the overt acts alleged in the indictment include the possession of forged super dollars in Ireland, the object of the conspiracy was one of dealing and trading in forged US Dollars. This is the gravamen of the conspiracy, the worldwide distribution and dealing in forged US Dollars, not the possession of those dollars at certain stages of the plot in this State which was merely incidental to the objective of dealing in and distributing the forged dollars outside Ireland.

7.19 The applicant submits that the law, prior to the coming into force of the Criminal Justice Act 2006 (hereinafter the Act of 2006), was that if a conspiracy was committed outside Ireland with the object of committing an offence inside Ireland then if any of the conspirators or their accessories committed an overt act of the conspiracy in Ireland, a prosecution could be brought for the conspiracy (*Ellis v. O'Dea*). If the conspirators, however, conspired in Ireland to do an act outside the State there was no jurisdiction

at common law to charge them with the offence. The common law position prevailed in Ireland prior to the coming into force of s. 71 of the Act of 2006 which created a new statutory offence of conspiracy that is expressed to embrace a conspiracy committed outside the State in specified circumstances. However, at the time of the commission of the offence alleged against the respondent, which was prior to the enactment of s. 71 of the Act of 2006, this State did not have jurisdiction over a conspiracy committed outside the State.

7.20 In the course of oral submissions to the Court, counsel for the applicant further submitted that, in considering whether s. 15 of the Act of 1965 applies in any particular case, the Court must approach the matter by considering whether the entire offence, and not just a single constituent part of it, is regarded under the law of the State as having been committed in the State. As authority for this, counsel relies upon the judgment of Keane C.J. in the case of *Stanton v O'Toole* [2000] I.E.S.C. 36 (unreported, Supreme Court, 9th of November, 2000).

7.21 *Stanton v O'Toole* was a case arising under Part III of the Act of 1965 in which the applicant faced extradition to Scotland for an alleged rape, and sought his release under s. 50 of the Act of 1965 on the ground, *inter alia*, that the offence described in the warrant did not correspond with an offence in Irish law. The case did not concern s. 15 of the Act of 1965. However, s. 50 (c) of the 1965 Act (since repealed) required that person arrested on foot of a backed extradition warrant should be released if the High Court was of opinion that **"the offence** specified in the warrant does not correspond with any offence under the law of the State which is an indictable offence or is punishable on summary conviction by imprisonment for a maximum period of at least six months" [emphasis added]. The warrant at issue recited that the plaintiff had been indicted for an offence particularised as follows:

> "On the 24th day of September 1993 at Laidlaw House, 95 Cheapside Street, Glasgow, you did assault Frances O'Rourke, care of Cranston Hill Police Office, Glasgow, seize hold of her, remove her clothing. struggle with her, place your hand over her mouth, throw her to the floor, scratch her on the face, restrain her, repeatedly pull her hair, force her to take your private member in her mouth and suck same, handle and insert your fingers into her private parts, penetrate her hinder parts with your private member, masturbate in her presence, lie on top of her, force her legs apart and rape her."

7.22 The plaintiff's case in Stanton was based on the proposition that "the offence" to which the warrant related was one of rape, and that the words "and rape her" addressed neither the issue of absence of consent by the victim nor the state of knowledge of the plaintiff. The plaintiff was unsuccessful both in the High Court and in the Supreme Court, the latter following the approach previously adopted in *Harris v Wren* [1984] I.L.R.M. 120. In his concluding remarks on this issue, Keane C.J. said the following, on which the applicant places particular reliance:

> "The fact that there are many possible offences in the particulars does not invalidate the warrant. The certificate refers to an indictable offence. Clearly, whilst other offences could have been alleged in this case one alone is being prosecuted. As the documents refer to 'an offence' it is appropriate to assume that the plaintiff will be prosecuted for the one offence alleged and certified. There is no issue of speciality argued in this case."

7.23 The following exchange then took place between counsel for the applicant, Ms Donnelly S.C., and the Court, arising out of this quotation (transcript, Day 6, pp. 1 24- 125.):

Counsel: "I am just referring to that there to make it clear that the court didn't rely on the other individual acts to say, well, look, there is one alleged there and that's sufficient ...”

Judge: "How does that apply in the present case?"

Counsel: "I say that it is simply the question that the respondent cannot say, as there is an attempt to say for example because there is an offence of possession of supernotes in this jurisdiction, there is a crime, that’s a crime here because there is an allegation contained within these of possession ."

Judge: "It should be focusing on conspiracy?"

Counsel: On the conspiracy and the extent of the conspiracy that is there....."

7.24 It should be stated that the Court is not convinced that the *Stanton* case in fact provides support for the contention that the Court must approach the s. 15 issue by considering whether the entire offence, and not just a constituent part or parts of it, is regarded under the law of the State as having been committed in the State. In saying that, the Court is not to be taken as expressing any view for the moment as to the merits of that contention.

7.25 However, the issue under consideration in *Stanton* was correspondence and it is important not to lose sight of that. The judgment makes it clear that in so far as the question of correspondence was concerned, the Court was not confined to considering whether rape in the issuing state corresponds only with rape as it is defined here. Rather, applying *State (Furlong) v. Kelly* [1971] I.R. 132; *Wilson v. Sheehan* [1979] I.R. 423 and *Hanlon v. Fleming* [1981] I.R. 489 it was held that the Court was entitled to consider all of the underlying facts relevant to the offence specified in the warrant, regardless of what name is given to that offence in the warrant, to see if those facts, or some of them, corresponded with any offence in Irish law which was either an indictable offence or carried a punishment on summary conviction of a maximum term of at least six months imprisonment.

7.26 Moreover, it seems to the Court that more significance is being attached to the specific remarks of the former Chief Justice relied upon, and quoted at paragraph 7.22 above, than ought to be attached to them. In this Court's view the ostensible purpose of the remarks in question was simply to put down a marker that, even though nobody had specifically raised it, the rule against specialty would, in the event of the respondent being surrendered, preclude the requesting state from seeking to try the respondent for any alleged offence other than the charge of rape for which he had been indicted, and notwithstanding that the underlying facts set out in the extradition warrant could support possible charges in relation to a number of other offences.

7.27 Counsel for the respondent also referred the Court to *Board of Trade v. Owen* [1957] A.C. 602. In that case the respondents were convicted on an indictment charging them with a conspiracy in London to defraud an export control department (known as Z.A.K.) of the Federal Republic of Germany by causing Z.A.K. to grant licences to export certain metals from Germany. This was done by fraudulently representing to Z.A.K. that the metals would be supplied to and consumed by Irish manufacturers, the respondents well knowing that they were in fact to be exported to Czechoslovakia, Poland, Romania and the U.S.S.R. The conviction was quashed by the Court of Criminal Appeal. On appeal to the House of Lords, it was held that a conspiracy to commit a crime abroad was not indictable in England unless the contemplated crime is one for which an indictment would lie there, for conspiracy is recognised as an

offence in order to prevent the commission of the substantive offence before it reaches even the stage of an attempt. The court held that this principle is part and parcel of the preservation of the Queen's peace within the realm with which, generally speaking, the criminal law is alone concerned; and, accordingly, a conspiracy of the nature there charged (which was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime) was not triable there, since the unlawful means and the ultimate object were both outside the jurisdiction.

7.28 Referring to *Ellis v. O' Dea (No. 2)* counsel for the applicant further urged upon the Court that that case has to be considered in its special context, *viz* that it was concerned with s. 3 of the Explosive Substances Act, 1883 as substituted by s. 4 of the Criminal Law (Jurisdiction) Act, 1976 which created an offence that was specifically intended by the legislature to be extraterritorial in its scope. The relevant provision states:

"A person who in the State or (being an Irish citizen) outside the State unlawfully and maliciously -

> (a) does any act with intent to ca use, or conspires to cause, by an explosive substance an explosion of a nature likely to endanger life, or cause serious injury to property, whether **in the State or elsewhere**, or
>
> (b) makes or has in his possession or under his control an explosive substance with intent by means thereof to endanger life, or cause serious injury to property, whether **in the State or elsewhere**, or to enable any other person so to do,

shall whether any explosion does or does not take place, and whether any injury to person or property is actually caused or not, be guilty of an offence ..."

[emphasis added]

Counsel for the applicant contends that the position in respect of the conspiracy offence at issue in this case is quite different and there is a presumption against it having extraterritorial effect.

7.29 In relation to *R. v. Smith (Wallace Duncan) (No. 4)* [2004] 1 Q.B. 1418 counsel for the applicant has, in effect, submitted that the decision in that case ought not to be followed because (i) the circumstances of that case are materially distinguishable from the circumstances of the present case, and (ii) the decision in that case was in any event wrong in principle.

7.30 Counsel for the applicant contends that *Smith (Wallace Duncan) (No. 4)* is distinguishable because it concerned, on the one hand, a substantive offence of obtaining services by deception where the obtaining took place outside the jurisdiction but a substantial part of the deception took place within the jurisdiction; whereas the present case, on the other hand, concerns the inchoate offence of conspiring to commit counterfeit acts outside of the jurisdiction.

7.31 The submission that the Court in *Smith (Wallace Duncan) (No. 4)* is wrong in principle is based on a contention that the Court of Appeal in that case overstretched the limits of its entitlement to develop the common law in order to meet the changing requirements of society, and encroached upon an area more properly within the remit of the legislature. Counsel has again urged in this context that there is a presumption in relation to the criminal jurisdiction of the courts that it is territorial, certainly in relation to such jurisdiction as has been created by statute, but also extending to such jurisdiction as is long established at common law, save where the legislature has expressly provided otherwise.

7.32 In relation to *R. (Purdy) v. D.P.P.* [2010] 1 A.C. 345, it was submitted on behalf of the applicant that that case is not relevant to the issues that this Court has to decide because it relates to the specific statutory offence in England of aiding and abetting a suicide in circumstances where suicide itself is not a crime in England. This Court respectfully agrees that it is not, *prima facie*, relevant or in point. The applicant is also of the view that *Attorney General v. X* [1992] 1 I.R. 1 is also not relevant or in point, and as has already been indicated, the Court shares this view.

7.33 In relation to *R. v. Doot* [1973) A.C. 807, counsel for the applicant places some reliance on the following passages in the judgment of Lord Salmon where he states (at p. 833):

"I recognise that the proposition that a conspiracy entered into abroad to commit a crime in England may be an offence under our law appears perhaps to be an exception to the well established general rule that "All crime is local" and that our criminal law does not, as a rule, extend to acts done abroad: *Macleod v. Attorney General for New South Wales* [1891] A.C. 455, 458. Such acts may or may not be criminal under the law of the state in which they are committed. If they are not criminal under that law and do no harm here nor amount to a conspiracy to commit a crime here it would be contrary to the rules of international comity to punish a foreigner and pointless to punish a British subject who had committed such an act abroad and then come to this country. The criminal law of England exists to protect his realm and all those within it, for example, an agreement made in England to commit an unlawful act constitutes the crime of conspiracy only if the act is unlawful by the laws of England. It is not enough that it is unlawful only by the law of the country in which it is to be committed: *Board of Trade v. Owen* [1957] A.C. 602.

If a conspiracy is entered into abroad to commit a crime in England, exactly the same public mischief is produced by it as if it had been entered into here. It is unnecessary for me to consider what the position might be if the conspirators came to England for an entirely innocent purpose unconnected with the conspiracy. If, however, the conspirators come here and do acts in furtherance of the conspiracy, for example, by preparing to commit the planned crime, it cannot, in my view, be considered contrary to the rules of international comity for the forces of law and order in England to protect the Queen's peace by arresting them and putting them on trial for conspiracy whether they are British subjects or foreigners and whether or not conspiracy is a crime under the law of the country in which the conspiracy was born."

7.34 Counsel for the applicant submitted that it is clear from these passages that *Board of Trade v. Owen* still represented the law as far as the House of Lords was concerned, and that in respect of a conspiracy entered into abroad it is only where significant overt acts in furtherance of the objective(s) of the conspiracy, and not merely incidental to it, have been committed within the U.K. that the conspirators can be prosecuted and tried in the U.K. That, says counsel, also accords with Irish Supreme Court's view as to the law here as expressed in Ellis *v. O'Dea (No 2).* However, in counsel's view neither *R. v. Doot* nor *Ellis v. O'Dea (No. 2)* provides support for the proposition that acts committed here that are merely incidental to a conspiracy the principal or main object of which is to commit a crime or crimes (in this case counterfeiting acts) abroad, can be prosecuted here.

The Court's Decision

7.35 Before considering the law in relation to the matter at issue, it is necessary for the Court to state its view of the facts as disclosed in the request for extradition and the documents supporting it. In that regard, the Court is concerned with (a) what the alleged objectives of the alleged conspiracy were, and (b) what acts of actual conspiracy, or overt acts in furtherance of the conspiracy, if any, were alleged to have been committed by the conspirators (including, and in particular, those alleged to have been committed in Ireland).

7.36 Having carefully considered the request for extradition and the documents supporting it, I find as a fact that the alleged objectives of the conspiracy to commit counterfeiting acts outside of the United States are those set out in paragraph 21 of the indictment filed with the United States District Court by a Federal Grand Jury sitting in the District of Columbia, USA on the 19th of May 2005 and which is exhibit A to the affidavit of Brenda J. Johnson sworn on the 12th of November, 2008.

7.37 Paragraph 21 of the indictment is in the following terms:

> "The objects of the conspiracy were:
>
> a) to make money by participating in buying and transporting Supernotes, and then either selling them for profit to person s who knew they were counterfeit, or passing them off as genuine to persons and businesses in exchange for legitimate currency o r things of value;
>
> b) to maximise profit by obtaining Supernotes in substantial quantities as directly as possible from their ultimate source, North Korea, and then reselling them as quickly as possible in quantity at a higher price;
>
> c) to continually seek new buyers for quantities of Supernotes, while continuing to arrange additional purchases of Supernotes for existing buyers;
>
> d) to minimise expenditures and risk of loss, by having conspirators engaged in buying and transporting Supernotes either advance the funds for Supernotes or post a money bond against their loss;
>
> e) to protect the true source of the Supernotes, North Korea, and a principal purchaser of its Supernotes, Sean Garland, from detection and consequent disruption of their activities, by:
>
> (1) limiting to only very close associates of defendant Sean Garland the true identity of the ultimate source of the Supernotes, that is, North Korea. and falsely letting other conspirators believe the source of the Supernotes was in Russia;
>
> (2) avoiding direct contact between defendant Sea n Garland and his less-senior conspirators and potential Supernate buyers. and instead using his close associates, including Christopher John Corcoran, to make and maintain contact with them:
>
> f) to maintain operational security --that is, to evade an d avoid detection by law enforcement, and consequent arrest, and the destruction of the illegal activity-- by:
> (1) using false, fraudulent identity documents, and the names and genuine identity documents of other persons, in order to travel and conduct transactions without identification ;
>
> (2) "laundering" proceeds from Supernote transactions so as to conceal the true source of the proceeds;
>
> (3) practising "compartmentation", that is, limiting information about any particular aspect of a transaction to those conspirators having a need to know it;
>
> (4) using unwitting persons to courier Supernotes and payments for Supernotes:
>
> (5) using codes-- such as "jackets" and "paperwork" for Supernotes --and secure communications; and
>
> (6) whenever questioned by authorities, to deny, minimise, and lie about the illegal activity so as to avoid full disclosure of its true nature a nd scope and of the identities of persons participating in it."

7.38 The Court further finds as a fact, from a consideration of the request for extradition and the documents supporting it. that the following acts of actual conspiracy, or overt acts in furtherance of the conspiracy, as particularised in paragraphs 22 and 23 of the indictment, are alleged to have been committed by the conspirators:

> **"Manner and Means Used to Accomplish the Objects of the Conspiracy**
>
> 22. a) Defendant Sean Garland used his official capacities with the WP and GKG Comms --and particularly those entities' international associations and activities -- as vehicles for travelling abroad (that is, outside of Ireland) and for communicating and meeting wit h persons abroad -- including North Korean nationals engaged in the transportation and sale of Supernotes -- and for arranging for the purchase, transportation, and resale of Supernotes.
>
> b) Other conspirators likewise used ostensibly legitimate business and personal reasons for travel, meetings, and other activities related to Supernote transactions.
>
> c) Defendant Sean Garland used his OIRA associates to conduct activities on behalf of his Supernotes organisation .
>
> d) The conspirators directly, an d through one another and other associates, sought out individual s interested in buying quantities of Supernotes, and then arranged with those buyers the delivery of, and payment for. Supernotes.
>
> e) In order to maintain the confidence of potential buyers, the conspirators obtained. promised to obtain, and attempted to obtain. sample Supernotes to demonstrate their high-quality.

f) While maintaining their practice of "compartmentation" the conspirators exchanged among themselves information about past and planned transactions in order to understand operational problems and avoid them in future.

g) Defendants Christopher John Corcoran, Terence Silcock and Mark Adderley identified and solicited defendant David Levin as a person who would buy and arrange for transport of quantities of Supernotes, and maintained contact with him and his associates for the purpose of arranging Supernote transactions. In order to buy and transport Supernotes, defendant David Levin obtained funds and couriers from and through an associate in Latvia, "H. J ."

h) Defendants Alan J ones, Terence Silcock and Christopher John Corcoran identified and solicited two potential buyers of quantities of Supernotes, and maintained contact with them for the purpose of arranging Supernate transactions.

i) Defendant Sean Garland met with North Korean nationals to arrange for Supernote transactions, including transactions involving the new "big head" Supernotes.

j) In January 1999 and June 1999, defendants Sean Garland, Christopher John Corcoran and Terence Silcock travelled to Moscow, Russia, to participate in the purchase of Supernotes, but on each occasion the transaction did not occur and later transactions were planned for, and executed in, Minsk, Belarus.

k) When the "big head" Supernotes became available, conspirators who hailed "small head" Supernotes, including defendant Sean Garland, sought to dispose of their remaining "small head" Supernotes before selling "big head" Supernotes.

l) Payments for Supernotes from defendant David Levin and others were conveyed to defendant Sean Garland through defendant Christopher John Corcoran, often by hand delivery through couriers including the defendant Terence Silcock and other associates.

m) Conspirators and associates would carry Supernotes and payments for Supernotes between Ireland and the United Kingdom by ferry boat because ferry passengers did not undergo security checks.

n) Defendant David Levin arranged for visas be obtained for conspirators and their associates to travel to Russia and elsewhere.

o) Conspirators kept written notes indicating quantities of Supernotes and payments for Supernotes.

Overt Acts

23. In further of the conspiracy and to accomplish the objects of the conspiracy, the conspirators committed the following overt acts, among others: ..."

(those that may be regarded as having been committed, or partly committed, in Ireland are in italics - the court's emphasis]

" ….(1) In or about December 1997, in the United Kingdom, defendant Christopher John Corcoran met with defendant Terence Silcock.

(2) *On or about February 27, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.*

(3) *On or about March 7, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.*

(4) On or about March 12, 1998, defendant Sean Garland and associates travelled to Moscow, Russia.

(5) On or about March 24, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(6) In or about March 1998, in Ireland, defendant Christopher .John Corcoran gave sample Supernotes to defendant Terence Silcock.

(7) In or about early 1998, in the United Kingdom, defendant Mark Adderley introduced defendants Terence Silcock and Christopher J ohn Corcoran to defendant David Levin as a potential buyer for Supernotes.

(8) On or about April 9, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(9) On or about April 17, 1998, defendant Sean Garland and associates, including defendant Hugh Todd, travelled to Moscow, Russia.

(10) On or about May 5, 998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(10) On or about May 17, 1998 defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(12) On or about June 5, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(13) On or about June 28, 1998, defendant Sean Garland and associates, including defendant Hugh Todd, travel led to Moscow, Russia.

(14) On or about July 10, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(15) On or about August 26, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(16) In or about mid-late 1998, defendant David Levin gave money to defendant Terence Silcock in payment for Supernotes.

(17) In or about mid-late 1998, in Ireland, defendant Terence Silcock obtained $100,000 in Supernotes from defendant Sean Garland through Christopher John Corcoran, in exchange for money he had received from David Levin.

(18) On or about October 30, 1998, in the United Kingdom, defendant Alan Jones exchanged Supernotes at a Thomas Cook travel agency.

(19) On or about October 31. 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(20) On or about November 25, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(21) On or about December 14, 1998, defendant's Terence Silcock and Alan Jones travelled from the United Kingdom to Ireland by air.

(22) In or about December 1998. in Ireland, defendants Sean Garland, Christopher John Corcoran, and Terence Silcock met and discussed travelling to Moscow, Russia, to obtain Supernotes for defendant David Levin.

(23) On or about December 15, 1998, defendants Terence Silcock and Alan Jones travelled from Ireland to the United Kingdom by ferry boat.

(24) On or about December 15, 1998. defendant Terence Silcock carried Supernotes, concealed on his person, from Ireland to the United Kingdom.

(25) On or about December 15, 1998, defendant Alan Jones carried Supernotes, concealed on his person, from Ireland to the United Kingdom.

(26) On or about January 14, 1999, defendants Sean Garland, Christopher John Corcoran, and Terence Silcock travelled to Moscow, Russia to obtain Supernotes.

(27) On or about January 26, 1998, defendant Terence Silcock travelled from the United Kingdom to Ireland by ferry boat.

(28) In or about January 1999, in Ireland, defendants Sean Garland and Christopher John Corcoran discussed the need to dispose of "small head" Supernote before obtaining new "big head" Supernotes.

(29) On or about February 2, 1999, in the United Kingdom, defendant Terence Silcock went to the residence of defendant David Levin.

(30) On or about February 5. 1999, at defendant Christopher John Corcoran's direction, defendant Terence Silcock picked up defendant Hugh Todd from the Birmingham airport in the United Kingdom, and took him to a hotel.

(31) On or about February 6, 1999, in the United Kingdom, defendant Christopher John Corcoran explained to Hugh Todd how the January 1999 trip to Moscow, Russia, had not been successful.

(32) On or about February 6, 1999 in the United Kingdom, defendant Christopher John Corcoran told defendant H ugh Todd that defendant Sean Garland had given him "big head" Supernotes.

(33) On or about February 6, 1999, in the United Kingdom, defendant Christopher John Corcoran gave a "big head" Supernote to defendant Hugh Todd.

(34) On or about February 6, 1999, in the United Kingdom, defendant Hugh Todd told defendant Christopher John Corcoran that defendant Sean Garland had given Todd a genuine passport of another person but bearing Todd's photograph, for Todd to use in passing Supernotes.

(35) On or about February 6, 1999 in the United Kingdom, defendants Christopher John Corcoran, Terence Silcock and Hugh Todd met together.

(36) On or about February 10, 1999, in United Kingdom, defendant Alan Jones offered to obtain Supernotes for two potential buyers.

(37) On or about March 21, 1999, in the United Kingdom, defendants Terence Silcock and Alan Jones met with the two potential buyers of Supernotes and discussed obtaining samples for them.

(38) On or about March 21, 1999, in the United Kingdom, defendants Terence Silcock and Alan Jones told the two potential buyers of Supernotes that Supernotes could be obtained in Warsaw, Poland, or Minsk, Belarus, and that a person could carry, concealed, $250,000 in Supernotes.

(39) On or about April 6, 1999, in the United Kingdom, defendants Terence Silcock told the two potential buyers of Supernotes that he expected to obtain samples delivered from Russia to his Irish contact, defendant Christopher John Corcoran, and that the buyers' first purchase had to be for at least $250,000 in Supernotes.

(40) On or about April 7, 1999, in the United Kingdom, defendant Terence Silcock went to the residence of defendant David Levin.

(41) On or about April 9. 1999. defendant Terence Silcock travelled from the United Kingdom to Ireland.

(42) On or about April 21. 1999, in the United Kingdom, defendant Terence Silcock told one of the two potential buyers of Supernotes that he would be meeting the next day with his Irish contact, defendant Christopher John Corcoran.

(43) On or about April 2, 1999, defendant Christopher .John Corcoran travelled from Ireland to the United Kingdom.

(44) On or about April 22, 1999, in the United Kingdom, defendants Christopher John Corcoran and Terence Silcock went to the residence of defendant David Levin.

(45) On or about April 23, 1999, in the United Kingdom, defendants Terence Silcock and Alan Jones met with the two potential buyers of Supernotes and discussed Supernotes due to arrive from Moscow, Russia.

(46) On or about April 29, 1999, in the United Kingdom, defendants Terence Silcock and David Levin had a conversation about laundering proceeds from illegal activity.

(47) On or about May 18, 1999, in the United Kingdom, defendant Terence Silcock told the two potential buyers of Supernotes that he would be travelling to Moscow, Russia, with defendants Sean Garland and Christopher John Corcoran and that defendant David Levin was arranging for Russian visas for them.

(48) On or about June 2, 1999, defendant Terence Silcock travelled from the United Kingdom to Ireland.

(49) On or about June 8, 1999, in the United Kingdom, defendant Terence Silcock, in order to maintain the interest of the two potential buyers of Supernotes, led them to believe that $1 million in Supernotes had arrived in London.

(50) On or about June 15, 1999, in the United Kingdom, defendants Terence Silcock and Alan Jones met with the two potential buyers of Supernotes. discussed obtaining Supernotes, and said *defendant Terence Silcock was travelling to Ireland on June 21. 1999. to meet with "the top man" - defendant Sean Garland*

(51) On or about June 21, 1999, defendant Terence Silcock travelled from the United Kingdom to Ireland, returning the same day.

(52) On or about June 21, 1 999, defendant Alan Jones told the two potential buyers of Supernotes that defendant Terence Silcock was travelling to Russia on June 25, 1999

(53) On or about June 22, 1999, defendant Terence Silcock went to the residence of defendant David Levin.

(54) On or about June 24, 1999, defendant Christopher John Corcoran travelled from Ireland to the United Kingdom.

(55) On or about June 24, 1999, in the United Kingdom, defendant David Levin gave passports containing Russian visas to defendants Christopher John Corcoran and Terence Silcock.

(56) On or about June 25, 1999, defendant Sean Garland travelled to Moscow, Russia.

(57) On or about June 25, 1999, defendants Christopher John Corcoran and Terence Silcock travelled to Moscow, Russia

(58) On or about June 25, 1999, defendant Sean Garland met in Moscow, Russia, with North Korean nationals.

(59) On or about June 25, 1999, in Moscow, Russia, defendant Christopher John Corcoran placed a call to the cellphone of defendant Sean Garland.

(60) On or about July 9, 1999, in the United Kingdom, defendants Terence Silcock and Alan Jones met with the two potential buyers of Supernotes and explained that the Russia trip had gone ahead at defendant Sean Garland's direction, even though defendant David Levin had forewarned them that police authorities had prior knowledge of the trip.

(61) On or about July 27, 1999, in the United Kingdom, defendants Terence Silcock and Alan Jones told the two potential buyers of Supernotes that defendant Sean Garland was "the Colonel in Chief' of "the old style IRA" and "when he capitalizes on the paperwork" - meaning Supernotes- "it all goes back into the organisation".

(62) On or about July 27, 1999, defendant Terence Silcock instructed defendant Christopher John Corcoran to travel to the United Kingdom to meet with the two potential buyers of Supernotes.

(63) On or about July 31. 1999, defendant Christopher John Corcoran travelled from Ireland to the United Kingdom.

(64) On or about July 31. 1999, in the United Kingdom, defendants Terence Silcock and Christopher John Corcoran met with the two potential buyers of Supernotes, and discussed defendant Sea n Garland and their travel to Moscow, Russian to obtain Supernotes.

(65) On or about August 1, 1999, in the United Kingdom, defendant Christopher John Corcoran told the two potential buyers of Supernotes that defendant Sean Garland had sent him to find out about a leak in the Supernote organisation, and instructed the two potential buyers to maintain contact directly with defendant Christopher John Corcoran.

(66) On or about August 23, 1999, in the United Kingdom, defendants Christopher John Corcoran and Terence Silcock and “D.U.” met.

(67) On or about September 6, 1999, in the United Kingdom, defendant Christopher John Corcoran instructed one of the two potential buyers of Supernotes on codewords - including ''jackets' - to use in discussing Supernotes.

(68) On or about September 6, 1999, in the United Kingdom, defendant Christopher John Corcoran assured the two potential buyers of Supernotes that defendant Sean Garland, who was a "top IRA man" to whom he was related by marriage, had sent defendant Christopher John Corcoran to address the problem of a possible leak in the Supernote organisation .

(69) On or before September 6, 1999, in the United Kingdom, defendant Christopher John Corcoran stored in his cell phone a phone number of defendant Sean Garland.

(70) On or about September 7, 1999, in the United Kingdom, defendant Christopher John Corcoran to ld defendant Terence Silcock that he would be meeting with defendant David Levin the n ext day.

(71) On or about September 7, 1999, in the United Kingdom, defendant Christopher John Corcoran told the two potential buyers of Supernotes that in order to buy $1 million in Supernotes they would have to put up a bond as defendant David Levin had done.

(72) On or about September 8, 1999, in the United Kingdom, defendants Christopher John Corcoran and David Levin met, together with "D.U."

(73) On or about October 20, 1999, in the United Kingdom, defendant Terence Silcock gave passports containing Belarus visas to "J.D."

(74) On or about October 21, 1999, in Copenhagen, Denmark, defendant Sean Garland faxed to Minsk, Belarus, a hotel reservation request for himself for the next day.

(75) On or about October 22, 1999, defendant Sean Garland travelled from Copenhagen, Denmark to Minsk, Belarus.

(76) On or about November 2, 1999, defendant Sean Garland travelled to Birmingham, United Kingdom.

(77) On or about November 3, 1999, defendant Christopher John Corcoran travelled to Birmingham, United Kingdom.

(78) On or about November 3, 1999, in the United Kingdom, defendants Sean Garland, Christopher John Corcoran and Terence Silcock met.

(79) On or about November 6, 1999, defendant Terence Silcock travelled from the United Kingdom to Ireland.

(80) On or about November 6, 1999, in Ireland, defendant Terence Silcock met couriers bringing money from defendant David Levin for payment to defendant Sean Garland through defendant Christopher John Corcoran.

(81) On or about November 24, 1999, in the United Kingdom, defendant Terence Silcock sent "D.U." to Ireland.

(82) On or before November 29, 1999, in the United Kingdom, defendant David Levin provided Supernotes to "M.M." to exchange for British currency, which "M. M." then did, using a Lithuanian passport in the name of "Gediminas Gotautas".

(83) *On or about December 21. 1999, in the United Kingdom, defendant Terence Silcock sent 'D.A." to Ireland to deliver money from defendant David Levin to defendant Sean Garland through defendant Christopher John Corcoran*.

(84) *On or about December 21, 1999, in Ireland, defendant Christopher John Corcoran met with "D.A.", who gave him a package of money.*

(85) *On or about December 21, 1999, in Ireland, defendants Sean Garland and Christopher John Corcoran met*.

(86) *On or about January 16, 2000, in the United Kingdom, defendant Terence Silcock sent "D.U." to Ireland.*

(87) On or about February 8, 2000, in the United Kingdom, defendants David Levin, Terence Silcock and Mark Adderley met.

(88) On or about March 30, 2000, in the United Kingdom, defendants David Levin and Mark Adderley met, together with "M.M."

(89) On or before March 30, 2000, in the United Kingdom, defendant Christopher John Corcoran sent a package to defendant David Levin, from Ireland to the United Kingdom, via "M.M."

(90) On or about March 31. 2000, in the United Kingdom, defendant David Levin caused an associate to make a telephone call inquiring whether the package from Ireland had arrived.

(91) On or about March 31, 2000, in the United Kingdom, defendant David Levin went to the residence of "M .M."

(92) On or about March 31, 2000, in the United Kingdom, defendant Mark Adderley gave defendant Terence Silcock a cash payment from defendant David Levin for Supernotes.

(93) On or about April 4, 2000, in the United Kingdom, defendant Terence Silcock picked up "A.B" from Birmingham Airport.

(94) On or about April4, 2000, in the United Kingdom, defendant Terence Silcock and "A.B." met with two persons sent by defendant David Levin, and obtained passports containing Russian visas.

(95) *On or about April 4. 2000, in the United Kingdom, defendant Terence Silcock drove "A.B" back to Birmingham Airport, from where "A.B" flew back to Ireland.*

(96) *On or about April 5. 2000, "TL" and "G.D" travelled from Ireland to Minsk, Belarus, via the United Kingdom and Germany.*

(97) On or about April 5, 2000, in the United Kingdom, defendants David Levin, Terence Silcock and Mark Adderley met.

(98) On or about April 18, 2000, in the United Kingdom, defendants Terence Silcock, David Levin and Mark Adderley met, together with "M. M."

(99) On or about April 18, 2000, in the United Kingdom, defendant David Levin gave money to defendant Terence Silcock for Supernotes.

(100) On or about April 20. 2000, in the United Kingdom, defendant Terence Silcock phoned defendant Christopher John Corcoran from a public telephone.

(101) In or about May 2000, in the United Kingdom, defendant David Levin informed defendant Terence Silcock that Levin was no longer able to exchange quantities Supernotes through Russian banks, as an explanation for why Levin was having difficulty paying money owed to defendant Sean Garland for Supernotes.

(102) In or about May, 2000 in the United Kingdom, defendant David Levin informed defendant Terence Silcock that border authorities in Europe had confiscated $250,000 in Supernotes from Levin's couriers, including "R.C", as an explanation for why Levin was having difficulty paying money owed for Supernotes.

(103) *On or about May 17, 2000, defendant Terence Silcock travelled from the United Kingdom to Ireland.*

(104) On or about May 27, 2000, in the United Kingdom, defendant Terence Silcock faxed a Russian-language document relating to Russian banks' detection of Supernotes, and German-language documents relating to the border authorities' confiscation of $250.000 in Supernotes, to defendant Christopher John Corcoran in Ireland as evidence of why defendant David Levin was having difficulty paying money owed for Supernotes.

(105) On or about June 5, 2000, in the United Kingdom, defendant Terence Silcock met with defendant David Levin to obtain money owed for Supernotes.

(106) On or about June 6, 2000, in the United Kingdom, defendant Terence Silcock had a conversation with defendant Christopher John Corcoran.

(107) On or about June 7, 2000, in the United Kingdom, defendant David Levin gave to defendant Terence Silcock money owed to defendant Sean Garland for Supernotes.

(108) On or about June 8, 2000, in the United Kingdom, defendants Terence Silcock and Mark Adderley met and discussed a courier.

(109) *On or about June 8. 2000, in the United Kingdom, defendant Terence Silcock gave $98.000 to a courier for delivery to defendant Sean Garland through defendant Christopher John Corcoran in Ireland.*

(110) On or about June 9, 2000, in the United Kingdom , defendant David Levin falsely stated to law enforcement authorities that he did not know the money he had been dealing in was counterfeit.

(111) On or before July 7, 2000, in the United Kingdom, defendant David Levin ascertained the whereabouts in Moscow, Russia, of approximately $70,000 in Supernotes that he had obtained from the Sean Garland Supernate organization, which Supernotes were subsequently recovered by law enforcement authorities."

7.39 The Court further finds as a fact that the conspirators are alleged to have conspired to commit counterfeiting acts in respect of US Dollars both within and outside this State. It is not, on the face of it, correct to say that such acts of conspiracy, and overt acts in furtherance of the conspiracy, as are alleged to have been committed in Ireland were merely incidental to the alleged objectives of the conspiracy as particularised in paragraph 21 of the indictment.

7.40 In particular the respondent, who is Irish, and was living in Ireland at all material times, is alleged to have been a leading party in the conspiracy. It is further alleged that he was at the head of the criminal organisation behind the conspiracy, variously described, both in the affidavit of Brenda J. Johnson , sworn on the 12th of November, 2008 and/or in the indictment, as the "the Garland organization" (*e.g.* , in paragraph 15 of Ms Johnson's affidavit); as "the Sean Garland Supernote organization"(*e.g.* in paragraph 23(111) of the indictment); and (in the context of a specific reference to Sean Garland) as "his Supernotes organization" (*e.g.* in paragraph 22(c) of the indictment), and that the organisation was based in Ireland. It is allegedly for this reason that other, non-Irish, conspirators, such as Terence Silcock, regularly made trips to Ireland, almost invariably travelling by ferry boat so as to avoid the more stringent security checks at airports.

7.41 Further, and consistent with the allegation that the organisation was based in, and was being run from, Ireland, the indictment alleges that certain specific transactions took place in Ireland, and specifically the transactions particularised at paragraphs 23(17), 23(22), 23(28), 23(80), 23(83), 23(84), and 23(85), respectively. The transactions in Ireland included specific acts of conspiring to commit counterfeit acts (*e.g.* the allegations in paragraphs 23(22) and 23(28)), respectively, of the indictment) and specific overt acts committed in furtherance of the overall alleged conspiracy of dealing in (by possessing, and/or buying and/or selling and/or exchanging, and/or transferring, and/or receiving, and/or delivering) substantial quantities of Supernotes, or substantial amounts of monies intended for the purchase of Supernotes, (e.g. the allegations in paragraphs 23(1 7), 23(80), 23(83), and 23(84), respectively, of the indictment). Moreover, it is alleged that in so far as one objective of the conspiracy was to make money, this was, in so far as Sean Garland's share of it was concerned, to raise funds for the Official IRA, a proscribed organisation that does not recognise the legitimacy of this State (see paragraph 23(61) of the indictment). The Court is of the opinion, therefore, that it would be wrong to conclude that the acts allegedly committed here were, in the circumstances of this particular case, merely incidental to a conspiracy the principal or main object of which was to commit a crime or crimes abroad.

7.42 In the Court's view, the case against the respondent alleges sufficient acts of actual conspiracy, and overt acts committed in furtherance of the conspiracy, within the territory of Ireland, and harmful to the interests of this country and its people, to justify the

conclusion, which the Court has arrived at, that the offence for which extradition is requested would be regarded under the law of the State as having been committed in Ireland.

7.43 The Court in arriving at this conclusion has had regard to all of the case law cited to it in the course of the parties' respective submissions. The Court accepts that the law as to jurisdiction in the case of a conspiracy entered into abroad in furtherance of which an overt act is done in Ireland is as set out *Ellis v. O'Dea* (No. 2) [1991]1 I.R. 251, and is broadly analogous to the traditional English common law position as described in *R. v. Doot* [1973] A.C. 807 which the Court has also found to be of considerable assistance. However, this case does not fit neatly into that pigeon hole.

7.44 In the Court's view, the evidence before it establishes that what is in fact alleged is that an umbrella or overarching conspiracy to commit counterfeit acts involving Supernotes (hereinafter called "the main conspiracy") was formed in, and/or was administered from, Ireland by the respondent and his associates. It is not alleged that the main conspiracy consisted of a single agreement to commit an unlawful act (or acts) entered into at a single point in time and at a single place. It was not that simple. The allegations contained in the request for extradition, and the documents supporting it, suggest that the main conspiracy was formed and acted upon on an incremental basis. The main conspirators, and certainly the respondent and his close associates, are alleged to have been based in Ireland and it is further suggested that the conspiracy was administered or directed from Ireland. However, it also involved various sub-conspiracies and various overt acts are alleged to have been committed in furtherance both of the main conspiracy, and of those sub-conspiracies, some of which were entered into or committed abroad, and some of which were entered into or committed in Ireland.

7.45 The Court accepts in general terms the applicant's submission that the Court must take an overview, and consider whether the entire offence, and not just a single constituent part of it, is regarded under the law of the State as having been committed in the State. Adopting that approach, the Court is firmly of the opinion that when an overview is taken as to what is alleged in this case, one is driven to the inevitable conclusion that the offence alleged involves an umbrella or overarching conspiracy to commit counterfeiting acts involving Supernotes, both within and without this State, but in any event outside of the USA, formed in, and/or administered from, Ireland. The Court has no doubt that such a conspiracy would be regarded under the law of the State as having been committed in the State, and that it would be prosecutable here.

7.46 It is also the Court's view that even if it were wrong in its finding that the offence alleged is sufficiently territorially grounded in Ireland to enable it to be prosecuted here, the Irish courts would have jurisdiction in any event, and notwithstanding the comity principle, having regard to the nature of the particular criminal conspiracy alleged in this case.

7.47 In arriving at this conclusion the Court has been significantly influenced, and persuaded by, the general approach to jurisdiction of Rose L.J. in *R. v. Smith (No. 1)* [1996] 2 Cr. App. R. 1., a decision of the English Court of Appeal (Criminal Division) involving the same defendant, and the same prosecution, as it was concerned with in *R. v. Smith (Duncan Wallace) (No. 4)* [2004] 3 W.L.R. 229, on which the respondent in the present case has placed reliance. The appellant in both cases, Smith, was the chairman and managing director of a merchant bank. In 1991 the bank ceased trading and it was subsequently wound up, owing its unsecured creditors approximately £92m. The appellant was charged with one count of fraudulent trading, contrary to s. 458 of the Companies Act 1985, and two counts (counts 3 and 4) of obtaining property by deception, contrary to s. 15(1) of the Theft Act 1968, the allegation being that, working from England and using a group of companies which he controlled, he had set up various bogus deals which boosted the size of the bank's profits. The appellant was convicted. In 1995, the Court of Appeal dismissed his appeal against conviction after rejecting his argument that, in relation to counts 3 and 4, the trial court had lacked jurisdiction because, although the deception had taken place in London, the obtaining had taken place outside the jurisdiction when the money was paid into a bank account in New York and the offences were thus committed in New York. The court, in a judgment given by Rose L.J., held that it would be astonishing if the English courts did not also have jurisdiction in such a case as there would be nothing inimicable to international comity in their assuming such jurisdiction. Questions of jurisdiction, although involving substantive law, contain a strong procedural element, and the court must recognise the need to adapt its approach to such questions in the light of developing and advancing communications technology. If the issue of jurisdiction in cases of obtaining by deception were to depend solely on where the obtaining took place, the criminal law would be distorted by complex and at times obscure issues which had no bearing on the criminality of those responsible for the dishonesty.

7.48 However. Rose L.J's approach was not without controversy and in the later case of *R. v. Manning* [1999] Q.B. 980 a differently constituted Court of Appeal (Criminal Division) declined to follow it. Buxton L.J delivered the judgment of the court in the *Manning* case. Then in *R. v. Smith (Duncan Wallace) (No. 4)* the Court of Appeal (Criminal Division) was required to revisit the particular issue in controversy and in effect to resolve the conflict between Rose L.J. and Buxton L..J. when it was asked by the Criminal Cases Review Commission to consider whether *R. v. Smith (No. 1)* had been wrongly decided, in the light of Buxton L.J's judgment in *Manning*. On this occasion the Court approved of, and endorsed, Rose L.J's approach and ruled that the decision in *R. v. Smith (No. 1)* on jurisdiction was correct.

7.50. It is appropriate in the circumstances of the present case to elaborate in some detail on the contrasting approaches to jurisdiction of Rose L.J. in *R. v. Smith (No. 1)* and of Buxton L.J. in *Manning*, respectively.

7.51 In *R. v. Smith (No. 1)*, as in *R. v. Manning*, the courts were concerned with the effect of another decision of the Court of Appeal (Criminal Division) in *R. v. Harden* [1963] 1 Q.B. 8. *Harden* was a case involving the obtaining of cheques by false pretences where the cheques had been posted from Jersey. In his judgment, Widgery J. stated succinctly, at p 19:

> "It appears from *Reg. v. Ellis* [1899] 1 Q.B. 230 that the gist of the offence of obtaining by false pretences lies in the act of obtaining, and that if this act is done within the jurisdiction it matters not that the false pretence was made abroad."

On this approach obtaining offences can be described as "result crimes"; that is crimes that are not complete until the specified result is achieved, and crimes where the location of the result determines the jurisdiction over the crime. This is also called the "terminatory theory" in some of the authorities.

The Rose L.J. approach

7.51 The Rose L.J approach is described as follows by Lord Woolf C.J. in *R. v. Smith (Duncan Wallace) (No. 4)* (at pp. 242-243):

"53. In his judgment in *R v Smith (No. 1)* [1996] 2 Cr App R 1, Rose LJ examined the correctness of the decision and referred to a number of different authorities. Having done so, he came to the conclusion, at p 18. that the court's reasoning in *R v Harden* "that the gist of ... obtaining property by false pretences lies in the act of obtaining" was "unimpeachable and clearly applies to the offence of obtaining by deception created by section 15(1)". In view of the remainder of his judgment this passage was criticised in argument

but it can be explained in the context of the judgment as a whole as the acceptance by Rose LJ that while *R v Harden* establishes one basis of jurisdiction, as Lord Diplock had previously pointed out in *R v Treacy* [1971] AC 537, "there is no reason in principle why the terminatory theory should have the effect of excluding the initiatory theory as an alternative ground of jurisdiction": see [1996] 2 Cr App R 1, 18B

54. Rose LJ went on to examine a number of statements in the authorities to which it will be necessary for us to make reference later which gave support to a different approach which he described as the "comity approach" but he has also referred to as the "initiatory theory". The initiatory theory was a description applied by Professor Glanville Williams in an article "Venue and the Ambit of Criminal Law" (1965) 81 LQR 518 which was referred to by Lord Diplock in R v Treacy and involves the proposition "that the crime is committed where the offender is when he does the acts which constitute the essential physical element of the crime": see [1996] 2 Cr App R 1, 18A.

55. The essence of the reasoning of Rose LJ's judgment however comes later and is to be found in the passage of his judgment to which we have already referred where he deals with the astonishing consequences that can flow from the *Harden* approach. It also appears from the following paragraphs at the end of the judgment which deal with the issue of jurisdiction in these terms, at pp 20-21:

> "The reliance of international banking on ever developing and advancing communications technology has added new weapons to the armoury of fraudsters, especially those whose purpose it is to perpetrate fraud across national boundaries. If the issue of jurisdiction in cases of obtaining is to depend solely upon where the obtaining took place it is likely that the courts, and especially juries, will be confronted with complex and, at times, obscure factual issues which have no bearing on the merits of the case. This court must recognise the need to adapt its approach to the question of jurisdiction in the light of such changes. In *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, 250, Lord Griffiths, giving the opinion of the Privy Council in a conspiracy case, having referred to the judgment of the Chief Justice of Hong Kong, Roberts CJ [in *Attorney General v Yeung Sun-shun* [1987] HKLR 987] said: 'The passage in *R v Treacy* [1971] AC 537 to which Roberts CJ refers is the celebrated discussion by Lord Diplock of the bounds of comity and the judgment of La Forest J in *Libman v The Queen* (1985) 21 DLR (4th) 174 contains a most valuable analysis of the English authorities on the justiciability of crime in the English courts which ends with the following conclusion at p 22 1 : "The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal Jaw where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by an other country.'" Lord Griffiths also said at p 251: 'Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England.'
>
> In *R v Sansom* [1991] 2 QB 1 30, in a judgment delivered by Taylor LJ, *Liangsiriprasert* was applied by this court in a conspiracy case. We see no distinction, in relation to the principles of jurisdiction, between conspiracy and obtaining by deception. Accordingly the English court had jurisdiction and ground 5a fails."

56. From these passages of the judgment of Rose LJ we understand his reasoning to be as follows. (i) The decision in *R v Harden* [1963] 1 QB 8 was correct but it no longer should be regarded as setting out an exclusive basis of jurisdiction. (ii) For the policy reasons which he identifies particularly in relation to complex fraud, where there are no reasons of comity which require a different approach, when substantial activities constituting a crime take place in England the court here should have jurisdiction in accordance with the approach indicated by the Chief Justice of Hong Kong, Roberts CJ , in *Attorney General v Yeung Sun-shun* [1987] HKLR 987. (iii) Thus as to jurisdiction, there does not have to be a distinction in relation to the principles of jurisdiction between different crimes. Conspiracy in inchoate crimes and obtaining by deception can be governed by the same general, less rigid approach. (iv) Questions of jurisdiction although they involve substantive law have a strong procedural element and are less immutable than issues of pure substantive law. This is particularly so where they have been the subject of criticism from sources of high authority as here."

The Buxton L.J. approach

7.52 Lord Woolf, at paragraphs 57 to 63 inclusive of his judgment in *R. v. Smith (Duncan Wallace) (No. 4)* (pp. 244-245 of the report) then describes, and critically analyses, the approach of Buxton L.J. in Manning. He said:

> "57. ..... A substantial part of the judgment is directed to explaining why he concludes that the last act or terminatory theory remains the binding common law of England and Wales based on the decision in R v Harden. In saying this, Buxton LJ is clearly seeking to demonstrate that that is the only basis of jurisdiction. None the less, it is not clear from his judgment that he appreciated that Rose LJ was advancing an alternative and additional approach to the terminatory or last act rule, a complementary approach. That is to say an approach which would result in jurisdiction if either the last act took place in England or a substantial part of the crime was committed here and there was no reason of comity why it should not be tried here.
>
> 58. The possibility that Buxton LJ may have misunderstood what Rose LJ meant by his approach is confirmed by the fact that Buxton LJ , at p 989, described the "comity theory" as providing:
>
> > "broadly, that any offence may be tried in this country even if the last act did not take place here, provided the court sees nothing contrary to international comity in its assumption of jurisdiction. In Smith *(No 1)*, therefore, this court assumed jurisdiction in a case where the deception had taken place in this country but the last act, the obtaining, had taken place in New York."
>
> Rose LJ, as we have made clear was not postulating as broad an approach as this. His approach requires the crime to have substantial connection with this jurisdiction.
>
> 59. Buxton LJ states that the court is bound by the cases that demonstrate that the last act or terminatory theory

remains binding common law of England and Wales and then continues, at p 989:

"We have carefully considered whether that position can be regarded as set aside by the decision of this court in Smith *(No 1)*, but we have to conclude that that decision cannot stand against the authorities to which we have just referred. We are driven to that conclusion partly by analysis of the speech of Lord Diplock in *R v Treacy* [1971] AC 537 which we do not think propounded a rule of jurisdiction that replaced the last act rule as the governing rule."

60. What was not examined in *R v Manning*, in any detail is the question of whether it is appropriate for a court to develop the law in the way that was done by Rose LJ. Instead Buxton LJ summarises his reasoning for not following the approach adopted in *R v Smith (No 1)* in these terms, at p 1002:

> "First, as to *R v Sansom* [1991] 2 QB 130, that case was, like *Liangsiriprasert v Government of the United States of America* [1991] 1 AC 225, solely about conspiracy, and did not address at all the last act rule as applied in cases of substantive offences. Further, we cannot agree that there is no difference in respect of jurisdiction between conspiracy and offences such as obtaining by deception. As we have sought to demonstrate, the line of authority in respect of each category has developed quite differently, and in no previous case has it been suggested that the law as to jurisdiction in cases of conspiracy can override or offset the existing authorities on obtaining by deception or procuring the execution of a valuable security.
>
> "Second, we cannot agree that the state of the authorities is such that this court is free to choose between the last act or 'gist of the offence' rule, and a 'comity' rule based on the general observations of Lord Diplock in *R v Treacy* [1971] AC 537. The latter has never been accepted as a rule of jurisdiction and, like this court in *R v Tirado* (1974) 59 Cr App R 80, we do not think that we are free to depart from the rule recognised in *R v Harden* [1963] 1 QB 8 or, in the particular case before us, from the rule of jurisdiction applied in *R v Thompson* [1984] 1 WLR 962 and *R v Nanayakkara* [1987] 1 WLR 265. In terms of reason and policy we fully agree with the court in Smith *(No 1)* [1996] 2 Cr App R 1 that such a step is highly desirable; but we respectfully cannot agree that it is open to this court."

61. As to this reasoning we would make two comments; the first being that in relation to conspiracy, a broader approach has undoubtedly been adopted as to jurisdiction than would follow on the application of the terminatory theory. Secondly, it does not necessarily follow that because the broader approach had been developed in connection with conspiracy and inchoate offences the same process of development would not be appropriate in cases involving offences of obtaining by deception. The opinion of Lord Griffiths in *Liangsiriprasert (Somchai) v Government of the United States of America* [1991] 1 AC 225 extending the jurisdiction in relation to conspiracy should not be summarily brushed aside as of no relevance. The message of his opinion as a whole is that the common law must evolve to meet current circumstances. As an illustration of Lord Griffith's approach the following additional paragraphs, at p 251, state:

> "But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing. But if this can be established by other evidence, for example the taping of conversations between the conspirators showing a firm agreement to commit the crime at some future date, it defeats the preventative purpose of the crime of cons piracy to have to wait until some overt act is performed in pursuance of the conspiracy.
>
> "Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England."

62. It is right, as Buxton LJ states, that the terminatory or last act rule has been regularly applied and it has the support of Viscount Dilhorne in *Director of Public Prosecutions v Stonehouse* [1978] AC 55, 74-75. But as he points out Lord Griffiths strongly endorsed the broader approach Rose LJ was to adopt in *R v Smith (No 1)*[1996] 2 Cr App R 1 . Support can also be found not only from Lord Diplock but also in the language of Lord Wilberforce in *R v Doot* [1973] AC 807,817, again a conspiracy case:

> "In the search for a principle, the requirement of territoriality does not, in itself, provide an answer. To many simple situations, where all relevant elements occur in this country, or, conversely, occur abroad, it may do so. But there are many 'crimes' (I use the word without prejudice at this stage) the elements of which can not be so simply located. They may origin ate in one country, be continued in another, produce effects in a third. Some constituent fact, the posting or receipt of a letter, the firing of a shot, the falsification of a document, may take place in one country, the other necessary elements in another."

63. The starting point is that although in *R v Harden* [1963] 1 QB 8 Widgery J did refer to the *Ellis* case [1899] 1 QB 230 which was decided at the end of the 19th century, it is clear that when *R v Harden* was decided there was no clearly defined approach to jurisdiction . The succinct judgment of Widgery J in *R v Harden* was therefore something of a watershed. In "'Territorial' Jurisdiction and the Criminal Law" [1972] Crim LR 276, 277 Mr Lynden Hall was prepared to argue that "there is no hard and fast principle which requires that an English court must apply the 'terminatory' theory" and to argue, at p 280, that:

> "merely because the courts appear on occasion to have held an offence triable in accordance with the 'terminatory' theory does not entail that other cases cannot be determined in accordance with the 'initiatory' theory. The two are not mutually exclusive. *Harden* appears to be the only case where an English court has disclaimed jurisdiction because the final element of the offence occurred outside England."

Other academic writers in addition to Glanville Williams were critical of the Harden approach. In 1994 A T H Smith regarded

our laws as to jurisdiction as being "parochial to an embarrassing degree" in relation to international fraud (*Property Offences* (1994), p 22, para 1-34). Lawrence Collins considered the "distinctions and their elaboration have led to some absurd and anomalous results" ("Fraudulent Conduct in International Law" (1989) 42 Current Legal Problems 255. 258). However, the fact is that if this court in *R v Manning* [1999] QB 980 was right, the court in *R v Smith (No 1)* [1996] 2 Cr App R 1 was not free to develop the law in the way they purported to d o."

The Court's conclusion in R. v. Smith (Duncan Wallace) (No.4)

7.53 Lord Woolf recorded the Court of Appeal (Criminal Division)'s conclusion in *R v. Smith (Duncan Wallace) (No. 4)* at pp. 246-248, as follows:

> "64. ..... Although we acknowledge and pay tribute to the power and persuasiveness of the reasoning of Buxton LJ's judgment, the conclusion that we have come to is that we should follow the judgment in *R v Smith (No 1)*. The reasons for our conclusion are as follows. (i) The court in *R v Manning* was required to follow the decision in *R v Smith (No 1)* unless it came to the conclusion that the court in *R v Smith (No 1)* was not entitled to develop the law in the way in which they did. Here an analogy can be drawn with what has happened in relation to the decision in *R v Halai* [1983] Crim LR 624. First Lord Bingham CJ disapproved of the decision in *R v Halai* in *R v Graham* [1997] 1 Cr App R 302 and then subsequently it was overruled so that it was no longer a risk to navigation. While the analogy is far from close we see the parallels in what happened to *R v Halai* and what *R v Smith (No 1)* had to say about *R v Harden*. Though *R v Harden* was not sunk by *R v Smith (No 1)*; it was moved to a mooring where it would not be a threat to navigation but for the decision in *R v Manning*. (ii) *R v Smith (No 1)* was not suggesting that *R v Harden* was wrongly decided. *R v Smith (No 1)* was suggesting it did not provide an exhaustive statement of the law as to jurisdiction in obtaining cases. We have already quoted the relevant passage of the judgment and we would suggest that Widgery J might be very surprised if he had been told that his judgment in *R v Harden* was to be treated as an impediment to any development of the law in relation to jurisdiction in this area. Buxton LJ, himself accepts that *R v Harden* has to be qualified where "the 'last constituent element' is a continuing or complex act," then the courts of this country have jurisdiction if any part of that act is committed in England and Wales ([1999] QB 980, 988 and *R v Markus* [1976] AC 35). The approach in *R v Harden* cannot be applied to attempts and it has not been applied in relation to conspiracy. (iii) The *R v Harden* approach leads to a wholly unsatisfactory situation in contemporary circumstances. The broader approach provided by the Criminal Justice Act 1993 was already known when *R v Smith (No 1)* was decided. This judgment is in accord with that legislation which regrettably was not brought into force until 1999. There is no risk of conflict with Parliament in our decision. (iv) A more flexible approach as to the binding effect of previous decisions of this court as to jurisdiction to try crimes is appropriate because there is not the same need for certainty as is the case in other areas of substantive law. In addition, Rose LJ was correct to identify a relationship with procedure where there is not a strict adherence to precedent. (v) While the answer to this issue is not achieved by counting the members of the House of Lords who have either supported or criticised the *Harden* decision, the fact that the decision in *R v Manning* is not in accord with the general approach to jurisdiction collectively adopted by Lord Diplock, Lord Wilberforce and Lord Griffiths undoubtedly provides some justification for developing the law as occurred in *R v Smith (No 1)*. (vi) While Buxton LJ criticises the judgment of La Forest J in *Libman v The Queen* (1985) 21 DLR (4th) 174 it has the endorsement of Lord Griffiths in *Liangsiriprasert* [1991] 1 AC 225, 250 as "a most valuable analysis". (vii) The approach advanced by Rose LJ has not prior to the judgment of Buxton LJ been considered and rejected. He was not seeking to overrule *R v Harden* directly. (viii) The development as to jurisdiction by Rose LJ in *R v Smith (No 1)* is consistent with the developments that have taken place in the law as to jurisdiction in the case of conspiracy and attempts. (ix) This is an area where it is necessary to recognise that some judges will be more proactive than others. The court in *R v Manning* could not be criticised if absent the decision in *R v Smith (No 1)* they had not been in favour of a more proactive approach to the jurisdiction of our courts to obtaining offences. However, once the *R v Smith (No 1)* decision was given the position was different. We would not accept the conclusion in *R v Manning* that the court in *R v Smith (No 1)* was not entitled to develop the law in the way that it did. It would undermine the inherent nature of the common law if courts were prevented as a matter of principle from developing the law to meet the needs of contemporary society in the present situation."

7.54 In the present case this Court does not agree with the submission of counsel for the applicant that it should disregard *R. v. Smith (No. 1)* and *R. v. Smith (Duncan Wallace) (No. 4)* as irrelevant and distinguishable, simply because they involved obtaining by deception which is, as counsel for the applicant has pointed out, a substantive offence unlike a conspiracy offence which is an inchoate offence. On the contrary, the Court finds itself in agreement with Lord Woolf that the opinion of Lord Griffiths in *Liangsiriprasert (Somchai) v. Government of the United States of America* [1991] 1 A.C. 225 extending the jurisdiction in relation to conspiracy ought not to be summarily brushed aside as of no relevance. Moreover it further considers that Lord Griffith's opinion that the common law must evolve to meet current circumstances is both important and sound in principle, though undoubtedly any Court contemplating a judgment that would have the effect of extending the common law should have regard to the doctrine of separation of powers and tread cautiously lest it encroach upon an area more properly within the remit of the legislature.

7.55 Applying Rose L.J's approach to the circumstances of the present case, this Court considers that the Irish Courts should, as a matter of good sense in the times in which we live, be entitled to assert jurisdiction in respect of a conspiracy formed in Ireland to effect harm by means of an unlawful act or acts to be committed principally in, or against, another State where it can be reasonably be asserted that the conspiracy, if carried into effect, would be harmful, or potentially harmful, either directly or indirectly, to the interests of this State. (The only necessary *caveat* to this, I feel, is that an Irish Court would have to be satisfied, at any trial in this jurisdiction, that the act or acts contemplated by the conspiracy, as well as being unlawful in this State if committed here, would also be unlawful if committed in, or against, the other State under the laws of that other State. This is because to conspire is not a crime in itself. To constitute a crime it must be a conspiracy to do an unlawful act.)

7.56. The Court does not consider that *Board of Trade v. Owen* [1957] 1 A.C. 602 represents authority to the contrary. Indeed, at the end of delivering judgment in that case, Lord Tucker (with whom Viscount Simonds, Lord Morton of Henryton, Lord Radcliff and Lord Somerville of Harrow all agreed) stated at p. 634 that he would "reserve for future consideration the question whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad."

7.57 In that regard, this Court agrees with the following passage from *Criminal Law* by Charleton, Bolger and McDermott (Butterworths, 1999), at para 4.56 of that work:

> "It might be asked, what is Ireland's interest in punishing a conspiracy made in Ireland to effect harm that is to

> occur in another jurisdiction? The answer is that Ireland has an interest in ensuring that it is not used as a base for conspiring to commit offences elsewhere. Although the carrying out of the projected harm might not directly affect our interests, the fact that the conspiracy is carried out in Ireland does affect our interests."

7.58 It is necessary, in drawing attention to this passage, to acknowledge that later in the same paragraph the authors submit that "the matter of conspiracies in Ireland to carry out offences abroad requires statutory reform." Further by way of an illustration of an instance where there has already been statutory reform, the authors cite s. 20 of the Misuse of Drugs Act 1977.

7.59 It cannot be gainsaid that statutory provisions such as s. 20 of the Misuse of Drugs Act 1977 and, more appositely in the context of the present case, s. 71 of the Act of 2006, put the question of extraterritorial jurisdiction in respect of the offences with which they specifically deal beyond doubt, and any reform of the law that removes potential doubt is clearly to be welcomed. However, it is not in this Court's view automatically to be assumed (a) that such provisions where they have been enacted necessarily create a new jurisdiction or extend an existing jurisdiction, or (b) that any question of declaring extraterritorial jurisdiction to prosecute the offences with which they specifically deal is to be taken, by virtue of the enactment of those provisions, as having been solely within the remit of the legislature. In this Court's view it would depend, in any case, on the specific nature of the offence under consideration, and to some extent on the facts of the individual case.

7.60 In the present case, the Court is of the view that even if such overt acts as were carried out in Ireland were merely incidental to a conspiracy formed partly abroad and partly in Ireland whose principle object is to effect harm by means of an unlawful act or acts to be committed principally in, or against, another State, Ireland would none the less be entitled to assert jurisdiction in respect of that conspiracy under common law principles. This is notwithstanding the absence at the material time of a statutory provision equivalent to that now contained in s. 71 of the Act of 2006. The jurisdiction can be asserted on the basis of the likelihood that the conspiracy, if carried into effect, would be harmful, or potentially harmful, either directly or indirectly, to the interests of this State. As already pointed out, one of the alleged objects of the conspiracy was to raise funds for a proscribed organisation that does not recognise the legitimacy of this State, and quite apart from that it is not in Ireland's interests to be seen as a base or haven for conspirators planning, and engaging in, international counterfeiting acts even if those acts are for the most part to be carried out abroad.

7.61 The Court is reinforced in the view that it has just expressed by the fact that under public international law a State is under a general (albeit limited) duty to prevent the commission within its territory of unlawful acts injurious to foreign States (see Proctor, *Mann on the Legal Aspect of Money* (Oxford University Press, 6th ed., 2000, chap. 20)). More significantly, however, each State also has under public international law a specific responsibility to prevent and punish the counterfeiting of a foreign States currency. According to Mann at paragraph 20.06 of that work:

> "This rule, apparently first propounded by Vattel [*The Law of Nations*, 46] was judicially recognised by the Supreme Court of the United States in 1887 [*US. v. Arjona* (1887) 120 US 479, 483]:
>
> > The law of nations requires every national government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace or to the people thereof; and because of this, the obligation of the one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation, has long been recognised.'"

7.62 For all of these reasons the Court is disposed to uphold the first objection raised by the respondent to his extradition, namely that his extradition is prohibited by s. 15 of the Act of 1965.

8. The Four Remaining Objections to the Respondent's Extradition.
8.1 The four remaining objections to the respondent's extradition are each predicated upon an assumption that the offence in respect of which the respondent's extradition is requested is an extraditable offence. In circumstances where this Court has decided that the offence is not extraditable in the particular circumstances of this case they are rendered moot. It is a well established principle that a Court should not render a decision upon a point that is moot. Accordingly, as it is unnecessary for the purpose of rendering its decision in this case for the Court to consider the further points of objection raised, it would be inappropriate for the Court to express any view on them.

9. Decision
9.1 The Court, having decided that the offence for which the respondent's extradition is requested is regarded under the law of the State as having been committed in the State, is prohibited by s. 15 of the Act of 1965 from extraditing the respondent. The Court therefore refuses the extradition request in this case and will refer the matter to the Director of Public Prosecutions so that she may consider whether or not to prosecute the respondent in Ireland.

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[1] In 1996, the United States Treasury made several changes in the appearance of the U.S. $ 100 note, the most significant of which was a change in the size of the portrait depicted on the front of the $100 note. While the 1996 notes retained the same size, colour and feel as the older notes, they display a larger portrait; and hence, have become known as "big heads." The older notes are referred to as "small heads"